International Lawyer

Volume 33
Number 2 *International Legal Developments in Review: 1998*

Article 32

1999

Recent Developments in the International Law of the Sea

Barry Hart Dubner

Recent Developments in the International Law of the Sea

BARRY HART DUBNER*

The purpose of this report is to review developments in the sphere of the international law of the sea during 1998. The areas discussed are: status of the 1982 Law of the Sea Convention,[1] tribunal decisions, developments concerning the Caspian Sea and other maritime boundary disputes, piracy, fisheries, and the marine environment.

I. Introduction

The United Nations declared 1998 the International Year of the Ocean (IYO).[2] The goals of this declaration were "to raise awareness of the oceans and coastal areas as finite-sized economical assets" and "to obtain commitments from governments to take action, provide adequate resources and give to the oceans the priority which they deserve." Consistent with the IYO, the Independent World Commission on the Oceans—a 43 member commission chaired by Mario Sares, former President of Portugal—issued a 225-page report[3] that recommended, among other things, that (1) the United Nations establish a world ocean affairs observatory to serve as a watchdog to monitor ocean governance and (2) an independent "guardian of the oceans" be established with a mandate to take up grievances from individuals, organizations, and countries.[4]

*Dr. Barry Hart Dubner, J.D., LL.M., LL.M., J.S.D. is a Professor at the Thomas M. Cooley Law School in Lansing, MI. The author would like to acknowledge and thank all those who helped in the process of either supplying information, comments, editorial changes, or advice in connection with the preparation of this publication, including Margaret L. Tomlinson; Professor John Noyes; Professor James E. Bailey; my wife, Bonnie; my research assistant, Michael Rosenblatt; my library liaison, Sharon Bradley, Esq.; and last, but not least, my secretary, Jill Pullum.

1. *See* Third United Nations Conference on the Law of the Sea: Final Act, U.N. Doc. A/Conf.62/121, 21 I.L.M. 1245 (1982) [hereinafter U.N. Law of the Sea Convention], *available at Oceans and Law of the Sea* (visited Mar. 5, 1999) <http://www.un.org/depts/los/>.

2. *See* G.A. Res. 131, UNGAOR, 49th Sess., U.N. Doc. A/RES/49/131 (1995) *available at* <www.un.org/Depts/los/IYO/index.htm>.

3. INDEP. WORLD COMM'N OF THE OCEANS, THE OCEAN . . . OUR FUTURE (1998).

4. *See id.*

The United States hosted the inaugural National Oceans Conference in Monterey, California on June 11 & 12, 1998. Addressing the conference, President Clinton announced "a $224 million initiative to enhance the health of our oceans while expanding ocean opportunities in responsible ways for the environment."[5] As part of that initiative, President Clinton announced a ban on the sale or import of undersized Atlantic swordfish and promised to ask Congress for an additional $194 million "to rebuild fish stocks within ten years, work with industry to develop new technologies to net only targeted species of fish, . . . and protect essential fish habitats."[6] The president proposed a new Harbor Services Fund to help sustain American ports for the 21st century and signed an executive order to extend the nation's moratorium on off-shore leasing for an additional ten years—a moratorium that was set to expire in 2002.[7] The president also urged the Senate to give its advice and consent to ratification of the Law of the Sea Treaty.[8]

II. Status of the 1982 Convention on the Law of the Sea[9]

The UN Convention on the Law of the Sea was opened for signature on December 10, 1982.[10] The occasion marked the culmination of more than fourteen years of work involving participation by more than 150 countries to create a broad based legal framework to accommodate multiple uses of the oceans. Although the United States took a leadership role in the negotiations and successfully sought to codify customary navigational freedom of the seas and of international waterways, in the end it did not sign the 1982 treaty because of objections to provisions of the section of the treaty dealing with deep seabed mining.[11] In the late eighties as it became evident that the Convention as written would likely enter into force without the participation of many important states, the Secretary General convened an informal working group to attempt to resolve the issues of concern to the United States and others. That effort resulted in the adoption on July 28, 1994 of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982, which effectively modified the LOS Convention with respect to its seabed mining provisions. The United States then signed the Agreement and the 1982 treaty, which were subsequently sent to the Senate for its advice and consent.[12]

The treaty entered into force in November 1994 and has since been ratified by 130 states including all the members of the European Community, as well as Russia, China, Japan, India, and Australia, indeed most of the significant users of the sea except for the United States. By the end of 1998 no Senate hearing had taken place because of the opposition of the chairman of the Senate Foreign Relations Committee, Senator Jesse Helms. In the summer of 1998 both the Secretary of State and the Secretary of Defense personally interceded, successfully, with Chairman Helms to seek a hearing before the approaching deadline of November 16, 1998, at which time those states that have signed but not ratified the treaty would no longer enjoy the

5. William Jefferson Clinton, Remarks by the President to the National Oceans Conference (June 12, 1998) *available at* <www.whitehouse.gov/WH/New/html>.

6. *Id.*

7. *See id.*

8. *See id.*

9. This part of the report was supplied to me by Margaret Tomlinson. *See* U.N. Law of the Sea Convention, *supra* note 1.

10. *See* U.N. Law of the Sea Convention, *supra* note 1.

11. *See* Thomas W. Lippman, *For Sea Treaty, It's Helms or High Water; Business, Pentagon Try to Overcome Senator's Doubts About Pact by Nov. 16 Deadline*, WASH. POST, July 13, 1998, at A4.

12. *See* U.N. Law of the Sea Convention, *supra* note 1.

provisional membership in seabed mining bodies as provided under the agreement. Provisional membership also protected the status of the United States or its nationals as a pioneer investor in preapproved future seabed mining sites, the status of which is now in doubt. The provisional members that did not ratify the treaty by November 16, 1998 are, in addition to the United States, Bangladesh, Belarus, Canada, Qatar, Switzerland, Ukraine, and the UAE.

III. Tribunal Decisions

There were two decisions regarding the law of the sea this year.[13] One was handed down by the Permanent Court of Arbitration in October; it held that disputed islands in the Red Sea were partly the sovereign territory of Yemen and partly the sovereign territory of Eritrea.[14] Arab Yemen and African Eritrea are on opposite sides of the Red Sea and agreed to set up an arbitration panel and to submit their dispute to arbitration in 1996. Both nations had claimed sovereignty over the small, arid, Hanish Islands which are located in a key shipping lane. In 1995, twelve people were killed in clashes.

The second decision was an order handed down by the International Tribunal for the Law of the Sea in the case of *St. Vincent and the Grenadines v. Guinea* (the M/V Saiga) in 1998. This order followed the tribunal's 1997 decision ordering the prompt release of the M/V Saiga and its crew, following their detention by Guinea.[15] In its March 1998 ruling, the tribunal unanimously prescribed a provisional measure requiring Guinea to refrain from taking measures against the M/V Saiga or its crew in connection with the 1997 arrest and detention of that vessel. The tribunal also recommended that St. Vincent and the Grenadines and Guinea endeavor to reach agreement to be applied pending the final decision and that the two states should make certain that the dispute not be aggravated or extended during the process. The pending case involves issues of freedom of navigation, hot pursuit, and the scope of a coastal state's power to enforce its customs regulations.

In addition to the aforementioned decisions, the following law of the sea cases are pending before the International Court of Justice:

(a) *Qatar v. Bahrain* concerns maritime delimitation and territorial questions. The court ordered that Qatar should file an interim report on the question of authenticity of each of the documents in question.[16]

(b) *Cameroon v. Nigeria* concerns a land and maritime boundary dispute between the two countries regarding the Bakassi Peninsula. On June 11, 1998, the court found that it had jurisdiction to deal with the merits of the case brought before it by Cameroon against Nigeria, and that Cameroon's claims were admissible.[17] The court decided that, after

13. Information provided, in part, by John E. Noyes, Professor, California Western School of Law. *See generally* John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. (forthcoming 1999).

14. Information provided by James E. Bailey, Assistant Professor, Northwestern School of Law of Lewis & Clark College.

15. International Tribunal for the Law of the Sea: Saint Vincent & Grenadines v. Guinea (The M/V "Saiga"), 37 I.L.M. 360 (March 1998), *available at International Tribunal for the Law of the Sea* (visited Mar. 5, 1999) <www.un.org/Depts/los/ord1103.htm>. According to Professor Noyes, the provisional order authority of the new LOS Tribunal is potentially quite far-reaching in its scope.

16. Maritime Delimitation & Territorial Questions Between Qatar & Bahrain (Qatar v. Bahrain) (Order of Mar. 30, 1998) *available at* <http://www.icj-cij.org/icjwww/idocket/igb/igbframe.htm>.

17. Land & Maritime Boundary Between Cameroon & Nigeria (Cameroon v. Nigeria) (Judgment of June 11, 1998—Preliminary Objections) *available at* <http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_judgment_980611_frame.htm>.

consultations with the parties, it will fix a time-limit for the filing of a counter-memorial by the respondent (Nigeria) since the applicant (Cameroon) has already filed a memorial on the merits of the case.

(c) *Islamic Republic of Iran v. United States of America* concerns the destruction of three offshore oil platforms owned and operated by the National Iranian Oil Company. By an order dated March 10, 1998, the court held that a counter-claim submitted by the United States was admissible and that it formed part of the proceedings.[18] It therefore directed the parties to submit further written pleadings on the merits of their respective claims. Iran was to submit a reply by September 10, 1998 and the United States a rejoinder by November 23, 1999. However, in response to a request by Iran to extend the date to December 10, 1998 for the filing of its reply, the court extended the time-limits to December 10, 1998 for the filing of a reply by Iran and to May 23, 2000 for the filing of a rejoinder by the United States.

(d) *Indonesia/Malaysia* concerned sovereignty over Pulau Ligitan and Pulau Sipadan Islands. Indonesia and Malaysia notified the court of a Special Agreement[19] whereby the two countries requested the court to determine whether sovereignty over the Islands belongs to the Republic of Indonesia or to Malaysia.[20]

(e) *Botswana/Namibia* concerned the boundary around Kasikily Sedudu Island and the island's legal status. The dispute was submitted to the court by special agreement in 1996. Hearings are scheduled for February-March 1999.

Another ICJ case was dismissed for lack of jurisdiction in 1998. *Spain v. Canada* concerned fisheries jurisdiction. On December 4, 1998, the International Court of Justice (ICJ) ruled (12-5) that it lacked jurisdiction to adjudicate the dispute brought by the Kingdom of Spain against Canada in 1995.[21] Spain's application of March 28, 1995, requested the court to declare that certain legislation of Canada (in particular the Coastal Fisheries Protection Act, amended in 1994, and implementing regulations) is not opposable to Spain, insofar as it claims to exercise jurisdiction over ships flying a foreign flag on the high seas, outside Canada's 200-mile Exclusive Zone. The application also asked the court to hold that the arrest by the Canadian Navy on the high seas, on March 9, 1995, of a Spanish flag fishing vessel involving the use of force constituted a violation of international law for which Canada must make reparation.

This is the first time since the judgment in *Aegean Sea Continental Sbelf (Greece v. Turkey)* rendered in 1978 that the court has found, at a preliminary stage, that it is without jurisdiction to entertain an application. The court's refusal to entertain Portugal's application in the case concerning *East Timor (Portugal v. Australia)* in 1995, although technically a dismissal, was based on a finding at the merits stage that the court could not exercise the jurisdiction conferred upon it to adjudicate the dispute referred by Portugal in the absence of Indonesia as a necessary third party. The full text of the decision may be found on the Internet at <http://www.icj-cij.org>.

18. Case Concerning Oil Platforms (Islamic Repub. of Iran v. United States) (Counter-Claim Order of Mar. 10, 1998) *available at* <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>.

19. Special Agreement Indonesia & Malaysia (Indon./Malay.) Joint Notification, Dated Sept. 30, 1998, Addressed to the Registrar of the Court *available at* <http://www.icj-cij.org/icjwww/icdocket/iinma/iinmaframe.htm>.

20. Peter H.F. Bekker, *International Court of Justice Rejects Jurisdiction in Fisheries Jurisdiction Case Brought by Spain Against Canada*, ASIL INSIGHT (Dec. 1998), *available at* <http://www/asil.org/insigh28.htm>.

21. Case Concerning Fisheries Jurisdiction (Spain v. Canada) (Judgment of Dec. 4, 1998) *available at* <http://www.icj-cij.org/icjwww/idocket/iec/iecframe.htm>.

IV. The Caspian Sea Dispute

In a June 21, 1998, article in *The New York Times*, there was a discussion regarding the Caspian Sea and various claims to it. The Caspian Sea, according to this report, is a California-sized body of saltwater—the world's largest land-locked body of water—which may sit on as many as two hundred billion barrels of oil which would constitute sixteen percent of the Earth's potential oil resources.[22] Even at the low prices of oil today that could add up to three trillion dollars in oil. The article went on to discuss the question underlying the lake-sea dispute—who owns the oil under the sea and who controls the pipeline route by which it gets to market. In an editorial response to this article, Professor Bernard H. Oxman responded that the choice of joint control by the riparian States does not turn on whether the Caspian is a lake. Professor Oxman pointed out that the riparian governments are consulting the United Nations Law of the Sea Convention for ideas about accommodating complex interests.[23]

V. A Dispute Involving a Possible Conflict Between Maritime Environmental Laws and Traditional Maritime Doctrine

International law is constantly evolving with norms created by years of practice adapted to changing circumstances. One emerging point of conflict is that between rights of navigation and the interest of coastal states in protecting the environment. Several current examples illustrate the issue of whether a coastal state may enact anti-pollution or traffic standards that go beyond those agreed upon in international conventions, and whether such standards, if enacted, can be enforced in straits and territorial waters. One such example is the enactment by the State of Washington of regulations affecting tanker vessels. A second has been the assertion by Turkey of the right to monitor traffic in the Bosporus Straits, which are governed by the 1936 Montreux Convention, prohibiting Turkey from interfering with transit through the Bosporus. It should be noted that under the Law of the Sea Convention, straits used for international navigation are governed by a regime of transit passage permitting navigation through, over, and under such straits. Imposition of traffic safety and other restrictions sought by the littoral state are subject to adoption by the International Maritime Organization designated to approve any such restrictions on behalf of the international community.

The State of Washington case involved state pollution standards for tankers that exceed those of federal and international standards. The United States, Singapore, and European nations announced that as of July 1, 1998, they would strictly enforce the International Safety Management Code (ISM Code). The ISM Code requires certification in conformance with safety standards for commercial vessels on international voyages. The International Association of Independent Tanker Owners (Intertanko) has agreed to comply with the ISM Code. The State of Washington, in setting regulations governing tanker equipment, communications, and crew training to protect its fragile environment, applied provisions of a federal domestic oil pollution act stating that the act provided "minimal" standards at best. Although Intertanko has agreed to comply with the ISM Code, in 1995 it challenged the state's "Best Achievable Protection" (BAP) regulations for tanker vessels. The BAP regulations were imposed in the aftermath of the Exxon Valdez incident, but Intertanko argued that U.S. states had no authority

22. *See* Elaine Sciolino, *The World; It's a Sea! It's a Lake! No. It's a Pool of Oil.*, N.Y. TIMES, June 21, 1998, § 4, at 1.

23. *See* Bernard H. Oxman, *Caspian Oil Riches*, N.Y. TIMES, June 27, 1998, at A14.

to impose requirements in derogation of federal and international standards. On June 18, 1998, the United States Court of Appeals for the Ninth Circuit resolved the dispute by upholding all but two provisions of the BAP regulations. The two state provisions that the Ninth Circuit held were preempted by federal law would have required tankers to (1) have global positioning system (GPS) receivers and two separate radar systems on board and (2) be equipped with an emergency towing package with state-specified design characteristics. One argument made by the Tanker Carrier Association is that if Washington requires more stringent environmental maritime safety standards for ships in "innocent passage" or docking within its port facilities, what is to stop other states from having their own regulations, which could be even more stringent than those of Washington? If the federal government does require uniformity, countries may retaliate against either the U.S. government or a state.

Concerning the Bosporus Straits, tanker traffic in this narrow waterway is reaching unforeseen, dangerous levels according to a recent article in the *New York Times*.[24] The Bosporus is seventeen miles long, 700 yards wide at some points, and the sole connection between the Black Sea and the Mediterranean. It is a vital bridge for migrating fish and other marine creatures. The increase in tanker traffic is due to the newly worked gas fields in the Caspian Basin. Turkey is bound by a 1936 treaty stipulating that Turkey may not interfere with the transit through the Bosporus. However, *The New York Times* reports that at the time of the treaty, the population of Istanbul was less than one million and now it is more than ten million. There were only two vessels a day passing through the Bosporus, but now there are 140. Tankers were forty meters long then, now they are up to 350 meters. There has been a huge increase in local traffic with 1,500 small boats using the Bosporus every day. It has become the busiest waterway in the world, three times busier than the Suez Canal. Due to various incidents regarding safety, oil spills, and environmental problems, the Republic of Turkey is seeking to "regulate" ships passing through the Bosporus, i.e., unilateral action proposed to prevent environmental and property damage to its citizens. Others complain that Turkey simply wants to profit from the Caspian oil and gas boom by having a pipeline constructed across its territory.

VI. Piracy

According to the International Maritime Bureau there has been an increase in the number of violent and audacious attacks on vessels to date.[25] For example, during 1997, there were 229 attacks reported to the Piracy Reporting Centre. These ranged from attacks against vessels in port or at anchor, to the highjacking of ships and theft of shiploads of cargos. Fifty-one seamen were killed and 412 passengers were taken hostage as a result of piratical attacks. In sixty-eight cases, the pirates were armed with guns and in fifty-one cases, they were armed with knives or other weapons. According to the Piracy Reporting Centre, in the last six months, three tankers were highjacked in Far Eastern waters. In two of the cases, the cargos were stolen by the pirates. In the third case, the vessel was arrested before all the cargo could be taken. Historically, it was pointed out by the Piracy Centre that only governments have been able to contain the rising trend of piracy. Since maritime traffic constitutes ninety percent of the world trade, when will there be a firm response?

---

24. *Id.*

25. ICC INTERNATIONAL MARITIME BUREAU, IMB REGIONAL PIRACY CENTRE (Kuala Lumpur), PIRACY—ANNUAL REPORT, June 1998, at 1.

According to *Jane's Intelligence Review*, the economic consequences of piratical attacks both on the high seas and in territorial waters amount to hundreds of attacks and property losses in the millions of dollars—insignificant in terms of dollar amounts, considering that there are fifty thousand local transits each year.[26] However, the problem is that the pirates are capable of inflicting, and do inflict in certain instances, serious harm to life and property each year. An incident in April, 1992 when pirates off Singapore attacked the Cypress-registered oil-tanker M/V Valiant Carrier with petrol bombs was a chilly reminder of the environmental damages that pirates can also cause.[27] The risks could increase if pirates used fast-attack craft and ship-to-ship missiles. *Jane's* points out that local governments "plainly resent the expectation that this is their problem to solve."[28] *Jane's* cites, as an example, a certain Malaysian prime minister who recently asked, "Is it too much to ask . . . that those who use the passages, and the maritime nations, contribute to the cost of keeping them free and safe?"[29]

There is a definitional problem regarding what an act of piracy is under current use of the word by various nations. Many violent acts of piracy are not, by conventional wisdom, actually considered piracy under international treaty law. Why is it so? Because most of these acts do not occur on high sea areas. Articles 100 to 107 of the Law of the Sea Convention (Convention) specifically deal with piracy and its repression on the high seas and are practically a verbatim reproduction of Articles 14-21 of the 1958 Geneva Convention on the High Seas. Other articles of the Convention that are relevant to the subject are articles 110 and 111. The Convention only addresses the repression of acts of piracy which take place on the high seas, and due to the reference in article 58(2), those which take place in the exclusive economic zone (although there is a difference of opinion as to the treatment of the exclusive economic zone as high seas).[30] Incidents of piracy and armed robbery in the territorial sea or in port areas are perceived as crimes against the state and are thus subject to its national laws. Article 27 gives a coastal state the right to exercise criminal jurisdiction on board a foreign ship passing through the territorial sea to conduct an investigation or to arrest the person if the crime is of a kind to disturb the peace of the country or the good order to the territorial sea.[31]

VII. Marine Fisheries

According to the Secretary General's report, the new findings indicate that, despite increases in agricultural production, future demand for fish is unlikely to be met in the absence of better management of the world's ocean resources.[32] Although problems of fisheries management are widely recognized in international instruments, such as the 1995 Fish Stocks Agreement and the Code of Conduct for Responsible Fisheries that have already been adopted, national fisheries management schemes have generally failed to protect resources from being over exploited and fisheries from being economically inefficient. Experts agree that several key factors are the main

26. *Maritime Risks and Threats in the Western Pacific*, JANE'S INTELLIGENCE REV., Aug. 1, 1995, at 3.
27. *See id.*
28. *Id.*
29. *Id.*
30. *See generally* Barry Hart Dubner, *Human Rights and Environmental Disaster—Two Problems that Defy the "Norms" of the International Law of the Sea Piracy*, 23 SYRACUSE J. INT'L L. & COM. 1, n. 42 (1997).
31. U.N. Law of the Sea Convention, *supra* note 1.
32. Information for this part of the report was supplied by Professor James E. Bailey, Assistant Professor, Northwestern School of Law of Lewis & Clark College. *See Report of the Secretary General on the U.N. Oceans Office*, at ¶ 261 (visited Mar. 5, 1999) <http://www.un.org/depts/los/losconvl.html>.

reason for the situation, such as the lack of political-will to make difficult adjustments, particularly in respect to the access of fishery resources and fishing rights; persistence of direct and indirect subsidies; lack of control of fishing fleets by flag states; resistance of the fishing industry to changes; lack of participation of traditional fishing communities in decision-making processes; and continued use of destructive fishing practices.

Projections of worked fishery production in 2010 range between 107 and 144 million tons. It is estimated that only between 74 and 114 million tons of this production will be available for human consumption, although the demand for fish food is forecast to be at 110 to 120 million tons. The actual amount from capture fisheries will depend, inter alia, on the effectiveness of national fisheries management and improved management of currently over-fished stocks that could provide an increase of between 5 and 10 million tons.

Recent assessments by FAO, however, concluded that over thirty-five percent of the world's major marine fishery resources were showing declining yields and twenty-five percent had reached a peak at high exploitation level, and that the potential for further increases in output was very modest at best. The FAO believes that as over-fishing has depleted prized species, such as tuna, cod, and swordfish, commercial fishermen are currently moving further down the oceanic food chain in search of a catch. As a consequence, second-level marine life normally preyed upon by the fish at the top of the tropic levels is being increasingly used for human consumption, thus causing further disruptive effects on the whole food chain that ultimately could lead to an overall declining production. Some experts have warned that if the global downward shift is not curbed, it could lead to a collapse of marine ecosystems and an effective end of commercial fisheries. These experts have suggested instead that in the next decades, fishery managers should emphasize the rebuilding of fish populations of large "no take" marine protected areas. In this connection, note should be made of the recent decision of the New England Fishery Management Council in the United Sates to establish the first year-round "no take" marine protected area in the Gulf of Maine in view of the serious decline of cod populations in the area. Others have called on interested countries to review the fishing capacity of their fleets and to take action to eliminate overcapacity and to reduce excessive fishing pressure in line with sustainable fishing, particular in relation to large-scale, industrialized vessels.[33]

Harmful fishing practices have also caused an annual discarding of an estimated twenty million tons of fish as well as the taking of a large number of incidental catch of sharks, marine mammals, turtles, and seabirds. Such practices have adversely affected marine biodiversity. It has been suggested that the use of selective fishing technologies to rescue the capture of unwanted catch, the adoption of management measures, such as closed seasons, closed areas, legal minimum mesh size and fish size to reduce the probability of catching undesired sizes and species, and the utilization of by-catch for commercial purposes as potential source of food could be employed to limit the problem of by-catch and discards. In addition, some environmentally concerned organizations have indicated that trade related measures should be applied to achieve effective enforcement of conservation regimes. They are of the view that, although such practices are considered to be inconsistent with World Trade Organization rules, regulatory distinctions based upon non-product-related criteria—in particular distinctions based upon production and process methods (PPMs)—should be the basis of a regulatory scheme to promote sustainable fishing practices.[34]

33. *See id.* ¶ 263.
34. *See id.* ¶ 264.

In September 1998, the United Nations FAO released the 1998 Human Development Report which stated that over-fishing of the oceans by industrial fleets has seriously depleted world fish stocks.[35] According to the FAO, "[although t]he marine catch has increased fourfold" during the past fifty years, "[f]ish stocks are declining, with about a quarter currently depleted or in danger of depletion and another forty-four percent being fished at their biological limit." In essence, over two-thirds of the world's fish species are either "fully exploited or over exploited." The FAO also warned that future demand for fish products cannot be met in the absence of better worldwide fisher management and conservation.

On October 23, 1998, the National Academy of Sciences echoed the concerns of the FAO with its own report which declared that the United States and other nations must take dramatic, and economically painful, steps to prevent a worldwide collapse of fish populations. The National Academy of Sciences report, "Sustaining Marine Fisheries," suggested several courses of action: (1) changing policies that encourage unrestricted competition on the open seas and lead to overcapacity in the fishing industry is widespread; (2) assigning fishing rights or quotas that individuals or enterprises could trade back and forth to reduce overcapacity and keep fishing at sustainable levels; (3) establishing additional marine refuges where it is illegal to fish or capture marine species in order to help keep stocks healthy (however, the report did not endorse a proposal to place twenty percent of the world's oceans off limit to fishing by 2020); and (4) proposing bycatch levels that should be considered in setting fishing quotas and designing management plans.

Not surprisingly, the continuing depletion of fish stocks has resulted in disputes involving fisheries. To help resolve such disputes, the Law of the Sea Convention of 1982 and its subsequent implementing agreements were intended to provide a framework on which to build more detailed regional agreements. This framework led to several bilateral negotiations in 1998. China and South Korea, Indonesia and the Philippines, Japan and the European Union (E.U.), and the United States and the European Union all began discussing bilateral fishery agreements that would comport with the Law of the Sea Convention.

On June 8, 1998, despite opposition from Ireland and France, the E.U. Fisheries Council concluded plans to phase out the use of driftnets by the end of 2001. The E.U. Fisheries Council will decide by the end of 1998 on measures to assist driftnet fishermen in adopting other trades.

Japan and China signed a new fisheries accord in November 1997 to replace their bilateral fisheries treaty. This new fisheries accord was approved in April 1998 by Japan's House of Councillors and its lower house, the Diet. In October 1998, Japan also signed a new fisheries accord with South Korea after two years of tense bilateral negotiations.

Despite this progress with China and South Korea, Japan was accused in September 1998 of violating two conventions to which it is a signatory: (1) the Law of the Sea Convention and (2) the Convention for the Conservation of Southern Bluefin Tuna. Under this second convention, to which Japan, New Zealand, and Australia are parties, fishing of the southern bluefin tuna can be conducted only with the consent of all three nations. Japan, however, implemented an experimental fishing program without the consent of the other two signatories. Australia and New Zealand alleged that Japan's program has resulted in Japan catching 1,400 tons over its previous quota of 6,065 tons. As of this writing, the nations have yet to begin negotiations on this alleged violation.

35. The information for the remainder of this text was provided by James E. Bailey, Assistant Professor, Northwestern School of Law of Lewis & Clark College.

Fishery conservation efforts have lagged behind in Africa. In May 1998, the OAU Inter-African Committee of Experts on Oceanography, Sea and Inland Fisheries found that some member states, despite being signatories of the Law of the Sea Convention, had not revised their domestic fisheries laws to comply with the ratified convention.

Besides the Law of the Sea Convention, the International Convention on the Regulation of Whaling (ICRW) of 1946 was also a source of controversy in 1998. Under ICRW, virtually all commercial whaling has stopped for the last thirty years. However, the ICRW does permit, upon approval of the International Whaling Commission, a small whaling quota to nations for scientific purposes or to indigenous communities whose subsistence or culture depend on whaling. In 1997, the commission approved a request by the United States to allow the Makah tribe of Washington State a maximum of five whales a year through 2002. The Makah have agreed with the National Marine Fisheries Service (NMFS) that they will hunt only migrating gray whales. In order to prevent the hunting of local gray whales, NMFS will provide the Makah with information about whale migration, and a marine biologist will confirm a whale's migratory status before the hunt will begin. Animal rights groups have vigorously opposed the Makah whale hunt, which nevertheless was scheduled to begin by the end of 1998. Norway has also angered animal rights groups by extending its whaling season from July 31 to August 17, 1998. Meanwhile, Japan continues to kill in the Antarctic and northern Atlantic under the ICRW's scientific research exception, despite criticism by animal rights groups and annual appeals by the International Whaling Commission that Japan phase out such whaling.

In the Pacific Northwest, the United States and Canada continued to negotiate over the now lapsed Pacific Salmon Treaty of 1985. The treaty's commercial fishing quotas, which were subject to adjustments based on regular renegotiations, have expired, and talks to renew the treaty began in March 1998. After several months of negotiation, Canada and the State of Washington agreed to a one-year accord on quotas for the sockeye salmon and on conservation plans for Washington bound chinook salmon and British Columbia bound coho salmon. However, talks between the United States and Canada collapsed in mid-July 1998 when the parties failed to agree on the most important issue: conservation and protection of the coho salmon that swim through the waters of both Alaska and British Columbia. Shortly after the U.S.-Canadian talks collapsed, British Columbia announced plans to revive a Washington State lawsuit that had been dismissed in January 1998 for lack of standing and in which British Columbia alleged that the United States had violated the Pacific Salmon Treaty. Whether this suit will proceed is unknown because the Canadian government opposes its revival by British Columbia. In September 1998, the David Suzuki Foundation issued a report recommending that Canada and the United States scrap the Pacific Salmon Treaty completely and replace it with treaties that establish conservation rather than allocation as the top priority.

VIII. Untimely Departure

On a sad note, Professor Myres Smith McDougal passed away in May. Working with his students, he produced six major treatises on international issues.[36] On a personal note, his treatise *Public Order and the Oceans* (co-authored with William T. Burke) helped me greatly in obtaining source material for my J.S.D. degree awarded by N.Y.U. in 1975.

36. *See* Wolfgang Saxon, *Myres Smith McDougal, 91, Expert on International Law at Yale*, N.Y. TIMES, May 10, 1998, § 1, at 36.