

*Article 119**Conservation of the living resources of the high seas*

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

- (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;
- (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may be seriously threatened.

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

SOURCES

1. A/AC.138/53, article 138, paragraph 2(a), reproduced in SBC Report 1971, at 105, 168 (Malta).
2. A/AC.138/SC.II/L.4 and Corr.1, article III, paragraph 2, subparagraphs A and B, reproduced in SBC Report 1971, at 241, 242 (U.S.A.).
3. A/AC.138/SC.II/L.6, paragraph 5, reproduced in SBC Report 1972, at 158 (USSR).
4. A/AC.138/SC.II/L.9, article IV, reproduced in SBC Report 1972, at 175 (U.S.A.).
5. A/AC.138/SC.II/L.12, Provision 2.3, paragraphs (1)–(3), reproduced in SBC Report 1972, at 188, 191 (Japan).
6. A/CONF.62/C.2/L.80 (1974), paragraph 2, III Off. Rec. 239 (U.S.A.).
7. A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I [A/CONF.62/C.2/WP.1], Provision 156, Formula C, paragraph 2, III Off. Rec. 107, 132 (Rapporteur-general) [Main Trends].
8. A/CONF.62/WP.8/Part II (ISNT, 1975), article 106, IV Off. Rec. 152, 167 (Chairman, Second Committee).

9. A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), article 107, V Off. Rec. 151, 169 Chairman, Second Committee).
10. A/CONF.62/WP.10 (ICNT, 1977), article 119, VIII Off. Rec. 1, 21.
11. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 119. Reproduced in I Platzöder 375, 433.
12. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 119. Reproduced in II Platzöder 3, 60.
13. A/CONF.62/WP.10/Rev.3 (ICNT/Rev.3, 1980, mimeo.), article 119. Reproduced in II Platzöder 179, 236.
14. A/CONF.62/L.78 (Draft Convention, 1981), article 119, XV Off. Rec. 172, 193.

Drafting Committee

15. A/CONF.62/L.67/Add.5 (1981, mimeo.), at 87–90.
16. A/CONF.62/L.72 (1981), XV Off. Rec. 151 (Chairman, Drafting Committee).

Informal Documents

17. Informal Working Paper No. 7, Provision XVIII, Formula B, paras. A, B and C, and Provision XX; No. 7/Rev.1, Provision XXIV; and No. 7/Rev.2, Provision XXI, Formula C, and Provision XXIV (all 1974, mimeo.). Reproduced in III Platzöder 402, 415 and 429.
18. C.2/Informal Meeting/68 (1982, mimeo.), articles 116 to 120 (Peru). Reproduced in V Platzöder 73, 74.

COMMENTARY

119.1. Article 119 sets out the criteria that are to be followed by States in establishing measures for the conservation of the living resources of the high seas, with the objective of maintaining or restoring populations of those resources at levels that can produce the maximum sustainable yield. In establishing conservation measures—including the determination of the allowable catch—States are to take into account biological, ecological, economic and environmental factors, based on the best scientific evidence available. Article 119 also establishes requirements for the contribution and exchange of scientific information, by all States concerned, through “competent international organizations, whether subregional, regional or global.” In keeping with the principle of the freedom of fishing on the high seas, neither the conservation measures agreed upon by the States concerned, nor their implementation, are to discriminate in form or in fact against the fishermen of any State.

119.2. At the 1971 session of the Sea-Bed Committee, a draft ocean space treaty prepared by Malta (Source 1) provided, *inter alia*, that in international ocean space (described as all ocean space not subject to coastal State jurisdiction) a Council (of States Parties) would be given the primary

responsibility for the rational management and orderly development of natural resources. The Council was to:

- (a) Manage the living resources of International Ocean Space in such a manner as to secure the maximum sustainable yield taking into due account the need to preserve the ecological balance of ocean space; to this end commercial fishing in International Ocean Space shall be subject to a system of non-discriminatory licensing based on scientific findings[.]

This text linked the term “maximum sustainable yield” with preserving the “ecological balance” of the oceans, and called for the award of commercial fishing licenses to be “based on scientific findings.”

A proposal by the United States of America (Source 2) contained the following provisions regarding conservation measures:

- 2. In order to assure the conservation and equitable allocation of the fisheries and other living resources of the high seas, the following principles shall be applied by [appropriate international fisheries organizations]:
 - A. Conservation measures shall be adopted that do not discriminate in form or in fact against any fishermen. For this purpose, the allowable catch shall be determined, on the basis of the best evidence available, at a level which is designed to maintain the maximum sustainable yield or restore it as soon as practicable, taking into account relevant environmental and economic factors.
 - B. Scientific information, catch and effort statistics, and other relevant data shall be contributed and exchanged on a regular basis.

That text referred to the conservation and “equitable allocation” of fishery resources. It envisioned regulation of high seas fisheries by international fisheries organizations in which the States concerned could participate. The objective of the conservation measures was to maintain or restore the maximum sustainable yield of the fisheries.

119.3. At the 1972 session of the Sea-Bed Committee, the Soviet Union (Source 3) submitted a draft article which provided that the coastal State could establish fishery regulations for areas of the high seas. Such regulations were not to discriminate “in form or in substance” against the fishermen of any State fishing in those areas. The United States of America (Source 4) submitted another proposal which included several principles on conservation of “living marine resources” (generally). Those principles read:

- In order to assure the conservation of living marine resources, the coastal State or appropriate international organization shall apply the following principles:

A. Allowable catch and other conservation measures shall be established which are designed, on the basis of the best evidence available, to maintain or restore the maximum sustainable yield, taking into account relevant environmental and economic factors.

B. For this purpose scientific information, catch and effort statistics, and other relevant data shall be contributed and exchanged on a regular basis.

C. Conservation measures and their implementation shall not discriminate in form or fact against any fishermen. Conservation measures shall remain in force pending the settlement, in accordance with the relevant provisions of this Article, of any disagreement as to their validity.

That text envisaged the application of conservation principles by the coastal State concerned or by the appropriate international organization.

A proposal by Japan (Source 5) also included a list of “basic principles” relating to conservation measures for high seas fisheries. That list read, in part:

(1) Conservation measures must be adopted on the basis of the best scientific evidence available. If the States concerned cannot reach agreement on the assessment of the conditions of the stock to which conservation measures are to be applied, they shall request an appropriate international body or other impartial third party to undertake the assessment. In order to obtain the fairest possible assessment of the stock conditions, the States concerned shall co-operate in the establishment of regional institutions for surveying and research into fishery resources.

(2) No conservation measure shall discriminate in form or fact between fishermen of one State from those of other States.

(3) Conservation measures shall be determined, to the extent possible, on the basis of the allowable catch estimated with respect to the individual stocks of fish. The foregoing principle however shall not preclude conservation measures from being determined on some other bases [sic] in cases where, due to lack of sufficient data, an estimate of the allowable catch is not possible with any reasonable degree of accuracy.

That proposal called for the assessment of the condition of the stocks to which conservation measures were to be applied. That assessment was to be undertaken by the States concerned or, in the absence of agreement, by an appropriate international body or other third party. The States concerned would also be required to cooperate in establishing regional fishery organizations “for surveying and research into fishery resources.”

119.4. At the second session of the Conference (1974), the United States of America (Source 6) submitted a modified version of its earlier proposal on

living resources of the high seas which contained the following provisions on conservation measures:

2. States, acting individually and through regional and international fisheries organizations, have the duty to apply the following conservation measures for such living resources:

(a) Allowable catch and other conservation measures shall be established which are designed, on the best evidence available, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, taking into account relevant environmental and economic factors, and any generally agreed global and regional minimum standards;

(b) Such measures shall take into account effects on species associated with or dependent upon harvested species and at a minimum shall be designed to maintain or restore populations of such associated or dependent species above levels at which they may become threatened with extinction;

(c) For this purpose, scientific information, catch and fishing effort statistics and other relevant data shall be contributed and exchanged on a regular basis;

(d) Conservation measures and their implementation shall not discriminate in form or in fact against any fisherman. . . .

That text was more detailed than the U.S.'s earlier proposal (Source 4). In addition to considerations such as "environmental and economic factors," it proposed that account be taken of "generally agreed global and regional minimum standards" in establishing conservation measures. It also proposed that consideration be given to the effect of conservation measures on "species associated with or dependent upon" the species for which those measures are to be taken. Introducing that proposal, the U.S. representative noted that he "agreed with those who maintained that the conservation duty of the coastal State in the economic zone and of other States beyond the economic zone was the same."¹

The U. S. proposal was subsequently included in the Main Trends Working Paper (Source 7) as Provision 156, Formula C.

119.5. At the third session (1975), following informal discussions, article 106 of the ISNT/Part II (Source 8) read:

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

(a) Adopt measures which are designed, on the best evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors,

¹ Second Committee, 44th meeting (1974), para. 21, II Off. Rec. 297.

including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended subregional, regional or global minimum standards.

(b) Take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through subregional, regional and global organizations where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

The substance of that text mirrored the provisions of article 50 of the ISNT/Part II (now article 61), concerning conservation of the living resources in the exclusive economic zone (see Volume II of this series, at 606, para. 61.7). It followed the elements of the U.S. proposal, but with some notable differences. Paragraph 1(a) added factors to be considered in adopting conservation measures, namely (i) the special requirements of developing States, (ii) fishing patterns, and (iii) the interdependence of stocks. The latter factor tied in with paragraph 1(b), concerning associated and dependent species.

119.6. At the fourth session (1976), there were no proposals on article 106. In the RSNT/Part II (Source 9), article 107 contained only drafting changes—for example, paragraph 1(a) referred to the best “scientific” evidence available. The title was added at this stage.

The only subsequent changes in the text were drafting changes made in the Draft Convention (Source 14) on the recommendation of the Drafting Committee (Sources 15 and 16).² These included the change in paragraph 1(a) from “subregional, regional or global minimum standards,” to the more precise wording “international minimum standards, whether subregional, regional or global.”

119.7(a). Article 119 parallels article 61, which requires the coastal State to take conservation measures for the maintenance of the living resources of the exclusive economic zone. Article 119, which is directed to all States, contains similar provisions in respect of the living resources of the high seas. In this respect, article 119 should be read with article 118, which requires “States” to cooperate in the conservation and management of the living resources of the high seas.

² See also A/CONF.62/L.57/Rev.1 (1980), section III, “Some issues involved,” XIV Off. Rec. 114, 116 (Chairman, Drafting Committee).

Article 119 refers to States “determining the allowable catch” of the living resources of the high seas, as one of the conservation measures to be taken by States. In combination with article 118, this is to be a cooperative effort between the States concerned. In making that determination, and in establishing other conservation measures, the criteria for consideration set out in paragraphs 1(a) and (b) provide general guidance. Those criteria relate equally to the measures taken by a State for its nationals under article 117, and to cooperative efforts undertaken by States under article 118.

119.7(b). Article 119 requires that in determining the allowable catch of the living resources of the high seas, States are required to consider the following factors: (i) the best scientific evidence available; (ii) relevant environmental and economic factors; (iii) the requirements of developing States; (iv) catch and fishing effort statistics; (v) generally recommended international minimum standards; and (vi) the interdependence of species and stocks. This would facilitate coordination in the management and conservation of those resources, and provides a natural link to the requirements set out in the preceding articles of Part VII, section 2. It is applicable, in particular, to those species and stocks which occur both within the exclusive economic zones of States and in the high seas, and which therefore require more comprehensive management if they are to be maintained as viable resources.

119.7(c). Paragraph 1(a) sets out the objective of determining the allowable catch and taking conservation measures, that is “to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.” The same objective is set out in article 61 paragraph 3, regarding conservation measures in the exclusive economic zone. Those measures are to be based on the “best scientific evidence available,” and the exchange of scientific information provided for in paragraph 2 (see para. 119.7(f) below).

While conservation measures are to be based on the best scientific evidence available, this principle does not preclude measures being determined on some other basis where, due to lack of sufficient data, an estimate of allowable catch is not possible with any degree of accuracy. This is reinforced by the reference to “available” evidence, which indicates that measures should be based on whatever evidence is at hand or reasonably obtainable. It does not suggest that no measures should be taken until the best scientific evidence or otherwise adequate information is available or obtainable. This reflects a precautionary approach to fisheries management when scientific data is not available or is inadequate to enable comprehensive decision making.

Determining the allowable catch also requires determination of the maximum sustainable yield, which should be based on scientific information about a given species or stock. This is qualified, however, by the requirement to consider “relevant environmental and economic factors” in taking measures for a given species or stock, including “the special requirements of developing States.” (This relates to the allowable catch and the allocation

of resources.) Identical provision is made in article 61, paragraph 3, with regard to conservation measures in the exclusive economic zone (see Volume II, at 609, para. 61.12(d)). This envisages that in establishing conservation measures the needs and interests of developing States will be considered. The qualification allows for some departure from the guiding principle of the maximum sustainable yield in taking conservation measures. The States concerned will have to cooperate in agreeing on the extent of such departure.

119.7(d). Paragraph 1(b) requires States, in determining the allowable catch and establishing conservation measures for high seas living resources, to consider the effects of those measures on “species associated with or dependent upon harvested species.” In this regard, the objective is stated as “maintaining or restoring populations of such associated or dependent species” in order to maintain the reproductive health of the species. This effectively broadens the obligation of States whose nationals are engaged in fishing on the high seas to conserve and manage the living resources of the high seas, to encompass the conservation of associated and dependent species (regardless of their commercial exploitability).³ To fulfill this obligation, the States or international organizations concerned will need to acquire scientific information, including catch and fishing effort statistics, on associated or dependent species. The ultimate goal is to maintain or restore the vitality and economic viability of the harvested stocks or species.

International concern on this and related issues led to the convening of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks in July 1993.⁴ This followed from the United Nations Conference on Environment and Development (UNCED) in June 1992,⁵ and the FAO Technical Consultation on High Seas Fishing held in September 1992.⁶

³ The issue of associated or dependent species has also been linked to the problem of the incidental catch (also known as “by-catch”) of such species in the use of large-scale driftnets on the high seas—incidental catch in such fisheries often is very high. General Assembly resolution 44/225 of 22 December 1989 notes that large-scale pelagic driftnet fishing

can be a highly indiscriminate and wasteful fishing method that is widely considered to threaten the effective conservation of living marine resources, such as highly migratory and anadromous species of fish, birds and marine mammals[.]

In that light, the resolution calls for international cooperation in “the enhanced collection and sharing of statistically sound scientific data” in order to accurately assess the impact of such fishing methods. The full text of the resolution is reproduced as Appendix I to the Introduction to Part VII above. On this issue generally, see, e.g., *The Regulation of Driftnet Fishing on the High Seas: Legal Issues*, FAO Legislative Study 47 (1991). See also paras. VII.13 to VII.15 above.

⁴ The document number for this Conference is A/CONF.164/-. See further para. VII.17 above.

⁵ The report of that Conference was issued as A/CONF.151/26/Rev.1 (1992, mimeo.), Agenda 21, Chapter 17, Volume I, at 238-74.

⁶ The report of FAO's consultation is reproduced as A/CONF.164/INF/2 (2 May 1993).

119.7(e). Paragraph 2 requires “all States concerned” to contribute and exchange, through competent international organizations, “available scientific information, catch and effort statistics, and other data relevant to the conservation of fish stocks.” Identical provision is made in article 61, paragraph 5, with regard to living resources of the exclusive economic zone (see Volume II, at 611, para. 61.12(j)). The availability of such information is essential for accurate stock assessments (i.e., health and productivity), and hence for the development of a comprehensive management plan for the conservation of those resources. It also follows from the obligation in paragraph 1(a) to base conservation measures on “the best scientific evidence available.”

Scientific information should include biological data, the migratory habits of the species in question (e.g., seasonal and geographic distribution), the fishing gear and methods utilized in harvesting those species, and the landings of each species, including incidental catches.⁷ Although the UN Food and Agriculture Organization (FAO) has established a number of regional and subregional fishery organizations,⁸ statistics on high seas fisheries are sporadic at best, making management based on available information difficult.⁹

119.7(f). Paragraph 3 requires that the conservation measures taken by the States concerned do not discriminate “in form or in fact” against the fishermen of any State engaged in fishing on the high seas. This follows from the principle of the freedom of the high seas, which includes freedom of fishing, subject to the provisions of articles 116 to 120 (under article 87, paragraph 1(e)), and the general equality of States.

As in the case of other provisions in the Convention on nondiscrimination,¹⁰ article 119, paragraph 3, prohibits discrimination, by the States establishing the conservation measures, against nationals of any State fishing on the high seas. This prohibition is intended to prevent the adoption of conservation measures which discriminate against the fishermen of any State

⁷ Annex 1 of the draft text prepared by the Chairman of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks contains detailed guidelines in respect of “minimum standards for collection and sharing of data” on those fish stocks. That draft Agreement, UN doc. A/CONF.164/22 (23 August 1994, mimeo.), is reproduced as Annex XI to this Volume.

⁸ See generally FAO doc. COFI/87/9 (1987, mimeo.), reproduced in 3 NILOS YB [1987], at 170; II AROA 1985–1987, at 787. See also FAO doc. COFI/89/3 (1989, mimeo.). Reproduced in 5 NILOS YB [1989], at 169 and 184.

⁹ See, e.g., FAO Fisheries Report No. 434 (FIPL/R434), *Report of the Expert Consultation on Large-Scale Pelagic Driftnet Fishing (1990)*, paras. 23 and 79–81. Reproduced in 6 NILOS YB [1990], at 192, 197 and 208. See also UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Regime for High-Sea Fisheries: Status and Prospects*, paras. 78–87, at 26 (UN Sales No. E.92.V.12 (1992)).

¹⁰ See article 24, paragraph 1(b), article 25, paragraph 3, article 42, paragraph 2, article 52, paragraph 2, and article 227. Those provisions relate to nondiscrimination by coastal States among or against foreign ships. See further Volume II, at 226, para. 24.7(b).

(discrimination “in form”), and of measures which, though not overtly discriminatory, have a discriminatory effect on such fishermen (discrimination “in fact”). This provision also requires an element of cooperation in adopting conservation measures, as well as consideration of the rights and interests of all States engaged in fishing on the high seas.

Equality of treatment of all States raises the problem of new entrants to a fishery which is fully utilized. All things being equal, new entrants who cooperate in conservation and management of high seas living resources, in accordance with article 119, should not in principle be excluded from a share in the total allowable catch. On the other hand, where conservation and management measures have already been established, new entrants must seek to exercise their right to fish through that mechanism. They cannot ignore or flaunt such measures simply in exercise of their rights or because they have not been able to obtain an allocation. Any dispute over high seas fisheries will be subject to the dispute settlement procedures set out in Part XV (cf. article 297, paragraph 3).