

## THE SEA OF OKHOTSK PEANUT HOLE: HOW THE UNITED NATIONS DRAFT AGREEMENT ON STRADDLING STOCKS MIGHT PRESERVE THE POLLACK FISHERY

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*Abstract:* The enclave of international waters in the central Sea of Okhotsk, called the "peanut hole," is surrounded by the 200 mile Exclusive Economic Zone ("EEZ") of the Russian Federation. Since 1991, distant water fishing nations ("DWFNs") have been fishing in the peanut hole in a manner that Russia claims is detrimental to the straddling pollack fish stock that exists both in Russia's EEZ and in the enclave. To prevent destruction of the pollack fishery, Russia imposed a moratorium on all fishing in the enclave; the moratorium is not universally observed. The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks has produced a Draft Agreement which proposes improved procedures for creating international agreement on conservation and management regimes for straddling fish stocks, primarily by requiring compatibility of measures taken within and beyond the EEZ. The Draft Agreement also provides for enforcement by flag states, dispute resolution, and cautious management in the event of scientific uncertainty. Russia and DWFNs fishing in the peanut hole should accede to the draft agreement because it avoids a Russian-imposed moratorium and provides a practicable framework for preserving the pollack fishery.

### I. INTRODUCTION

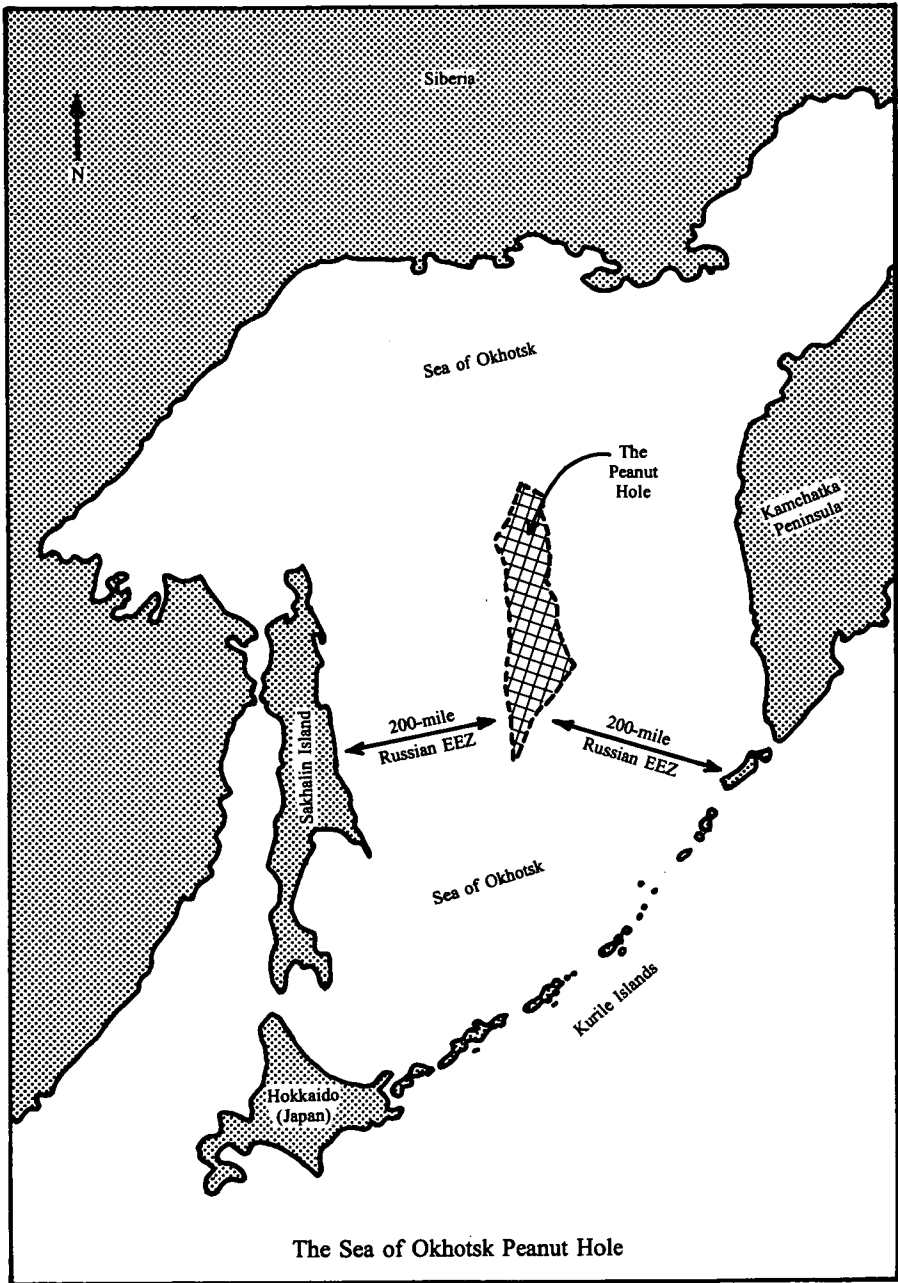
The Sea of Okhotsk (pronounced "*Ahk Hóestk*") lies off the southern coast of the Russian Far East; it is framed by Sakhalin Island to the east, the Kamchatka Peninsula to the west, Siberia to the north, and the Kurile Islands to the south.<sup>1</sup> This biologically rich sea hosts an Alaskan pollack<sup>2</sup> fishery which provides for trade between the Russian Far East and other Pacific Rim countries, constituting a major source of income for the Russian Far East.<sup>3</sup> Russia also sells the right to fish for pollack within the Russian

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<sup>1</sup> See *infra*, p. 444.

<sup>2</sup> An alternative spelling of "pollack" is "pollock." This Comment adopts the former spelling as it is used in United Nations documents. Some sources quoted below use the latter spelling.

<sup>3</sup> Foreign trade in the city of Vladivostok in the Russian Far East amounted to US\$337.7 million in the first nine months of 1994, 81.6% of which was from fish and sea products. Japan, the People's Republic of China ("PRC"), and the Republic of Korea ("ROK") were the city's three biggest trading partners. *Vladivostok Foreign Trade*, PAC. RIM FISHERIES UPDATE, Feb. 1995, at 5. For the same time period, trade for the Kamchatka region of the Russian Far East amounted to US\$225 million, 99% of which was from fish products. The Kamchatka area's four biggest trading partners were Japan, the ROK, the United States of America, and the PRC. *Foreign Trade in Kamchatka Region*, PAC. RIM FISHERIES UPDATE, Feb. 1995, at 5.



exclusive economic zone ("EEZ")<sup>4</sup> to nations including Japan, South Korea, Poland, and China.<sup>5</sup> Pollack is an economically desirable fish, largely because of its abundance.<sup>6</sup>

About three percent of the Sea of Okhotsk, an enclave roughly thirty-five miles wide and 300 miles long, lies outside of the EEZ of the Russian Federation, and is thus considered under international law to be high seas waters.<sup>7</sup> This oblong high seas enclave, shaped like a peanut, has been dubbed the "peanut hole." It is completely surrounded by the EEZ of the Russian Federation.

In the autumn of 1991, ships of many nations began fishing heavily for Alaskan pollack<sup>8</sup> in the peanut hole.<sup>9</sup> The Russian Federation asserts

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<sup>4</sup> The EEZ is an innovation of the 1982 United Nations Convention on the Law of the Sea, U.N. Doc. A/Conf.62/122 (1982); 21 I.L.M. 1261 [hereinafter *CLOS*]. The EEZ may extend up to 200 miles seaward from the baseline of a coastal state. *Id.* at 1280, art. 57. The baseline is the low water line along the coast. *Id.* at 1272, art. 5. According to the EEZ regime, a coastal state has exclusive rights to manage and exploit fish within 200 miles of its shores. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES* 31 (1994). The coastal state may allow foreign states to fish within its EEZ on terms specified by the coastal state. *Id.* at 43. The EEZ regime is customary international law. *Id.* at 1.

<sup>5</sup> For example, in 1995 South Korea will pay a US\$12,600,000 fee for harvesting 55,000 tons of Alaskan pollack within the Russian EEZ, and trade 22,000 tons of Korean EEZ fish for a 22,000 ton quota of Russian EEZ fish. *More on South Korea's 1995 RFE Waters Fishing Quota*, RUSSIAN FAR E. UPDATE, Jan. 1995, at 5.

The selling of quotas (the right to fish for a specified type and amount of fish) is the primary negotiating tool available to Russia as it attempts to solve the straddling stock problem by means of bilateral agreements. For an explanation of the changing ways in which quotas are allocated, see Tatiana V. Toumanova & Alice V. Blanchard, *Comments on Doing Business in the Russian Federation*, 6 U.S.F. MAR. L.J. 519, 528-31 (1994). "The Committee of Fisheries allocates fishing quotas annually in accordance with the recommendations of the scientific agencies of the Russian Federation." *Id.* at 528.

<sup>6</sup> In 1991, a larger portion of the world fish catch consisted of pollack than of any other species, and the (now former) USSR, Japan, Korea, and China were the top pollack fishing nations. *Fisheries Statistics: Catches and Landings*, U.N. Food and Agriculture Organization, vol. 72, at 187 (1991). Much of this pollack comes from the Sea of Okhotsk. EDWARD MILES ET AL., *ATLAS OF MARINE USE IN THE NORTH PACIFIC REGION* 42 (1982) (graphically depicting pollack fishing in the Northwest Pacific region including the Sea of Okhotsk).

<sup>7</sup> "High seas" are waters not included in the EEZ of any coastal nation. BURKE, *supra* note 4, at 82. It is often asserted that according to contemporary international law, the traditional freedom of the right of all nations to fish the high seas continues. *Id.* at 83-84, 93. As stated in article 116 of the U.N. Convention: "All States have the right for their nationals to engage in fishing on the high seas subject to . . . ." Qualification of this right is an issue addressed by this Comment.

<sup>8</sup> Alaskan pollack is sometimes called Walleye pollack. MILES ET AL., *supra* note 6, at 42.

<sup>9</sup> "In 1991, fleets mostly from Poland, China and the Republic of Korea, harvested some 700,000 metric tons of pollack in the Peanut Hole. In 1992, the catch could have been as high as 1 million metric tons." *Some High Seas Fisheries Aspects Relating to Straddling Fish Stocks and Highly Migratory Fish Stocks*, at 10, n.3, U.N. Doc. A/Conf.164/INF/4 (1993) [hereinafter *Fisheries Aspects*].

A more colorful, if hyperbolic, account of the increased fishing appeared in the newspaper: "[T]hirty-nine Polish supertrawlers burst into the central part of the Sea of Okhotsk . . . followed by nine large South Korean trawlers and almost the entire Chinese fishing fleet. Somewhat later, fishing ships from Japan, Panama, Bulgaria and Ukraine appeared. A wild revelry began . . . . Reluctant to observe

that the pollack in the peanut hole are part of the same stock that Russians fish and manage in the Russian EEZ, giving rise to a problematic situation called a "straddling stock."<sup>10</sup> The pollack stock straddles the line, as defined by international law, that separates the EEZ of the Russian Federation from the high seas waters of the peanut hole, over which Russia has little or no control.<sup>11</sup> Problems arise because the Russian regime for managing the pollack fishery is frustrated when fishing practices in the peanut hole (such as excessive fishing pressure) are inconsistent with the management regime in the EEZ, thereby undermining attempts to effectively manage the fishery as a whole. The Russian Federation asserts that lack of effective management in the Sea of Okhotsk is causing excessive depletion of the pollack fishery and disruption of the ecology of the Sea.<sup>12</sup> A solution to the conflict would prevent excessive depletion of the pollack fishery in the Sea of Okhotsk. It would also avoid the consequences of depletion, such as severe economic hardship on the Russian Far East<sup>13</sup> and further strain on political relations with the flag states of foreign fishing fleets.<sup>14</sup>

As long as the conflict remains unresolved, domestic fishing interests will pressure the Russian government to extend Russian jurisdiction over the pollack stock in the peanut hole, thereby eliminating the high seas enclave.<sup>15</sup> Such action would impair the viability of the United Nations

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elementary international fishing regulations, foreign fishermen set to clearing out the wealth of the northern sea." Yelena Matveyeva, *On the Brink of a Military Conflict in the Sea of Okhotsk*, MOSCOW NEWS WKLY., Aug. 20, 1993, at 15.

<sup>10</sup> *Consequences of Unscientific Fishing for Alaska Pollack in the Enclave of the Sea of Okhotsk*, at 2, U.N. Doc. A/Conf.164/L.21 (1993) [hereinafter *Consequences*].

<sup>11</sup> The extent of control Russia has over this area is uncertain, a subject of dispute, and a focus of this Comment.

<sup>12</sup> *Consequences*, *supra* note 10, at 2-3.

<sup>13</sup> "The continued unscientific fishing . . . will inevitably lead to . . . severe social consequences for the indigenous peoples and fishermen of the Russian Far East." *Id.* at 2.

<sup>14</sup> In 1993, Russia's Pacific Fleet performed war games in the Sea of Okhotsk, frightening off about 30 South Korean, Japanese, Chinese and Panamanian ships fishing in the peanut hole. MOSCOW NEWS WKLY., no. 25, June 16, 1993, available in Westlaw MOSNEWS Database.

When Poland, China, and South Korea initially refused to abide by the Russian moratorium on fishing in the peanut hole, "Russian officials in New York responded that Moscow was prepared to take 'all necessary means' under international law to halt the fishing, which diplomats said could entail stopping or seizing foreign trawlers and assessing captains for damages." David E. Pitt, *Fishing Countries Split on Harvest*, N.Y. TIMES, Aug. 1, 1993, §1, at 9.

<sup>15</sup> Whether extension of jurisdiction would be legal is addressed *infra*, part II.C.1.b. It could be done in any case with varying degrees of force. Russia could, for instance, enforce Russian fishing laws with the Russian navy in the peanut hole, outside of the Russian EEZ.

1982 Convention on the Law of the Sea ("CLOS")<sup>16</sup> and may threaten the continued viability of the EEZ regime throughout the world if other states also extend jurisdiction over their own straddling stocks.<sup>17</sup> The controversy over the straddling stock in the Sea of Okhotsk is in many ways a critical conflict, the resolution of which will presage the development of customary international law of the sea and the CLOS.<sup>18</sup> It is important to the continuing viability of the CLOS that the Okhotsk conflict be resolved in a manner consistent with the CLOS.<sup>19</sup> In recognition of this and other straddling stock problems around the globe, the United Nations has convened a conference on straddling fish stocks for the purpose of creating international procedures for solving straddling stock problems consistently with the CLOS.<sup>20</sup> The chairman of the conference has formulated a Revised Draft Agreement (Draft Agreement) that points the way to a future treaty pertaining to straddling stocks.<sup>21</sup> This Comment analyzes the Draft Agreement as revised in April 1995, in light of the peanut hole conflict.

Part II of this Comment will provide background to pertinent issues. Sub-part A outlines the conflicting interests that give rise to straddling stock problems generally, sub-part B describes in detail the problem as manifested in the Sea of Okhotsk, sub-part C outlines the relevant law as it exists as of this writing, and sub-part D explains the origin and application of the Draft Agreement. Part III analyzes the Draft Agreement, especially as it applies to the Sea of Okhotsk. Part IV explores four scenarios considering how the Draft Agreement might provide for resolution of the peanut hole

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<sup>16</sup> UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, U.N. Doc. A/Conf.62/122 (1982); 21 I.L.M. 1261. The Convention dominates the international law of the sea. It is discussed in part II.C., *infra*.

<sup>17</sup> If Russia does extend jurisdiction, Chile, Argentina, and Canada may also extend jurisdiction, as each nation is currently embroiled in a straddling stock dispute. See Evelyne Metzler, *Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries*, 25 OCEAN DEV. & INT'L L. 255, 268-72, 273-78, 297-305 (1994). If the 200 mile limit of the EEZ regime is ignored with impunity, the whole CLOS is threatened. 88 A.J.I.L. 488, 497 (the future of the 1982 CLOS may depend on the willingness of governments to negotiate constructively regarding straddling stocks). Canada's conflict with the EC over straddling stocks recently came to a head when Canadian authorities seized a Spanish trawler that was fishing *outside* the Canadian EEZ. See Edison Stewart, *Canadians Seize Spanish Trawler: Warning Shots Fired in Turbot War*, TORONTO STAR, Mar. 10, 1995, at A1.

<sup>18</sup> See *infra*, part II.B.

<sup>19</sup> *Id.*

<sup>20</sup> The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Conference 164, held its organizational session in New York on April 19-23, 1993. The conference is discussed in Part III, *infra*.

<sup>21</sup> *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. Doc. A/Conf.164/22/Rev. 1 (1994) [hereinafter *Draft Agreement*].

conflict. Part V concludes that the Draft Agreement is a feasible way to resolve (and to prevent) straddling stock conflicts by consent of fishing nations. Specifically, the Draft Agreement may guide the nations which are parties to the Sea of Okhotsk conflict to an acceptable long-term regime for conservation of the pollack stocks without impairing the CLOS.

## II. BACKGROUND

### A. *Straddling Stocks as a Problem of the Commons*

The problem of straddling stocks is a manifestation of the "tragedy of the commons."<sup>22</sup> The tragedy is that when a common resource (such as fish) is harvested by rational actors who cannot be assured of restraint by other harvesters, and the ability to harvest exceeds the ability of the resource to replenish, the resource will tend to be over-harvested. Due to overcapitalization of much of the world's fishing fleet,<sup>23</sup> effective management of fisheries often requires harvesting less fish in the present to ensure (at least probabilistically) harvests in the future.<sup>24</sup> Sustainable harvests are most likely achieved when one harvester is assured that restraint in the present will improve the prospects for rewards in the future.<sup>25</sup> As stated by the chairman of the straddling stocks conference, "Unregulated fishing is susceptible to the greed of fishermen and to the false logic that if you leave any fish behind, someone else will catch it anyway."<sup>26</sup>

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<sup>22</sup> The phrase comes from Garrett Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243 (1968), and is used extensively in environmental literature. The theory denoted by the phrase is pithily put in a quotation from the article: "Freedom in a commons brings ruin to all." *Id.* at 1244.

<sup>23</sup> Statement made by the Chairman of the Conference at the opening of the Fourth Session, held on Aug. 15, 1994, at 1, U.N. Doc. A/Conf.164/21 (1994), [hereinafter Statement] citing Earth Summit, Agenda 21, U.N. Doc. A/Conf. 151/21/Rev.1 (1992).

<sup>24</sup> While environmental factors may more significantly affect abundance of a fish stock than human activities, the latter can have a substantial impact, as they do especially in the peanut hole. BURKE, *supra* note 4, at 27. *But see infra*, part II.B.3 (excessive fishing in the donut and peanut holes have significantly depleted fish stocks).

<sup>25</sup> In Hardin's article, *supra* note 22, individual persons are considered harvesters. In the context of this Comment, nations are considered individual harvesters. Although this may change nuances of Hardin's analysis, the principle still applies inasmuch as nations tend to act rationally, i.e., in pursuit of enlightened self-interest, much as individuals do. For example, China has less incentive to control the harvest of its fishing fleet if it feels Korea will simply catch all the fish China refrains from catching. *But see* BURKE, *supra* note 4, at 80 (the legal right of coastal nations to manage fish within their EEZs has not generally led to effective management).

<sup>26</sup> Statement, *supra* note 23, at 1.

A primary purpose of the EEZ regime is to enclose the commons so that a coastal nation that manages a fishery sustainably reaps the benefits of its restraint.<sup>27</sup> The weakness in the regime is that it fails to account for the fact that not all fish which occur in the EEZ stay within the EEZ at all times,<sup>28</sup> thus enabling nations other than the coastal nation to catch them, and thereby undermining the purpose of the regime. In the case of a straddling stock such as the pollack in the Sea of Okhotsk,<sup>29</sup> the legal entitlements of Russia (the coastal nation) and distant water fishing nations ("DWFNs") can result in ineffective management. This result occurs in two main ways. First, Russia's management of the EEZ fishery is frustrated when fish that Russians refrain from catching (or selling the right to catch) may be caught by DWFNs when the fish migrate into the peanut hole. Thus, restraint by Russia does not adequately promote the continuing existence of the stock. Instead, it makes more fish available to those fishing in the peanut hole and thereby undermines the incentive for Russians to fish conservatively.<sup>30</sup> Second, DWFNs have little or no reason to regulate their own harvest in the absence of multilateral agreement because no management regime applies to high seas waters, and competition obviously exists for the limited pollack resource. The incentive in a straddling stock situation is perverse—it is to catch as many fish as possible as quickly as possible, without regard to scientifically sound fishing, or the effect on Russia's management regime.

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<sup>27</sup> "The basic policy of the 1982 Convention is that effective conservation and management of coastal species require recognition of a single management unit and that coastal states, as single management units, should be employed wherever feasible" (footnotes omitted). William T. Burke, *Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries* 16 ECOL. L. Q. 285, 304 (1989) [hereinafter *Straddling Stocks*].

<sup>28</sup> "The point could be made that nearly all resources taken on the high seas occur within EEZs at some stage of their life history." *Report of the Technical Consultation on High Seas Fishing and the Papers Presented at the Technical Consultation on High Seas Fishing*, at 47, para. 15, U.N. Doc. A/Conf.164/INF/2 (1993).

<sup>29</sup> A stock can be straddling in different ways. Even sedentary stocks that occur on both sides of the EEZ border may be considered straddling. High diffusion stocks, characterized by extensive random movements and mixing, must be managed as one unit. Helpful diagrams of straddling stocks can be found in *Fisheries Aspects*, *supra* note 9, at 15 (Annex V). Pollack in the Sea of Okhotsk intermingle in the peanut hole, but reproduce elsewhere. See *infra*, part II.B.2. Knowing where the fish are and when, is, of course, necessary for effective management of the stock.

<sup>30</sup> Recall the so-called "false logic" described in the text accompanying n.26, *supra*.

B. *The Unique Nature of the Peanut Hole*

The peanut hole is unique, as is each straddling stock situation, in the particular geographical, biological and political factors that define the conflict. The particular nature of the peanut hole, however, makes this conflict an especially good measure of how straddling stock problems might be resolved globally, and whether such resolutions will be consistent with the CLOS and customary international law. For instance, the intensity of the fishery causes some to contend that the conflict must be resolved quickly if the fishery is to be maintained.<sup>31</sup> Thus, there is pressure to achieve an effective solution. Additionally, Russia's position as a coastal nation in this dispute and a DWFN in other straddling stock conflicts makes the peanut hole situation worthy of close study. Because Russia has both coastal and distant interests, an efficacious international law that is agreeable to Russia might be agreeable to a majority of fishing nations, both coastal and distant. The particulars of the situation are addressed below.

1. *Geography*

a. *Extension of jurisdiction*

The Sea of Okhotsk is the only sea in the world which has a high seas enclave surrounded by the EEZ of a single state.<sup>32</sup> By adding just eighteen miles to its management enforcement area, Russia could eclipse the peanut hole altogether.<sup>33</sup> Conceivably, Russia could extend jurisdiction<sup>34</sup> by effectively claiming an EEZ beyond the 200 mile limit, or by asserting exclusive authority over the pollack stock. Doing the former would contravene inter-

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<sup>31</sup> "Russian biologists predict that the fishery will collapse within 3 years . . ." Metzler, *supra* note 17, at 291.

<sup>32</sup> Annex, *Threat of Destruction of Alaska Pollack Stocks in the Sea of Okhotsk as a Consequence of Continued Unregulated and Unscientific Fishing in its Enclave*, at 2, U.N. Doc. A/Conf./164/L.43 (1994).

<sup>33</sup> Russia is authorized under the EEZ regime to enforce fisheries regulation up to 200 miles from shore, but if it enforced regulations up to 218 miles from shore, it would control fisheries in the entire Sea of Okhotsk. The EEZ is subject to the sovereignty of the coastal State as far as fishing is concerned, but other nations are allowed, *inter alia*, innocent passage (as provided in part 2, § 3 of the 1982 U.N. Convention) as part of the freedom of navigation. However, there is no place to pass to in an enclave, and any boat in the peanut hole is probably there to catch fish.

<sup>34</sup> "Coastal state authority, or jurisdiction, over fisheries refers to the competence of the coastal state to prescribe and to apply policy, including regulations, to fishing activity within an area claimed to be subject to that authority" (footnote omitted). BURKE, *supra* note 4, at 26.



national law as an impermissible extension of jurisdiction.<sup>35</sup> Doing the latter raises a more sophisticated legal question. In any event, the ease with which jurisdiction could be extended puts pressure on the Russian government to do so, especially when citizens plead for governmental action.<sup>36</sup>

Russia is reluctant to extend jurisdiction, through, for a variety of reasons. Customary international law recognizes an EEZ up to 200 miles from the baseline but not further.<sup>37</sup> Additionally, Russia is itself a high seas fishing nation that fishes straddling stocks in other parts of the world, notably off the coasts of New Zealand, Argentina, and Canada.<sup>38</sup> Extending jurisdiction in the peanut hole might encourage other nations to assert jurisdiction beyond 200 miles to protect their own straddling stocks, in some cases to the detriment of Russian fishing operations. The first deviation from the 200 mile limit is likely to be the most difficult to justify; if and when it occurs, highly charged straddling stock situations might motivate other nations to follow suit and to extend their own jurisdictions. Furthermore, once the 200 mile limit of the CLOS is ignored, nations might feel more free to ignore other burdensome aspects of the regime, resulting in erosion of the efficacy of the CLOS.<sup>39</sup> The challenge posed by the peanut hole is to solve the problem without an extension of jurisdiction that would erode the structure of international law which rests so fundamentally on the 200 mile limit of coastal state jurisdiction.

#### b. *Poaching*

The enclosed nature of the peanut hole creates the possibility of ships lingering in the peanut hole for the purpose of venturing into the Russian EEZ to fish illegally.<sup>40</sup> Due in large part to fuel shortages in the Russian

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<sup>35</sup> The EEZ regime, under the CLOS and customary international law, allows an EEZ up to 200 miles, but not further, from the coast. *Id.*

<sup>36</sup> A cable signed on behalf of 180 Russian fishing crews was sent to President Yeltsin, Prime Minister Chernomyrdin, the Committee of Fishing, and Dalryba urging the government to adopt certain measures, including allowing Russian fishermen to block foreign vessels fishing in the peanut hole. *Captains' Request for Solving Okhotsk Sea Problem*, PAC. RIM FISHERIES UPDATE, Mar. 1994, at 4.

<sup>37</sup> BURKE *supra* note 4, at 31, 40. For explanation of the baseline, see *supra*, note 4.

<sup>38</sup> See Metzler, *supra* note 17, at 263, fig. 1.

<sup>39</sup> See, e.g., Pitt, *supra* note 14, at 9 ("Mr. Nandan, who is overseeing the U.N. conference said he was worried that an accumulation of disputes, similar to the peanut hole dispute, could threaten the Law of the Sea, which he said 'contributes to the peaceful use of 70 percent of the earth's surface.'").

<sup>40</sup> *Letter Dated Mar. 22, 1994, From the Chairman of the Delegation of the Russian Federation Addressed to the Chairman of the Conference*, Annex, at 3, U.N. Doc. A/Conf.164/L.43 (1993) ("Foreign fishing vessels use the enclave as a base for illegal poaching of fish even in the economic zone of the Russia Federation in the Sea of Okhotsk.").

Far East in the early 1990s, enforcement of fisheries law and regulations in the Sea of Okhotsk has been poor.<sup>41</sup> The simple existence of boats in the peanut hole creates the possibility and threat of poaching by foreign vessels in the Russian EEZ. An anti-poaching campaign, "Operation Putina," was in effect in 1994 to crack down on illegal fishing by foreign vessels within the Russian EEZ.<sup>42</sup> The operation has met with some success,<sup>43</sup> but poaching and the threat of poaching remain problems which pressure Russia to extend jurisdiction over the peanut hole.

## 2. *Scientific Information*

Accurate knowledge of the biology of the pollack stock is, of course, crucial to effective management of fishing. Russia contends that as a rule, in an enclave situation like the peanut hole, the coastal nation knows more about the stock and how to manage fishing of it than does a DWFN, because the coastal nation is likely to have studied the greatest portion of the stock over the greatest period of time, and has more experience with its management and conservation.<sup>44</sup> Therefore, Russia suggests, the minimum standards for conservation of a straddling stock, especially in an enclave situation, should be the regime developed and tested by the coastal nation.<sup>45</sup> Given the technological, scientific, and institutional differences among nations, though, it may not always be true that a coastal nation has better knowledge of a fish stock.

The Russian government claims to have significant information on pollack in the Sea of Okhotsk. For instance, Russia asserts that sub-populations of the pollack stock reproduce in the northwestern, northern,

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<sup>41</sup> "Foreign trawlers [fishing in the 200-mile Soviet economic zone in the Okhotsk Sea] cannot be arrested as coast guards vessels have no fuel." CIS Econ. & Foreign Trade, Nov. 14, 1991, available in Westlaw CISECFT Database.

<sup>42</sup> *Anti-Poaching Campaign in the Russian Economic Zone in the Sea of Okhotsk Launched*, RUSSIAN FAR E. UPDATE, June 1994, at 8.

<sup>43</sup> *Id.* The operation, although somewhat successful in discouraging poaching by foreign vessels, has caught far more Russian than foreign poachers. Operation Putina is part of an extensive anti-poaching campaign in the Russian Far East (especially the Southern Primorskii Krai, Sakhalin eastern coast, the Kurile Straits) and in Russia generally. The Kamchatka region has its own anti-poaching program, called the "Losos." *Update on RFE's Anti-Poaching Operations*, RUSSIAN FAR E. UPDATE, Sept. 1994, at 5.

<sup>44</sup> Aspects of fishing to be regulated include the areas where fishing is allowed, total allowable catch, size and age of legal fish, types of gear allowed, amount of effort expended, and surveillance of fishing operations. *Letter Dated July 27, 1993, from the Alternate Chairman of the Delegation of the Russian Federation Addressed to the Chairman of the Conference*, at 3, U.N. Doc. A/Conf.164/L.27 (1993).

<sup>45</sup> *Id.* at 2.

and eastern parts of the Sea and intermingle in the peanut hole.<sup>46</sup> For this reason, there has long been a permanent ban on fishing by Russian fishermen in the central part of the Sea, which has also been observed by countries traditionally fishing in the Sea.<sup>47</sup>

Scientific knowledge of the ecology of the area in which the straddling stock exists is also pertinent to a solution. Over fishing of straddling stocks has an "unknown impact on species interaction and marine ecosystems within national jurisdiction and on the high seas."<sup>48</sup> In the Sea of Okhotsk, for example, Alaskan pollack is the main prey of juvenile Coho salmon.<sup>49</sup> Significant depletion of pollack may adversely affect the salmon fishery, which in turn may affect marine mammal populations, possibly with unforeseen disruption to the ecosystem of the Sea.<sup>50</sup>

Lack of scientific information and disagreement about the information that does exist are characteristic of straddling stock situations. As is typical, the genesis of the problem in the peanut hole was that Russia claimed impending doom for the Sea when other nations claimed there was no reliable evidence that pollack stocks were reducing.<sup>51</sup> The peanut hole conflict thus confirms that procedures for collection of credible scientific knowledge will be an essential part of any legal regime for solving straddling stock problems; the more reliable and complete the information, the better the prospects for agreements to be negotiated quickly and complied with voluntarily.

### 3. *Political Urgency Instilled by History*

The history of another straddling stock problem, the "donut hole" in the Bering Sea, affects the concerns and political relations of parties to the peanut hole conflict. A summary understanding of the rise and resolution of the donut hole conflict, which was also an Alaskan pollack fishery adjacent

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<sup>46</sup> *Consequences*, *supra* note 10, at 2.

<sup>47</sup> *Id.*

<sup>48</sup> Metzler, *supra* note 17, at 261.

<sup>49</sup> 28 J. ICHTHYOLOGY 101, 103 (1988) (juvenile Coho salmon in the Sea of Okhotsk feed mainly in coastal waters where their main prey, juvenile walleye [Alaskan] pollack, are concentrated).

<sup>50</sup> *Consequences*, *supra* note 10, at 3.

<sup>51</sup> "The Russian side is of the opinion that the Walley [Walleye] pollock catch is excessive which may result in the extinction of the fish. Poland is of the opinion that there are no scientific data related to the state of the fish resources and only after collecting such data can one say whether present fishing threatens walley pollock." PAP Polish Press Agency News Wire, July 29, 1994, available in LEXIS, NEXIS Library, NON-US File. Walleye is an alternative name for Alaskan pollack. MILES et al., *supra* note 6, at 42.

to the EEZ of Russia and involved many of the same nations party to the peanut hole conflict, will elucidate the problem at issue.

a. *Straddling pollack stock in the donut hole*

The waters of the high seas enclave known as the donut hole lie in the central Bering Sea, and are surrounded by the EEZs of the Russian Federation and the United States (Alaska). As the fishing capacity of the U.S. fleet increased in the 1980s, and consequently quotas to foreign fleets decreased, there was a gradual movement of Japanese, South Korean, Polish, and Soviet pollack fishing fleets from the EEZ of the United States to the international waters of the Central Bering Sea.<sup>52</sup> As fishing pressure increased, the pollack stocks became fully (and then over-) exploited, and the stock size<sup>53</sup> and catch<sup>54</sup> quickly plummeted.

By 1992, pollack stocks were significantly depleted in the donut hole.<sup>55</sup> As a result of ten conferences, a convention ("the Donut Hole Convention") was signed in 1994 by all nations fishing in the central Bering Sea to provide for conservation of pollack in the donut hole.<sup>56</sup> In the peanut hole, as in the donut hole, the coastal nations had to shut down their own fisheries to mitigate the effects of over-harvesting, while DWFNs continued to fish.<sup>57</sup> Russia and the United States, with the cooperation of the People's Republic of China, Poland, the Republic of Korea, and Japan, decided to extend a moratorium on pollack fishing in the donut hole at least until the fall of 1995 when a conference is scheduled to be held.<sup>58</sup> Notably, the nations involved have been temporarily able to suspend fishing by agreement, without an extension of jurisdiction by either coastal state, although an extension was encouraged by some in the U.S. fishing industry.<sup>59</sup>

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<sup>52</sup> Metzler, *supra* note 17, at 283-84.

<sup>53</sup> *Id.* at 285.

<sup>54</sup> *Id.* at 287, tbl. 3.

<sup>55</sup> The pollack catch declined from over 1.4 million tons in 1989 to less than seven thousand tons in 1992. *Id.* See also Testimony of Ambassador David A. Colson, Deputy Assistant Secretary of State for Ocean Affairs, United States Department of State before the Committee on Foreign Relations of the U.S. Senate, Sept. 28, 1994, available in Westlaw USTESTIMONY Database. See also, *Conservation and Management of Straddling Fish Stocks in the Bering Sea and the Sea of Okhotsk*, at 1, U.N. Doc. A/Conf.164/L.33 (1993) [hereinafter *Conservation and Management*].

<sup>56</sup> *Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea*, June 16, 1994, Japan-PRC-Korea-Pol.-Russian Federation-U.S., 34 I.L.M. 67 (1994). As of January 1995, the convention had been signed by each party but not ratified by any party. *Id.*

<sup>57</sup> *Conservation and Management*, *supra* note 56, at 1.

<sup>58</sup> RUSSIAN FAR E. UPDATE, Dec. 1994, at 6, 11.

<sup>59</sup> Metzler, *supra* note 17, at 288.

b. *How the donut hole affects the peanut hole*

Fortunately, because of similarities between the donut hole and the peanut hole conflicts, a solution to the donut hole (such as the Donut Hole Convention) may be adapted to the peanut hole. Unfortunately, DWFNs did not suspend fishing in the donut hole until the fishery was no longer economically viable, which portends an ill fate for the peanut hole.<sup>60</sup> As a result of the depleted stocks and the moratorium in the donut hole, ships previously in the donut hole moved to the peanut hole to continue similar fishing operations.<sup>61</sup> The increase of fishing in the peanut hole occurred even more quickly than in the donut hole, giving rise to concerns that stock depletion would be swift. The peanut hole is small, covering only about 10,500 square miles; in contrast, the donut hole spreads across about 661,000 square miles.<sup>62</sup> Negotiations for a conservation regime for the donut hole took years to accomplish a moratorium on fishing, and continue still as the fish stocks recover. Meanwhile, the fishery remains at least temporarily commercially unproductive. Comparison to the donut hole gives a sense of urgency to the straddling stock problem of the peanut hole.

4. *Russian Moratorium*

The sense of urgency caused the Russian Federation to impose drastic measures of protection on the peanut hole. On April 16, 1993, the Russian Parliament adopted a decree which prohibited fishing by Russian and foreign vessels in the Central Sea of Okhotsk, effective June 15, 1993: "[T]he Federation is temporarily halting fishing of the biological resources

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<sup>60</sup> *Conservation and Management*, supra note 56, at 1.

<sup>61</sup> *Id.* at 2. See also *Senate Report on the Sea of Okhotsk Fisheries Enforcement Act of 1993*, S. Rep. No. 218, 103rd Cong., 1st Sess. (1993) available in Westlaw LH Database. The Act would prohibit U.S. fishermen from fishing in the peanut hole and impose civil penalties. There has been no U.S. fishing in the peanut hole. David A. Colson, *Current Issues in International Fishery Conservation and Management, Statement Before the Subcommittee on Fisheries, Wildlife, and Oceans of the House Subcommittee on Resources*, Jan. 25, 1995, U.S. Dept. of State Dispatch, vol. 6, No. 7, available in LEXIS, INTLAW Library, DSTATE File (reporting that there have been rumors of U.S. vessels wishing to fish in the peanut hole, and urging passage of the Sea of Okhotsk Enforcement Act which would prohibit U.S. vessels from fishing in the peanut hole, so as to avoid jeopardizing cooperation between the United States and the Russian Federation on fisheries issues).

<sup>62</sup> William J. Kirby, [The Straddling Stock Dilemma in the Bering Sea Donut Hole: Initiating a Sea-Wide Regime, Avoiding NAFO's Pitfalls] 6 (1990) (unpublished paper, on file at the University of Washington Gallagher Law Library).

in [the central part of the Sea of Okhotsk] by Russian and foreign ships until an appropriate international agreement has been reached."<sup>63</sup> Russia apparently has not attempted to enforce the moratorium, but enforcement was not necessary for the decree to have some effect. South Korea and China initially refused to abide by the moratorium,<sup>64</sup> but later reached bilateral agreements with the Russian Federation which allow access to pollack in the Russian EEZ in return for refraining from fishing in the peanut hole.<sup>65</sup> Poland also initially spurned the moratorium, and continues to negotiate with Russia.<sup>66</sup> By the time the decree was issued, Japan had already ceased fishing for pollack in the peanut hole.<sup>67</sup>

The moratorium was to continue while multilateral negotiations took place in an attempt to reach more permanent agreement.<sup>68</sup> In March 1995, Russia announced it would continue to apply national management measures to the peanut hole.<sup>69</sup> By then, however, Russia had concluded bilateral agreements with all major DWFNs fishing in the peanut hole except Poland, and the prospects for the pollack fishery in general were reported to be good.<sup>70</sup> This favorable report seems incongruous with the impending collapse of the fishery predicted by the Russian delegation to the U.N. conference on straddling stocks, and apparently contradictory information exists.<sup>71</sup> In part, the apparent health of the pollack fishery may be due to the

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<sup>63</sup> Metzler, *supra* note 17, at 293 (quoting *Decree on Measures to Protect Biological Resources of the Sea Of Okhotsk*, Moscow Rossiyskaya Gazeta, no. 935DO384C (May 5, 1993): 5).

<sup>64</sup> Metzler, *supra* note 17, at 293. See also, *Korea Plans Okhotsk Fishing Despite Ban*, KOREA ECON. DAILY, Aug. 27, 1993 available in Westlaw MAGSPLUS Database.

<sup>65</sup> *Poles Continue to Fish Peanut Hole*, PAC. RIM FISHERIES UPDATE, Feb. 1995, at 6.

<sup>66</sup> *Foreign Vessels Still Fishing in Peanut Hole*, PAC. RIM FISHERIES UPDATE, Feb. 1995, at 6. Negotiations between Poland and Russia broke off in March 1995. *Polish-Russian Fishing Talks Severed*, Gazeta Wyborcza, March 9, 1995 at 13, available in LEXIS, NEWS Library, PNBUL File.

<sup>67</sup> Metzler, *supra* note 17, at 292.

<sup>68</sup> *Id.* at 293.

<sup>69</sup> *Russia to Extend Pollock Fishing Curb to Whole of Sea of Okhotsk*, ITAR-TASS News Agency, March 31, 1995, reported in BBC Summary of World Broadcasts, April 7, 1995, available in LEXIS, NEWS Library, NON-US File.

<sup>70</sup> *RFE Fishing Council Meets to Discuss the Industry*, RUSSIAN FAR E. UPDATE, Nov. 1994, at 5. It may be that the pollack stock in the EEZ is in good condition but the stock in the peanut hole is declining. If so, this would undercut Russia's contention that pollack in the Sea of Okhotsk is one stock. Alternatively, it may be that over time the fish in the EEZ will decline in abundance. Whatever the precise health of the fishery is, this report indicates that collapse of the stock is not imminent.

<sup>71</sup> See, e.g., *Threat of the Destruction of Alaska Pollack Stocks in the Sea of Okhotsk as a Consequence of Continued Unregulated and Unscientific Fishing in its Enclave*, at 2, U.N. Doc. A/Conf.164/L.43 (Annex) (1994). See also Conference Documents, available in World Wide Web, <http://www.iisd.ca/linkages/vol07/0742002e.html> ("Document A/Conf.164/L.49, submitted by the Russian Federation on 30 March 1995, details the 'Growing threat of the destruction of Alaska pollack stocks in the Sea of Okhotsk as a consequence of large-scale unregulated and unscientific fishing in its enclave.'").

decreased capacity of the Russian fishing fleet resulting from vessel obsolescence, lack of fuel, and other problems.<sup>72</sup> Also, the negotiated agreements with all nations but Poland seem to have significantly defused the situation. Nonetheless, the agreements are negotiated annually, and no matter what the present stock abundance is, the underlying problems of management and access to the straddling stock remain. These problems threaten to reappear if and when disagreement arises between Russia and a major DWFN. The Draft Agreement seeks to prevent such a flare up<sup>73</sup>—something the CLOS failed to do.

### C. *The 1982 Convention and Customary International Law*

On November 16, 1994, the 1982 United Nations Convention on the Law of the Sea ("CLOS") entered into force, becoming binding law on the sixty nations that have ratified the Convention.<sup>74</sup> The CLOS is a result of the nine-year Third U.N. Conference on the Law of the Sea.<sup>75</sup> The provisions applicable to the EEZ (and therefore in large part to fisheries) are widely considered to be part of customary international law.<sup>76</sup> Even when the CLOS is not in force between parties to a straddling stock dispute: (1) the disputants may choose to adopt the treaty as guiding procedural and substantive law; (2) one nation may unilaterally offer to proceed according to the treaty; or (3) all parties may proceed according to the treaty without a formal agreement.<sup>77</sup> One value of having a treaty such as the CLOS is having routine dispute resolution procedures,<sup>78</sup> which are available even to

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<sup>72</sup> *Focus: Fishing in the Russian Far East*, RUSSIAN FAR E. UPDATE, Oct., 1994, at 7.

<sup>73</sup> "The objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks . . ." *Draft Agreement*, *supra* note 21, at 3.

<sup>74</sup> See, e.g., John R. Stevenson & Bernard H. Oxman, *Comment: The Future of the United Nations Convention on the Law of the Sea*, 88 A.J.I.L. 488, 488 (1994) ("An overwhelming majority of states have signed the convention, over sixty have ratified it, and it will enter into force on November 16, 1994.").

<sup>75</sup> Prior to the Third U.N. Conference, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas existed, which in article I provides for a modification of the traditional freedom to fish the high seas, subjecting it to the interests and rights of the coastal state. This modification was incorporated into article 116 of the 1982 CLOS. The 1958 Convention has a very limited conception of conservation, and its provisions have never been implemented and is thus mostly irrelevant now. BURKE, *supra* note 4, at 11-13.

<sup>76</sup> *Id.* at 23.

<sup>77</sup> E.L. Miles & W.T. Burke, *Pressures on the United Nations Convention of the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks*, 20 OCEAN DEV. & INT'L LAW 343, 352-53 (1989).

<sup>78</sup> *Id.* at 356.

nations not bound by its terms. The CLOS does address straddling stocks expressly.

1. *1982 CLOS and Straddling Stocks*

a. *Duty to seek agreement*

The CLOS provides that in the event of a straddling stock: "the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area."<sup>79</sup> The CLOS thus envisions two possibilities: (1) a regional organization formed with the consent of interested nations and authorized by those nations to manage fishing of a straddling stock; or (2) agreement among nations, without the formation of a separate organization, brought about by direct bilateral or multilateral negotiations. The CLOS, however, does not require (by this provision, at least) anything more of the disputing nations than that they *seek to agree*. Nations may, consistent with the Convention, and in good faith, fail to agree on measures for the conservation of a straddling stock.<sup>80</sup>

There is no regional fisheries organization active in the Sea of Okhotsk, and it is unlikely that a regional organization encompassing the peanut hole would form in the foreseeable future, unless the organization affords Russia significant management discretion and enforcement powers. Russia does have improving relations with some neighboring fishing nations, such as Japan, and their cooperation would be expected in forging a regional organization.<sup>81</sup> It is not impossible that such an organization could form, and it may be that a truly effective long term management regime for fisheries in the area will require a regional organization authorized to enforce regional measures. But, given Russian dominance of the Sea of Okhotsk by virtue of its surrounding EEZ and the Russian assertion that all fishing historically took place in the peanut hole only under intergovern-

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<sup>79</sup> CLOS, *supra* note 4, at art. 3, para. 2.

<sup>80</sup> *Contra*, Miles & Burke, *supra* note 77, at 352 (arguing that in the event disagreement obtains, a coastal state has a superior right). This interpretation, that coastal nations have a superior right, has not been reflected in practice. *See infra*, text accompanying notes 90-91.

<sup>81</sup> Tsuneo Akaha, *From Conflict to Cooperation: Fishery Relations in the Sea of Japan*, 1 PAC. RIM L. & POL'Y J. 225, 266-67 (fairness and equity are beginning to characterize some bilateral agreements in the Sea of Japan, and fairness will be a key characteristic of any successful cooperative fishing arrangements among Japan, Russia, and Korea).



mental agreements, Russia will be reluctant to relinquish its claim to control fisheries in the area. Considering the necessary conditions for a regional organization is beyond the scope of this Comment, but it is relevant to note that establishment of regional fisheries organizations does not necessarily solve straddling stock problems, as the experience of the North Atlantic Fisheries Organization proves.<sup>82</sup>

b. *Hierarchy of rights*

Even in the absence of a regional organization encompassing the peanut hole, the CLOS does provide a hierarchy of rights that form the basis of a legal solution to a straddling stock problem. Article 116 provides: “[a]ll States have the right to engage in fishing on the high seas, subject to: (a) their treaty obligations; (b) the rights and duties as well as the interests of the coastal States provided for, *inter alia*, in article 63, paragraph 2.”<sup>83</sup> Thus, the right of a state to fish on the high seas appears to be subject to the interests of a coastal state in conserving and managing its fish stocks. Professor William Burke, of the University of Washington, has advocated this interpretation of the CLOS, based on the sovereign rights of the coastal nation.<sup>84</sup> Burke observes that article 56, read in conjunction with article 63(2), limits the freedom to fish the high seas.<sup>85</sup> Article 56 provides that in the EEZ, a coastal state has *sovereign rights* to biological resources.<sup>86</sup> Merely seeking agreement does not preserve a coastal state’s *sovereign rights* if fish stocks in the EEZ are adversely affected by fishing in adjacent international waters.<sup>87</sup> Furthermore, the rights of a coastal state over biological resources in the EEZ include the right to manage the resources in a manner designed to achieve economic, social and political as well as

<sup>82</sup> See, e.g., Metzler, *supra* note 18, at 299 (the regional organization [NAFO] has failed to resolve conflicts over straddling stocks).

<sup>83</sup> Article 63, para. 2, is excerpted, *supra*, text accompanying note 79.

<sup>84</sup> BURKE, *supra* note 4, at 133. See also, *Straddling Stocks*, *supra* note 27, at 300.

<sup>85</sup> *Straddling Stocks*, *supra* note 27, at 299.

<sup>86</sup> Article 56(1)(a) reads in pertinent part: “In the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving, and managing, the natural resources, whether living or non-living, of the waters superjacent to the sea-bed . . . .”

<sup>87</sup> *Id.* at 299. Cf. Kirby, *supra* note 57, at 29, n.68. Kirby argues that Burke’s analysis fails because article 56 reads: “[i]n the exclusive economic zone, the coastal state has sovereign rights for the purpose of [managing natural resources] . . . .” instead of “the coastal state has sovereign rights for purposes of . . . managing natural resources in the EEZ” (emphasis added). Thus, argues Kirby, the sovereign rights apply only within the EEZ and do not extend to any activity on the high seas. The language of the Convention is ambiguous on this point, but Burke’s interpretation appears to be the better one because it is more consistent with the purposes of the EEZ and conservation.

environmental goals,<sup>88</sup> making management of the fisheries a matter almost entirely of coastal state discretion.<sup>89</sup> Arguably then, the CLOS condones the moratorium declared by Russia.

In practice, it has not been confirmed that DWFNs must submit to the interests or sovereign rights of a coastal nation.<sup>90</sup> In fact, coastal states have generally not taken unilateral action against DWFNs to protect straddling stocks.<sup>91</sup> Russia's moratorium was not universally observed, and Russia apparently did not seek enforcement of its moratorium in an international tribunal, suggesting that a coastal state in a straddling stock situation is practically powerless. This is a recognized fault of the CLOS.

## 2. *Shortcomings of 1982 CLOS*

### a. *Vagueness*

Although the CLOS subjects the freedom to fish the high seas to the interests and rights of a coastal state, it does not indicate how the rights are qualified, or how restrictions on the right would be applied to a DWFN.<sup>92</sup> The vagueness of the hierarchy of rights hinders the Convention's effectiveness because it fails to provide a mechanism for the ordering of the rights.

The vagueness is largely a result of the exigencies of negotiating the Convention. Legislative history of the 1982 CLOS reveals that proposed amendments to the straddling stock provisions (such as a dispute settlement tribunal to determine conservation measures in the event nations fail to

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<sup>88</sup> BURKE, *supra* note 4, at 54-55.

<sup>89</sup> The only sense in which a coastal state does not have discretion in management of fisheries occurring within its EEZ is when it is determined that a surplus of fish exists over the amount which the coastal state will harvest. In this case, coastal states are to allow foreign states to fish in the EEZ. Since the coastal states determine when a surplus exists, management of the fishery is virtually entirely within the discretion of the coastal state. See BURKE, *supra* note 4, at 44 ("The [1982] convention explicitly declares that the coastal state has discretion to establish the allowable catch. The catch may be set in accordance with the coastal state's judgment about both the level of abundance and the rate of replacement of the fishery stocks which will serve the coastal state's economic and other interests.") (footnotes omitted).

<sup>90</sup> BURKE *supra*, note 4, at 135.

<sup>91</sup> The most significant exception is the February 1995 seizure of a Spanish fishing vessel by Canada. See, e.g., *Canadians Seize Spanish Trawler*, *supra* note 17. The Canadian action provides corroborating evidence for the argument that without an effective international law governing straddling stocks coastal states will begin to take unilateral action. Compare, BURKE, *supra* note 4, at 136 (the pattern of inaction on the part of coastal states could give rise to the expectation that coastal states do not have an enforceable superior right).

<sup>92</sup> Burke, *supra* note 9, at 95.

agree by direct negotiations)<sup>93</sup> were withdrawn out of fear that they might jeopardize the whole Convention.<sup>94</sup> Opposition to the amendments came from Japan and the Soviet Union, both DWFNs.<sup>95</sup> By painting with a broad brush over problems that were only incubating at the time of the Conference, the Convention inadequately addresses straddling stock problems as manifested in the 1990s.<sup>96</sup>

*b. Lack of provision for enforcement*

Probably the primary shortcoming of the CLOS regarding straddling stocks is that it fails to provide for enforcement of a coastal state management regime against a DWFN fishing a straddling stock beyond the EEZ.<sup>97</sup> Since the CLOS authorizes coastal states to regulate salmon fishing beyond 200 miles but expressly requires consent of the high-seas fishing states for enforcement, it is unlikely that any provision of the CLOS will be interpreted to confer any greater enforcement power over straddling stocks. No express provision for enforcement is provided.<sup>98</sup>

The CLOS authorizes a coastal state to propose a management regime to a DWFN fishing outside the EEZ and to seek dispute resolution in the event a DWFN refuses to abide by the coastal state's proposed regulations.<sup>99</sup> Notably, the coastal state is not authorized to enforce any measures beyond the EEZ; enforcement of legal obligations of vessels fishing on the high seas is left to flag states.<sup>100</sup> Thus, although the authority to prescribe management measures for the fishing of straddling stocks in the high seas

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<sup>93</sup> *Straddling Stocks*, *supra* note 27 at 301 (dispute resolution was part of an Argentine proposal that provided for indirect application of coastal state measures in the event nations failed to agree).

<sup>94</sup> Metzler *supra*, note 17, at 257.

<sup>95</sup> BURKE, *supra* note 4, at 34. See also Metzler, *supra* note 17, at 302, text accompanying n.56.

<sup>96</sup> "The problems of high seas fishing which this Conference is asked to address are not new. They were known to the participants of the Third United Nations Conference on the Law of the Sea, but attempts to deal with them at that time were not very successful, largely because they were not seen as urgent . . . . However, events in the last decade and more have clearly indicated that with the advent of the exclusive economic zone, the pressure on high seas fishing has grown rapidly, and the problems have become more urgent than they were at the time the Convention was being negotiated." *Statement made by the Chairman of the Conference at the Opening of the Organizational Session, Held on 19 April 1993*, at 1, UN. Doc. A/Conf.164/7.

<sup>97</sup> BURKE, *supra* note 4, at 134 (noting only two instances in which a coastal state may be authorized by the CLOS to enforce measures on the high seas, neither of which is directly relevant).

<sup>98</sup> *Straddling Stocks*, *supra* note 27, at 303.

<sup>99</sup> Miles & Burke, *supra* note 77, at 352 (in the event of disagreement, the coastal state cannot enforce its management regime, but can only seek dispute resolution).

<sup>100</sup> BURKE, *supra* note 4, at 134, 306.

may be inferred from the CLOS, authority to enforce the prescription is lacking.

c. *Fundamental inconsistency of the EEZ with ecosystem management*

The CLOS is based on the political foundation of coastal state sovereign rights up to 200 miles from shore (the EEZ), but ecosystems do not conform to a 200 mile political boundary.<sup>101</sup> When this inconsistency cannot be accommodated by negotiations, and international law fails to provide for application of hierarchical rights and enforcement, straddling stocks may suffer over fishing. Ultimately, nations that depend on those stocks will bear the cost of their depletion. In recognition of the fact that talks have been failing throughout the world, and due to growing concerns about the sustainability of high seas fishing, the United Nations convened a conference to address the issue.<sup>102</sup>

D. *The 1995 Revised Draft Agreement on Straddling Stocks*

I. *Origin and Relevance*

The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks held its organizational session in April 1993. The stated mandate of the Conference is to promote the implementation of the provisions of the CLOS pertaining to straddling fish stocks.<sup>103</sup> At the fourth session, held in August 1994, the Chairman of the Conference prepared a draft agreement.<sup>104</sup> At the fifth session, held in March and April of 1995, the chairman revised the Draft Agreement.

The Revised Draft Agreement (Draft Agreement) is at this time the best indication of how the straddling stock problem in the peanut hole might be solved within the strictures of international law, that is, without the Russian Federation unilaterally extending its jurisdiction and asserting management authority in the high seas enclave. Russia has been exten-

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<sup>101</sup> BURKE, *supra* note 4, at 81.

<sup>102</sup> *Draft Agreement*, *supra* note 21.

<sup>103</sup> The mandate extends also to highly migratory fish stocks, which include such fish as tuna, which are not addressed in this Comment.

<sup>104</sup> *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. Doc. A/Conf.164/22 (1994).

sively involved in the conference and formulation of the Agreement.<sup>105</sup> As it is still only a draft, the Agreement has no binding force for any nation and may be modified before it is opened for signature. Analysis of its present form, though, may forecast the future management of the Sea of Okhotsk pollack resource, and furthermore, may indicate whether the CLOS will rule the sea in future years. If a solution to the straddling stock problem cannot be found within the CLOS, the future of the entire CLOS is questionable.

## 2. *Application of the Draft Agreement*

### a. *Application to fisheries*

The Draft Agreement applies to the conservation and management of straddling fish stocks beyond areas under national jurisdiction.<sup>106</sup> Thus, management of the portion of the pollack stock within the Russian EEZ is unaffected by the Agreement. However, the Agreement provides for two major exceptions.<sup>107</sup> The provisions of article 6 (pertaining to the "precautionary approach") and article 7 (pertaining to "compatibility") apply *within* areas of national jurisdiction, i.e., within the Russian EEZ. These exceptions are significant because they mean the Draft Agreement does not simply qualify the right of a DWFN to fish a straddling stock,<sup>108</sup> but it also provides in some instances that the discretion of a coastal nation to implement management measures is constrained. Importantly, the agreement provides for some give and take on the part of nations on both sides of the 200 mile limit—since neither side is being asked to bear the full burden of conservation, it is more likely that the Draft Agreement will be consented to by nations on both sides.

### b. *Application to nations*

The Draft Agreement applies to nations that have consented to be bound by it and for which the agreement is in force,<sup>109</sup> and to nations that

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<sup>105</sup> By late 1994, of 45 total documents of limited distribution published by the U.N. pertaining to the conference, Russia was responsible for 13 of them.

<sup>106</sup> *Draft Agreement*, art. 3(1), at 4.

<sup>107</sup> *Id.*

<sup>108</sup> *See infra*, part IV.B.

<sup>109</sup> *Draft Agreement*, art. 1(1)(d), at 3. *See also* art. 37 (Ratification, acceptance, approval, and formal confirmation), at 28, and art. 39 (Entry into force), at 28.

become party to it in accordance with the CLOS.<sup>110</sup> By implication, it does not apply to nations which do not consent to be bound by it, whether or not such a nation is bound by the CLOS. Since some aspects of the Draft Agreement differ from the CLOS, nations considering whether to accede to the Draft Agreement must determine whether their interests are best served under the Draft Agreement or the 1982 CLOS. In the context of the peanut hole, it is difficult to imagine why Russia would not agree to be bound by the agreement, for what is gained in constraining DWFNs far outweighs any influence DWFNs can exert on Russian management under the Agreement. When considering Russia's involvement as a DWFN in other fisheries, however, the calculus is more complicated. Nonetheless, to the extent the Draft Agreement imposes order on straddling stock fisheries, fishing nations, both coastal and distant, have an interest in agreeing to its terms in an effort to conserve stocks world-wide and to promote predictability on which fishing industries and fishing nations can plan. Of course, that interest in agreement will only result in broad accession if the Draft Agreement is seen as fair and effective.

### III. ANALYSIS

#### A. *General Assessment of the Draft Agreement*

The Draft Agreement is a significant, but cautious, step forward in implementing the provisions of the CLOS regarding straddling stocks. It purports to promote and to elaborate upon the CLOS<sup>111</sup> and must be read consistently with that Convention,<sup>112</sup> but it does appear to alter slightly the legal relationship between coastal and DWF nations. The Agreement does provide clarity and specificity where the CLOS is vague, and to a limited degree it prescribes competences of coastal and high seas fishing nations in a straddling stock situation which may form the basis of negotiated solutions to straddling stock conflicts. For disputes which cannot be resolved by negotiation, the Draft Agreement incorporates the dispute

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<sup>110</sup> *Draft Agreement*, art. 1(2), at 3.

<sup>111</sup> "[This] is a Conference . . . to resolve the festering problems of high seas fishing in order to give full and faithful effect to the very delicately balanced provisions of the Convention [CLOS], so that high seas fishery [sic] can continue to produce maximum sustainable yield, having regard to the environmental, economic and other factors as provided for in the Convention, and without the kind of conflicts that have resulted in the convening of this Conference." *Statement made by the Chairman of the Conference at the Opening of the Organizational Session*, at 3, U.N. Doc. A/Conf.164/7 (1993).

<sup>112</sup> *Draft Agreement*, art. 4, at 4.

resolution provisions of the CLOS. Improving upon the original, the revised Draft strengthens provisions for enforcement, but only in the context of regional agreements. The Agreement may be widely adopted because it protects DWFNs from extension of coastal state jurisdiction, and it protects the management regime of coastal nations from being undermined by high seas fishing. The specific ways in which the draft agreement provides this protection are discussed below.

## B. *Compatibility*

### 1. *Generally*

Almost all aspects of the Draft Agreement inhere in the provisions for compatibility;<sup>113</sup> compatibility is in many ways the kernel of the Agreement's vision for solving straddling stock disputes. Compatibility requires that the conservation and management measures taken on the high seas be compatible with those measures taken in areas under national jurisdiction to ensure conservation and management of the stock. States are obligated by the Draft Agreement to cooperate for the purpose of achieving compatible measures.<sup>114</sup> Special emphasis is placed on the conservation and management measures on the high seas, for which states shall:

take into account the conservation and management measures established in accordance with article 61 of the Convention [CLOS] in respect of the same stock(s) by coastal States in areas under national jurisdiction and *ensure that measures established in respect of the high seas do not undermine the effectiveness of those measures established in respect of the same stocks(s) by coastal States in areas under national jurisdiction* . . . .<sup>115</sup>

Article 56 of the CLOS grants coastal states sovereign rights over fisheries in the EEZ, which means they can establish any management regime consistent with the CLOS. Therefore, the Draft Agreement also affords coastal states the authority to prescribe the limits of a management regime

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<sup>113</sup> *Draft Agreement*, art. 7, at 7.

<sup>114</sup> *Draft Agreement*, art. 7(2), at 7.

<sup>115</sup> *Draft Agreement*, art. 7(2)(a), at 7 (emphasis added).

on the high seas, inasmuch as high seas management cannot undermine management in the EEZ. Thus, by inference, a coastal state has a superior right to establish management of the fishing of straddling stock—a DWFN cannot undermine the management of a coastal nation. This superior right is especially significant because management is a broader concept than conservation; management may be informed by the economic, social and political interests of the coastal nation. Thus, a DWFN may be prevented from fishing a straddling stock because of the economic policy, for instance, of a coastal state.

Compatibility, however, works both ways. The Draft Agreement provides many factors for nations to consider in seeking agreement on the management of a straddling stock, such as the “geographical particularities of the region, including the extent to which the stock(s) occur and are fished in areas under national jurisdiction.”<sup>116</sup> Presumably, these same factors would be considered by an arbitral tribunal. Although a coastal nation has priority in establishing the management regime, it does *not have an unqualifiedly superior right* to a straddling stock. Qualifications of the right will sometimes work in favor of DWFNs and sometimes in favor of the coastal state.<sup>117</sup> The coastal state does, however, have the authority to set the management regime for the stock and to expect that no DWFN will undermine that regime except in unusual circumstances justifiable on grounds listed in the Agreement. To the extent that compatibility requires a coastal nation to take into account management practices on the high seas, it imposes a new duty on coastal nations that is not found in the CLOS.

To achieve compatibility, the Draft Agreement imposes mechanisms for international cooperation, such as the duty to pursue cooperation to ensure effective conservation of straddling stocks.<sup>118</sup> These mechanisms impose a duty either to establish a regional or subregional fisheries organization, or to negotiate directly (and in good faith) for the conservation and management of straddling stocks. Included among these mechanisms is a special provision for high seas enclaves surrounded by the EEZ of a single state.

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<sup>116</sup> *Draft Agreement*, art. 7(2)(c), at 8.

<sup>117</sup> *Id.* In addition to the qualifications of geography and the extent to which the stock is fished by each nation, nations are to consider: the biological unity of the stock, previously agreed measures, respective dependence of the nations on the stock, and the effects of management practices on the living marine resource as a whole. *Draft Agreement*, art. 7(2)(b)-(e). Obviously, these factors provide much room for balancing and an equitable allocation of the stock.

<sup>118</sup> *Draft Agreement*, art. 8(1), at 9.



## 2. *In a High Seas Enclave*

Article 14 of the Draft Agreement was written with the peanut hole in mind. It provides in pertinent part:

States whose nationals fish for straddling stocks . . . in an area of the high seas which is surrounded entirely by an area under the national jurisdiction of a single State shall cooperate with that State to establish conservation and management measures . . . Having regard for the geographical and ecological characteristics of the area, States shall pay *special* attention . . . to the establishment of compatible . . . measures . . . and shall ensure that measures established in respect of the high seas take into account the rights, duties and interests of the coastal State under the [1982] Convention . . .<sup>119</sup>

Article 14 also provides that if the nations are unable to agree on conservation and management measures "within a reasonable period of time," then the provisions of article 7 concerning the use of dispute settlement to establish provisional measures will apply.

The operative word in article 14 is *special*. The word emphasizes compatibility and the rights, duties and interests of coastal states, but it adds nothing new to the article 7 provisions on compatibility. Since the general provisions on compatibility apply to high seas enclaves surrounded by the EEZ of one state no less than anywhere else, it is unclear what article 14 adds to the Agreement. Possibly it is meant to ensure that enclaves surrounded by one EEZ are to be treated as any other straddling stock situation, and unilateral extension of jurisdiction is unlawful. In this sense, article 14 is a prophylactic measure protecting DWFNs. Alternatively, the emphasis on special regard for geographical and ecological characteristics of the enclave may be a concession to Russia, lending force to the Russian argument that a coastal state is best situated to establish the management regime for the high seas waters of an enclave surrounded by one state. How the provisions for compatibility would affect regulation of fishing in the peanut hole can best be understood in light of other aspects of the Draft Agreement.

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<sup>119</sup> *Draft Agreement*, art. 14, at 14 (emphasis added).

### C. *The Precautionary Approach*

One innovation in the Draft Agreement is the requirement that coastal nations and DWFNs apply the precautionary approach. The precautionary approach is an attempt to prevent the absence of adequate scientific information from resulting in the absence or delay of conservation measures.<sup>120</sup> It is not limited to any specific technique, but requires taking into account the best available scientific information, and imposes a general duty to "be more cautious when information is uncertain, unreliable, or inadequate."<sup>121</sup> Minimum standards are to be agreed upon in advance, including stock-specific reference points and the action to be taken if they are exceeded.<sup>122</sup> In the event reference points are exceeded, immediate action is to be taken in accordance with pre-agreed courses of action to restore the stock.<sup>123</sup> The precautionary approach is to consider the impacts of fishing on associated ecosystems<sup>124</sup> and related species.<sup>125</sup> A one-page annex to the agreement supplies suggested guidelines for applying the precautionary approach.<sup>126</sup> The approach emphasizes caution in the face of scientific uncertainty and requires planning in advance so that if and when scientific evidence indicates a stock is declining, appropriate responsive measures can quickly be implemented.

Since the precautionary approach is only effective if the standards are set at conservative levels, and are observed by fishing nations, the approach does not guarantee conservation. It does, however, give a basis in international law for managing conservatively in the face of scientific uncertainty. In other words, unless it can be proven unjustifiable to the satisfaction of a dispute resolution tribunal, conservative management and fishing practices are encouraged by the precautionary approach. However, the precautionary approach is susceptible to abuse. For instance, a coastal state could attempt to manage a straddling stock unduly conservatively where the stock borders the high seas, while fishing intensively deep within the EEZ, thereby pushing the burden of conservation off to a high-seas fishing state. Since

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<sup>120</sup> *Draft Agreement*, art 6(2), at 6.

<sup>121</sup> *Id.*

<sup>122</sup> *Draft Agreement*, art. 6(3)(b), at 6.

<sup>123</sup> *Id.*

<sup>124</sup> *Draft Agreement*, art. 6(3)(c), at 6.

<sup>125</sup> *Draft Agreement*, art. 6(6), at 6.

<sup>126</sup> *Draft Agreement*, Annex 2, at 37.

the coastal state has sovereign rights over fisheries in the EEZ, the high seas state could not dispute the practice, unless it could show that what was ostensibly justified by the precautionary approach was really an abuse of the rule.<sup>127</sup>

Coastal nations are required to apply the precautionary approach within their EEZs,<sup>128</sup> and both coastal and DWFNs are required to apply the precautionary approach outside the EEZ in giving effect to their duty to cooperate according to CLOS.<sup>129</sup> But there is no authority to administer or enforce the precautionary approach, other than a signatory state requiring its own nationals to act accordingly. Therefore, it is difficult to see how the approach might have prevented the peanut hole conflict in a timely manner. The nations that continued to fish the peanut hole after the Russian-imposed moratorium justified doing so by asserting that there was no convincing scientific evidence that pollack stocks in the Sea of Okhotsk were being depleted.<sup>130</sup> A claim by Russia that DWFNs in the peanut hole were not abiding by their obligation to apply the precautionary approach might be submitted to a dispute resolution tribunal, and provisional measures applied. A tribunal's decision would depend on the facts of the situation, underscoring the need for good science and data collection.

#### *D. Science and Data Collection*

The collection and provision of scientific information is another of the mechanisms for international cooperation in straddling stock management. The Draft Agreement addresses the need for scientific data on fish stocks and fishing practices by requiring nations party to the agreement to collect and to exchange data in a detailed, timely, and accurate manner.<sup>131</sup> Nations are also to agree on the format for the data,<sup>132</sup> and to develop and to share techniques and methodologies for the assessment of straddling stocks.<sup>133</sup> An annex is provided which details a minimum standard for collecting and sharing data.<sup>134</sup>

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<sup>127</sup> *Draft Agreement*, art. 32, at 26 (prohibits exercising rights of the Agreement in a manner which constitutes an abuse of the right). The example given in the text may violate compatibility.

<sup>128</sup> *Draft Agreement*, art. 3(1), at 4.

<sup>129</sup> *Draft Agreement*, art. 5(c), at 5.

<sup>130</sup> *See supra*, part II.B.4.

<sup>131</sup> *Draft Agreement*, art. 12(1)(a)-(c), at 12.

<sup>132</sup> *Draft Agreement*, art. 12(2)(a), at 12.

<sup>133</sup> *Draft Agreement*, art. 12(2)(b), at 12.

<sup>134</sup> *Draft Agreement*, Annex 1, at 33.

Collection of data in a unified format will elucidate the particulars of any one straddling stock dispute and inform political negotiations among states. Rarely, if ever, will scientific information alone be incontestable and point to a clear solution, but it may forestall conflicts which have no scientific basis. To the extent it serves this purpose, data collection is crucial to solving straddling stock problems. When conflict does arise, though, whether based on widely accepted scientific data or in the face of high uncertainty, nations must turn to peaceful dispute settlement.<sup>135</sup>

### E. *Dispute Resolution Procedures*

Making disputes subject to third-party resolution may forestall conflicts before they begin by removing any incentive to disagree on management measures. If and when a dispute does arise, dispute resolution provisions may be necessary for a peaceful resolution. To forestall and to resolve disputes, the dispute resolution provisions of the Draft Agreement adopt the provisions of the 1982 CLOS,<sup>136</sup> which allow parties to select a means for dispute settlement from the following: the International Tribunal for the Law of the Sea; the International Court of Justice; or an arbitral tribunal.<sup>137</sup> The Draft Agreement allows disputes of a technical nature to be referred to an *ad hoc* expert panel.<sup>138</sup> If nations are unable to agree on provisional measures pending the formal resolution of a dispute, then this disagreement may be submitted to dispute resolution as well.<sup>139</sup> The court or tribunal hearing a dispute also has authority under the Agreement to prescribe provisional measures when states party to a dispute are unable to agree on provisional measures within a reasonable period of time.<sup>140</sup>

Dispute resolution procedures would probably have been highly effective in the peanut hole conflict. Given the valuable pollack resource and the small (in area) high seas fishery, all nations involved have an interest not only in maintaining the resource over time, but also in having some (if limited) right to catch fish. A neutral tribunal is well situated to decide aspects of a management regime that the parties themselves cannot

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<sup>135</sup> *Draft Agreement*, art. 26, at 24 ("States have the obligation to settle their disputes by . . . peaceful means . . .").

<sup>136</sup> *Draft Agreement*, art. 29(2), at 25.

<sup>137</sup> CLOS, *supra* note 4, art. 287. An arbitral tribunal is the default means. *Id.*

<sup>138</sup> *Draft Agreement*, art. 28, at 24.

<sup>139</sup> *Draft Agreement*, art. 30(1), at 25.

<sup>140</sup> *Draft Agreement*, art. 30(3), at 26.

agree upon; but nations would prefer to retain control over as much as possible so as to compromise in the manner that best serves their interests. Only disputes that cannot be compromised are likely to be submitted to the tribunal. With a dispute settlement mechanism in the background, disagreement, instead of perpetuating the status quo, leads to compromise, because nations are likely to be wary of the unpredictability of an arbitral decision. As is typical of international law, however, enforcement of a favorable decision remains problematic.

#### F. Enforcement

The Draft Agreement contemplates four types of enforcement of its provisions: enforcement by flag state;<sup>141</sup> by port state;<sup>142</sup> according to international cooperation;<sup>143</sup> and according to regional agreement.<sup>144</sup> According to the Draft Agreement, the flag state bears the responsibility for ensuring that vessels flying its flag comply with agreed measures for the conservation and management of straddling stocks and that they do not undermine the effectiveness of those measures.<sup>145</sup> Therefore, enforcement depends upon the motivation and capability of the flag state. Improvement of flag state enforcement is bolstered by the Food and Agriculture Organization's ("FAO") Compliance Agreement.<sup>146</sup> The FAO agreement requires states to ensure that vessels authorized to fly the state's flag do not undermine the effectiveness of international conservation and management measures.<sup>147</sup> If widely adopted, the FAO agreement will significantly improve the international system of flag state enforcement of provisions of international law.<sup>148</sup>

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<sup>141</sup> *Draft Agreement*, art. 19, at 17.

<sup>142</sup> *Draft Agreement*, art. 22, at 21.

<sup>143</sup> *Draft Agreement*, art. 20, at 18.

<sup>144</sup> *Draft Agreement*, art. 21, at 19.

<sup>145</sup> The Draft Agreement also imposes a licensing requirement on flag states, art. 18 (3)(a) at 15, and requires states to authorize vessels flying its flag to be used for fishing on the high seas "only where it is able to exercise effectively its responsibilities in respect of such vessels under the conservation and under the provisions of this Agreement." *Draft Agreement*, art. 18(1), at 15.

<sup>146</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 20, 1993, Food and Agriculture Organization of the United Nations; 33 I.L.M. 968 [hereinafter FAO Agreement].

<sup>147</sup> FAO Agreement, art. III § 1; 33 I.L.M. 968, 971.

<sup>148</sup> As of July 27, 1994, no nation has deposited an instrument of acceptance of the agreement. *Id.* at 968.

An important consequence of the flag state enforcement regime of the Draft Agreement is that a coastal nation is *not* authorized to extend jurisdiction over fishing operations beyond its EEZ even in straddling stock situations. Instead, the agreement provides for a dispute resolution procedure, which requires adherence by all nations to the Agreement, and requires effective enforcement by the flag state of its nationals. This system will work only when the flag state has a strong interest in maintaining international adherence to the Agreement, such as to prevent coastal state attempts at extension of jurisdiction and abandonment of the 200 mile limit to the EEZ. It also depends on technological feasibility, such as the ability of a nation to police vessels flying its flag in all corners of the globe. Lack of provision for enforcement authority in the CLOS led, in part, to failure in the management of straddling stocks, reiterating the tragedy of the commons. However, without the delegation of enforcement from fishing nations to a regional or other authority, enforcement must remain the responsibility of sovereign flag states. Given the political pressures brought to bear on a nation from its nationals, though, it is doubtful that a system resting on flag state enforcement can reach the level of enforcement desired by coastal nations seeking to protect straddling stocks. It may eventually take regional fisheries organizations empowered with enforcement capabilities to manage straddling stocks effectively.

The second type of enforcement provision is enforcement in the context of a regional agreement. The Draft Agreement has strong provisions regarding regional agreements, including arrangements for enforcement by authorized inspecting states until the flag state can take control of the vessel alleged to be in violation.<sup>149</sup> These provisions are similar to provisions in the Donut Hole Convention in that they allow for a continued boarding by a coastal state (in the case of the Draft Agreement) or any other party to the Convention (in the case of the Donut Hole Convention) when the flag state does not take prompt action. In neither case is any state other than the flag state authorized to prosecute or to impose a penalty on a vessel (or its crew) alleged to be in violation, but the threat of continual boarding puts pressure on a flag state to take control of a violation situation, and prevents continuation of a violation. Notably, the Draft Agreement does not limit the enforcement provisions to vessels that are party to the regional agreement. Once a regional agreement is in effect, it preempts other management regimes for the area. Thus, although joining a regional

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<sup>149</sup> *Draft Agreement*, art 21(7), at 20.

agreement is voluntary, there is an incentive to join since non-members and members alike are subject to the regional enforcement regime.

While it is unlikely that Russia would relinquish its claim to control of the Sea of Okhotsk, and hence unlikely that Russia would agree to any enforcement other than Russian enforcement in the peanut hole, some form of regional arrangement is foreseeable.<sup>150</sup> An arrangement is possible because it is likely that DWFNs would agree to authorize some degree of Russian enforcement in the peanut hole as part of a management regime which guarantees DWFN access to pollack within the Russian EEZ. This is effectively what is being done presently as nations agree not to fish in the peanut hole in return for access to pollack in the Russian EEZ. The test case will be Poland. If Poland holds out for lower prices for access to Russian pollack, it may in effect be requiring Russia to subsidize compatibility in the peanut hole—a situation ripe for further conflict. Because it is consistent with the Draft Agreement and addresses a problem similar in numerous ways to the peanut hole conflict, the Donut Hole Convention may serve as a model for an improved enforcement regime. The regime would allow continued Russian boarding of foreign vessels when flag states fail to take control of or to investigate their ships alleged to be in violation of conservation or management measures in the peanut hole. This regime would be a great stride toward conserving the pollack stock in the peanut hole.

The two other enforcement provisions of the Draft Agreement do little to bolster the enforcement scheme. International cooperation is encouraged, allowing a flag state to request the assistance of another nation in investigation, and to grant permission to a coastal state to board a vessel of the flag state.<sup>151</sup> But cooperation still remains within the discretion of the flag state. Cooperation can help surmount some of the logistical difficulties of enforcement (such as when a flag state does not have a ship nearby to investigate), but it cannot overcome flag state reluctance to constrain the fishing of its nationals.

A port state is authorized, *inter alia*, to inspect documents, fishing gear, and catch on board when vessels are voluntarily in its ports.<sup>152</sup> Also, a port state may establish regulations for the purpose of prohibiting access to its ports when it has been established that the catch has been taken in a

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<sup>150</sup> See *supra* note 81 and accompanying text.

<sup>151</sup> *Draft Agreement*, art. 20, at 18.

<sup>152</sup> *Draft Agreement*, art. 22(2), at 21.

manner that undermines the conservation and management measures pertaining to a straddling stock.<sup>153</sup> This ability to deny port access creates an incentive for a DWFN wishing to use a foreign port to comply with fishery management measures of a straddling stock near a port state. But alone, this is not an effective enforcement mechanism.

It is uncertain whether the enforcement provisions of the Draft Agreement are sufficiently strong to achieve broad compliance. Flag state enforcement, the predominant enforcement regime, is necessarily less rigorous than a regime depending on third-party enforcement. Ironically, though, the weakness of the Draft Agreement enforcement provisions may be one of its strengths. By not subjecting DWFNs to enforcement by the coastal nation in the absence of a regional organization or arrangements, the Draft Agreement offers protection to DWFNs which may induce them to subscribe to the Agreement. Russia apparently never did attempt to vigorously enforce the moratorium it imposed on the peanut hole, but it has been suggested that if coastal states do not take steps to enforce their legal rights to manage the fishing of straddling stocks, they may compromise their rights.<sup>154</sup> To maintain immunity from foreign enforcement, DWFNs may accept some qualification of their right to fish a straddling stock.

#### IV. SCENARIOS

Since the Draft Agreement indicates how straddling stock conflicts are likely to be resolved in the future, it is constructive to speculate how the peanut hole conflict would have transpired if the Agreement were in effect when the conflict first arose. Additionally, since the conflict is not yet resolved, such speculation may actually forecast the future of fishing in the area. The following four scenarios illustrate how the Draft Agreement might resolve the peanut hole conflict.

##### A. *First Scenario*

The facts in this scenario are as follows: scientific data of the pollack population and catch data of the relevant fishing states have been recorded so that an accurate determination of the effect of high seas fishing practices on the management and conservation measures of Russia can be

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<sup>153</sup> *Draft Agreement*, art. 22(3), at 21.

<sup>154</sup> BURKE, *supra* note 4, at 136.



determined. The DWFNs are vindicated because the data reveal conclusively (to a dispute resolution tribunal or court) that high seas fishing does not undermine coastal management and conservation. On the facts of this scenario, Russia may be unsatisfied because poaching from the EEZ by ships fishing the peanut hole continues, but poaching is a distinct and separate complaint which should not be addressed as a straddling stock conflict. Russia may also desire to sell access to its EEZ, thereby gaining foreign currency in exchange for excess pollack, but a DWFN will not pay for access when it is legally justified in catching the same fish freely on the high seas.

When conservation *and* management practices do not conflict, there is no straddling stock problem. If nations abide by the provisions of the agreement that increase the amount and quality of scientific information on straddling stocks, then some purported problems may be revealed not to be problems at all. Thus, one value of the Draft Agreement is in separating spurious from real conflicts.

#### B. *Second Scenario*

In this scenario, the facts are the same as in the first scenario, except that although *conservation* is not undermined (i.e., there is no threat to the continued existence of a healthy stock), Russian *management* of the stock is undermined by a DWFN. Recall that Russian management may be informed by considerations other than conservation, such as economic and social policy. If DWFN fishing is curtailed in this situation, it may be subject to coastal state national policy determinations that are broader than a scientific concern for the maintenance of the fishery. In this case, a tribunal is likely to consider carefully the qualifications on the superiority of the coastal state right to management, and take into account such factors as the respective dependence of the coastal state and the DWFN on the stock.<sup>155</sup> The decision of a court or tribunal in this case would involve balancing of interests by the tribunal, and any outcome is likely to be fact dependent and difficult to predict. On these facts, it is probable that the DWFNs would be allowed to fish in the peanut hole on a restricted basis.

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<sup>155</sup> *Draft Agreement*, art. 7(2)(d), at 8.

### C. *Third Scenario*

The facts in this scenario are that data has been collected and proves conclusively that DWFN fishing does undermine coastal conservation and management measures. In this case, articles 7 and 14 of the Draft Agreement places the burden on the DWFNs to modify their fishing so that they do not undermine coastal state management. This scenario is probably how the peanut hole fishery would have transpired if the Draft Agreement was in force in 1992. It may transpire this way if the conflict continues or rekindles in the future, and the Draft Agreement is in force.

This scenario plays out similarly to how earlier interpretations of CLOS would have it, but does so more clearly and with greater textual authority. According to the Draft Agreement, the compatibility requirement will influence the determination of a dispute settlement tribunal in favor of a coastal state if a dispute is brought to it, and that in turn will influence negotiations among Russia and DWFNs. These influences are brought to bear on parties to the conflict by the Draft Agreement's implication that high seas fishing rights are generally submissive to the right of the coastal state to manage fish stocks within its EEZ even though that entails significant power of the coastal state to influence management practices beyond the EEZ. The flag states of vessels fishing the high seas portion of the straddling stock will be responsible for enforcing curtailment of fishing to the level that coastal state management is no longer undermined. This ensures compatibility of fishing practices within and beyond the EEZ, but it affords the coastal state an upper hand in the management decisions. Only in this way can the fundamental inconsistency of the EEZ regime (it stops at 200 miles when the fish do not) be resolved.

### D. *Fourth Scenario*

In this scenario the data collected do not reveal anything conclusively, but point only to possibilities that are rebuttable or provable only with further information—maybe even information that is difficult or impossible to obtain in any useful time frame. The fourth scenario is likely to be the most common in straddling stock situations, and it is here that the Draft Agreement demonstrates the most foresight. According to the Draft Agreement, the precautionary approach must be applied to ensure that the fishery does survive. The absence of certainty is not a justification for

abandon of caution. In the peanut hole, catch levels would probably be reduced to levels similar to those within the EEZ, and scientific studies would be launched to ascertain what higher level of fishing the peanut hole could sustain without undermining the Russian fishery within the EEZ. The power of the Draft Agreement lies in this fourth scenario. The Agreement provides a rational hierarchy of interests in straddling stocks, and therefore an effective and plausible solution to the problem. The primary obstacle to its adoption is getting DWFNs to accede to it.

## V. CONCLUSION

The Draft Agreement provides rights and procedures that can help prevent and resolve straddling stock conflicts like the peanut hole. The compatibility requirement is the primary mechanism of the Draft Agreement; it ensures that conservation and management measures of a straddling stock on each side of the 200 mile EEZ limit will not undermine such measures on the other side. Although the Draft Agreement imposes the obligation to ensure compatibility on both coastal and distant water fishing nations, it appears to give priority to coastal state management, thus subjecting the freedom to fish on the high seas to the rights, interests, and duties of a coastal state. Many factors are to be considered, however, in reaching agreement on (or dispute resolution of) compatible measures, and a coastal nation will not always be able unilaterally to establish the conservation and management regime of a straddling stock. Enforcement under the Draft Agreement remains a problem; however, stronger enforcement provisions would probably decrease the willingness of nations to accede to the agreement. For the Draft Agreement to be effective, nations must have the political will to enforce the Agreement's provisions on ships flying the national flag.

Because the Draft Agreement clearly qualifies the right to fish the high seas, DWFNs may be disinclined to consent to it. If, however, they feel that their consent will prevent the threatened extensions of jurisdiction that would even more severely curtail the fisheries available to them, then they may see the Draft Agreement as a compromise in their best interest. Furthermore, since the Draft Agreement affords DWFNs a right, however weak, to require that management of fishing in the EEZ be compatible with high seas management, the Draft Agreement gives DWFNs something the CLOS did not. DWFNs should consent to the Draft Agreement, as should

coastal nations including Russia, because what is lost in particular instances is eclipsed by what is gained in the aggregate, namely, a procedure for solving straddling stock disputes by consent. In turn, a solution to straddling stock problems can lead to an increase in the productivity of the worlds' fisheries which, ominously, has been declining since 1989.<sup>156</sup>

It appears that in the near future Russia will clear foreign vessels from the peanut hole by means of bilateral negotiations, allowing foreign vessels to buy quotas allowing them to fish in the Russian EEZ. This is the method preferred by CLOS and the Draft Agreement because it is voluntary and presumably beneficial to both nations party to the negotiated agreement. Russia, however, is working to rebuild its fishing fleet.<sup>157</sup> If successful, there may come a time in the future when Russia does not want to grant quotas to its EEZ because Russian fishermen are capable of harvesting all of the allowable catch, or Russia's asking price may become too high, and foreign nations may again look to the peanut hole as an alternative fishing ground. In such cases, an international law like the Draft Agreement should be in place to prevent or to quickly resolve any conflict.

Russia may yet decide to extend jurisdiction so that there is no high seas enclave, and thus no fishing in the Sea of Okhotsk that is not subject to Russian management. DWFNs would then be forced to negotiate with Russia for the terms of their fishing anywhere in the Sea of Okhotsk. Russia, in that case, would retain the power to exclude any nation that does not negotiate a sweet enough deal. It is the threat of this occurrence, now or in the future, that might inspire all fishing nations to accede to the Draft Agreement. With the Draft Agreement in force, straddling stocks like the Sea of Okhotsk Alaskan pollack are more likely to be harvested sustainably for years to come.

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<sup>156</sup> "Marine fisheries catches peaked at 86 million metric tons in 1989, and subsequently decreased in 1990, 1991, and 1992." *Fisheries Aspects*, *supra* note 9, at 2.

<sup>157</sup> *Focus: Fishing in the Russian Far East*, RUSSIAN FAR E. UPDATE, Oct. 1994, at 7.