

***PACTA TERTIIS***  
**AND THE 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 & MANAGEMENT**  
**OF STRADDLING FISH STOCKS &**  
**HIGHLY MIGRATORY FISH STOCKS**

by

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***Pacta Tertiis* and the  
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**

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## **I Introduction**

The 1982 United Nations Convention on the Law of the Sea<sup>1</sup> is little by little reaching the stage where it can be said to have become the constitution of the world ocean.<sup>2</sup> It should however be clear that, even in the supposition that the former submission is borne out by state practice, this 1982 Convention should certainly not be considered as a static constitution. If indeed constitutions exist in many different forms, varying from extremely rigid documents to easily amendable ones,<sup>3</sup> the 1982 Convention proved at an early stage to fit the latter category.

Even though this convention was originally conceived as a package deal, it became clear as the date of entry into force slowly approached, that some adjustments would be required if this document were ever to be generally accepted by the international community of states. Due to the particular provision of this convention concerning its entry into force,<sup>4</sup> states had ample time to reflect on the option whether they preferred the text as it stood to enter into force, with probably only a limited membership, or whether they rather tended to compromise with a good

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<sup>1</sup> United Nations Convention on the Law of the Sea (U.N. Doc. A/Conf.162/122), December 12, 1982, multilateral, as reprinted in United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea* (U.N. Pub. Sales No. E.83.V.5). Hereinafter cited as 1982 Convention. This convention entered into force on November 16, 1994.

<sup>2</sup> As of September 10, 1999, 132 instruments of ratification, accession, or succession had been deposited with the Secretary-General of the United Nations, as available on Internet at "<http://www.un.org/Depts/los/los94st.htm>" on October 29, 1999.

<sup>3</sup> David, R. & Brierley, J., *Major Legal Systems in the World Today*, London, Stevens & Sons, pp. 108-111 and 439-447 (1985), about the diversity in the civil law countries and the special example of the American constitution respectively.

<sup>4</sup> According to Art. 308 (1) of the 1982 Convention, this convention would enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession. Guyana was the country depositing this crucial instrument of ratification on November 16, 1993. See United Nations, *Report of the Secretary-General on the Law of the Sea: Addendum* (U.N. Doc. A/48/527/Add.1), November 30, 1993, p. 1.

chance of reaching the goal of universality which had clearly been aimed at since its very inception.

The latter option was finally lifted by means of a General Assembly resolution adopted a few months before the entry into force of the 1982 Convention.<sup>5</sup> This resolution incorporated in annex the text of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.<sup>6</sup>

But even with the incorporation of these adjustments, which were still accepted before its entry into force, other parts of the 1982 Convention had already come under fire<sup>7</sup> and it became obvious soon afterwards that the 1982 Convention would not remain an immutable codification which would withstand the ravages of time for a long time to come. At the occasion of the first conference devoted to the 1982 Convention probably organized after the entry into force of the latter document,<sup>8</sup> the Director of the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations, already indicated that other sections of the convention, besides Part XI might well follow suit. The regime of high seas fisheries was singled out in this respect.<sup>9</sup> But also the environmental protection regime was pointed at as possible target area for future changes.<sup>10</sup>

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<sup>5</sup> A/RES/48/263 of August 17, 1994.

<sup>6</sup> Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (U.N. Doc. A/RES/48/263/Annex), August 17, 1994, multilateral as reprinted in 33 *International Legal Materials* pp. 1309-1327 (1994). Hereinafter cited as 1994 Agreement. This agreement entered into force on July 28, 1996.

<sup>7</sup> Writing at the time of the tenth anniversary of the 1982 Convention, *see* Treves, T., "La pêche en haute mer et l'avenir de la Convention des Nations Unies sur le droit de la mer", 38 *Annuaire Français de Droit International* pp. 885-904 (1992). If the deep sea-bed mining had not yet started and its future remained uncertain, the new stresses on the convention, according to this author, were potentially more dangerous for the future of the 1982 Convention, since they touched the very heart of a crucial compromise found in that convention, namely the 200-mile rule for limiting the competence of the coastal state (*ibid.*, pp. 886-887).

<sup>8</sup> *Colloque sur la Belgique et la nouvelle Convention des Nations Unies sur le droit de la mer* (Salmon, J. & Franckx, E., eds.), 30 Collection de droit international (Centre de droit international - Université Libre de Bruxelles & Centrum voor Internationaal Recht - Vrije Universiteit Brussel; Actes de la journée du 25 novembre 1994), Brussels, Bruylant, 174 pp. (1995).

<sup>9</sup> Lévy, J.-P., "Les Nations Unies et la Convention de 1982 sur le droit de la mer," in *Colloque sur la Belgique et la nouvelle Convention des Nations Unies sur le droit de la mer, supra* note 8, pp. 11, 11-12, where this author states: "Déjà à l'heure actuelle nous voyons des pans entiers de l'édifice juridique construit avec tant de difficultés et basé sur tant de compromis s'effriter dans certains domaines et même être totalement détruits dans d'autres pour être remplacés par de nouvelles constructions. C'est le cas en particulier des dispositions concernant la pêche en haute mer et l'établissement d'un régime international pour le développement des ressources minérales des grands fonds marins. Ainsi dans ces deux espaces qui se trouvent hors de la juridiction nationale, la communauté internationale envisage des modifications substantielles alors même que nous fêtons l'acceptation conventionnelle de dispositions censées les régir." Mentioning the same two areas, *see* Lucchini, L., "La Convention des Nations Unies sur le droit de la mer du 10 décembre 1982: une entrée en vigueur pour quelle Convention?", 7 *Espaces et Ressources Maritimes* pp. 1-9 (1993). *See also* Casado Raigon, R., "L'application des dispositions relatives à la pêche en haute mer de la Convention des Nations Unies sur le droit de la mer", 8 *Espaces et Ressources Maritimes* p. 210, 214 (1994), who stresses the fact that, as far as fisheries are concerned, the attention of the 1982 Convention was totally fixed on the exclusive economic zone notion, and not on that of the high seas. This author concludes: "[C]'est l'une des raisons pour lesquelles les dispositions relatives à la pêche en haute mer (du moins est-ce l'impression qu'elles donnent) ont quelque chose d'abstrait ou ont été rédigées sans souci de précision, leur but ayant été, tout au plus, de chercher à résoudre des problèmes dont on ignorait la portée exacte." Stressing the same point, *see* de Raulin, A., "La répression dans les eaux internationales", 15 *Annuaire de Droit Maritime et Océanique* p. 189, 208 (1997). These problems, however, soon surfaced as most distant water fishing nations were forced to look for new fishing grounds beyond these newly created exclusive economic zones. And since most of the commercially

The present author, for instance, has already at different occasions drawn attention to the need for adjustment with respect to certain provisions of Part XII (Protection and Preservation of the Marine Environment), be it with respect to land-based<sup>11</sup> or vessel source pollution.<sup>12</sup>

But it was in the area of fisheries that less than one year later a second<sup>13</sup> additional agreement saw the light of day, namely the 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.<sup>14</sup> It is this convention which will form the subject of the present paper.<sup>15</sup>

harvested fish stocks are to be found inside the 200-mile limit, it meant that the limited resources beyond soon became subject to over-exploitation. See for instance Hayashi, M., "United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of the 1993 Sessions", 11 *Ocean Yearbook* pp. 20, 20-21 (1994). See also the detailed study of Meltzer, E., "Global Overview of Straddling and Highly Migratory Fish Stocks: the Nonsustainable Nature of High Seas Fisheries", 25 *Ocean Development and International Law* p. 255, 328 (1994), concluding that "[i]n every identified case where the stocks straddle beyond a national fisheries zone the stock, if of commercial value, has been overfished." As a matter of fact, their catch percentage in the global context of the total marine production almost doubled in a matter of years after the introduction of 200-mile zones, namely from 5 to almost 10 %. See United Nations, *Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Some High Seas Fisheries Aspects Relating to Straddling Fish Stocks and Highly Migratory Fish Stocks* (U.N. Doc. A/CONF.164/INF/4), June 15, 1993, pp. 2-3. About this particular evolution, see also Thébaud, O., "Transboundary Marine Fisheries Management: Recent Developments and Elements of Analysis", 21 *Marine Policy* pp. 237, 238-239 (1997).

<sup>10</sup> Lévy, J.-P., *supra* note 9, pp. 30-31.

<sup>11</sup> Franckx, E., "Regional Marine Environment Protection Regimes in the Context of UNCLOS," 13 *International Journal of Marine and Coastal Law* pp. 307-324 (1998).

<sup>12</sup> Franckx, E., "First Report (May 1996)" (prepared as Rapporteur of the Committee on Coastal State Jurisdiction Relating to Marine Pollution of the International Law Association for the Helsinki Conference, August 1996), in *The International Law Association: Report of the Sixty-Seventh Conference held at Helsinki, Finland, 12 to 17 August 1996, London, I.L.A.*, p. 148, 177 (1996).

<sup>13</sup> Contrary to the 1994 Agreement relating to the exploitation of the mineral resources of the deep seabed, which already at the time of signature of the 1982 Convention seemed in a way inevitable if a universally accepted instrument were to be arrived at, this was not at all the case with respect to the fishing regime contained in that same document. Or as stressed by Lucchini, L. & Voelckel, M., *Droit de la mer*, Tome 2, Vol. 2, Paris, Pédone, p. 642 (1996): "[I]l en allait, en revanche, différemment du nouveau régime de pêche que celui-ci mettait sur pied et sur lequel un consensus semblait *solidement et durablement* établi". But see Freestone, D., "The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime?", 5 *Canterbury Law Review* pp. 341, 362 (1994) and Freestone, D. & Makuch, Z., "The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement", 7 *Yearbook of International Environmental Law* pp. 3, 49-50 and note 249 (1996), who speak of the "'unfinished agenda' of the LOSC" in this respect.

<sup>14</sup> Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (U.N. Doc. A/CONF.164/37), September 8, 1995, reprinted in 34 *International Legal Materials* pp. 1542-1580 (1995). Hereinafter cited as 1995 Agreement. This agreement has not yet entered into force. For further details, see *infra* note 114.

<sup>15</sup> Notwithstanding the very specific subject matter covered by this 1995 Agreement, which only covers two clearly defined species of fish, it should be stressed that most of the species found in the high seas cross the 200-mile limit at some stage of their life cycles, and can therefore be considered, from a biological point of view, as straddling stocks. See Hayashi, M., "The Role of the United Nations in Managing the World's Fisheries", in *The Peaceful Management of Transboundary Resources* (Blake, G., Hildesley, W., Pratt, M., Ridley, R. & Schofield, C., eds.), London, Graham & Trotman, p. 373, 374 (1995) and by the same author, *supra* note 9, pp. 21-22, both referring to a study by F.A.O., *World Review of High Seas and Highly Migratory Fish Species and Straddling Stocks*, Rome, F.A.O. Fisheries Circular 868, preliminary version. Beyond the field of application of the 1995 Agreement, therefore, not much other living resources remain on the high seas. As stressed by Lucchini, L. & Voelckel, M., *supra* note 13, p. 690 and Momtaz, D., "L'Accord relatif à la conservation et la gestion des stocks de poissons chevauchants et grands migrants", 41 *Annuaire Français de Droit International* p. 676, 681 (1995).

## II *Pacta tertiis*

*Pacta tertiis* is a rather cryptic description of a basic rule of customary international law which dates back to Roman law, and which reads in full *pacta tertiis nec nocent nec prosunt*.<sup>16</sup>

Or looked upon from the point of view of the third party, an agreement concluded between two or more parties is for him a *res inter alios acta*.<sup>17</sup> This adagium of Roman contract law fitted nicely in the theory of international law as it emerged in the 17<sup>th</sup> century and which was in essence an interstate law based on the sovereign equality of its participants. The consensual nature of international law, implying that states can only be bound by what they have expressly consented to themselves, was a logical consequence of this development.<sup>18</sup>

With respect to treaty law, this rule was codified in the Convention on the Law of Treaties of 1969, which states that treaties do not “create either obligations or rights for a third State without its consent”.<sup>19</sup> This rule seems to be generally accepted today.<sup>20</sup>

As far as customary law is concerned, the consensual nature of international law has been reflected in the so-called “persistent objector”-theory,<sup>21</sup> cunningly described by some as “the acid test of custom’s voluntarist nature”.<sup>22</sup>

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<sup>16</sup> See for instance Bledsoe, R. & Boczek, B, *The International Law Dictionary*, Santa Barbara, ABC-Clio, Inc., pp. 259-260 (1987). This adagium contains the basic rule of contract law that agreements do not give rights, neither do they impose obligations on third states. Hereinafter cited as *pacta tertiis* rule.

<sup>17</sup> Or to quote the full Latin maxim: “Res inter alios acta alteri nocere non debet”. This can be translated as: “Things done between strangers ought not to injure those who are not parties to them”. See *Black’s Law Dictionary* (Black, C., ed.), St. Paul, West Publishing Co., p. 1310 (6<sup>th</sup> ed., 1990). This Latin expression is also known in a slightly different form: “Res inter alios acta aliis neque nocet neque prodest”. See De Koninck, C., *Latijnse Rechtspreuken* (Latin Legal Adages), Gent, Mys & Breesch, pp. 170-171 (1998).

<sup>18</sup> This theory was espoused by the Permanent Court of International Justice in the Lotus Case (France/Turkey), *PCIJ*, Series A, n 10, 18 (1927). Especially the former Soviet Union and its allies proved to be staunch supporters of this theory. See Tunkin, G., “Protsess Sozdaniia Norm i Istochniki Mezhdunarodnogo Prava” [The Formation of Norms and Sources of International Law], in *Kurs Mezhdunarodnogo Prava* [Course of International Law] (Kudriavtsev, V., ed.), Vol. 1 (*Poniatie, Predmet i Sistema Mezhdunarodnogo Prava* [The Concept, Object and System of International Law] (Miullerson, R. & Tunkin, G., eds.)), Moscow, Nauka, pp. 182, 184-189 (1989). These authors particularly stressed the consensual nature of customary international law norms (*ibid.*, p. 197), which has been described as “the Achilles’ heel of the consensualist outlook”. See Weil, P., “Towards Relative Normativity in International Law?”, *77 American Journal of International Law* p. 413, 433 (1983).

<sup>19</sup> Vienna Convention on the Law of Treaties, May 23, 1969, multilateral, Art. 34, 1155 *United Nations Treaty Series* 331. Hereinafter cited as 1969 Vienna Convention. This convention entered into force on January 27, 1980.

<sup>20</sup> See for instance *Oppenheim’s International Law* (Jennings, R. & Watts, A., eds.), Vol. 1, Part. 3, London, Longman, p. 1260 (9<sup>th</sup> ed., 1992), who state that this “general rule is so well established that there is no need to cite extensive authority for it.”

<sup>21</sup> Most contemporary writers appear to adhere to this theory. To cite only general textbooks on international law published in the English language during the second half of the present decade, see for instance Brownlie, I., *Principles of Public International Law*, Oxford, Clarendon Press, p. 10 (1998); Shaw, M., *International Law*, Cambridge, Grotius Publications, pp. 71-72 (4<sup>th</sup> ed., 1997); Malanczuk, P., *Akehurst’s Modern Introduction to International Law*, London, Routledge, p. 48 (7<sup>th</sup> ed., 1997); and Wallace, R., *International Law*, London, Sweet & Maxwell, p. 12 (3<sup>rd</sup> ed., 1997). For a more complete overview of the literature mainly preceding the period just covered, listing those in favor and those against, see Tomuschat, C., “Obligations Arising for States Without or Against Their Will”, *Recueil des Cours*, Vol. 241, p. 195, 285 note 214 (1997). See also Thirlway, H., “The Law and Procedure of the International Court of Justice, 1960-1989”, *61 British Yearbook of International Law* p. 1, 106 (1990), who reached the following conclusion in 1990: “The principle that the status of exemption, as a persistent objector, from an otherwise well-recognized general rule of customary law is at least theoretically possible, is

A positive aspect of this consensual nature of international law is most certainly that international law, when compared with municipal law, has a rather high level of compliance. The other side of the medal, however, is that international law has been struggling with the problem of the so-called free rider. By not subscribing to a commitment undertaken by a majority of others, one can not only thwart the efforts of others but sometimes even profit from their voluntary abstention of action. International law has been very ill equipped to tackle this specific problem.<sup>23</sup> Nevertheless, as will be seen below, the question has been raised recently whether states indeed have the option of continuing to beat a different drum if a majority of others have established a contrary rule. The validity of the theory that a persistent objector can opt out from customary law obligations, has for instance been questioned lately.<sup>24</sup> But especially with respect to certain treaty law, the idea has been suggested that the *pacta tertiis* rule might not be as strict as once believed.<sup>25</sup>

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however now well-established". Combining an analysis of judicial decisions and the writings of legal scholars, Danilenko, G., *Law-making in the International Community*, Dordrecht, Martinus Nijhoff, pp. 109-113 (1993), reaches the same conclusion, even though he acknowledges the existence of an opposite tendency in the literature (on this point *see infra* note 24 and accompanying text). For a present day detailed argumentation refuting these criticisms, *see* Mendelson, M., "The Formation of Customary International Law", *Recueil des Cours*, Vol. 272, pp. 155, 227-244 (1998). Or as the rule is clearly synthesized in the comment attached to the sources of international law, to be found in the Restatement of the Law Third as adopted and promulgated by the American Law Institute in 1986 (*Restatement of the Law: The Foreign Relations Law of the United States*, St. Paul, American Institute Publishers, pp. 24, 25-26 (1987)): "Although customary law may be built by the acquiescence as well as by the actions of states ... and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures". State practice moreover confirms the frequent use made of this notion. *See* Colson, D., "How Persistent Must the Persistent Objector Be?", 61 *Washington Law Review* p. 957, 969 (1986), relying mainly on the practice of the United States. This latter remark is substantiated, at least as far as the law of the sea is concerned, by Roach, J. & Smith, R., *United States Responses to Excessive Maritime Claims*, The Hague, Martinus Nijhoff, 676 pp. (2<sup>nd</sup> ed., 1996).

<sup>22</sup> Weil, P., *supra* note 18, p. 434.

<sup>23</sup> Or as D. Shelton caricatured this issue, focusing on the fishing problem, during a conference on international lawmaking (*New Trends in International Lawmaking: International 'Legislation' in the Public Interest* (Delbrück, J., ed.), Berlin, Duncker & Humblot, p. 121 (1997)): "If time is taken to achieve unanimity through drafting, adopting, and enforcing a treaty or developing a norm of customary international law, the fish will long have disappeared".

<sup>24</sup> Charney, J., "The Persistent Objector Rule and the Development of Customary International Law", 56 *British Yearbook of International Law* pp. 1-24 (1986) and by the same author "Universal International Law", 87 *American Journal of International Law* pp. 529, 538-542 (1993); "International Lawmaking in the Context of the Law of the Sea and the Global Environment", in *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy* (Young, M. & Iwasawa, Y., eds.), Irvington, Transnational Publishers, p. 13, 26 note 49 (1996); and "International Lawmaking: Art. 38 of the ICJ Statute Reconsidered", in *New Trends in International Lawmaking: International 'Legislation' in the Public Interest*, *supra* note 23, pp. 171, 183-184. As indicated *supra* note 21, this remains today a minority opinion. One of the arguments denying the persistent objector rule any effectivity in contemporary international law is its allegedly limited usefulness based on the assumption that the objector will in the end bow to diplomatic pressure. The recent advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons (*ICJ Reports 1996*, p. 226) as well as subsequent state practice in this area, however, tend to indicate that if the issues at state are vital to the security of a state, countries seem to have no difficulty in keeping up this persistent objector status. As admitted by Steinfeld, A., "Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons", 62 *Brooklyn Law Review* pp. 1635, 1675-1676 and 1685 (1996).

<sup>25</sup> In general, *see* Chinkin, C., *Third Parties in International Law*, Oxford, Clarendon Press, pp. 134-144 (1993), arguing that even though the 1969 Vienna Convention relies heavily on consensualism, "it was drafted in a sufficiently flexible way to allow future development of international law" (*ibid.*, p. 138). More specifically with respect to the 1982 Convention, *see infra* notes 126-129 and accompanying text.

It is not by accident that it is exactly in the field of fisheries and environmental protection that the 1982 Convention has come under pressure lately to adjust certain of its provisions. This “tragedy of the commons”,<sup>26</sup> when applied to high seas fisheries, results in the fact that the abstention policy, even if voluntarily adhered to by a certain number of states, can easily be undermined by others. By not subscribing to similar restrictions, the third state in question not only undermines the objective pursued by the others, i.e. the conservation of the living resources of the high seas, but even obtains an indirect benefit because of the diminished general fishing effort in a certain area. The whaling issue has been on the international agenda for some time.<sup>27</sup> The straddling and highly migratory fish stocks came to the fore more recently.

Also with respect to marine pollution it is easily understood how the efforts of some may not only be annihilated by the unrestricted actions of others, but can also put the latter in a competitive advantage because they will not need to invest in the costly equipment normally required in order to reduce, for instance, vessel-source pollution.

Of these two topics, the fisheries issue has been singled out by the present paper. For the reasons explained in the next part, the recent 1995 Agreement appeared to provide a perfect instrument to test these stresses placed on the classical *pacta tertiis* rule.

### III The 1995 Agreement

Indeed, the 1995 Agreement has generally been hailed in the literature as devising some truly “innovative solutions”.<sup>28</sup> Moreover, Nandan who presided the conference leading up to the conclusion of this document, described it at the end of the Conference using adverbs as “historic”, “far-sighted, far-reaching, bold and revolutionary”, “strong and binding”, and remarked that:

“[i]n many ways, it better secures the future of the [1982] Convention by dealing with problems raised in its implementation.”<sup>29</sup> If one consults the legal literature on this 1995 Agreement, there appears to be general agreement that especially Part VI, Compliance and Enforcement, and Part VIII, Peaceful Settlement of Disputes, stand out in this respect. Even though both contain almost the same number of articles,<sup>30</sup> the former nevertheless clearly contains the crux of the novelties.<sup>31</sup> The

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<sup>26</sup> As this concept was coined by Hardin, G., “The Tragedy of the Commons”, 162 *Science* pp. 1243-1248 (1968), a United States biologist. For the application of Hardin’s concept to the oceans in the field of environmental protection, see for instance D’Amato, A. & Hargrove, J., “An Overview of the Problem”, in *Who Protects the Ocean? Environment and the Development of the Law of the Sea* (Hargrove, L., ed.), St. Paul, West Publishing Co., pp. 1, 4-6 (1975). For its concrete application to the issue of high seas fisheries management, see for instance Knight, G., *Managing the Sea’s Living Resources: Legal and Political Aspects of High Seas Fisheries*, Lexington, Lexington Books, pp. 2-5 (1977).

<sup>27</sup> See for instance Schiffman, H., “The Protection of Whales in International Law: A Perspective for the Next Century”, 22 *Brooklyn Journal of International Law* pp. 303-359 (1996), who stresses the negative influence of the persistent objector notion in this respect (*ibid.*, pp. 331-333).

<sup>28</sup> See Tahindro, A., “Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks”, 28 *Ocean Development and International Law* p. 28, 33 (1997).

<sup>29</sup> Statement of the Chairman, Ambassador Satya N. Nandan, on 4 August 1995, upon the Adoption of the 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.164/35), September 20, 1995, paras. 1, 2, 12 and 4 respectively.

<sup>30</sup> The section on the peaceful settlement of disputes contains even slightly more articles. Indeed,

latter may be understandable when considering the marked weakness of such provisions in marine environmental conventions in general,<sup>32</sup> it nevertheless remains a rather exceptional feature when compared with other recent initiatives taken in this particular field.<sup>33</sup>

Part VIII indeed mainly refers back to the provisions relating to the settlement of disputes set out in Part XV of the 1982 Convention, which are said to apply *mutatis mutandis*, whether or not the parties to the 1995 Agreement are also parties to the 1982 Convention.<sup>34</sup> This further focuses the attention on the compliance and enforcement part of the agreement,<sup>35</sup> when looking for substantially novel provisions.<sup>36</sup> Or as stated by one observer:

Part VI consists of Arts. 19-23, Part VIII of Arts. 27-32.

<sup>31</sup> This is clearly reflected in the length of these articles. Art. 21, for instance, on the subregional and regional cooperation is the longest article of the whole agreement. It contains not less than 18 different subheadings. It is for instance no coincidence that Pannatier, S., "Problèmes actuels de la pêche en haute mer", 101 *Revue Générale de Droit International Public* pp. 421-445 (1997), when discussing actual problems of high seas fisheries, singles out this Part VI in order to stress relevant recent developments with respect to the obligation to cooperate, provided in Art. 118 of the 1982 Convention, and finds it sufficient for the other parts of the 1995 Agreement to simply refer back to a previously written analysis on that agreement (*ibid.*, pp. 439-440). The marked resemblance between the final outcome of the Canadian-European Community so-called "turbot-war" of 1995 (Agreed Minute, Canada-European Communities, April 20, 1995, as reprinted in 34 *International Legal Materials* pp. 1260-1272 (1995)) and the 1995 Agreement adopted later on that same year (*see supra* note 14) in this respect, as emphasized by Joyner, C., & von Gustedt, A., "The Turbot War of 1995: Lessons for the Law of the Sea", 11 *International Journal of Marine and Coastal Law* p. 425, 455 (1996), further underlines the novel character of the enforcement provisions of the latter document.

<sup>32</sup> For a good recent analysis, *see* Ardia, D., "Does the Emperor Have No Clothes? Enforcement of International Laws Protecting the Marine Environment", 19 *Michigan Journal of International Law* pp. 497-568 (1998).

<sup>33</sup> This contrasts sharply with the 1993 F.A.O. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (November 24, 1993, multilateral, as reprinted in 10 *International Journal of Marine and Coastal Law* pp. 417-425 (1995); hereinafter cited as F.A.O. 1993 Compliance Agreement; this agreement has not yet entered into force), which is said at first sight to be lacking in so far as effective enforcement measures are concerned. *See* Moore, G., "The Food and Agriculture Organization of the United Nations Compliance Agreement", 10 *International Journal of Marine and Coastal Law* p. 412, 415 (1995) and by the same author "Un nouvel accord de la FAO pour contrôler la pêche en haute mer", 7 *Espaces et Ressources Maritimes* p. 62, 67 (1993). The same can be said about the 1995 F.A.O. Code of Conduct for Responsible Fisheries (F.A.O. Doc. 95/20/Rev.1), October 31, 1995, as reprinted in F.A.O., *Code of Conduct for Responsible Fisheries*, Rome, F.A.O., 46 pp. (1995). Hereinafter cited as 1995 F.A.O. Code of Conduct. This code was the result of a twin-track approach. Besides the elaboration of the 1995 Agreement, a binding legal document focusing on high seas fisheries, a Code of Conduct was being developed which covered much more than high seas fishing and, of particular importance here, was intended to be voluntary in nature. As stressed by Edeson, W., "The Code of Conduct for Responsible Fisheries: An Introduction", 11 *International Journal of Marine and Coastal Law* p. 233, 233 (1996). About the close interrelation between the 1995 F.A.O. Code of Conduct and the 1995 Agreement, *see* de Fontaubert, C., Downes, D. & Agardy, T., "Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats", 10 *Georgetown International Environmental Law Review* pp. 735, 791-792 (1998). It should be noted that only one article (Art. 4.1) of this long document addresses the issue of implementation.

<sup>34</sup> Art. 30 (1) of the 1995 Agreement.

<sup>35</sup> Which proved to be "probably the most controversial issue that surfaced in the course of these negotiations". *See* de Fontaubert, C., "The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Another Step in the Implementation of the Law of the Sea Convention", 12 *Ocean Yearbook* p. 82, 87 (1996). In the same sense, *see* also Hayashi, M., "Enforcement by Non-Flag States on the High Seas Under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks", 9 *The Georgetown International Environmental Law Review* pp. 1, 1 and 11 (1996).

<sup>36</sup> It is therefore not surprising to find articles in the specialized legal literature analyzing this particular agreement in the broader context of the issue of compliance with respect to international environmental



“Thus, it is in Part [VI] that we see the most clear example of progressive development of international law in the Agreement”.<sup>37</sup>

The logical question which these remarks raise, therefore, appears to be whether “the tough new scheme for international enforcement”,<sup>38</sup> incorporated in this 1995 Agreement, breaks new ground with respect to the *pacta tertiis* rule.<sup>39</sup>

Before trying to answer this question, the careful formulation of the latter should be stressed. The main purpose of the present article is not to analyze whether Part VI of the 1995 Agreement breaks new ground with respect to international law in general -- this question has already been exhaustively dealt with by others<sup>40</sup> -- but only with respect to the *pacta tertiis* rule. Even then, a further distinction should be made between the application of this rule *vis à vis* third parties outside the conventional framework of 1995<sup>41</sup> and its possible application inside that same framework.<sup>42</sup> For reasons explained below,<sup>43</sup> the latter appears to be a false question and will as a consequence not retain our attention.<sup>44</sup>

Totally opposite points of view are defended relating to the external *pacta tertiis* effect in the specialized literature. On the one extreme of the spectrum, one finds authors who categorically answer the question in the negative:

agreements in general. See for instance Vigneron, G., “Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement”, 10 *Georgetown International Environmental Law Review* pp. 581-623 (1998), who reaches the conclusion that the 1995 Agreement, when compared with other agreements of its kind, “is likely to effect better conservation and management” (*ibid.*, p. 623). When Tahindro speaks of innovative solutions, for instance, he focuses on provisions relating to compliance and enforcement. See *supra* note 28 and accompanying text. His conclusions stress this point once again. See Tahindro, A., *supra* note 28, p. 50.

<sup>37</sup> Moran, P., “High Seas Fisheries Management Agreement Adopted by UN Conference: The Final Session of the United Nations Conference on Straddling and Highly Migratory Fish Stocks, New York, 24 July - 4 August 1995”, 27 *Ocean and Coastal Management* p. 217, 223 (1995).

<sup>38</sup> Words used by the British Fisheries Minister in the House of Commons, as reprinted by Anderson, D., “The Straddling Stocks Agreement of 1995 -- An Initial Assessment”, 45 *International and Comparative Law Quarterly* p. 463, 475 (1996).

<sup>39</sup> Or as formulated by Juda, L., “The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique”, 28 *Ocean Development and International Law* p. 147, 155 (1997), with respect to a particular provision of that agreement: “Does this nonfishing stipulation have the nature of an implementation of provisions of the 1982 Law of the Sea Convention? If this is so, it might be maintained that such a provision is declaratory in nature and consequently binding on all 1982 Convention parties, whether or not they are party to the Straddling Stocks Agreement. Or, does the provision in question represent a further development of conventional law binding only on states party to that agreement? If so, and if some states do not become party to the agreement, then the problem of the free rider -- that is, a nonparty state free from the restrictions other states have accepted -- may once more emerge.” The author appears to simply raise the issue, without taking position.

<sup>40</sup> See for instance Hayashi, M., *supra* note 35, pp. 1-36, who reaches a positive answer (*ibid.*, p. 26).

<sup>41</sup> Hereinafter described as the external *pacta tertiis* effect.

<sup>42</sup> Hereinafter described as the internal *pacta tertiis* effect. Or to paraphrase Simma, B., “From Bilateralism to Community Interest in International Law”, *Recueil des Cours*, Vol. 250, p. 217, 370 (1997) one could still speak of an obligation *erga omnes*, the *omnes*, however, being strictly limited in the present context to the actions of other contracting parties.

<sup>43</sup> See *infra* notes 73-82 and accompanying text.

<sup>44</sup> But see Hey, E., “Global Fisheries Regulations in the First Half of the 1990s”, 11 *International Journal of Marine and Coastal Law* p. 459, 482 (1996), who appears to place both issues on the same level in this respect. This author has doubts about the legal consistency of such effects of the 1995 Agreements (*ibid.*, pp. 488-489).

“Despite the language in the 1995 Agreement, none of its obligations are applicable to non-parties unless it can be argued that a provision (or the Agreement as a whole) has become part of customary international law.”<sup>45</sup>

On the other extreme, another author can be mentioned who, when commenting on Art. 21 of the 1995 Agreement, does not seem to have the slightest doubt to answer the question in a positive manner:

“These provisions<sup>46</sup> seem to ignore one of the basic principles of the International Law of Treaties: that is, “*pacta tertiis nec nocent nec prosunt*”. Such a principle, codified in the 1969 Vienna Convention on the Law of Treaties, implies that a treaty cannot create obligations for third States without their consent.”<sup>47</sup>

At first sight, the latter interpretation might seem to be a rather awkward submission, taken into account the very strict mandate given to the diplomatic conference that its results should be “fully consistent” with the provisions of the 1982 Convention.<sup>48</sup> The latter convention, which certainly was revolutionary in some aspects,<sup>49</sup> did however not have the slightest ambition

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<sup>45</sup> Örebech, P., Sigurjonsson, K. & McDorman, T., “The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement”, 13 *International Journal of Marine and Coastal Law* p. 119, 123 (1998).

<sup>46</sup> I.e. Arts. 21-22 of the 1995 Agreement.

<sup>47</sup> de Yturriaga, J., “Fishing in the High Seas: From the 1982 UN Convention on the Law of the Sea to the 1995 Agreement on Straddling and Highly Migratory Fish Stocks”, 3 *African Yearbook of International Law* p. 151, 179 (1996). See also by the same author *Ambitos de jurisdicción en la Convención de las Naciones Unidas sobre el Derecho del Mar: una perspectiva española*, Madrid, Ministerio de Asuntos Exteriores, Secretaría General, p. 388 (1995) and *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea*, The Hague, Martinus Nijhoff, p. 223 (1997), where similar statements can be found. It appears from the general framework in which this statement has to be framed, that the author is addressing the issue of external *pacta tertiis* effect. See also Van Dyke, J., “Modyfying the 1982 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources: The Straddling Stocks Negotiations”, 10 *International Journal of Marine and Coastal Law* p. 219, 219 (1995), who, when commenting on a 1994 draft of the 1995 Agreement (U.N. Doc. A/Conf.164/22), August 23, 1994, states that the proposed changes to the regime governing the high seas living resources “appear to amount to the establishment of a new regime”. He furthermore states when discussing the implications of this draft for the fishing practices in the Pacific, that “[s]ome precedents for exerting jurisdiction beyond the 200-mile areas can be found in treaties on other topics, although they are not as dramatic as the present language in the Draft Agreement”. One of the agreements in question referred to is the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, which appears to constitute a claim for jurisdiction (namely prohibit non ratifying states to dump in the “donut” areas of the treaty area) beyond the ratifying states’ 200-mile zones (*ibid.*, p. 225). For an even more radical statement in this respect, see Delbrück, J., “‘Laws in the Public Interest’ - Some Observations on the Foundations and Identification of *erga omnes* Norms in International Law”, in *Liber amicorum Günther Jaenicke - Zum 85. Geburtstag* (Götz, V., Selmer, P. & Wolfrum, R., eds.), Berlin, Springer, pp. 17, 26-27 (1998), who seems to consider the whole 1995 Agreement as giving rise to obligations *erga omnes*, and to classify its content as *erga omnes* norms, accepted under contemporary international law. As confirmed by the comments of this author during a conference on international lawmaking (*New Trends in International Lawmaking: International ‘Legislation’ in the Public Interest*, *supra* note 23, p. 135). See also *infra* note 111.

<sup>48</sup> A/RES/47/192 of December 22, 1992, para. 1. See for instance Lucchini, L., “Stocks Chevauchants -- Grands Migrateurs”, in *International Legal Issues Arising Under the United Nations Decade of International Law* (Al-Nauimi, N. & Meese, R., eds.), The Hague, Martinus Nijhoff, pp. 513, 544-545 (1995). This was a “carefully crafted compromise”, as mentioned by de Yturriaga, J., *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea*, *supra* note 47, pp. 183-184.

<sup>49</sup> If the part on the peaceful settlement of disputes of the 1995 Agreement could itself not really be

of giving a new content to the *pacta tertiis* rule.<sup>50</sup> The exact title of the agreement, moreover, namely the 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, does apparently not leave much room for progressive development either.

However, as already aptly stated by the Harvard Research on International Law of the 1930s, the terminology used to label commitments between states has to be qualified as “confusing, often inconsistent, unscientific and in a perpetual state of flux”.<sup>51</sup> Consequently, one has to look beyond the mere title in order to find the real intention of the drafters. It is difficult to find a better example to illustrate this latter point than the 1994 predecessor of this agreement with had a strikingly similar title:<sup>52</sup> Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.<sup>53</sup> This did not prevent the content of this convention from radically changing the substance of the part of the 1982 Convention to which it related.<sup>54</sup>

It is therefore important to have a closer look at the true content of the 1995 Agreement in order to find out first of all whether it really implements the corresponding part of the 1982 Convention. This preliminary question will be addressed first, for in the supposition that the 1995 Agreement is fully consistent with the 1982 Convention, and the latter convention does not infringe upon the *pacta tertiis* rule, then the above-mentioned question becomes irrelevant. If on the other hand, the answer to this first query turns out to be negative, the issue of the possible impact of the 1995 Agreement on the *pacta tertiis* rule does become relevant.

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considered to be truly revolutionary (*see supra* notes 34-36), the document to which it refers and the rules of which it *mutatis mutandis* applies, namely Part XV (Settlement of Disputes) of the 1982 Convention, certainly was.

<sup>50</sup> The many references to be found in the 1982 Convention to “generally accepted international rules and standards” should not be considered as broadening the scope of this Latin adagium. Instead, by accepting the 1982 Convention, incorporating this rule of reference, parties beforehand accept being bound by the content of these generally accepted international rules and standards even if they were not a party to the particular convention which contained the rule in question. *See* Franckx, E., *supra* note 12, pp. 176-177. *See also* Molenaar, E., *Coastal State Jurisdiction over Vessel Source Pollution*, The Hague, Martinus Nijhoff, pp. 157-164 (1998). The latter calls it “the indirectly binding effect of UNCLOS”.

<sup>51</sup> Law of Treaties: Draft Convention, with Comment, Prepared by the Research in International Law of the Harvard Law School, as reprinted in 29 *American Journal of International Law* p. 657, 712 (1935).

<sup>52</sup> According to Balton, D., “Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks”, 27 *Ocean Development and International Law* p. 125, 135 (1996), this was no coincidence. The negotiations leading up to the conclusion of both agreements took place around the same period of time, sometimes in the same place and moreover often by the same people.

<sup>53</sup> *See supra* note 6.

<sup>54</sup> According to Orrego Vicuña, F., *The Changing International Law of High Seas Fisheries*, Cambridge, Cambridge University Press, p. 136 (1999), this is one of the essential distinguishing factors between the 1994 Agreement and the 1995 Agreement. If the former does substantially change the 1982 Convention, the latter “does not in any way amend the [1982] Convention”. *But see* in general the next part for a more balanced approach. *See also* more specifically, *infra* note 58.

#### IV Does the 1995 Agreement “implement” the corresponding parts of the 1982 Convention?

Given the complex kind of provisions to be found in the 1995 Agreement, it appears impossible to answer this question by a simple yes or no.<sup>55</sup> Depending on whether authors belong to a civil law country or rather to a country inspired by the common law tradition, three substantially different kinds of articles of the 1995 Agreement are distinguished by means of the following classifications.

The civil lawyer<sup>56</sup> speaks first of all of provisions which are fully consistent with the letter and the spirit of the 1982 Convention, i.e. the so-called provisions *propter* or *secundum legem*. Secondly, some articles of the 1995 Agreement go beyond the 1982 Convention, but are nevertheless in line with the spirit of that convention since they represent a natural development of the latter document. These are the so-called provisions *praeter legem*. Finally, there is a third set of provisions which are plainly inconsistent with the 1982 Convention and which are qualified as *contra legem* provisions.

Others have similarly proposed a classification of the 1995 Agreement in three different groups of articles, but rather speak of a first group facilitating the implementation of the 1982 Convention, a second group strengthening this conventional regime of 1982, and finally a third group developing that same regime. In this latter group, some articles are said to depart from the 1982 Convention.<sup>57</sup>

What both approaches have in common, however, is that a certain number of articles of the 1995 Agreement do not merely implement the 1982 Convention, but go beyond the latter framework by incorporating rules which cannot be rimed with the content of the 1982 Convention.<sup>58</sup>

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<sup>55</sup> Striking in this respect is an article by Vignes which exactly sets itself as one of its goals to answer this specific question, namely: “Cet Accord s’inscrit-il dans le cadre de l’application de la Convention de 1982 ou en dénature-t-il le contenu?”. See Vignes, D., “Le gommage des différences entre haute mer et zone économique exclusive opéré par l’Accord du 4 décembre 1995 sur les stocks chevauchants et de grands migrateurs: vers l’assimilation de la haute mer à la zone de 200 milles et la disparition de la liberté de la pêche en haute mer”, 4 *Revue de L’INDEMER* p. 93, 97 (1996). Or as rephrased later on (*ibid.*, p. 119): “On s’est aussi posé la question de savoir s’il [l’Accord de 1995] méritait le titre d’Accord d’application de la Convention de 1982?” His answer to this last question starts out by saying: “Non enfin à la question de la dénomination d’Accord d’application”, but ends up by warning: “Il ne faut toutefois pas se méprendre: le titre de l’Accord de 1995 n’est pas Accord d’application mais ‘Accord aux fins de l’application’. Le fantaisisme de cette appellation permet tout”, and concludes: “Oui, il est accord aux fins de l’application”. See *ibid.*, p. 120.

<sup>56</sup> See for example de Yturriaga, J., “Fishing in the High Seas: From the 1982 UN Convention on the Law of the Sea to the 1995 Agreement on Straddling and Highly Migratory Fish Stocks”, *supra* note 47, p. 178 and by the same author *The International Regime of Fisheries, ibid.*, pp. 221-223.

<sup>57</sup> Hayashi, M., “The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention”, 29 *Ocean and Coastal Management* pp. 51, 53-65 (1995). See also Freestone, D. & Makuch, Z., *supra* note 13, p. 49, using the following three leveled terminology: Implementing, progressively developing and supplementing.

<sup>58</sup> Or as stressed by Lucchini, L. & Voelckel, M., *supra* note 13, p. 690: “L’Accord feint sans doute de se soumettre à la CMB, mais *il va au-delà*. Son autonomie par rapport à elle est réelle. Sous le prétexte, en effet, de donner plus de substance au devoir de coopération, il transforme, à différents égards ... le droit des pêches en haute mer”. In the same sense, see Edeson, W., “Towards Long Term Sustainable Use: Some Recent Developments in the Legal Regime of Fisheries”, in *International Law and Sustainable Development* (Boyle, A. & Freestone, D., eds.), Oxford, Oxford University Press, p. 165, 173 (1999), where he writes: “Overall, the UN Fish Stocks Agreement

The next part will analyze whether this last group of provisions also applies to the *pacta tertiis* rule incorporated in the 1982 Convention as a whole, and its part on fisheries on the high seas in particular.

## V The 1995 Agreement and the *pacta tertiis* rule

Combining the fact, first of all, that some provisions of the 1995 Agreement are indeed overstepping the framework set by the 1982 Convention<sup>59</sup> and, secondly, that it is especially the section of the 1995 Agreement dealing with compliance and enforcement which is most innovating,<sup>60</sup> one logically wonders whether the *pacta tertiis* rule has been modified by the 1995 Agreement. A closer analysis of this particular issue therefore appears warranted.

As shrewdly remarked by Hayashi when analyzing the 1995 Agreement, it is noteworthy that in all areas where this agreement departs from conventional international law, i.e. the 1982 Convention, the provisions are only binding on so-called state parties.<sup>61</sup> The latter have been defined by the 1995 Agreement as:

“States which have consented to be bound by this Agreement and for which the Agreement is in force”.<sup>62</sup>

A first article worth mentioning in this respect is Art. 8 (4) of the 1995 Agreement. Even though this article does not form part of the section of the 1995 Agreement on compliance and enforcement, it nevertheless has a direct bearing on the *pacta tertiis* issue and is therefore included in the present analysis. Art. 8 (4) is special for it introduces the principle that the access to the fishery resources in a particular region of the high seas is restricted to states which are either members of the competent subregional or regional fisheries management organization, or agree to apply the conservation and management measures established by such organization or,

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presents a paradox, for while it is very carefully worded to appear to do no more than implement the 1982 UN Convention, it does nonetheless introduce significant changes in the international legal regime governing the stocks to which the Agreement applies” and Freestone, D. & Makuch, Z., *supra* note 13, p. 50 concluding that “most commentators are agreed that in a number of important respects it goes considerably beyond existing customary law as well as the strict regime of the LOSC”. *But see* Orrego Vicuña, F., *supra* note 54, pp. 288-289, who argues that the progressive development characteristic of some of the provisions of the 1995 Agreement do nothing more than implement the principle of effective conservation and management, which itself does form part of the 1982 Convention. Such line of argument, however, appears to be flawed in as far as it could justify almost any new measure, upsetting that way the fundamental balance between coastal and distant-water fishing nations. Such a *carte blanche* competence was clearly not envisaged when the diplomatic conference leading up to the 1995 Agreement was convened (*see supra* note 48 and accompanying text). Moreover, it could easily undermine some of the basic tenets on which the book itself is based, such as the absolute safeguarding of the coastal state’s sovereign rights in its exclusive economic zone, since effective conservation and management seem indeed to be better served by a uniform procedure for the binding settlement of disputes based on the biological unity of the resources in question, i.e. covering the exclusive economic zone as well as the high seas. Concerning this issue, *see infra* notes 136-138 and accompanying text.

<sup>59</sup> As demonstrated in Part VI of the present paper.

<sup>60</sup> As demonstrated in Part III of the present paper.

<sup>61</sup> Hayashi, M., *supra* note 57, pp. 65-66.

<sup>62</sup> Art. 1 (2)(a) of the 1995 Agreement, which itself follows the definition of the notion of states parties to be found in the 1982 Convention (Art. 1 (2.2)) and is moreover virtually identical to the definition of the notion “party” in the 1969 Vienna Convention (Art. 2 (1)(g)).

in the absence of such regional organization, participate in conservation and management arrangements directly entered into by the interested parties. Because of its novel character, this provision appears to reflect progressive development rather than codification of present day international law. As a consequence, the argument can be sustained that even though the article in question only uses the term “States”, its application remains restricted to the parties to the 1995 Agreement.<sup>63</sup> If such line of argumentation is followed, the logical conclusion to be reached is that outside the strict conventional framework, this provision must remain ineffective since it can hardly be considered as forming part of contemporary customary international law.<sup>64</sup>

A second fundamentally new provision is to be found in Art. 21,<sup>65</sup> which forms the cornerstone of the part on compliance and enforcement of the 1995 Agreement, and maybe even of the whole agreement as such.<sup>66</sup> More particularly, paragraph one of that article needs to be singled out in this respect since it establishes the principle in international law that ships may be boarded and inspected on the high seas by member states of an existing subregional or regional organization or arrangement whether or not the flag state of the boarded or inspected vessels is

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<sup>63</sup> Hayashi, M., *supra* note 57, p. 66. See also Freestone, D. & Makuch, Z., *supra* note 13, p. 34, who state that this provision “would only be binding on parties to the [1995] Agreement, *inter se*”. But see deLone, E., “Improving the Management of the Atlantic Tuna: The Duty to Strengthen the ICCAT in Light of the 1995 Straddling Stocks Agreement”, 6 *New York University Environmental Law Journal* pp. 656, 663-664 (1998), where she states with respect to Art. 8 (4): “Non-parties to the Agreement may not fish within the area of the organization's jurisdiction. This provision is crucial as it affirmatively denies the legitimacy of the principle of freedom of the high seas and effectively puts an end to the inefficient and harmful free-rider problem”.

<sup>64</sup> Support for such conclusion can be inferred from the recent order of the International Tribunal for the Law of the Sea in the Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), concerning the request for provisional measures (as available on Internet at “<http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>” on October 29, 1999). At the heart of the dispute was a convention establishing a regional fisheries organization, namely the Convention of Southern Bluefin Tuna, multilateral, May 10, 1993, as available on Internet at “<http://www.austlii.edu.au/au/other/dfat/treaties/1994/16.html>” on October 29, 1999), to which Australia, Japan and New Zealand are the only parties. The Court, *en passant*, noted in its reasoning that non-parties to this convention had recently increased their catches in a considerable manner (para. 76), but only ordered that the three countries involved in the dispute “should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock” (*but see* on the doubtful appropriateness of such *excursus* Judge Warioba's declaration). The weak formulation of this measure has been duly stressed by Judge Laing in his separate opinion (para. 11 *in fine* reads: “The aim is salutary, but it is unclear what benefit will accrue from prescribing such dialogue, especially where the obligation is not couched in patently mandatory terms”). Even though Judge *ad hoc* Shearer reached the conclusion that the 1995 Agreement, which had been signed by the three parties concerned, constitutes “an instrument of important reference to the parties in view of its probable future application to them, and in the meantime, at least, as a set of standards and approaches commanding broad international acceptance”, in order to assess the relevance of the precautionary approach found in Art. 6 of that agreement, none of the judges even hinted at the possibility inherent in Art. 8(4) of that same agreement that Australia, Japan and New Zealand might start to exclude third parties from fishing in the region. As a consequence, Art. 8 (4) does not seem to fit the only alternative left for provisions of the 1995 Agreement to become binding on non-parties to that agreement, namely by crystalizing customary international law. See Örebech, P., Sigurjonsson, K. & McDorman, T., *supra* note 45 and accompanying text.

<sup>65</sup> This article has been described as “a pivotal evolutionary development of the international legal order of fisheries”. See Colburn, J., “Turbot Wars: Straddling Stocks, Regime Theory, and a New U.N. Agreement”, 6 *Journal of Transnational Law and Policy* (1997), as available on Internet at “<http://www.law.fsu.edu/journals/transnational/issues/6-2/colb.html>” on December 12, 1998. But see Momtaz, D., *supra* note 15, p. 690, who states: “Dans ce domaine, l'Accord n'innove pas”. Because of the many examples already to be found in state practice (*see also infra* notes 78-80 and accompanying text), this author is of the opinion that the innovative character of the 1995 Agreement is rather to be found in the fact that it elaborated a detailed set of procedures for boarding and inspection (Momtaz, D., *supra, ibid.*).

<sup>66</sup> As already remarked, this article is moreover the longest of the whole agreement. See *supra* note 31.

a member of that organization or participant in such arrangement.<sup>67</sup> This provision, at first sight, may indeed seem to negate the *pacta tertiis* rule. The 1982 Convention, following the 1958 Convention on the High Seas<sup>68</sup> in this respect, only codifies a longstanding rule of customary international law which states that on the high seas, only the flag state is competent.<sup>69</sup>

Two basic objections to this reasoning must however be raised. First of all, a careful reading of this article reveals that it only applies to

“fishing vessels flying the flag of another State Party to this Agreement”.<sup>70</sup>

Only then will it be immaterial whether or not the flag state of that boarded or inspected fishing vessel is a member of the existing subregional or regional organization or arrangement.<sup>71</sup> In other words, given the definition provided by the 1995 Agreement of the term state party,<sup>72</sup> the pretended negation of the *pacta tertiis* rule only applies to fishing vessels flying the flag of a country for which the 1995 Agreement is in force. Fishing vessels flying the flag of non-parties to the 1995 Agreement can therefore not be boarded and inspected on the high seas unless by the flag state itself. It appeared useful to formulate this consequence in a positive as well as a negative manner, for it clearly indicates that, in the supposition that the *pacta tertiis* rule is negated, this negation only applies to a certain group of states, i.e. those that agreed to be bound

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<sup>67</sup> Art. 21 (1) of the 1995 Agreement. Such right to board and inspect granted to a non-flag state may eventually, in cases of serious violations, even lead to the bringing to port of the vessel in question. See Art. 21 (2).

<sup>68</sup> Convention on the High Seas, April 29, 1958, multilateral, Art. 6 (1), 450 *United Nations Treaty Series* 82. Hereinafter cited as 1958 High Seas Convention. This convention entered into force on September 30, 1962.

<sup>69</sup> Art. 92 (1) of the 1982 Convention.

<sup>70</sup> Art. 21 (1) of the 1995 Agreement.

<sup>71</sup> As emphasized by Orrego Vicuña, F., *supra* note 54, pp. 245 and 256-257, both states have as a consequence to be a party to the 1995 Agreement, but only the inspecting state has to be a member of the existing subregional or regional organization or arrangement. See also the careful, elaborated language used by Oxman, B., “The International Commons, the International Public Interest and New Modes of International Lawmaking”, in *New Trends in International Lawmaking: International ‘Legislation’ in the Public Interest*, *supra* note 23, p. 21, 56, where he writes: “[S]tate parties to the [1995] Agreement that are members of a regional fisheries organization may board and inspect on the high seas fishing vessels of other states parties to the [1995] Agreement for violation of the organization’s measures, even if the latter states do not belong to the organization” (our emphasis). See also Wolfrum, R., “Means of Ensuring Compliance With and Enforcement of International Environmental Law”, *Recueil des Cours*, Vol. 272, p. 9, 46 (1998) and Freestone, D. & Makuch, Z., *supra* note 13, p. 36. Using similar careful wording, see Joyner, C., “Compliance and Enforcement in New International Fisheries Law”, 12 *Temple International and Comparative Law Journal* p. 271, 294 (1998), Song, Y., “Comments on Mr. Carr’s Presentation”, 24 *Ecology Law Quarterly* p. 861, 864 (1997) and Gutreuter, J., “Quota Allocation Methods in the Management of International Marine Fisheries: Future Implications”, 12 *Tulane Environmental Law Journal* p. 479, 485 (1999). Nevertheless, in a comment on Oxman’s just mentioned comments, J. Frowein generalizes the issue once again, unnecessarily blurring its very strict limits of application (*New Trends in International Lawmaking: International ‘Legislation’ in the Public Interest*, *supra* note 23, p. 102). See also the confusing language used by McLaughlin, R., “Settling Trade-Related Disputes over the Protection of Marine Living Resources: UNCLOS or the WTO?”, 10 *Georgetown International Environmental Law Review* p. 29, 93 (1997), who refers for instance to Art. 30 when addressing the issue of what kind of actions state parties to the 1995 Agreement can take with respect to recalcitrant states which are not a party to that instrument. General statements, such as “[c]ontrol measures taken in the framework of regional mechanisms acquire also an obligatory character with respect to ships of third states” (Sorokin, A., “Nekotorye aspekty razvitiia i sovershenstvovaniia konventsii OON po morskomu pravu 1982 goda” (Some Aspects of the Development and Improvement of the 1982 UN Convention on the Law of the Sea), 35-36 *Rybatkie Novosti* (Fishing News) (1998)), should therefore be avoided as much as possible.

<sup>72</sup> See *supra* note 62 and accompanying text.

by the 1995 Agreement. But even scaled down to these more limited proportions, the submission that Art. 21 (1) violates the *pacta tertiis* rule seems difficult to maintain.

This brings us to our second basic objection. If one rephrases the original submission more carefully, based on a closer reading of Art. 21 (1), by saying that the *pacta tertiis* rule is only violated with respect to states bound by the 1995 Agreement, the fundamental question needs to be asked whether one can still really speak of a violation in this case.<sup>73</sup> The fact remains, indeed, that states, party to the 1995 Agreement will nevertheless be bound by regional measures to which they have not agreed.<sup>74</sup> But how can one pretend to violate a basic principle of international law, if one has agreed beforehand, out of his own free will, to change that very same principle. Unless peremptory norms of international law are involved, which does not appear to be the case, no good reasons seem to exist as to why states can not, *inter se*, agree to accept certain very specific exceptions to the exclusive jurisdiction of the flag state on the high seas. State practice indicates that examples do exist,<sup>75</sup> on a bilateral<sup>76</sup> as well as on a multilateral level.<sup>77</sup> Fisheries do not form an exception in this respect, as state practice appears to be abundant on the bilateral<sup>78</sup> and the regional<sup>79</sup> level. Art. 21 of the 1995 Agreement consequently perfectly fits this state practice,<sup>80</sup> be it that, for the first time, the bilateral and regional approaches are replaced by a multilateral framework agreement with universal aspirations.<sup>81</sup> This explains why the present paper starts from the premise that the issue of the internal *pacta tertiis* effect is not really relevant.<sup>82</sup>

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<sup>73</sup> This question in other words addresses the issue of the “internal *pacta tertiis* effect” as described above. See *supra* note 42 and accompanying text.

<sup>74</sup> Hayashi, M., *supra* note 35, p. 27, who qualifies the verb “bound” by the word “indirectly”.

<sup>75</sup> To take but the example of Belgium, see de Pauw, F., “L’exercice de mesures de police en haute mer en vertu des traités ratifiés par la Belgique”, in *La Belgique et le droit de la mer*, 3 Collection de droit international (Centres de droit international de l’Institut de Sociologie de l’Université de Bruxelles et de l’Université de Louvain); Actes du Colloque conjoint des 21 et 22 avril 1967), Bruxelles, Editions de l’Institut de Sociologie de l’Université Libre de Bruxelles, pp. 121-150 (1969).

<sup>76</sup> Exchange of Notes concerning Cooperation in the Suppression of Unlawful Importation of Narcotic Drugs into the United States, United Kingdom-United States, November 13, 1981, *United Kingdom Treaty Series* N 8 (1982), Cmnd 8470. This bilateral agreement, as can be inferred from its title, only allowed one party (the United States) to interfere with vessels flying the flag of the other party (the United Kingdom) suspected of illegal trafficking of narcotics. The United States appears to have concluded a great number of similar conventions, especially with countries in the Caribbean region. See Warner, R., “Jurisdictional Issues for Navies Involved in Enforcing Multilateral Regimes Beyond National Jurisdiction”, 14 *International Journal of Marine and Coastal Law* p. 321, 327 (1999). But see Treaty to Combat Illicit Drug Trafficking at Sea, March 23, 1990, Italy-Spain, Art. 5, reprinted in 29 *Law of the Sea Bulletin* pp. 77-80 (1995), where mutual rights and obligations were accepted in this respect. This treaty entered into force on May 7, 1994.

<sup>77</sup> See for instance the Convention for the Protection of Submarine Cables, March 14, 1884, multilateral, Art. 10, as reprinted in *United Nations Legislative Series* I, pp. 251-255 (1951). This convention entered into force on March 1, 1888.

<sup>78</sup> See for instance the Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean and the Bering Sea, March 2, 1953, Canada-United States, Art. 2, 222 *United Nations Treaty Series* 77, as amended. This convention entered into force on October 28, 1953. For a more recent example, see Memorandum of Understanding on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215, December 20, 1991, China-United States, as mentioned by Balton, D., *supra* note 52, p. 146 note 24.

<sup>79</sup> See for instance the list of regional fishery conventions breaking the flag state monopoly on the high seas mentioned by Rayfuse, R., “Enforcement of High Seas Fisheries Agreements: Observation and Inspection under the Convention on the Conservation of Antarctic Marine Living Resources”, 13 *International Journal of Marine and Coastal Law* p. 579, 580 note 4 and accompanying text (1998).

<sup>80</sup> See Balton, D., *supra* note 52, p. 151 note 103.

<sup>81</sup> Treves, T., “Intervention en haute mer et navires étrangers”, 41 *Annuaire Français de Droit International* p. 651, 674 (1995). See also Hayashi, M., *supra* note 35, pp. 10 and 27.

<sup>82</sup> See *supra* note 43 and accompanying text.



Taken together, these objections boil down to the ascertainment that the consensual nature of international law has been fully respected by Art. 21 (1).<sup>83</sup> States are only bound by what they freely committed themselves to.<sup>84</sup> For states only party to the 1982 Convention, the exclusive jurisdiction of the flag state will continue to apply. For those countries also party to the 1995 Agreement, the latter will apply as a *lex specialis*, i.e. boarding and inspection of fishing vessels, and eventually bringing them to port, will be possible by ships of other states than the flag state, but nevertheless limited to those of states for which the 1995 Agreement has entered into force. The same regime also applies to fishing vessels of states only bound by the 1995 Agreement and not by the 1982 Convention. Finally, with respect to states which are party to neither international instrument just mentioned, customary law will continue to apply.

With respect to this latter category, it must be admitted that certain exceptions to the rule of the exclusive competence of a particular flag state for acts committed on the high seas are to be found in customary international law, such as the right of boarding foreign ships if reasonable grounds exist that the latter are engaged in piracy or slave trade.<sup>85</sup> Only in the case of piracy does such exception extend to the right of seizure and institution of legal procedures.<sup>86</sup> Acts of piracy are indeed generally recognized to give rise to universal jurisdiction under international law.

The fisheries issue, on the other hand, is not believed to fit this category of customary law exceptions. It must be remembered that only the most serious actions, disapproved by the world community as a whole, can give rise to such universal jurisdiction. It will be sufficient in this respect to refer to the fact that hijacking of airplanes is not readily accepted to fit this restricted category of exceptions under contemporary international law.<sup>87</sup> There appears to exist no good reason why the 1988 Rome convention aimed at the suppression of similar acts against ships,<sup>88</sup>

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<sup>83</sup> This particular point, as demonstrated by the *travaux préparatoires*, was not even questioned by the coastal states, as clearly expressed by one of its most active members, namely Norway, towards the end of the conference: "All parties to the convention that we are now negotiating should be subjected to enforcement, whether they are parties to the relevant regional organization or arrangement or not. Enforcement will thus take place *inter partes*, on the basis of consent. This would imply no deviation from international law." Statement by Mjaaland on April 3, 1995, as reprinted by Treves, T., *supra* note 81, p. 669 note 64.

<sup>84</sup> This seems also to be the conclusion reached by Fitzmaurice, M., "Modifications to the Principles of Consent in Relation to Certain Treaty Obligations", 2 *Austrian Review of International & European Law* pp. 275, 280 and 296 (1997).

<sup>85</sup> As codified in Art. 22 of the 1958 High Seas Convention and Art. 110 of the 1982 Convention. The latter convention also mentions ships engaged in unauthorized broadcasting. It is rather doubtful that this latter category has at present a customary law basis. Given the novel character of some bases of jurisdiction contained in the jurisdiction clause (*see* especially Art. 109 (3)(d and e) of the 1982 Convention), which will of course most often prove to be the most practical method to ensure effective control and may result in the seizure of a vessel flying the flag of a third state on the high seas (Art. 109 (4)), this provision can hardly be considered as forming part of customary international law since the latter does not permit such bases for creating jurisdiction. *See Oppenheim's International Law*, *supra* note 20, p. 764. Reaching the same conclusion, *see* also Reuland, R., "Interference with Non-national Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction", 22 *Vanderbilt Journal of Transnational Law* p. 1161, 1227 (1989), who furthermore stresses: "The provision granting the flag-state jurisdiction over non-national radio broadcasters is uncontroversial if intended merely to apply to treaty parties *inter se* ... The right to exercise jurisdiction over radio pirates is a conventional right only and therefore is not opposable to states not party to the 1982 Convention" (*ibid.*).

<sup>86</sup> *See* Art. 19 of the 1958 High Seas Convention and Art. 105 of the 1982 Convention.

<sup>87</sup> Higgins, R., *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, pp. 63-65 (1994).

<sup>88</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, multilateral, reprinted in 27 *International Legal Materials* pp. 668-690 (1988). This convention

and which is said to have been closely modeled on these conventions relating to aircraft,<sup>89</sup> should be treated differently in this respect. When related to the high seas, it could also be mentioned in the same thrust of ideas that Italy's highest court rejected in 1992 the idea that a customary rule of international law had emerged which allowed high seas intervention with respect to foreign vessels suspected of drug trafficking.<sup>90</sup>

Even though it might appear the ultimate solution to the problem,<sup>91</sup> it seems extremely doubtful at present that fishing on the high seas, which does not respect the conditions of access agreed upon by certain others, might fit this category of instances giving rise to universal jurisdiction and qualifies as an exception, embedded in customary international law, to the rule of the exclusive flag state jurisdiction on the high seas. The carefully balanced practice of states when concluding specific agreements containing derogations from the monopoly of flag state jurisdiction on the high seas, be it on a bilateral, regional or universal level,<sup>92</sup> sustains, according to Treves, this submission. He concludes his study on the intervention on the high seas and foreign ships in the following manner:

“Le soin avec lequel les Etats en négocient les contours en tenant compte des différentes situations semble confirmer qu'ils sont soucieux de ne pas permettre qu'on puisse tirer des exceptions qu'ils acceptent des arguments pour faire valoir qu'une règle coutumière correspondant à ces exceptions est en train de se former.”<sup>93</sup>

Instead, it has been stressed that this Art. 21 introduces a mere exception to the relevant basic principles of international law enshrined in the 1982 Convention,<sup>94</sup> not recognized by customary international law and consequently it remains a mere

entered into force on March 1, 1992.

<sup>89</sup> Brown, E., *The International Law of the Sea*, Vol. 1, Aldershot, Dartmouth, p. 306 (1994).

<sup>90</sup> As mentioned by Treves, T., *supra* note 81, p. 655 note 18 and accompanying text. It should be remembered that the 1958 High Seas Convention remained silent on the issue and the Art. 108 of the 1982 Convention does not empower a state to interfere with ships flying the flag of another state without the latter's consent. However, as mentioned *supra* note 76, states recently started to create conventional exceptions to this rule on a bilateral basis.

<sup>91</sup> Teece, D., “Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High-Seas Environment?”, 8 *Colorado Journal of Environmental Law and Policy* pp. 89, 123-124 (1997).

<sup>92</sup> As already mentioned *supra* notes 76-79 and accompanying text.

<sup>93</sup> Treves, T., *supra* note 81, p. 675. Burke, focusing more particularly on the fishery-related agreements, comes to a similar conclusion: “[T]he major proposition reconfirmed by these agreements is that flag states consider these agreements to be required for the purpose of non-flag state involvement, even to the limited degree in these understandings”. Burke, W., *The New International Law of Fisheries: UNCLOS 1982 and Beyond*, Oxford, Clarendon Press, p. 338 (1994).

<sup>94</sup> See Davies, P. & Redgwell, C., “The International Legal Regulation of Straddling Fish Stocks”, 67 *British Yearbook of International Law* p. 199, 248 (1996) who state: “Whilst the Law of the Sea Convention does contain very limited exceptions to the exclusivity of that jurisdiction on the high seas, these do not apply to fisheries matters.” The argument could of course be made that Art. 21 is fully consistent with the 1982 Convention, because the latter itself provides for the possibility of conventional exceptions to the monopoly of the flag state jurisdiction on the high seas in its Art. 92 (1). As emphasized by Vigneron, G., *supra* note 36, p. 600 note 107, and implied on p. 588. But whether this corresponds with the strict mandate given to the diplomatic conference which elaborated this document (*see supra* note 48 and accompanying text), is a totally different question. It appears obvious from the *prolegomenae* of this conference, that the latter was not given the task to concentrate on elaborating exceptions to the conventional regime. Relying on Art. 92 (1), or for that matter on Art. 116 (a), in this respect would have provided the negotiators with a *carte blanche*, which was most certainly not the case, as already stressed above (*see supra* note 58 and further references to be found there). Leaving aside the issue of whether Art. 21 of the 1995

“conventional rule and as such will be applicable only to the parties to the 1995 Agreement. These measures may not therefore be enforced against nonparties unless they have consented to their application”.<sup>95</sup>

As a result, since Art. 21 (1) most certainly has not crystallized as customary international law yet, this means that, outside a specific conventional framework,<sup>96</sup> only the flag state will remain competent.<sup>97</sup>

A last article to be specifically mentioned in this respect, is Art. 23 (1-2). This article not only grants the port state the right, but also bestows it with the obligation to take measures to promote the effectiveness of subregional, regional and global conservation and management measures. To this end, the port state may inspect documents, fishing gear and catch on board of fishing vessels when the latter are voluntarily in its ports or offshore terminals. The application of port state control with respect to fisheries matters has been labeled as “[a]nother major jurisdictional advance” of the 1995 Agreement.<sup>98</sup> Port state control, as a means of enforcement, was introduced in the field of marine pollution by means of the 1982 Convention.<sup>99</sup> No such application was however envisaged by the latter instrument with respect to fisheries matters.<sup>100</sup> As rightly remarked by Vignes, it is therefore quite troubling to find in Art. 23 (1) the reference “in accordance with international law” when establishing the principle that port states have the right and duty to take measures in this respect.<sup>101</sup> Several delegations during the negotiations apparently criticized this broadening of the field of application from the environmental sphere to the field of fisheries,<sup>102</sup> while scholarly writings even called it a misapplication of the port state

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Agreement is in conformity with, or rather derogates from the 1982 Convention, this author concurs with the fact that this Art. 21 is a “far-reaching exception” to the flag state principle enshrined in the 1982 Convention (*ibid.*, pp. 588 and 610), representing a “significant development” (*ibid.*, p. 610) by granting states “unprecedented authority” (*ibid.*, p. 588) to board foreign ships.

<sup>95</sup> Tahindro, A., *supra* note 28, p. 39.

<sup>96</sup> The 1982 Convention does not provide such a framework. In the absence of a specific agreement, moreover, no state has the authority at present to enforce, unilaterally, a multilaterally agreed standard. As stressed by Davies, P. & Redgwell, C., *supra* note 94, p. 234.

<sup>97</sup> Rayfuse, R., *supra* note 79, pp. 603-604, when addressing the problem of non-application of the Convention on Conservation of Antarctic Marine Living Resources (hereinafter cited as CCAMLR) to non-members, points at the 1995 Agreement as possible alleviating factor. However, she underlines that it will only enlarge to field of application of the CCAMLR inspection system to non-members of CCAMLR which are party to the 1995 Agreement. About the most probable practical effect of this possibility, *see infra* note 114.

<sup>98</sup> Freestone, D. & Makuch, Z., *supra* note 13, p. 37.

<sup>99</sup> Art. 218 of the 1982 Convention.

<sup>100</sup> According to Orrego Vicuña, F., *supra* note 54, pp. 49-50, who’s book is exactly guided by the leitmotiv that environmental concerns have lately been added to the high seas fishing debate (*see* for instance pp. 2, 11-12, 52, 78, 145-170 ...), emphasizes that a spill-over effect can be discerned from the former area into the latter with respect to questions of compliance and enforcement of obligations. The precedent set by port state jurisdiction in Art. 218 of the 1982 Convention with respect to marine pollution proved to be of such importance according to this author that it was utilized later on in the area of high seas fisheries enforcement “thereby further contributing to the development of the law of high seas fisheries”.

<sup>101</sup> Vignes, D., *supra* note 55, p. 118. *See* also Gherari, H., “L’Accord du 4 août 1995 sur les stocks chevauchants et les stocks de poissons grands migrateurs”, 100 *Revue Générale de Droit International Public* p. 367, 382 (1996), who finds this reference to international law “pas très éclairante”. Maybe reference can be made here to the possible trade law issues which the application of the principle of port state jurisdiction in a sector such as fisheries might entail. *See* Freestone, D. & Makuch, Z., *supra* note 13, pp. 38-41.

<sup>102</sup> As mentioned by Hayashi, M., *supra* note 57, p. 63. *See* also Momtaz, D., “La conservation et la gestion des stocks de poissons chevauchants et grands migrateurs”, 7 *Espaces et Ressources Maritimes* p. 47, 56

concept.<sup>103</sup> As a result, the content of this particular provision changed quite substantially during the course of the negotiations leading up to the 1995 Agreement.<sup>104</sup>

These elements once again clearly point in the direction that these provisions do not form part of customary international law.<sup>105</sup> The fact that Canada tried to include similar provisions in its bilateral fishing agreements does not seem sufficient evidence to undermine the correctness of this statement.<sup>106</sup> It seems relevant in this respect to refer back to the direct source of inspiration which served as basis for this provision, namely Art. 218 of the 1982 Convention, which has not reached customary status either.<sup>107</sup> Unless a country explicitly agrees by subscribing to the 1995 Agreement, this particular provision does not bind non-parties.

Still other articles could be added to this list of provisions which seem to infringe the *pacta tertiis* rule. For instance, Art. 8 (3) providing that all states harvesting straddling or highly migratory fish stocks on the high seas have a duty to apply the conservation and management measures adopted by the subregional or regional fisheries management organization, Art. 17 (2) obliging non-members of such organization as well as non-participants in arrangements directly entered into by two or more states for the same purpose not to authorize its vessels to harvest these stocks, and Art. 17 (3) obliging members to request non-members to cooperate fully with such organization or arrangement with respect to the implementation of the measures prescribed by them, all have the common feature of implying certain duties on third states in one form or another. The bottom line, nevertheless, appears to remain that

“[s]uch language is designed to create obligations for non-parties to the 1995 Agreement, but mere semantics cannot overcome the principle that treaties are only binding upon ratifying states”.<sup>108</sup>

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(1993).

<sup>103</sup> Barston, R., “United Nations Conference on Straddling and Highly Migratory Fish Stocks”, 19 *Marine Policy* p. 159, 116 (1995).

<sup>104</sup> See de Yturriaga, J., *The International Regime of Fisheries*, *supra* note 47, pp. 215-216. See also Orrego Vicuña, F., *supra* note 54, p. 261. A similar evolution already characterized the genesis of Art. 218 of the 1982 Convention. See for instance Keselj, T., “Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding”, 30 *Ocean Development and International Law* pp. 127, 129-131 (1999) for a good overview.

<sup>105</sup> See for instance Hayashi, M., *supra* note 57, p. 63, who states that the article in question “is in no way to be considered as part of customary law”. See also Tahindro, A., *supra* note 28, p. 41, who concludes: “Therefore, it is undeniable that this new regime is binding only on those states which accept it by becoming parties to the Agreement, and cannot be considered as part of customary international law”. *But see* Orrego Vicuña, F., *supra* note 54, pp. 265-266.

<sup>106</sup> Vignes, D., *supra* note 55, p. 118. Besides the voluntary 1995 F.A.O. Code of Conduct, which provides in its Art. 8 (3)(2) that the port state “should provide assistance to the flag state as is appropriate” in case of noncompliance with subregional, regional or global conservation and management measures, the only possible link appears to be the F.A.O. 1993 Compliance Agreement, where a corresponding provision is to be found. (Art. 5 (2)). This is however a watered-down version of the provision later to be found in the 1995 Agreement, since the port state must notify the flag state if the former has reasonable grounds for believing that the objectives of the agreement have been undermined by a flag state’s fishing vessel. The article then continues that the parties may make arrangements for the port state to “undertake investigatory measures as may be considered necessary”. The F.A.O. 1993 Compliance Agreement, as already mentioned (*supra* note 33), has however not yet entered into force.

<sup>107</sup> McDorman, T., “Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention”, 28 *Journal of Maritime Law and Commerce* pp. 305, 307 and 315 (1997). See also Birnie, P. & Boyle, A., *International Law and the Environment*, Oxford, Clarendon Press, p. 282 (1992).

<sup>108</sup> Örebech, P., Sigurjonsson, K. & McDorman, T., *supra* note 45, p. 124. See also the statement by these authors, already mentioned before (*supra* note 45 and accompanying text).

## VI Conclusions

This paper as a consequence cannot but reach the conclusion that the argument according to which the 1995 Agreement constitutes a violation of the *pacta tertiis* rule appears not totally convincing. On the contrary, a careful analysis seems to demonstrate that this agreement does not create obligations for third states, but only for the states parties, i.e. those states which have consented to be bound by the 1995 Agreement and for which this document entered into force.<sup>109</sup>

Sometimes this is explicitly stated by the terms of the 1995 Agreement, in which case there is not the slightest doubt. In other instances the text of the agreement is not that explicit, but even then the context appears to suggest that its drafters did not intend to break new ground with respect to the *pacta tertiis* rule. Lucchini and Voelckel, for instance, draw attention to another part of the 1995 Agreement which is specifically devoted to the issue of non-parties to it, namely Part IX (Non-Parties to this Agreement). The key provision here is Art. 33 (2),<sup>110</sup> which has been characterized as:

“Une formule générale et évasive”.<sup>111</sup>

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<sup>109</sup> See *supra* note 62 and accompanying text. To pretend that the Canadian-Spanish fishing dispute could have been prevented early 1995 if the 1995 Agreement had been in force at that time (see Shavloske, P., “The Canadian-Spanish Fishing Dispute: A Template for Assessing the Inadequacies of the United Nations Convention on the Law of the Sea and a Clarion Call for Ratification of the New Fish Stock Treaty”, 7 *Indiana International and Comparative Law Review* p. 223, 243 (1996), Brown, H., “The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of International Environmental Law and the Conference's Final Agreement”, 21 *Vermont Law Review* p. 547, 588 (1996) and Schaefer, A., “1995 Canada-Spain Fishing Dispute (The Turbot War)”, 8 *Georgetown International Environmental Law Review* p. 427, 443 (1996)), only seems to make sense if one subsumes that Canada and Spain had duly ratified that document and were actually bound by it at the time of the incident (as for instance implied by the final appeal made by the first mentioned author for countries to ratify this convention (Shavloske, P., *ibid.*, p. 244) but taken for granted by the last author, according to whom apparently the 1995 Agreement had already entered into force (Schaefer, A., *ibid.*, p. 443 and note 35), *quod non* (see *infra* note 114)). The latter prerequisites are for instance duly stressed by McDorman, T., “The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention”, 35 *Canadian Yearbook of International Law* p. 57, 59 (1997). But see Kedziora, D., “Gunboat Diplomacy in the Northwest Atlantic: the 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High[ly] Migratory Fish Stocks”, 17 *Journal of International Law & Business* pp. 1132, 1156-1157 (1997), who criticizes major shortcomings of the 1995 Agreement, but finds them rather in the non-compliance by members to the regional fishery organizations themselves, than in the non-compliance by non-member states, and following a similar reasoning Faith, J., “Enforcement of Fishing Regulations in International Waters: Piracy or Protection, Is Gunboat Diplomacy the Only Means Left?”, 19 *Loyola of Los Angeles International & Comparative Law Journal* p. 199, 220 (1996), who is of the opinion that re-flagging becomes a non-issue under the 1995 Agreement because all fishermen are required to cooperate with the regional management efforts. See also Christopherson, M., “Toward a Rational Harvest: The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species”, 5 *Minnesota Journal of Global Trade* pp. 357, 373-378 (1996), Ardia, D., *supra* note 32, pp. 542-543, and Smith, K., “Highly Migratory Fish Species: Can International and Domestic Law Save the North Atlantic Swordfish?”, 21 *Western New England Law Review* pp. 5, 35-43 (1999), who, when assessing the effectiveness of the 1995 Agreement, do not find the non-compliance by non-members issue worth mentioning in their evaluation.

<sup>110</sup> This provision reads: “States Parties shall take measures consistent with this Agreement, and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this Agreement”.

<sup>111</sup> Lucchini, L. & Voelckel, M., *supra* note 13, p. 675. With respect to this particular provision, these authors raise the question: “Qu’est-ce que dissuader et comment dissuader? La question se trouve posée; L’Accord ne lui apporte pas de réponse”. Nevertheless, it must be admitted that these authors, later on, reach the following conclusion with respect to Art. 21 (1) of the 1995 Agreement: “[C]ontraire à la loi du pavillon - si longtemps

Such a provision can hardly be considered as supporting the idea that the 1995 Agreement by itself creates legal obligations on non-parties.<sup>112</sup> On the contrary.<sup>113</sup>

It appears therefore more appropriate to adhere to the point of view that the 1995 Agreement, in strict application of the *pacta tertiis* rule, does not create any legal obligations for third states. Countries having difficulty with its content, as a consequence, should seriously consider the option of not becoming a party to it.<sup>114</sup> They should indeed realize that by

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intouchable - elle l'est également à la règle '*res inter alios acta*', puisque les navires des Etats tiers à l'organisme ou à l'arrangement n'échappent pas, de ce fait, à ces mesures". It appears, however, that the authors are no longer addressing the external *pacta tertiis* effect, but rather the internal one, as explained above. See *supra* notes 41-42 and accompanying text.

<sup>112</sup> Indeed, according to Anderson, D., *supra* note 38, p. 473, this provision "would include the prohibition of landings in their ports of catches taken on the high seas contrary to agreed conservation measures". See also the recently (November 1997) adopted resolution by the General Council of the Northwest Atlantic Fisheries Organization (hereinafter cited as N.A.F.O.) which contained a scheme to promote compliance by non-contracting party vessels with the conservation and enforcement measures established by N.A.F.O., which provided similar kind of measures coupled to a prior inspection in order to check compliance with N.A.F.O. measures. See United Nations, *Report of the Secretary-General: Oceans and the Law of the Sea* (U.N. Doc. A/53/456), October 5, 1998, paras. 135 and 268-270. This is however a far cry from imposing legal obligations on third states contrary to the international law rules governing jurisdiction, since it appears to be an act of sovereignty to grant foreign vessels the right of access to ports, the only requirement being that one may not discriminate among foreign ships in this respect. See O'Connell, D., *The International Law of the Sea*, Vol. 2, Oxford, Clarendon Press, p. 848 (1984). Beyond this discretionary power to open or close ports, as mentioned by O'Connell, a state seems also to possess the right under customary international law to prescribe conditions for access for as long, once again, the latter are applied on a non-discriminatory basis. See Churchill, R. & Lowe, V., *The Law of the Sea*, Manchester, Manchester University Press, pp. 52-53 (1988). To impose such prohibition on fish landing or even inspections on fishing vessels, therefore, does not form an exception to the basic principles of international law governing the subject. See also Orrego Vicuña, F., *supra* note 54, pp. 261-266. Nevertheless, even a further coordinated development of such ideas in international and regional organizations has been resisted by states. See Barston, R., "The Law of the Sea and Regional Fisheries Organizations", 14 *International Journal of Marine and Coastal Law* p. 333, 352 (1999). This author also mentions that the same resistance is to be noted with respect to trade sanctions as a possible mechanism to urge non-contracting parties to comply. The first regional fisheries organization to do so was the International Commission for the Conservation of Atlantic Tunas. See Carr, C., *supra* note 37, p. 857, who also mentions the same objections raised concerning the prohibition of discriminatory trade measures in violation of the rules of the World Trade Organization (*ibid.*, p. 858 note 55). The United States, on the other hand, is a strong supporter of such kind of measures, as indicated by the statement of M. West, U.S. Deputy Assistant Secretary of Oceans on September 15, 1998 (as mentioned in "Contemporary Practice of the United States Relating to International Law", 93 *American Journal of International Law* pp. 494-496 (1999)). For a good synthesis on the legal issues involved when using trade restrictions as method for enforcing compliance with environmental standards, see Wolfrum, R., *supra* note 71, pp. 58-77.

But see Vice, D., "Implementation of Biodiversity Treaties: Monitoring, Fact-finding, and Dispute Resolution", 29 *New York University Journal of International Law and Politics* p. 577, 624 (1997), who when explicitly referring to Art. 33 (2) concludes: "Non-parties may also be subject to these provisions".

<sup>113</sup> See Brownlie, I., *supra* note 21, p. 261 note 34, who, based on a similar general provision to be found in the Antarctic Treaty, namely in its Art. X, concludes: "This provision could be read as a clear admission that non-parties are not bound by the treaty itself." Or as applied to the 1995 Agreement, see Teece, D., *supra* note 91, pp. 121-122.

<sup>114</sup> As already implied by Rayfuse, R., *supra* note 79, p. 604, and Picard, J., "International Law of Fisheries and Small Developing States: A Call for the Recognition of Regional Hegemony", 31 *Texas International Law Journal* p. 317, 341 (1996), when these authors submit respectively that non-members to either CCAMLR, or ICCAT, will not likely be party to the 1995 Agreement either. Such states will most probably make use of this possibility to avoid entering into unwanted commitments. It is moreover highly relevant to note that the early predictions suggesting that the entry into force of the 1995 Agreement would take place late 1996 or 1997 (see Mack, J., "International Fisheries Management: How the U.N. Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing on the High Seas", 26 *California Western International Law Journal* p. 313, 332

adhering to this agreement, they commit themselves to rules and obligations which in some important areas surpass the strict framework of the 1982 Convention.

If not by way of treaty law, can it be sustained that third states may nevertheless be bound by the above-mentioned principles of the 1995 Agreement under customary international law? Once again, the answer appears to be negative. The *contra legem* part, as indicated above, is completely new and does not at present generate the necessary practice of states for this option to be even seriously considered. With respect to the *secundum* and *praeter legem* part of the 1995 Agreement, the same argumentation may not necessarily apply. Nevertheless, from a theoretical point of view, it appears most difficult to sustain that these provisions will form one day part of customary international law. The main reasoning behind this submission is that customary law does not appear to be an appropriate vehicle to develop highly technical and concrete rules such as the ones contained in the 1995 Agreement.<sup>115</sup> It might suffice in this respect to refer by way of example to the obligations of flag states with respect to fishing vessels flying their flag.<sup>116</sup>

The only manner in which the novel principles enshrined in this agreement can be reasonably promoted in the future, is by securing as many ratifications as possible, preferably from a representative mix of countries, but especially including high seas fishing states.<sup>117</sup>

Is there then no hope at all to solve the free rider problem with respect to the law of the sea? As far as the 1982 Convention is concerned, the future looks rather bright in this respect. The almost universal character of that convention, as reflected in the high number of states parties bound by it, makes it possible for the rules of reference contained in that convention to have a maximum outreach and possibly extend the field of application of certain conventional

(1996)), proved to be incorrect. At present, only 24 states have ratified the 1995 Agreement, including moreover, as will be seen *infra* note 117, only very few distant water fishing nations (as available on Internet at “<http://www.un.org/Depts/los/los164st.htm>” on October 29, 1999). Ten states have moreover made declarations, the exact nature of which is not always immediately clear (as available on Internet at “<http://www.un.org/Depts/los/los164decl.htm>” on October 29, 1999).

<sup>115</sup> As stressed by Orrego Vicuña, F., *supra* note 54, p. 215. Exception made of some basic principles of the 1995 Agreement, the detailed rules will have more difficulty of evolving into customary law according to this author, especially those relating to institutions or dispute settlement.

<sup>116</sup> See the detailed nature of Art. 18 of the 1995 Agreement. Even though Tahindro, A., *supra* note 28, p. 36 builds up an argument according to which Arts. 18 and 19 of the 1995 Agreement might well be considered as forming part of customary international law, such line of reasoning is contested by Orrego Vicuña, F., *supra* note 54, p. 240.

<sup>117</sup> As stressed by Davies, P. & Redgwell, C., *supra* note 94, p. 270, when they write: “The success of these measures will of course depend upon widespread participation by high seas fishing States in the Agreement where these additional inspection powers are grounded.” At present, only four major fishing nations have ratified the agreement, namely (in chronological order): The United States, Norway, Iceland and the Russian Federation (*see supra* note 114). The lip service paid to this agreement by the different actors in this field at present (*see* Vigneron, G., “The Most Recent Efforts in the International Community to Implement the 1995 United Nations Straddling Fish Stocks Agreement”, *Colorado Journal of International Environmental Law and Policy* pp. 225-245 (1998)) is simply not sufficient as can be inferred from the illegal, unregulated and unreported fishing on the high seas which is today considered to be one of the most significant problems affecting fisheries (*see* the unedited, advance text of the latest report of the Secretary-General of the United Nations, entitled “Oceans and the Law of the Sea”, to the 45<sup>th</sup> General Assembly, para. 249, as available on Internet at “<http://www.un.org/Depts/los/A54429ad.htm>”). The optimism expressed by Grzybowski, D., Deitch, J., Dwyer, S., Eichhorn, D., Lutness, B. & Ternieden, C., “Historical Perspective Leading Up to and Including the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks”, 13 *Pace Environmental Law Review* p. 49, 72 (1995), where they state that “[i]n the near future, the agreement will be completed and conservation and use of the world's species of fish will be at optimum levels for all to enjoy”, therefore, seems unfounded.

provisions, especially in the field of marine pollution, such as MARPOL 73/78<sup>118</sup> or SOLAS,<sup>119</sup> to ships flying the flag of states which may not be a party to these latter conventions, but which, by accepting the 1982 Convention and the rules of reference contained therein, will nevertheless have agreed to be bound by these so-called generally accepted international rules and standards.<sup>120</sup>

By placing the center of decision with respect to the conservation and management of straddling and highly migratory fish stocks in the hands of subregional or regional fisheries management organizations and arrangements, it could be argued that a similar reasoning could be made with respect to the 1995 Agreement. By becoming a party to it, the argument could be sustained that states in a way consented beforehand to accept and implement the measures established through these organizations or arrangements. It is probably in this light that one has to understand the conclusion reached by Tahindro:

“Ultimately, the measure of this success will depend on its rapid ratification by a large number of states, which would compel nonparties to take into account its conservation and management scheme as well as the conservation and management measures established at subregional or regional levels by fisheries management bodies or arrangements in accordance with the provisions of the Agreement”.<sup>121</sup>

Unless a massive number of countries ratify this 1995 Agreement, this rule of reference to regional organizations will remain difficult, if not impossible, to apply against third states.<sup>122</sup> At present this perspective however looks not too bright.<sup>123</sup>

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<sup>118</sup> This system was based on two documents: The International Convention for the Prevention of Pollution from Ships, November 2, 1973, 12 *International Legal Materials* pp. 1319-1444 (1973) and the Protocol to the Convention, February 17, 1978, reprinted in 17 *International Legal Materials* pp. 546-578 (1978). This conventional system entered into force on October 2, 1983.

<sup>119</sup> Convention on the Safety of Life at Sea, November 1, 1974, reprinted in 14 *International Legal Materials* pp. 959-978 (1975), as amended. The basic agreement entered into force on May 25, 1980.

<sup>120</sup> As already explained *supra* note 50. International law does not prohibit such a construction (*see* Sohn, L., “Generally Accepted’ International Rules”, 61 *Washington Law Review* p. 1073, 1080 (1986)), nor do the more technical rules of treaty law (*see* Fitzmaurice, M., *supra* note 84, p. 293).

<sup>121</sup> Tahindro, A., *supra* note 28, p. 50.

<sup>122</sup> *But see* Balton, D., *supra* note 52, p. 140 who states: “Ultimately, in a world of sovereign states, each nation has the right to determine for itself whether to become party to the agreement. Like other treaties, the agreement cannot compel states to adhere to it. Unlike most other treaties, however, the agreement elaborates on a framework of obligations built by the 1982 Convention that are generally accepted as reflecting customary international law”. Even in the supposition that the fishery provisions concerning straddling and highly migratory fish stocks of the 1982 Convention are considered to form part of customary international law, which does not appear to be evident given the widely diverging positions of coastal and fishing nations on this issue as evidenced during the negotiations of the 1995 Agreement, it would appear dangerous to rely on this argument given the novel character of some of its provision as demonstrated above. It is therefore submitted that the concluding remark of Balton in this respect, namely that “[i]n time, perhaps soon, the provisions of the agreement may themselves achieve the same status” brings one back to square one: Unless the 1995 Agreement will be adhered to by a large majority of states representing coastal as well as high seas fishing states, the possible customary nature of its novel provisions remains difficult to conceive.

<sup>123</sup> As clearly stressed by the contribution of non-government organizations to the first report of the Secretary-General of the United Nations to the General Assembly, at the latter’s request (*see* A/RES/51/35 of January 17, 1997) on further developments relating to the 1995 Agreement. Almost all of them showed concern about the extremely slow pace of ratification, the total lack of provisional application, nevertheless explicitly provided by the agreement, and the apparent unwillingness of major fishing nations to adhere to it. *See* United Nations, *Report of the Secretary-General, Oceans and the Law of the Sea: Agreement for the Implementation of the Provisions of the*



It is repeated once again that the use of this method of rules of reference may help to solve to some extent the free rider problem, but is not really by itself a negation of the *pacta tertiis* rule. The consensual nature of international law is respected since these countries first accept the rule of reference, before becoming bound by conventional provisions referred to, even when the latter are not directly binding on them as a matter of treaty law.

Does this mean that the *pacta tertiis* rule is still standing immutable on its pedestal with exactly the same content it had at the time of the inception of international law? In an increasingly interdependent world, it has been argued, a certain departure of the accepted *pacta tertiis* principle becomes unavoidable,<sup>124</sup> especially in the field of preservation of international peace and security. The question then arises whether this novel development has spilled over to other areas of international law, including environmental law.<sup>125</sup>

Handl, for one, convincingly argues that with respect to the 1982 Convention some new developments can be discerned.<sup>126</sup> The special nature of this convention<sup>127</sup> as well as the quasi universal adherence to it, strengthen the author in his belief that this particular convention might well have an outreach beyond the strict group of states which are a party to it.<sup>128</sup> If these elements

*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/52/555), October 31, 1997, paras. 64-71. As such, it undermines the globalization trend in the regulation of marine living resources utilization as well as the importance of procedures guiding the decision-making process, perceived by Thébaud, O., *supra* note 9, p. 250.

<sup>124</sup> See Oppenheim's *International Law*, *supra* note 20, p. 1264.

<sup>125</sup> Answering this question affirmatively, see for instance Riedel, E., "International Environmental Law -- A Law to Serve the Public Interest? -- An Analysis of the Scope of the Binding Effect of Basic Principles (Public Interest Norms)", in *New Trends in International Lawmaking: International 'Legislation' in the Public Interest*, *supra* note 23, pp. 61, 89-91. Distinguishing *ius cogens* rules in this area, while at the same time stressing the evolutionary developments taking place in this branch of international law, inferring that also less serious acts and omissions may well start to generate similar effects, see Gray, M., "The International Crime of Ecocide", 26 *California Western International Law Journal* pp. 215, 266-271 (1996) and Uhlmann, E., "State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Preemptory Norms", 11 *Georgetown International Environmental Law Review* pp. 101, 118-135 (1998). See also Perkins, J., "The Changing Foundations of International Law: From State Consent to State Responsibility", 15 *Boston University International Law Journal* pp. 434, 450-452 (1997), who also concludes in this respect: "These developments, recognizing that at least some of international law can develop and become binding on states without their consent, and even over their objection, directly challenge the traditional canon and its premise that a sovereign state can be bound only by the exercise of its own sovereign consent" (*ibid.*, p. 452).

<sup>126</sup> Handl, G., "Regional Arrangements and Third State Vessels: Is the *Pacta Tertiis* Principle Being Modified?", in *Competing Norms in the Law of Marine Environmental Protection* (Ringbom, E., ed.), London, Kluwer International, pp. 217, 235-239 (1997). At present, the 1982 Convention would seem to fit the three criteria suggested by Scott, G. & Carr, G., "Multilateral Treaties and the Formation of Customary International Law", 25 *Denver Journal of International Law and Policy* pp. 71, 84-92 (1996), for this treaty to generate effect beyond the strict group of state parties. *Contra* Weil, P., *supra* note 18, p. 432, who cites this 1982 Convention as an example where the application of the so-called *erga omnes* obligation would get out of hand: "One shudders to think of the controversies that may lie in wait over the opposability, to states and parties, of certain provisions of the Convention on the Law of the Sea" (*ibid.*, p. 440). See also the restrictive analysis made by Lee, L., "The Law of the Sea Convention and Third States", 77 *American Journal of International Law* pp. 541, 550-552 (1983), who sustains the argument that third parties can only be bound by the obligations of the 1982 Convention by means of their "express agreement 'in writing'" (*ibid.*, p. 552).

<sup>127</sup> Namely the specific process by which it was created as well as the character of that convention as the focal point of the expectations of states to stabilize this area of law.

<sup>128</sup> Handl, G., *supra* note 126, p. 238. This author applies the same kind of reasoning moreover to international biodiversity, climate and ozone regimes. See Handl, G., "The Legal Mandate of Multilateral

are taken as standards for a possible outward reach to non-parties to a particular convention, one cannot but conclude that the 1995 Agreement does not reach such thresholds at present.

Moreover, Handl stressed the fact that such possible third party outreach is closely linked to the presence in the 1982 Convention of a detailed compulsory dispute settlement procedure.<sup>129</sup>

At first sight one could argue that the 1995 Agreement could easily pass this part of the test, since its Part VIII, Peaceful Settlement of Disputes, simply refers back to the corresponding part of the 1982 Convention, the provisions of which are said to apply *mutatis mutandis*.<sup>130</sup> But exactly relating to the application of the binding dispute settlement procedures, an essential distinction was made by the 1982 Convention between areas under national jurisdiction, where an exception to the general rule was specifically provided for, and those beyond, where the said general rule did apply.<sup>131</sup> The fundamental developments explained above, which exactly distinguish the 1995 Agreement regime from that of the 1982 Convention, would have seemed to plead in favor of an adaptation of the said principle. But this did not happen, placing the 1995 Agreement once more in a disadvantageous position for present purposes when compared to the 1982 Convention. Indeed, Art. 32 of the 1995 Agreement<sup>132</sup> clearly indicates that only high seas fisheries disputes

Development Banks as Agents for Change Toward Sustainable Development”, 92 *American Journal of International Law* pp. 642, 660-661 (1998).

<sup>129</sup> Handl, G., *supra* note 126, pp. 238 and 240. See also the strong plea made by McDougal, M. & Burke, W., *The Public Order of the Oceans: A Contemporary International Law of the Sea*, New Haven, New Haven Press, pp. 938-939 (1987), to break the stalemate concerning the high seas fisheries free rider problem by means of the imposition of regulations without the consent of such states, other than the consent implied by submission to adjudication by third parties, under the condition that such states are provided the opportunity to refute the contentions of those who urge the necessity of regulation and propose a particular system for resolving the problems involved”. This is why, despite the substantive deficiencies of the Convention on Fishing and the Conservation of the Living Resources of the High Seas (April 29, 1958, multilateral, 559 *United Nations Treaty Series* 285), these authors nevertheless hail the dispute settlement provisions of the latter convention (*ibid.*, pp. 996-997, 1002 and 1007).

<sup>130</sup> See *supra* note 34 and accompanying text. See also Hey, E., *supra* note 44, calling it a particular strength of the 1995 Agreement when compared with the other main global instruments that aim to regulate fishing activities and that were adopted during the first half of the 1990s.

<sup>131</sup> As duly stressed by Orrego Vicuña, F., *supra* note 54, pp. 68, 75 and especially 282-287. But see Brown, E., *supra* note 89, p. 228, who argues that Art. 297 (3)(a) of the 1982 Convention (as reprinted *infra* note 132) should be construed narrowly. Based on a strict reading of the concept “living resources in the exclusive economic zone” (our emphasis), the argument is developed that straddling fish stocks fall outside the scope of that provision because they venture outside that zone.

<sup>132</sup> In this article it is stated: “Article 297, paragraph 3, of the [1982] Convention applies also to this [1995] Agreement.” The article of the 1982 Convention referred to, reads:

“(a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

(b) Where no settlement has been reached by recourse to section I of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:

- (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
- (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
- (iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and

will remain subject to this provision.<sup>133</sup> As correctly stated by Freestone and Makuch, the one line of Art. 32 of the 1995 Agreement, may not accurately reflect the importance of this exclusion.<sup>134</sup> Boyle, who recently analyzed this specific issue, concluded indeed:

“The imbalance of compulsory jurisdiction over high seas states and EEZ states which is one of the more remarkable features of Part XV of the LOS Convention has been faithfully and fully reproduced in the 1995 Fish Stocks Agreement by virtue of its lock-stock-and-barrel incorporation of Part XV. The conclusion which flows from this is obvious: that the 1995 Fish Stocks Agreement does not reform the existing LOS Convention scheme relating to fisheries disputes, but merely extends it with all its imperfections to non-LOS Convention states.”<sup>135</sup>

But in an agreement which basically deepens the delicate balancing act on the universal level between coastal states on the one hand and fishing nations on the other in relation to stocks of fish which have as a common characteristic that they cross the man-made 200 nautical mile limit, it is somewhat disturbing to find a system of compulsory settlement of disputes which includes high seas fisheries, but not the other side of the same medal, i.e. the fishery disputes relating to the exclusive economic zone.<sup>136</sup> Discretionary decisions of coastal states with respect to fisheries will remain outside the principle of compulsory dispute settlement under the 1995 Agreement.<sup>137</sup> Or as aptly stated by Gherari with respect to this provision:

“Logique dans le cadre de la Convention [de 1982] de par l’inspiration qui l’anime, cette limitation de compétence ne risque-t-elle pas de poser problème dans celui de l’Accord dans la mesure où les mesures nationales et internationales sont désormais intimement liés et que certains principes directeurs examiné[s]

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under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

- (c) In no case shall the conciliation commission substitute its discretion for that of the coastal State.
- (d) The report of the conciliation commission shall be communicated to the appropriate international organizations.
- (e) In negotiating agreements pursuant to articles 69 and 70, States Parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.”

This article is said to exclude practically all disputes arising out of the exercise of the coastal states of its sovereign rights with respect to fisheries in its exclusive economic zone from the system of compulsory procedures. See Oda, S., “Dispute Settlement Prospects in the Law of the Sea”, 44 *International and Comparative Law Quarterly* pp. 863-872 (1995).

<sup>133</sup> McDorman, T., *supra* note 109, pp. 65-66. This author therefore concludes that no decision can be imposed which proves unacceptable to the coastal state (*ibid.*, p. 66).

<sup>134</sup> Freestone, D. & Makuch, Z., *supra* note 13, p. 43 note 211. More generally, von Zharen, W., “Ocean Ecosystems Stewardship”, 23 *William and Mary Environmental Law and Policy Review* p. 1, 39 (1998), labels the limited competence of the 1995 Agreement in the exclusive economic zones of coastal states a serious flaw of this document.

<sup>135</sup> Boyle, A., “Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks”, 14 *International Journal of Marine and Coastal Law* p. 1, 22 (1999).

<sup>136</sup> As remarked by Davies, P. & Redgwell, C., *supra* note 94, p. 246. See also Örebech, P., Sigurjonsson, K. & McDorman, T., *supra* note 45, p. 135, and the remarks made by Noyes, J., “The International Tribunal for the Law of the Sea”, 32 *Cornell International Law Journal* p. 109, 161 note 282 (1998).

<sup>137</sup> As repeatedly stressed by Orrego Vicuña, F., *supra* note 54, pp. 175, 182 and 191. This author already stressed this specific point with respect to the 1982 Convention. See *supra* note 131 and accompanying text.

plus haut et destinés à assurer la cohérence des deux catégories de mesures valent aussi bien pour les eaux sous juridiction nationale que pour la haute mer?”<sup>138</sup>

One wonders how, under such a system, a tribunal could ever specify balanced provisional measures to prevent damage to a particular stock when two states have, for instance, been unable to agree on conservation and management measures. This is indeed an innovating competence introduced by the 1982 Convention with respect to environmental harm in general<sup>139</sup> which the 1995 Agreement later applied more concretely to living resources.<sup>140</sup> Coupled moreover with the problems relating to the prompt release of vessels, of which the 1995 Agreement created an added circumstance of possible application,<sup>141</sup> be it in a rather obscure manner,<sup>142</sup> the conclusion appears to be justified that the chances of the 1995 Agreement infringing the rule of *pacta tertiis* in the near future, look rather slim.

Brussels, October 29, 1999

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<sup>138</sup> Gherari, H., *supra* note 101, pp. 389-390. See also Boyle, A., *supra* note 135, pp. 23-24, who comes to a similar conclusion by arguing that the issue at stake is more than a technical question of treaty interpretation. It has to be viewed from a broader perspective, namely the equitable balancing of the rights of both sides involved.

<sup>139</sup> 1982 Convention, Art. 290.

<sup>140</sup> 1995 Agreement, Art. 31.

<sup>141</sup> Chitty, G., “Opening Statement: The International Tribunal for the Law of the Sea: Establishment and ‘Prompt Release’ Procedures”, 11 *International Journal of Marine and Coastal Law* p. 143, 144 (1996).

<sup>142</sup> According to Anderson, D., “Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements”, 11 *International Journal of Marine and Coastal Law* p. 165, 173 (1996) a strict interpretation of this document would seem to make Art. 292 of the 1982 Convention inapplicable with respect to the 1995 Agreement, but whether this was the true intention of the drafters of the 1995 Agreement is not clear. Only future state practice or clarification by an international court or tribunal may clarify the exact content to be given to the term “*mutatis mutandis*” in Art. 30(1) of the 1995 Agreement. Treves, T., “The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea”, 11 *International Journal of Marine and Coastal Law* p. 179, 187 (1996), on the other hand states that “it seems possible” to apply this procedure with respect to fishing offences on the high seas, even though the author admits such an eventuality to be rather unlikely. Both authors stress the fact that a draft provision making Art. 292 *expressis verbis* applicable was deleted during the last session, but that this deletion was caused by other reasons: The former refers to a possible confusion between the exclusive economic zone and the high seas beyond (Anderson, D., *ibid.*, note 20) whereas the latter points to the specific wording of the draft which would have conceded that Art. 21 permitted detention of vessels and crew (Treves, T., *ibid.*). Consequently, the deletion of this explicit provision does not prevent the application of Art. 292 in these circumstances (Treves, T., *ibid.*, and Orrego Vicuña, F., *supra* note 54, p. 255). Also Tahindro, A., *supra* note 28, p. 38, McDorman, T., *supra* note 109, pp. 75-78, and Örebeck, P., Sigurjonsson, K. & McDorman, T., *supra* note 45, pp. 139-140, believe that this article does apply.