

small scale coastal fisheries. Such factors as the size and number of fishing vessels in operation, fishing gears used, and recent catch performance and fishing efforts of the coastal State shall be taken into account in determining the said minimum catch (hereinafter referred to also as "the preferential catch"). The interests of traditionally established fisheries of non-coastal States shall also be duly taken into account in determining the preferential catch. In cases where the stock of fish concerned is in a state of full utilization, the preferential catch shall not exceed the average annual catch attained by the said small scale coastal fisheries during the preceding (five) year period.

(b) The term "small-scale coastal fisheries" referred to in the preceding sub-paragraph means.....¹

- (3) The provisions of sub-paragraphs (1) and (2) above shall not apply to the fishing of highly migratory stocks which may be exploited in extensive areas of the high seas.

Commentary

1. Not all coastal fisheries are eligible for protection since coastal fisheries of some countries are fully developed and are capable of competing on equal terms with distant water fisheries of non-coastal States. Moreover, it must be taken into account that coastal fisheries enjoy natural advantage over distant water fisheries with respect to supply and unloading because of the proximity of fishing grounds.

2. Under the present regime, two groups of coastal fisheries are covered by the rules of protection. The first

1. An appropriate definition of "small-scale coastal fisheries" is to be inserted. (See also Commentary to the present paragraph).

group is the coastal fisheries of developing coastal States. It may be generally stated that such factors as shortage of capital, lack of technology, immobility of labour and inadequate marketing systems make the coastal fisheries of developing countries inherently uncompetitive, requiring special consideration as infant industries. It is, therefore, proposed that the coastal fisheries of a developing coastal State be entitled to the "preferential catch" defined in terms of the maximum annual catch attainable on the basis of the fishing capacity of its coastal fisheries. In other words, a developing coastal State is assured of a preferential share in the allocation of the fishery resources concerned, according to its maximum capacity, including some reasonable allowance for its future growth. If, however, the existing capacity is already large enough to enable the coastal fisheries to fish a major portion (e.g. more than 50%) of the allowable catch of the stock of fish concerned, the preferential catch will be determined on the basis of the existing capacity, without taking into account its future expansion. Although this limitation on the preferential catch is considered necessary to avoid the eventual total exclusion of the fisheries of non-coastal States, it is not intended as an authorization to allocate the remaining portion of the allowable catch exclusively to non-coastal States. Arrangements can be made among the parties concerned to allow the coastal fisheries to compete with distant water fisheries for some additional catch beyond what is already guaranteed.

3. There is of course a difficult question: What is a "developing coastal State"? It is, however, considered unwise to deal with this question in abstract terms partly because none of the existing definitions of a developing country is satisfactory and also because there seems to exist a general understanding in the international community on the meaning of the term, leaving only a limited number of countries in the "grey" area between developed and developing countries. If need arises to decide the status of any of

these countries in the grey area in relation to the present rules of protection, it may be dealt with on a case by case basis among the parties concerned.

4. As regards non-developing coastal States, coastal fisheries in general cannot be considered infant industries which require special protection. Furthermore, such countries usually possess necessary financial and technological means of making internal adjustments, including the modernization of their fishing fleets. In such cases, protection would not only discourage needed adjustments but might even encourage over-investment in inefficient fishing industries at the expense of the legitimate interests of non-coastal States. It is for these reasons that the second group of coastal fisheries eligible for protection under the new regime is limited to what is termed here as "small-scale coastal fisheries," which are by nature not amenable to internal adjustments and therefore are extremely vulnerable to competition. (Although the present text does not give a precise definition of "small scale coastal fisheries," it is considered possible to agree on an appropriate definition in terms of the size of fishing vessels and their local mobility.) Under the rules of protection, such small scale local fisheries of a non-developing coastal State will be entitled to the "preferential catch" defined in terms of the minimum annual catch required for their continued operation on the existing scale. The preferential catch will be determined in such a way as to allow the coastal fisheries concerned to earn reasonable income from their operation but not to encourage their future expansion.² If the stock of fish with respect to which a preferential catch is to be established is found to be fully utilized by the coastal and non-coastal States concerned, the preferential catch cannot exceed the average annual catch recorded during a certain number of preceding years (e.g.

2. Note that in the case of the preferential catch for coastal fisheries of a developing coastal State, allowance will be made in principle for the possible growth of their future catch.

five years) by the coastal fisheries requiring protection. This limitation, which is designed to accommodate the minimum interests of non-coastal States, does not preclude the parties concerned from concluding arrangements under which the protected coastal fisheries may compete with distant water fisheries for additional catch beyond what is already guaranteed.

5. The rules of protection under the present regime will not apply to highly migratory stocks, such as tuna and salmon, which cannot be properly regulated by general rules in respect of either protection or conservation. This is not to say that coastal States should always be placed on equal terms with non-coastal States in fishing such stocks. It is considered, however, that as far as these stocks are concerned, problems relating to protection or conservation can better be solved on a regional basis without resorting to general rules.

2.3 Implementation

(1) Measures to implement the provisions of paragraph 2.2 shall be determined by agreement among the coastal and non-coastal States concerned with respect to the individual stocks of fish on the basis of the proposals made by the coastal States.

(2) Catch allocation among the coastal and non-coastal States concerned, including the preferential catch, shall be made within the allowable catch of the stock of fish subject to allocation if the allowable catch is already estimated for conservation purposes.

(3) In order to enable coastal States to utilize fully their preferential catch, the coastal and non-coastal States concerned shall agree on necessary supplementary measures to be applicable to the non-coastal States.

(4) In cases where the allowable catch is not available, the coastal and non-coastal States concerned shall agree on

necessary measures to enable the coastal State to utilize fully its preferential catch. Such measures may include arrangements to minimize interference with the traditional fishing grounds and fishing gears used by coastal fisheries of that coastal State.

(5) In cases where nationals of two or more coastal States which are entitled to the preferential catch under paragraph 2.2 are engaged in fishing a common stock of fish, no coastal State may invoke the provisions of Part II with respect to such stock without the consent of the other coastal States concerned.

(6) The measures adopted in accordance with the foregoing sub-paragraphs shall be consistent with the obligations already assumed by any of the States concerned for conservation purposes.

(7) The measures adopted under this paragraph shall be subject to review at such intervals as may be agreed upon by the States concerned.

Commentary

1. The preferential rights cannot be exercised unilaterally by a coastal State but are made subject to negotiation and agreement with the non-coastal States concerned. This is not an unreasonable limitation on the preferential rights in view of the fact that these rights are defined only in general terms in paragraph 2.2 and, if left entirely to the discretion of the coastal State, they could be easily misused or abused to the serious detriment of the interests of distant water fisheries of other States. Thus, a coastal State which wishes to claim its preferential catch is required to demonstrate to the interested non-coastal States: (i) what its actual needs are and (ii) what specific measures are necessary to meet such needs without unduly affecting the interests of the non-coastal States. If the parties concerned fail to reach agreement on these two points within a reasonable period (six

months), despite their sincere efforts to negotiate, they will have recourse to the procedure for the settlement of disputes under Part IV, paragraph 4.2.

2. If the allowable catch of a stock of fish to which the preferential rights of a coastal State are to be applied is available, country quotas may be established within the limit of that allowable catch, reserving the preferential catch for the coastal State. Quotas thus allocated, however, may not serve as adequate means of protection for the coastal fisheries concerned. Given the relative inefficiency of the coastal fisheries, the quota arrangement may not in itself bring about the intended increase in the catch of the coastal State up to the limit of its preferential catch. In these circumstances, such supplementary measures as closed seasons, closed areas and prohibition of certain fishing gears, which are applicable to the distant water fisheries of the non-coastal States concerned, may be considered necessary in order to enable the coastal State to utilize fully its preferential catch.

3. Quota arrangements based on the allowable catch may not be workable in all cases. In fact, such arrangements are meaningless when the stock conditions are such that their is no practical need to establish an overall catch limitation for conservation purposes. Furthermore, it is often difficult to make a reasonably accurate estimate³ of the allowable catch, due to the absence of adequate data. Even in such cases, it may still be necessary for coastal States to protect their coastal fisheries by some other means. In these circumstances, such regulatory measures as closed seasons, closed areas, limitations on fishing gears, which are suggested as supplementary measures in the preceding paragraph, will now serve as principal means of protection for coastal fisheries.

4. In cases where no conservation arrangement exists with respect to the stock of fish to which the preferential

3. See paragraph 4 of the Commentary to Part III, paragraph 3.3 of the text.

rights of a coastal State are to be applied, the coastal and non-coastal States concerned may freely negotiate necessary implementation measures pursuant to sub-paragraphs (1)-(4), taking into account the general objective of conservation as defined in Part III, paragraph 3.1. If, however, any of the States concerned has assumed specific obligations under the conservation arrangements already in force with respect to the stock concerned (e.g. a closed season), the implementation measures must be harmonized with such arrangements so that the two sets of measures, respectively for conservation and protection, will not be mutually incompatible.

PART III : CONSERVATION OF FISHERY RESOURCES

3.1 Objective of conservation measures

The objective of conservation measures is to achieve the maximum sustainable yields of fishery resources and thereby to secure a maximum supply of food and other marine products.

Commentary

Fishery resources are not inexhaustible and yet are renewable on a constant level if appropriate conservation measures are taken. Such measures should be designed to maintain a stock of fish on a level which will yield the largest surplus to be exploited without affecting the future size of the stock ("maximum sustainable yield"). Recognition of the concept of maximum sustainable yield as the basic objective of conservation is already reflected in Article 2 of the Convention on Fishing and Conservation of the Living Resources of the High Seas (hereinafter referred to as "the Geneva Convention").

3.2 Obligations to adopt conservation measures

(1) In cases where nationals of one State are exclusively engaged in fishing a particular stock of fish, that State shall

adopt, when necessary, appropriate conservation measures consistent with the objective defined in paragraph 3.1 and in accordance with the principles set forth in paragraph 3.3.

(2) In cases where nationals of two or more States are engaged in fishing a particular stock of fish, these States shall, at the request of any of them, negotiate and conclude arrangements which will provide for appropriate conservation measures consistent with the objective defined in paragraph 3.1 and in accordance with the principles set forth in paragraph 3.3

(3) In cases where conservation measures have already been adopted by States with respect to a particular stock of fish which is exploited by nationals of such States, a new-comer State shall adopt its own conservation measures which are no more lenient than the existing measures until new arrangements are concluded among all the States concerned. If the existing measures include a catch limitation or some other regulations which do not allow nationals of the new-comer States to engage in fishing the stock concerned, the States applying the existing measures shall immediately enter into negotiation with the new-comer State for the purpose of concluding new arrangements. Pending such arrangements, nationals of the new-comer State shall not engage in fishing the stock concerned.

Commentary

Since no State can claim the exclusive exploitation of fishery resources of the high seas and since every State is entitled to benefit from the prudent utilization of such resources, every State is under the obligation to maintain the productivity of the fishery resources which its nationals exploit whether by themselves or with nationals of other States. It is also obvious that international cooperation is essential for effective conservation programmes when nationals of two or more States are engaged in fishing the same stock or stocks of fish. Furthermore,