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Yellow-Fin Tuna: A Transboundary Resource of the Eastern Pacific

INTRODUCTION

Marine tunas, highly migratory species of the seas, are, *par excellence*, typical transboundary natural resources. They therefore require the effective enforcement of special rules under Public International Law designed to regulate the behavior of fishing fleets so as to provide for their conservation and utilization.

Because of the impressive volumes of some varieties of tunas in the Eastern Pacific Ocean, mostly yellow-fin tuna and skipjack, that region has become a significant legal laboratory to put the said rules to a test. This is especially so because the rules are not so widely accepted and well defined as to avert the possibility of conflicts which, in fact, have more than materialized among several coastal and non-coastal States, at least during the last 12 years.

The purpose of this work is to analyze the legal and diplomatic discrepancies underlying the controversies that, during the said lapse of time, have arisen regarding tuna resources in the Eastern Pacific. Emphasis will be put, throughout this analysis, on the central role played by Mexico in all international developments concerning tunas which have taken place in the region. Mexico's attempts to negotiate an international regime for the long-term preservation of this transboundary wealth with either its neighbors to the north or to the south will also be emphasized.

BACKGROUND

Before the emergence of the new Law of the Sea, which eventually yielded international recognition in the mid-seventies for a 200-mile Exclusive Economic Zone, dealing with tuna resources in the Eastern Pacific Ocean had been a substantially easier matter than it has been ever since. Their migratory pattern is surely not too different now from what it was back then, but the previous international legal subdivisions of the ocean space where that pattern occurred was substantially simpler. Much of that

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space used to be a part of the High Seas, an area under the regime of freedom of fishing for all members of the international community, whereas coastal States had, under traditional law of the sea customary rules, only a restricted marine zone that they could call exclusively their own, that is, the Territorial Sea limited to a maximum breadth of 12 nautical miles.[1] Thus, much of the more abundant tuna wealth in the region, mostly yellow-fin tuna, traveled in waters regarded as *res communis* and, therefore, subject to being caught freely by practically anyone on a first-come, first-served basis.

The economic attractiveness of developing this fishery, as well as the need for doing so in a way that would assure its sustained availability, was first contemplated by the United States, a country which had been putting together a sizable fleet to exploit the tuna. This activity was carried out by the United States virtually unchallenged, since no coastal State in the region had developed more than small and quite primitive tuna fleets, which operated only very close to shore.

However, two factors on the horizon pointed toward the need to start organizing an international regime to preserve the interests already created. First, after World War II there was a significant increase in fishing activities. Second, since 1947 some South American coastal States of the Eastern Pacific Ocean had been making claims to an extended national 200-mile maritime zone.[2] Both factors signaled the need to develop international rules that would make it impossible for coastal States to undertake unilateral measures within their claimed jurisdictions, which would be inconsistent with the migratory nature of the resource, and which would have an adverse effect on its conservation, to the detriment of the rights and interests of other States.

Yellow-fin tuna migrate in a vast region along the Western Hemisphere's Pacific coasts, from the border between the United States and Mexico to the border between Peru and Chile, and back. Any irrational act of exploitation of the resource on the part of one State's fleet, either in its own coastal waters or in the High Seas, independently of whether or not the State in question is a coastal State, may endanger the conservation of those resources. Thus, the need for a convened international regime becomes apparent.

THE WASHINGTON CONVENTION

In order to plant the seed for international cooperation on the matter, a cooperation which would become a vehicle for preserving its own interests, the United States concluded with Costa Rica, in 1949, a Con-

1. M. MacDougal & W. Burke, The Public Order of the Oceans 63 (1962).
2. A. Székely, Latin America and the Development of the Law of the Sea (1976).

vention for the Establishment of an Inter-America Tropical Tuna Commission (IATTC)[3] which entered into force on March 3, 1950. The fact that other States, including coastal ones, shared the conviction of the need for such an international undertaking, is evidenced by the fact that several of them eventually joined the convention by acceding to it. Panama acceded to the convention in 1953, Mexico in 1964, and Nicaragua as late as in 1973; Ecuador acceded, but withdrew in 1967. Distant fishing nations also joined the convention, such as Canada in 1968, Japan in 1970, and France in 1973.

The Commission's main function was to carry out research, under the Director of Investigations, on the various aspects relating to the exploitation of yellow-fin tuna and other tuna species, obtaining, compiling and interpreting data to be used toward the maximum continuing utilization of those resources. The convention was then, in its origins, rather a scientific and technical cooperating scheme to learn more about the resource and to use the knowledge as well as possible to better exploit it.

THE IATTC REGIME

The implementation of the convention and the practice and operation of the Commission—through more than two decades of annual meetings—developed an unparalleled international regime, which was to become a model of success for other migratory species and marine regions of the world.[4] A brief history of the development of this regime can be described as follows:

1) In 1962, the Commission created its Yellow-fin Regulatory Area (CYRA), delimiting the portion of the Eastern Pacific Ocean where it operated, covering an area of more than 5,000 square nautical miles with, in some parts, a breadth of more than 1,000 miles from shore. The CYRA was drawn from San Francisco to Valparaiso, although historical scientific evidence had shown no evidence of significant concentration of the resource either in the United States or in Chile. However, the Area was designed to cover more than the possible migratory pattern of the resource;
2) In 1966, as a result of a proposal put forward in 1961 by the Director of Investigations in response to a reduction in the abundance of yellow-fun tuna, the Commission initiated the system of deciding a yearly maximum allowed global catch quota in the

3. 1 U.S.T. 230, T.I.A.S. No. 2044, 80 U.N.T.S. 3.

4. *See* Broderick, *The International Tuna Fishery,* 10 Colum. J. World Bus. 42–50 (1975); J. Carroz, Establishment, Structure, Functions and Activities of International Fisheries Bodies: The Inter-American Tropical Tuna Commission, Fisheries Technical Paper No. 58 (1965) (FAO: Rome); Rose, *The Tuna Example: Is There Hope for International Cooperation?* 11 San Diego L. Rev. 776–814 (1974).

CYRA. The quota was also the result of a recommendation made by the Director which was based on the best available scientific evidence;

3) The catch was undertaken in a competitive manner, again, on a first-come, first-served basis, which meant that each State was free to catch as many tons of the fish as its individual fleet's capacity allowed as long as the catch of all fleets combined did not exceed the global quota;
4) When the information available led the Director to conclude that the said quota was about to be reached, he would recommend both the closure of the open fishing season, as well as the allowance for a so-called last fishing trip;
5) During the last trip, each boat was authorized to cover the maximum of its carrying capacity; and
6) Since 1969, special quotas were authorized during the closed season for small and newly constructed boats from developing coastal member States. These quotas were created mostly for Mexico, on its insistence, in order to allow it to better compete with the powerful fleet of the United States. Since then, each year Mexico would obtain a special national quota, through very hard and painful bargaining negotiations with the United States, which were necessary because that country had veto power on the decisions of the Commission, in that all Commission decisions had to be unanimous. Since 1975, other Central American member States also started receiving their own special national quotas.

The best proof of the success of such a conservation regime is the fact that it not only restored the abundance of yellow-fin tuna, but the Commission was able to slowly increase the global catch quota from the original 79,300 tons in 1966 to the almost all-time high of 210,000 tons in 1977. It was in regard to other tuna species that the Commission kept its operations at a mere scientific level, since their abundance did not seem to require the adoption of conservation measures.

THE EMERGING NEW LAW OF THE SEA

The system was obviously good, but only as long as the rules of the game remained the same, especially the jurisdictional ones. However, the Third United Nations Conference on the Law of the Sea (UNCLOS), the aspirations that led to it, and its work, slowly but surely changed the legal geography of the Eastern Pacific Ocean. The Conference started its substantive work in 1974 in Caracas, and was to last for 8 more years before culminating in 1982 in Montego Bay with the adoption of the United Nations Convention on the Law of the Sea.[5] A little over a year

5. U.N. Doc. A/CONF. 62/122, of Oct. 7, 1982.

after the conference started, it was evident that a consensus was already emerging on the international recognition for the right of all coastal States to establish a 200-mile Exclusive Economic Zone (EEZ), and some countries of the Eastern Pacific were getting ready to do just that. The result would inevitably be that the greatest volumes of yellow-fin tuna would now be concentrated in that zone rather than in the High Seas. Since coastal States would enjoy sovereign rights over the natural resources in the zone for their exploration and exploitation, conservation, and management, most of the said tuna could no longer be freely caught, except in the now considerably reduced High Seas portion of the CYRA. Now unilateral action by coastal States would have an even greater effect on the conservation of the resource. The need for a coastal State to bargain for a share of it practically vanished and, with all of the above, the IATTC gradually became obsolete.

THE FIRST MEXICAN PROPOSALS

Consequently, Mexico proposed, during the Annual Meeting of the Commission in Paris in 1975, the holding of an international conference among all coastal States bordering the Eastern Pacific, as well as with all IATTC distant fishing members, in order to negotiate a new instrument that would contemplate the new legal realities posed by the EEZ, and to substitute accordingly the until then prevailing international regime. Mexico also asked that the Director of Investigations be entrusted with the task of preparing a study with possible alternatives for that new instrument.[6]

During the IATTC's Meeting the next year in Managua, Mexico reiterated its intention to convoke the said conference, a matter which was received positively by other members. The delegations of the United States, Canada, and Japan even expressed their intention to accept the invitation. Costa Rica, with a growing interest in actively participating in the fishery, voiced its desire to support and co-sponsor the idea. This coincidence of interests gave birth to a bilateral alliance which, at first, seemed to be strong and unbreakable but which, sooner than later, proved to be fragile and even ended in overt antagonism. Finally, the Conference for the International Conservation and Management of Tuna in the Eastern Pacific was convened in San José, from September 19–23, 1977.

NEGOTIATIONS FOR ARTICLE 64 AT UNCLOS

Meanwhile, such widely-shared positive intentions had already been evident at the UNCLOS negotiations. Distant fishing States, especially

6. *See* A. Székely, México y el Derecho Internacional del Mar (1979).

the United States, soon gave signals of recognizing that the enthronement of the EEZ would have the potential effect of displacing U.S. tuna fleets from the Eastern Pacific, and the United States thus seemed to see it in its interest to seek to strike a deal with coastal States that would allow its fleet to continue operating under the best possible conditions. On the other hand, coastal States, especially Mexico with its gradually increasing tuna fleet, envisaged the need, in order to gain wide recognition for its rights in the EEZ, to somehow accommodate the interests of distant fishing States. These two elements explain the reason why Mexico and the United States played a dominant role in the negotiation of the draft provisions on highly migratory species, which eventually found their way into the convention. This exercise, initially viewed as successful, established the two countries as the leading protagonists of the developing tuna struggle in the Eastern Pacific.

The negotiation seemed to achieve a balance of the competing interests through the drafting of what became article 64 of the convention. Its paragraph 1 provides that:

> The Coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex 1 shall co-operate directly or through the appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the Exclusive Economic Zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.

This provision, which read by itself would seem to secure mostly the interests of States other than the coastal State by subjecting the latter to specific obligations which would inhibit it from freely undertaking unilateral actions, was balanced with a supplementary provision, paragraph 2 of article, aimed specifically at preserving the rights of the coastal State. Thus, the two elements of the equation constitute the unity of the regime provided by article 64 for highly migratory species. Paragraph 2 stipulates:

> The provisions of paragraph 1 apply *in addition* to the other provisions of this Part.[7]

It is essential to understand, from that paragraph, the following:

1. ". . . this Part" refers to the part of the convention to which article 64 belongs, namely, part V, entitled "Exclusive Economic Zone."

7. Emphasis added.

2. Part V of the convention starts with article 55, which defines the EEZ, and is composed also of articles 56 to 75.
3. Paragraph 2 of article 64 clearly stipulates that it is paragraph 1 which is a provision "additional" to those in part V, and not the reverse, that is, not that all other articles in part V are an addition to paragraph 1. In other words, the regime for highly migratory species in the EEZ is composed of two elements:
   a) The general provisions in part V, and
   b) The specific provision in paragraph 1 of article 64, which is additional to those other articles in part V.
4. Consequently, the provisions in paragraph 1 do not derogate from those stipulated in other articles of part V. On the contrary, the provisions in paragraph 1 cannot be applied to derogate from other provisions in part V, but only applies additionally to them.
5. The commanding primary rules to be applied, in regard to highly migratory species in the EEZ, are mainly those which recognize, in favor of the coastal State: "sovereign rights" over natural resources in the zone, which include all species whether highly migratory or not (article 56); as well as those which do not allow for freedom of fishing (as in the High Seas under Article 87) within the EEZ (Article 58); which provide for the right of the coastal State to determine the allowable catch of the living resources in its Zone (Art. 61); and for the system to ensure their optimum utilization (Article 62). In addition to all those provisions, in the case of highly migratory species, coastal States are under the duty, according to paragraph 1 of article 64, to cooperate internationally to ensure their conservation and to promote their optimum utilization. The latter legal caveat, however, does not and cannot mean that because of it, those species, when in the EEZ of a coastal State, are no longer subject to its sovereign rights, much less therefore that they can be freely fished by others, or that the coastal State cannot exercise its rights under articles 61 and 62. Conversely, it means that, when exercising its rights regarding those particular species, and precisely because of their transboundary nature, the coastal State must cooperate internationally so as not to affect the rights and interests of others. Consequently, there is no room for legally considering highly migratory species as *res communis* because, if that had been the intention or the case, the reference in paragraph 2 of article 64 would have been to part VII of the convention (High Seas), and not to part V (EEZ).

This was the way article 64 was negotiated and in that understanding, under the purview of UNCLOS, thanks to accomplishments which followed an Informal Consultation Group meeting in New York from November 3–14, 1975 in which Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Panama, Peru, France, Japan, and the

United States participated. Its text appeared officially in the Revised Informal Negotiating Text in May of 1976 at the end of Conference's season in New York, and remained virtually unaltered in subsequent texts and in the convention itself. That is the way it was, and has been accepted and understood by all Latin American delegations. More importantly, that article was not ever challenged by the United States delegation at the Conference, which it could have done effectively since the article's adoption required consensus. It is obvious that the United States, however, was simultaneously experiencing a change of heart and moving in a different and opposite direction. Accordingly, and on the basis of an unsustainable maneuvering and interpretation of the until then clear terms of article 64, highly migratory species would have to be extricated from the regime applicable to the EEZ, and subject to a vague and ill-defined special regime whose purposes aimed at preserving the interests of distant tuna fishing nations as intact as possible. This position was made apparent on April 13, 1976, when U.S. legislation denied recognition, for itself and for others, of the sovereign rights of the coastal State over the highly migratory species in the EEZ.[8] This did not stop the United States from undertaking acts of recognition, at least symbolic, inconsistent with its legislation but in line with its previous more positive attitude during the negotiations for article 64.

One of those acts derived from a Fisheries Agreement that the United States concluded with Mexico on November 24, 1976[9] in which special treatment was accorded to highly migratory species. In article XVIII of the agreement and in part IV of its annex, even when formally safeguarding through a disclaimer its legal position, and pending the international conference that would establish a new regime for the Eastern Pacific, the United States agreed that fishing for tuna by its boats in the Mexican EEZ would be subject to the acquisition of a certificate to be issued by the Government of Mexico.

THE SAN JOSE CONFERENCE

Meanwhile, at the San Jose Conference, the participants benefited from the six alternative regimes offered by the IATTC's Director of Investigations, prepared at the request of Mexico.[10] Mexico and Costa Rica decided to co-sponsor, at the Conference, a proposal based on the only one of those alternatives that was seen as compatible with both the sov-

8. 29 U.S.T. 823, T.I.A.S. No. 8853.

9. *See* Fishery Conservation Management Act, Pub. L. No. 94-265, 90 Stat. 336 (1976); *see* 76 Dept. of State Bull. of Feb. 28, 1977 at 175–78. This position was reiterated in 1983 when President Reagan established the EEZ of the United States.

10. *See* Joseph & Klawe, *The Living Pelagic Resources of the Americas*, 2 Ocean Dev. and Int'l L. 37–64 (1974).

ereign rights of the coastal States, and their obligations on conservation and optimum utilization incorporated in article 64.

The basic elements of the Mexico–Costa Rica proposal basically contemplated the following:

1. A new regional organization would be established in order to succeed the IATTC, fundamentally with the same membership but including, as well, all other coastal States of the Eastern Pacific.
2. The principle of the "Saturation of the Fisheries," a Mexican idea, would be introduced in the new regional convention, which would allow the new organization to determine, on the basis of the best available scientific data, when particular species are being exploited at or near the level of its optimum sustainable yield and, consequently, that the increase of the fishing effort by allowing the participation of fleets of new States would endanger the fishery. In that case, the organization would declare that such a fishery is closed, and no new members would be allowed in it.
3. The CYRA would be replaced by the "Area of Application of the Treaty," basically corresponding to the limits of the CYRA but starting 12 miles from the coast and being divided into two parts, namely, the High-Seas and the outer 188 miles of the EEZ of all coastal States.
4. The convention would regulate the fishing of both tuna species which required conservation measures through the adoption of a global catch-quota (yellow-fin), and tuna species which did not require such measures (skipjack). Coastal States would enjoy national quotas which could be determined on the basis of the criterion of "the concentration of the resources" within their respective 200 miles zones.
5. On the basis of the best scientific evidence derived from the studies of the research section of the organization, the Secretary General would be empowered to close the season whenever the global catch quota was about to be met.
6. The criterion of the concentration of the resources to calculate the national catch quotas would be based on the equivalent of the average volume caught by the international fleet in the respective EEZ during the preceding 5 years.
7. If the coastal State had a catch capacity smaller than its national quota, the surplus would be made available to other States Parties in exchange for an adequate economic compensation. National quotas would be considered as minimum quotas in the sense that the coastal State could go beyond that minimum in the open season, or continue fishing for it in the closed season.
8. There would be a single international permit or license for access to the area of application of the treaty instead of a multitude of

national licenses, and they would be subject to the payment of fees. Eventually the idea developed in the sense that there would be an international permit for access to the High Seas portion, and a necessarily uniform system of national license for access to each EEZ.

9. The fees obtained by the organization would be devoted to cover its expenses (up to a maximum of 20 percent of all fees paid), and the remainder would be distributed, first, among coastal States in proportion with the concentration of the resource in their respective EEZ and, second, among all member States in proportion to their catches.
10. The practice of the last trip, once the season had been closed, which lent itself to abuse and to going beyond the maximum allowable global catch quota, would be terminated.

The events at the Conference could not have been more negative. The United States showed little enthusiasm for the Mexico–Costa Rica proposal, and instead it indicated its preference for maintaining the regime of the IATTC as if nothing had happened in the legal arena.

UNILATERAL EMBARGOES AND WITHDRAWALS FROM IATTC

As a result of that negative development, during the next annual meeting of the IATTC, which took place in Mexico in October 1977, that organization found it impossible for the first time to decide on a maximum global catch quota for the CYRA. This was the result of the fact that the United States opposed the national quota requested by Mexico. On November 8 of that year, Mexico denounced the 1949 convention and withdrew from the IATTC. Almost within the same period of time, Costa Rica suffered an embargo imposed unilaterally by the United States for having seized U.S. boats caught fishing illegally for tuna in the Costa Rican EEZ, which also led to the withdrawal of that Central American country from the IATTC.

THE FIRST TWO PLENIPOTENTIARY CONFERENCES

It was obvious, then, that a major controversy had erupted in the Eastern Pacific on the tuna issue. Despite an incredibly large number of meetings that ensued, held in different capitals, no progress was made. On the contrary, things got progressively worse. Two plenipotentiary Conferences were held in Bogota and Mexico City in 1978 and 1979, respectively. At both Conferences, Mexico, Costa Rica, and the United States arrived with a common proposal on which they shared agreement, except for a very small albeit important number of matters. Success seemed to be within reach. At the last minute, however, prevailing disagreements on those matters, as well as the appearance of a new factor in the ne-

gotiations, led to the disheartening failure of both Conferences. The new element was the participation of the other Latin American coastal States of the Eastern Pacific which were not members of the IATTC, most notably Peru, Ecuador, and Colombia, who as members of their Permanent Commission of the South Pacific (CPPS), had distinguished themselves at UNCLOS for their more radical "territorialist" positions regarding the 200-mile zones. Their attitude of trying to deal with tuna species as they would all other marine species, disregarding their highly migratory nature, in a jealous exercise of extreme sovereignty, precluded real possibilities for their conservation and optimum utilization. This new element would come again into the scene a few years later.

THE ABANDONMENT OF THE NEGOTIATING EFFORT

In the meantime, a final effort to reach an agreement, at least between Mexico, Costa Rica, and the United States, failed because of discrepancies on the criterion of "the concentration of the resource and on the question of the last trip."[11] All further negotiating efforts were abandoned. Another element which induced the defeat of the negotiating effort was the fact that the United States, in response to the seizure by Mexico of some U.S. boats caught fishing illegally for tuna in the Mexican EEZ, imposed on Mexico, on the basis of its domestic legislation, an embargo on the importation into the United States of any tuna or tuna products from Mexico.

The embargo, imposed on July 11, 1980, only aggravated matters, as it precluded or made more difficult the resumption of negotiations. When the embargo was finally lifted six years later, on August 14, 1986, and once it was agreed that Mexico would resume its tuna exports to the United States in an orderly fashion so as to not disrupt the market, nothing had been achieved for the benefit of either side's positions.

On the one hand, Mexico did achieve the lifting of the U.S. embargo without having to modify in any way its legal position on the controversy. However, the regional disarray, derived from the lack of agreement after the failed negotiations, was beginning to affect the abundance of the resource and the ability of the IATTC to take effective conservation measures. This in itself meant a threat to Mexico's long-term interests, since it had invested substantially to become the owner of the second largest fleet in the hemisphere.

On the other hand, the United States lifted the embargo because it produced more self-inflicted harm to the U.S. tuna fleet than to Mexico (which used the opportunity to effectively diversify to Europe its export market). The embargo led to the bankruptcy of all major U.S. tuna

11. See text *supra* following note 4.

processing plants, and both the U.S. tuna fleet and the plants were pushed to operate in the South Pacific and in East Asia, respectively, in both cases a much less economically advantageous proposition than the previous situation they enjoyed in the Eastern Pacific or in the United States.

This rupture between Mexico and the United States did not mean that either of the two countries abandoned their respective aspiration to find a solution satisfactory to their individual interests. Each went elsewhere seeking support.

THE 1983 SAN JOSE AGREEMENT

Once again, the United States went back to Costa Rica and, together with that country and with Honduras, Guatemala, and Panama, signed in 1983 an interim Agreement on Tuna in the Eastern Pacific Ocean, an instrument which contained no conservation regime at all. It is obvious that the United States used the lack of regional consensus to persuade the said Central American countries to join in on a treaty, through which it obtained guarantees of access for its fleet to their EEZ's in exchange for the payment of token amounts for fishing permit fees. This must have seemed better than nothing to those Central American nations, deprived of any boats to exploit their own resources. That U.S. strategy eventually failed, however. Because of the lack of ratification of the San Jose Agreement by a sufficient number of its signatories, it has yet to come into force. Its only virtue is that its article XIV left the door open for negotiations of a definite regional regime.

THE SELA-OLDEPESCA-CPPS EFFORT

However, the mere adoption of the San Jose Agreement was sufficient to put Mexico into motion and, in its turn, to seek support in the region. First it moved for the creation of a Working Group for Regional Coordination for the Utilization of the Tuna Resources, within a Committee of the Latin America Economic System (SELA). This Working Group met for the first time in Mexico City in February 1984, with the participation also of the Permanent Commission of the South Pacific. Thus, the participation of all Central and South American coastal States of the Eastern Pacific was ensured. The former participated thanks to their feeling free to do so in accordance with article XIV of the San Jose Agreement.

The Working Group achieved an important success by adopting by consensus the following 14 "Fundamental Principles" for the formulation of a regional tuna convention in the Eastern Pacific:

> 1. Sovereign rights of coastal states over all fishing resources in the jurisdictional waters, including the so-called "highly migratory species" for the prioritary benefit of their peoples and so that their rational exploitation may be developed with the objective of insuring their conservation.

2. The conservation, protection, and optimum utilization of the resource must be the fundamental objective of a regional convention on tuna.

3. For the purposes of the eventual convention, optimum utilization shall be understood as meaning the rational exploitation of the resources with the aim of insuring their maximum sustainable yield.

4. Tunas are highly migratory species which cover a wide area of migration in the eastern tropical Pacific, thus in order to insure their conservation and regulate their exploitation, it is necessary to promote the creation of a regional organization to that end, with a council empowered to adopt its decisions by consensus.

5. The regional organization must have the necessary mechanisms to obtain and to exchange among its members the required scientific data to satisfy its objectives, especially the one relating to the conservation of the resource.

6. The area of application of the convention shall be the pattern of migration in the eastern tropical Pacific of the regulated species, both within the jurisdictional waters of the member states as in the areas of high seas adjacent to them.

7. The highly migratory species regulated by the convention shall be prioritarily those whose catch volumes make it necessary to undertake their conservation, on the basis of the best available scientific information.

8. All coastal states of the eastern tropical Pacific shall be able to participate in the convention, as well as those states which have been fishing those resources in the region. The Council shall decide on the admission of other members through accession to the convention, but respecting the principle of the saturation of the fishery when applicable.

9. In application of the sovereign rights which pertain to the coastal states over the above-mentioned resources, they shall be able to issue access licenses or fishing permits to the surpluses in their jurisdictional waters aiming at a regional conservation regime.

10. The coastal states shall communicate to the regional organization data on the surpluses that it makes available to other states. The organization to be created by the convention shall issue the access licenses or fishing permits for the utilization of these resources in international waters.

11. In order to insure the conservation of the resource, there shall be the need to determine a global quota of permissible catch in the area of application in accordance with the best available scientific information. The global quota shall incorporate the respective national quotas in accordance with the concentration of the resource in each zone.

12. Always with the objective of insuring the conservation of those species, coastal states shall report on the volumes of catch made in the respective zones. Through the appropriate schemes, information shall be gathered regarding catches in international waters.

13. Any regime to be agreed shall have concrete provisions on supervision and control.

14. The referred convention shall give due attention to the need to promote the development of the fishing capacity in those coastal states which have not yet been able to catch the concentration of existing resources in their waters, taking into consideration the needs of the disadvantaged vessels.

As it can be appreciated, those Principles were evidence of the devotion prevailing among those Latin American countries, at least at the moment of their adoption, for the conservation of the highly migratory species in their region. The negotiation was then conducted through the newly created Latin American Organization for Fisheries Development (OLDEPESCA), in co-sponsorship with the Permanent Commission of the South Pacific. The exercise made it possible to even go as far as to elaborate by consensus a full draft convention during a meeting in Antigua, Guatemala in August of 1987, overcoming severe difficulties and discrepancies, which were identical to those that led to the failure of the Bogota and Mexico City Plenipotentiary Conferences of 1978 and 1979. During the entire Latin American negotiating exercise that lasted between 1984 and 1987, the Group split into two camps: on the one hand was Mexico with the sporadic support of some Central American States, who were also searching for a better alternative to the 1983 San Jose Agreement; on the other hand were the members of the Permanent Commission of the South Pacific, namely Colombia, Ecuador, Peru, and Chile which, as was said, wanted to treat tuna as they would any other marine living resource, notwithstanding their highly migratory nature.

In Antigua, success seemed to indeed be at hand, especially because the two groups had overcome their differences and, most importantly, the conservation spirit had prevailed. Consequently, once again a Plenipotentiary Conference was convoked. The Conference met in Mexico in January 1987. By that time, Costa Rica and Colombia had, again, a change of heart, and rejected most of the key provisions of the draft convention. The session ended once more in failure, and it is still to resume in Lima at a date still unspecified.

The failure was due to the following:

1. Some coastal States do not accept the need for uniformity in the natural licensing system, and insist on licenses being issued by each country subject to its own sovereign requirements.
2. Others demand the possibility of allowing fleets of non-member States into their EEZ, outside of the conservation regime, even when that would translate into the total obliteration of that regime.
3. Some insist that national catch quotas shall be determined unilaterally, as a sovereign right "in accordance with its needs," but each coastal State in its respective EEZ, even if that determination

is not supported by the best or any kind of internationally available scientific evidence.

4. Others feel that there should be no obligation to make surpluses available to others, even if they are members of the organization.
5. Some challenge the principle of the saturation of the fishery.
6. Some demand unanimity in the adoption of the decision on the global catch quota.

Believing that the Plenipotentiary Conference in Mexico City would finally achieve the long-sought regional regime for highly migratory species in the Eastern Pacific, Mexico had approached the United States to insure its participation in that event. Even when the United States found several provisions of the Antigua draft unacceptable, it participated in the Conference as an observer, only to witness the prevailing lack of agreement among the Latin Americans themselves.

CONCLUSION

The impotence of the Eastern Pacific Ocean community of nations to deal with this matter has to be explained both as a result of a lack of vision and a lack of political will. Evident before their own eyes is the fact that the lack of agreement has reduced the abundance of this transboundary resource, and that if this situation continues, there will shortly be no resources to manage and conserve internationally, much less to catch. What started as a success story has developed into a model of what not to do with transboundary resources. However, a more successful exercise of preventive diplomacy could still show that the new realities of the new Law of the Sea are not necessarily inconsistent with the adequate and effective management of tuna resources.[12] There has to be some give and take. The only principle that cannot be negotiated is the duty to individually and jointly conserve the resource.

12. For other detailed analyses, see G. Estrella Beira, La Guerra del Atún: El Ecuador y las Doscientas Millas Marinas (Editorial Luz de América, Guayaquil, Ecuador 1971); Fisher, Wood & Burge, *Latin American Unilateral Declarations of 200 Mile Offshore Exclusive Fisheries: Toward Resolving the Problems of Access Faced by the U.S. Tunafish Industry*, 9 SW. L. Rev. 643–670 (1977); Fontan, *Evolución de la pesca de atún sub-tropical*, 49 Revista General de Marina 41–43 (1957); Froman, *The 200-Mile Exclusive Economic Zone: Death Knell for the American Tuna Industry*, 13 San Diego L. Rev. 707–714 (1976); J.L. Kask, "Tuna—A World Resource," 2 Occasional Paper (Law of the Sea Institute: Kingston, R.I. 1969); Kinsey, *The Tunaboat Dispute and the International Law of Fisheries*, 6 Cal. W. L. Rev. 114–133 (1969); *Tunidos en el Pacífico Oriental: 1969*, PESCA 32–35 (July 1971) (Revista Peruana); Ramírez, *Los "Tuna-Clippers": aves de rapina de los mares mexicanos*, 30 Revista General de Marina 9, 10 (1954); S. Saila & V. Norton, Tuna: Status, Trends, and Alternative Management Arrangements, Paper No. 6 (Resources for the Future: Wash. D.C. 1974); Schaefer, *A Study of the Dynamics of the Fishery for Yellow Fin Tuna in the East Tropical Pacific Ocean*, 2 Inter-American Tropical Tuna Comm. Bull. No. 6, 247–285 (La Jolla, Cal. 1957); Smetherman & Smetherman, *The CEP Claims, U.S. Tuna Fishing, and Inter-American Relations*, XIV Orbis No. 4, 951–972 (Winter 1971); "List of Seizures and Harrassments of Tuna Vessels from September 15, 1951 to June 28, 1963," U.S. Dept. of Interior, see 3 Int'l Legal Materials 61 (1964); Cicin-Sain, Orbach, Sellers & Manzanilla, *Conflictual Interdependence: United States–Mexican Relations on Fishery Resources*, 26 Nat. Res. J. 769–792 (1986).