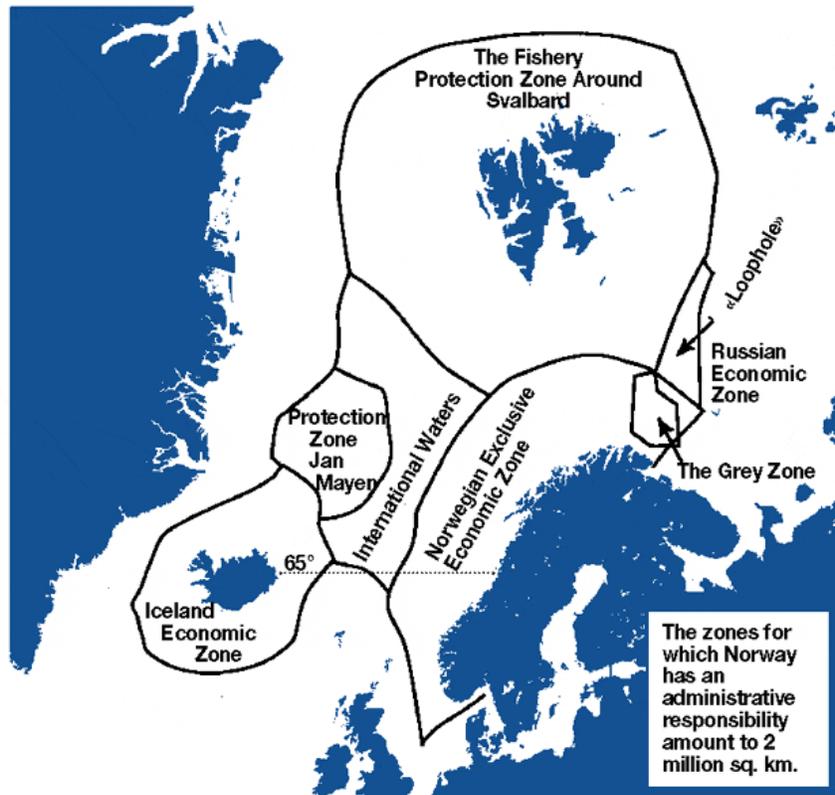


## **THE LOOPHOLE DISPUTE FROM AN ICELANDIC PERSPECTIVE**

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**ABSTRACT:** The study approaches the Loophole dispute between Iceland, Norway and Russia from an Icelandic perspective. The focus is mainly on four issues; the underlying legal framework of the dispute, the question why Iceland engaged in these fisheries, the negotiation process and how dramatically Iceland's stance on high sea fisheries has shifted since the mid-1990s. The study attempts to answer if Iceland respected its obligations under the Law of the Sea Convention in the dispute. The study concludes that it is questionable if Iceland behaved as a responsible fisheries nation in the Loophole dispute and that Iceland even violated its obligation under Article 300 of UNCLOS whereas she did not respect Law of the Sea Convention's due regard obligation.

## Economic and Fishery zones in the Northern Region



This map is published on the website of the Norwegian Government, [www.regjeringen.no](http://www.regjeringen.no). It shows the economic and fishery zones in the Northern Region. The Loophole is in the middle of the map on the right hand side.

### I. INTRODUCTION

Unregulated fishing<sup>1</sup> on the high seas has caused difficulties in the relationship between various countries after the reduction of available areas of operation for distant water fishing with

<sup>1</sup> The 2001 Food and Agriculture Organization's International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing defined the term "unregulated fishing as following:

3.3 Unregulated fishing refers to fishing activities:

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

the introduction of the Exclusive Economic Zone (EEZ) into international law. This study deals with such a dispute, a dispute that caused turbulence in the relationship between Iceland, Norway and Russia from 1993 to 1999. The keystone of the dispute was unregulated fishing by Icelandic vessels for straddling stocks, mainly cod, in a high seas enclave in the central Barents Sea known as the Loophole. The study tries to answer the following question: Did Iceland respect its obligations under the Law of the Sea Convention in the dispute?

The following coverage of the dispute is divided into six parts. In the first the main aspects of the underlying legal framework is described. In the second part it is explained why Iceland engaged in these fisheries and the main arguments for these fisheries are outlined. In the third part a rough description of the negotiation process is given and the main aspects of the agreement that ended the dispute are discussed. In the fourth part the influence of the dispute on the negotiations at the United Nations regarding straddling and highly migratory fish stocks are explained. In the fifth the relationship between the dispute and another dispute in the Barents Sea regarding the fishery protection zone surrounding Svalbard is outlined. In the sixth and the last part it is shown how dramatically Iceland's stance on high sea fisheries has shifted since the mid-1990s.

## **II. THE LEGAL FRAMEWORK**

For the last centuries the most fundamental doctrine of the Law of the Sea has been the freedom of the high seas. One of its elements is the freedom of fishing. For centuries people believed that the resources of the sea were inexhaustible. For example, Hugo Grotius (often called

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3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing is available at: <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM> (last visited Jun. 29, 2009).

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the father of international law) believed so.<sup>2</sup> This belief persisted well into the twentieth century. Now it is understood that the oceans must also be protected from excessive use and exploitation,<sup>3</sup> or as stated by the International Court of Justice in the Fisheries Jurisdiction Case:

[T]he former laissez faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the need of conservation for the benefit of all.<sup>4</sup>

Through the 20th century pressure increased on coastal states to regulate fishing and expand their jurisdiction to limit foreign fishing.<sup>5</sup> The most significant result was the creation of the EEZ. With the introduction of EEZs, the freedom to fish on the high seas was reduced in geographic extent and importance, 90-95 percent of the world's marine fish catch was taken from the ocean areas now under coastal state jurisdiction.<sup>6</sup>

Despite the above-mentioned evolution the freedom of the high seas remains a fundamental principle in the Law of the Sea. This is reflected in the United Nations Convention on the Law of the Sea (UNCLOS).<sup>7</sup> According to Article 87(1) of UNCLOS, “[t]he high seas are open to all States, whether coastal or land-locked.” Moreover, this freedom is supposed to be exercised under the conditions laid down by UNCLOS and by other rules of international law. It comprises, among others, both for coastal and land-locked states, the freedom of fishing subject to

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<sup>2</sup> Grotius stated the following: “For everyone admits that if a great many persons hunt on the land or fish in the river, the forest is easily exhausted of wild animals and the river of fish, but such a contingency is impossible in the case of the sea.” HUGO GROTIUS, *THE FREEDOM OF THE SEAS: OR THE RIGHT TO WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* 57 (Ralph van Deman Magoffin trans.; James Brown Scott ed., 1916).

<sup>3</sup> Lawrence Juda, *Changing Perspectives on the Oceans: Implications for International Fisheries and Oceans Governance*, in *BRINGING NEW LAW TO OCEAN WATERS* 17, 18 (David D. Caron and Harry N. Scheiber ed., 2004).

<sup>4</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Judgement, ICJ Reports (1974), 32.

<sup>5</sup> Juda, *supra* note 3, at 19.

<sup>6</sup> *Id.* at 20.

<sup>7</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, A/CONF.62/122 (1982), reprinted in I.L.M. 1261 (1982) [hereinafter referred to as UNCLOS] (entered into force Nov. 16, 1994). Iceland ratified UNCLOS 21 June 1985, The Russian Federation 12 March 1997 and Norway 24 June 1996. *See* Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 07 August 2007. Available at: [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea) (last visited Jun. 29, 2009).

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the conditions laid down in section 2 of Part VII of UNCLOS, which deals with conservation and management of the living resources of the high seas.<sup>8</sup> Article 87(2) provides, that the freedoms, laid out in paragraph 1, “shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas.” In the view of, David Anderson, “[t]he due regard test is an element in the principle of good faith: rights must be exercised reasonably . . . . The selfish disregard of the interests of others could well amount to an abuse of rights contrary to Article 300.”<sup>9</sup> Moreover, Anderson has stated that “[t]he law must provide some qualifications to a concept of ‘freedom’ in order to safeguard the interests of others in the international community.”<sup>10</sup> He suggests that the principle “*maxim sic utere tuo ut alienum non laedes*”<sup>11</sup> applies, perhaps, in the sense that a State should not cause or permit ships flying its flag to do things on the high seas that interfere, whether maliciously or unreasonably, with the interests of other users.”<sup>12</sup>

Conservation and management of the living resources of the high seas is the subject of section 2 of Part VII of UNCLOS. The conditions laid down in the section are a few. According to Article 116 all States have the right for their nationals to engage in fishing on the high seas subject to their treaty obligations; the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2,<sup>13</sup> and articles 64 to 67;<sup>14</sup> and the provisions of section 2 in

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<sup>8</sup> See Article 87(1)(e) of UNCLOS.

<sup>9</sup> David Anderson, *Freedoms of the High Seas in the Modern Law of the Sea*, in THE LAW OF THE SEA: PROGRESS AND PROSPECTS 327, 332 (David Freestone et. al. ed., 2006). Article 300 of UNCLOS read, “States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”

<sup>10</sup> *Id.* at 331.

<sup>11</sup> In English: One must so use his rights as not to infringe on the rights of others.

<sup>12</sup> Anderson, *supra* note 9, at 331.

<sup>13</sup> Article 63(2) provides that “[w]here the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.”

<sup>14</sup> Article 64(1) provides that: “[t]he coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the

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Part VII (article 116-120). Article 117 provides that “[a]ll States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.” Article 118 provides that:

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States, whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

A description follows in Article 119 what states shall take into consideration, when determining the allowable catch and establishing other conservation measures for the living resources in the high seas. As will be shown later on it is questionable if Iceland respected UNCLOS conservation obligations in the Loophole dispute.

UNCLOS provisions provided a framework for the development of fisheries agreements on a regional basis. On the other hand this framework also causes problems. Lawrence Juda has pointed out that the zonal approach to ocean jurisdiction in UNCLOS led to some fisheries problems because the framework, relying on politically defined boundaries, failed to take into sufficient account either the transboundary character of natural ecosystems or the movement of living resources and pollutants.<sup>15</sup> He noted that “[t]he fish are not party to the diplomatic Agreement embodied in the EEZ and they wander about, motivated by factors such as food availability and water temperature, disregarding the sanctity of solemnly created treaty regimes.”<sup>16</sup>

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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 cooperate to establish such an organization and participate in its work.”

Article 65 deals with marine mammals, Article 66 with anadromous stocks, and Article 67 with catadromous stocks.

<sup>15</sup> Juda, *supra* note 3, at 20.

<sup>16</sup> Lawrence Juda, *The United Nations Fish Stocks Agreement*, in *YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT 2001/2002* 53, 53 (Olav Schram Stokke & Øystein B. Thommessen ed., 2002).

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A common argument is that UNCLOS is not sufficiently detailed to guide states to take effective measures for improved conservation and management of fishery resources<sup>17</sup> and that UNCLOS has little to say about stocks that straddle or migrate between the high seas and the EEZ (UNCLOS has only one provision about straddling fish stocks)<sup>18</sup> or consequences for overfishing the high seas.<sup>19</sup> It has also been argued that the lack of specific provisions delineating the legal rights and duties of states that harvest fish swimming between EEZs and the adjacent high seas hindered effective implementation or enforcement of conservation measures for straddling or migratory stocks, and made conflicts between coastal states and distant water nations inevitable.<sup>20</sup> In the same line of arguments it is said that with the conclusion of a number of regional fisheries management organizations (RFMOs), a new problem arose; how to ensure the effectiveness of such regional arrangements under international law in the face of fishing activities of non-participating states.<sup>21</sup> A growing number of fishing vessels started to cause serious problems by targeting high value fish stocks on the high seas, by circumventing relevant regional measures by using open registries in states that are not party to regional fisheries management arrangements, or by not reporting on their catch properly.<sup>22</sup>

On the other hand it has been pointed out that conservation has never been the major goal of the adherents of the extension of coastal state jurisdiction and that the alliance between coastal fishing industries and conservationists with respect to fisheries management was largely a

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<sup>17</sup> E.g., Moritaka Hayashi, *Illegal, Unreported, and Unregulated (IUU) Fishing: Global and Regional Responses*, in BRINGING NEW LAW TO OCEAN WATERS 95, 96 (David D. Caron and Harry N. Scheiber ed., 2004).

<sup>18</sup> See *supra* note 13.

<sup>19</sup> Deirdre M. Warner-Kramer & Krista Canty, *Stateless fishing vessels: The current international regime and a new approach*, 227 OCEAN & COASTAL L.J. 226, 232 (2000).

<sup>20</sup> The most famous conflict is probably the Canadian arrest of the Spanish vessel *Estai* on the high seas in March 1995. See R. R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 306 (3rd ed. 1999).

<sup>21</sup> Budislav Vukas & Davor Vidas, *Flags of Convenience and High Sea Fishing: The Emergence of a Legal Framework*, in GOVERNING HIGH SEAS FISHERIES: THE INTERPLAY OF GLOBAL AND REGIONAL REGIMES 53, 55-56 (Olav Schram Stokke ed., 2001).

<sup>22</sup> See Hayashi, *supra* note 17, at 96.

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marriage of rhetorical convenience.<sup>23</sup> Under political pressure to find ways to protect local fishing industries the adherent's main focus has been on the acquisition of means to reduce competition from foreign high sea fishing.<sup>24</sup>

Coastal States managed to engage environmentalists to fight for more restraints on high seas fisheries, in the name of conservation, and make them an important subject in the preparation for and at the 1992 United Nations Conference on Environment and Development (UNCED)<sup>25</sup> even though it is evident from the last decades experience that the territorialization of the ocean in itself will not solve conservation problems.<sup>26</sup> Following UNCED, a number of concrete steps were recommended and several instruments were subsequently adopted such as the 1993 Food and Agriculture Organization Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas<sup>27</sup> (The Compliance Agreement) and the United Nations 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 (The Fish Stock Agreement).<sup>28</sup> Interestingly, the most heated part of the Loophole dispute coincided in time with

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<sup>23</sup> See Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AJIL 830, 848 (2006).

<sup>24</sup> *Id.* at 849.

<sup>25</sup> See U.N. General Assembly, *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992) Annex I: Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/26 (Vol.I).

<sup>26</sup> See Oxman, *supra* note 23, at 848-849.

<sup>27</sup> Food and Agriculture Organization: Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted Nov. 24, 1993, 33 I.L.M. 969 [hereinafter Compliance Agreement] (entered into force on Apr. 23, 2003).

<sup>28</sup> 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, *opened for signature* on Dec. 4, 1995, A/CONF.164/37 reprinted in 34 I.L.M. 1542 [hereinafter referred to as the Fish Stock Agreement] (entered into force on 11 November 2001). Iceland ratified the Fish Stock Agreement 14 February 1997, The Russian Federation 4 August 1997, and Norway 30 December 1996. See Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 07 August 2007.

*Available at:*

[http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea) (last visited Jun. 29, 2009).

the global-level negotiations of the United Nations Fish Stocks Agreement<sup>29</sup> as will be described later on.

### III. A DISPUTE ESCALATES

In 1977 the Soviet Union<sup>30</sup> established a 200 nm fishing zone off its Barents Sea coast (converted to a 200 nm EEZ in 1984), and Norway established a 200 nm EEZ off its mainland coast and a controversial 200 nm fishery protection zone around Svalbard (formerly known as Spitzbergen). The extension of the fisheries jurisdiction of the two countries covered nearly the whole Barents Sea.<sup>31</sup> However in the middle of the Barents Sea, a small enclave of high seas (62,400 square kilometers), that came to be known as “the Loophole”, was not covered by the 200-mile claims.<sup>32</sup> Since the extension to 200 nm shared stocks have been managed by the Joint Norwegian Russian Fisheries Commission established by the 1975 Agreement on Co-operation in the Fishing Industry between Norway and the Soviet Union.<sup>33</sup> The Commission has each year set Total Allowable Catches (TACs) for cod, haddock and capelin, each of which are seen as a single

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The Fish Stock Agreement applies to fisheries for straddling stocks and highly migratory stocks only, the Compliance Agreement applies generally to all fishing vessels. These instruments have both in common that they apply only to fishing vessels that operate on the high seas.

<sup>29</sup> Olav Schram Stokke, *Management of Shared Stocks in the Barents Sea*, Paper Presented at the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks - Bergen, Norway, 7-10 October 2002, available at <http://www.fao.org/DOCREP/006/Y4652E/y4652e0e.htm#bm14> (last visited Jun. 29, 2009) [hereinafter SHARED STOCKS].

<sup>30</sup> It is commonly accepted that the Russian Federation constitutes a continuation of the USSR, with consequential adjustments to take account of the independence of the other former Republics of the Soviet Union. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 187 (5th. ed., 2003).

<sup>31</sup> See Gunnar G. Schram, *Deilur um fiskverndarsvæðið við Svalbarða*, in AFMÆLISRIT: ÞÓR VILHJÁLMSOON SJÖTUGUR 9. JÚNÍ 2000 223, 229 (Davíð Þ. Björgvinsson ed., 2004).

<sup>32</sup> See R.R. Churchill, *The Barents Sea Loophole Agreement: A “Coastal State” Solution to a Straddling Stock Problem*, 14 *Int Mar Coast Law* 467, 468 (1999).

<sup>33</sup> Norway and Union of Soviet Socialist Republics Agreement on co-operation in the fishing industry, *opened for signature and entered into force* on Apr. 11, 1975, 983 U.N.T.S. 3.

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biological unit, and from time to time other conservation measures such as mesh size regulations. The TAC is divided between the two coastal States in fixed shares, with some of the Norwegian quotas being made available to third state vessels (primarily from the Member States of the European Community (EC)) through bilateral agreements.<sup>34</sup> The Commission allocates quotas to the parties, decides on the shares to be allocated to third parties, and determines operational restrictions.<sup>35</sup>

It has been pointed out that “[w]hile the Barents Sea fisheries complex is simpler than in many other ocean areas, since the harvest is largely taken by two coastal States, a complicating feature is the fact that the area is extremely sensitive in a military sense.”<sup>36</sup> The reason for the sensitivity “is due to the importance of nuclear submarines deployed in Northern waters for the maintenance of the strategic deterrence, especially during the Cold War period.”<sup>37</sup> An important “consequence of this sensitivity has been helpful to fisheries management, namely that both Norway and the Soviet Union were eager to avoid unnecessary political tension in the area.”<sup>38</sup>

The availability of cod in the Loophole increased markedly around 1990 because of changes in temperature and salinity. Cod became a straddling as well as a shared stock. This change attracted distant water vessel operators despite a short season due to ice conditions.<sup>39</sup> In 1991 the fishing began slowly with vessels from the EC, Greenland and the Faroes.<sup>40</sup> The potential problems that such fishing might cause were avoided by Norway agreeing to give the EC, Greenland and the Faroes greater fishing rights in Norwegian waters in return for reducing their fishing activities in the Loophole and keeping their total catches in the Barents Sea to within the

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<sup>34</sup> Churchill, *supra* note 32, at 468-470.

<sup>35</sup> SHARED STOCKS, *supra* note 29.

<sup>36</sup> *Id.* at 181.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 183.

<sup>40</sup> Churchill, *supra* note 32, at 470.

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limits of their total quotas in national waters in the Barents Sea.<sup>41</sup> However, two years later third party fisheries accelerated when Icelandic fisheries vessels, some registered under flags of convenience such as Panama,<sup>42</sup> began to operate in the Barents Sea, which they had not done for decades.<sup>43</sup>

Icelandic fisheries vessels owners' interest in operating in the area can be traced to a drop in the total cod quota in Icelandic waters to a historic low combined with a rapid growth in the harvesting capacity of the Icelandic fleet.<sup>44</sup> From 1980 to 1995 the total cod catch from all fishing grounds around Iceland decreased from 428,344 tons to 202,900 tons.<sup>45</sup> The catch in the Loophole indicated that further fisheries in the area could be quite profitable. The total Icelandic catch was estimated to be 60,000 tons in 1994 and 40,000 tons in 1995.<sup>46</sup> These are very large numbers especially when it is borne in mind that third party catch in the Loophole was only 12,000 tons in 1993.<sup>47</sup> In 1994 value of the fish recovered from the Loophole amounted to 5.5% of the value of Iceland's exports.<sup>48</sup> It is believed that in September 1994, 700 to 800 Icelandic fishermen were operating in the Loophole<sup>49</sup> and by 1995 as many as eighty Icelandic trawlers had operated there.<sup>50</sup> In the period 1993-98 the total catch of cod by Icelandic vessels (most of it caught in the period 1994-96) was estimated to be about 135,000 tons. Not only were Icelandic catches much greater

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Egill Ólafsson, *Veiðarnar skiluðu fimm milljörðum þegar best lét*, Morgunblaðið. Mar. 6, 1999 at 14.

<sup>44</sup> SHARED STOCKS, *supra* note 29, at 183.

<sup>45</sup> See Ministry of Fisheries, *Icelandic Fisheries in Figures 2005*, at 3, available at:

[http://sjavarutvegsraduneyti.is/media/sjavarutvegur\\_i\\_tolum/allur\\_baklingurinn\\_2005.pdf](http://sjavarutvegsraduneyti.is/media/sjavarutvegur_i_tolum/allur_baklingurinn_2005.pdf) (last visited Jun. 29, 2009).

<sup>46</sup> SHARED STOCKS, *supra* note 29.

<sup>47</sup> *Id.*

<sup>48</sup> Ólafsson, *supra* note 43.

<sup>49</sup> *Id.*

<sup>50</sup> SHARED STOCKS, *supra* note 29, at 183.

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than those of earlier third state fishing in the Loophole but, unlike such third states, Iceland had no fishing rights in the Norwegian or Russian 200-mile zones in the Barents Sea.<sup>51</sup>

Norway strongly objected to the fishing by the Icelanders from the beginning, as did the Russians. Noting that the stock was fully utilized, the two countries rejected the legitimacy of the unregulated activity in the Loophole.<sup>52</sup> The general attitude of Icelandic fisheries vessels owners, a powerful interest group in domestic politics in Iceland, was that their ships were engaged in fisheries on the high seas and therefore the legality was unquestionable.<sup>53</sup> The Icelandic Government, in general, held the same view. Jón Baldvin Hannibalsson, the Foreign Minister at the time, pointed out that the fish stocks in the Barents Sea were upsurging and it was hard to see that the fish stocks were endangered.<sup>54</sup> Furthermore, he stated that the Loophole dispute was not caused by the Icelandic Government, “free men simply went fishing on the high seas and the Icelandic Government had no legal authority to stop them.”<sup>55</sup>

In the beginning of the dispute the Icelandic Ministry of Fisheries was quite critical regarding the fishing in the Barents Sea. At the time the ministry was working on a regulation that would ban fisheries by Icelandic vessels beyond the EEZ. The ministry wanted to cooperate with Norway to regulate fisheries south of Iceland on the Reykjanes ridge, beyond Iceland’s EEZ.<sup>56</sup> Þorsteinn Pálsson, the Minister of Fisheries at the time, was quoted saying that it was not in conformity with Iceland’s policy that uncontrolled fishing progressed in areas like these.

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<sup>51</sup> Churchill, *supra* note 32, at 471.

<sup>52</sup> SHARED STOCKS, *supra* note 29, at 184.

<sup>53</sup> They also claimed historical rights dating back to the early 1950s which is a quite tenuous argument whereas the Icelandic fishery in the area was never of much significance. See Áslaug Ásgeirsdóttir, *Oceans of Trouble: Domestic Influence on International Fisheries Cooperation in the North Atlantic and Barents Sea*, 7 *Global Environmental Politics*, 120, 140 (2007).

<sup>54</sup> Jón Baldvin Hannibalsson, *Ekki lagaheimildir til að banna veiðarnar*, Morgunblaðið, Aug. 14, 1993, at 21

<sup>55</sup> *Íslensku skipin létu reka meðan beðið var ákvörðunar útgerða*, Morgunblaðið, Nov. 24, 1993, at 5 [translated by author].

<sup>56</sup> Jón Heiðar Þorsteinnsson, *Úthafsveiðar Íslendinga*, (Oct. 1995) (unpublished B.A. thesis, University of Iceland) (on file with National and University Library of Iceland), at 56.

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Hannibalsson seems to have been of a different opinion if an assertion in the annual report of the Minister of Foreign Affairs about foreign policy is kept in mind. In the report it is asserted that Icelanders could take pride in their achievements in the Loophole and they steadfastly implemented all provisions of the Law of the Sea Convention.<sup>57</sup>

The Legal Advisor for the Federation of Icelandic Fishing Vessels Owners at the time was quoted saying that people had to realize that currently, for fisheries vessels' owners that are confronted with difficulties in their business, these fisheries are much more important than the will and ambitions of the Icelandic Government to lead the formation of an international policy in fisheries management that could come to reality after 5 to 10 years.<sup>58</sup>

The aforementioned regulation was never passed. The Prime Minister and the Minister of Foreign Affairs opposed it. Their opposition was based on a legal opinion from a professor at the University of Iceland which concluded that it was questionable to deprive individuals of their fishing rights which they enjoyed under international law with a regulation put forward by the Minister of Fisheries.<sup>59</sup>

Norway and Russia used various measures to limit the fisheries in the Loophole. In 1994 the landing of high seas catches taken without a quota was prohibited in Norway.<sup>60</sup> Another measure was the practice of blacklisting Loophole vessels from subsequent access to the Norwegian EEZ, even if the vessel had changed ownership in the meantime.<sup>61</sup> Private boycott actions were also introduced that aimed at cutting off Norwegian supplies of provisions, fuels, and services to Loophole vessels, as well as punishing domestic companies that failed to adhere to

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<sup>57</sup> Utanríkisráðuneytið, *Skýrsla utanríkisráðherra um utanríkismál 1993* (Dec. 10 1993) available at: <http://utn.stjr.is/utgefing-efni//nr/736#Hafr%E9ttarm%E11> (last visited Jun. 29, 2009).

<sup>58</sup> *Geta skaðað hagsmuni til langs tíma*, Morgunblaðið, Aug. 13, 1993, at 23.

<sup>59</sup> Gunnar G. Schram, *Þjóðréttarregla að veiðar á úthafinu eru frjálssar*, Morgunblaðið, Aug. 19, 1993, at 27.

<sup>60</sup> SHARED STOCKS, *supra* note 29, at 184.

<sup>61</sup> *Id.* at 184-185.

such boycotts. The Russians exerted similar pressure even in Icelandic ports by encouraging the Murmansk-based industry to discontinue landings of cod from Russian vessels at ports in Iceland.<sup>62</sup> However, these public and private sanctions did not deter unregulated harvesting activities. The reasons were mainly two: The vessels operating in the Loophole were able to operate independently of the Russian and Norwegian fishing industries, and the Icelanders were determined to establish a sizable fishery in the Loophole. In the long run, however, reliance on Icelandic ports would add considerably to the over-all costs of fishing in the Barents Sea.<sup>63</sup>

The catch in the Loophole collapsed in 1997 with the consequence of a big loss for the Icelanders engaged in the fisheries in the area. In 1998 the catch was only 1,500 tons. The main reason was the fast decline of the codstock.<sup>64</sup> The negative prospective of future fishing in the Loophole, combined with the view that operating there was dangerous and quite costly,<sup>65</sup> created an atmosphere in Iceland for serious negotiations.

#### IV. THE NEGOTIATION PROCESS

The Loophole conflict was solved in a trilateral negotiation. The negotiations can be viewed as one between the two coastal States bordering the Barents Sea, on the one hand, and a distant water fishing nation on the other hand.<sup>66</sup> The dispute seems to have been regarded as more important by the Icelandic and Norwegian Governments than by Russia. The reason is presumably that Russia is a state with a much broader range of interests than Iceland and Norway with the

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<sup>62</sup> *Id.* at 185.

<sup>63</sup> *Id.*

<sup>64</sup> Editorial, *Veiðar í Barentshafi*, Morgunblaðið, Mar. 6, 1999, at 38.

<sup>65</sup> Ólafsson, *supra* note 43.

<sup>66</sup> Fredrik Sjö, *The Loophole, the Power and the Sea* (2006), available at <http://theses.lub.lu.se/archive/2006/01/09/1136818434-21166-555/C-uppsats5B25D.pdf>, at 4 (last visited Jun. 29, 2009).

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consequence that issues as the conflict in Chechnya got more attention by the Russian government than a fisheries dispute.<sup>67</sup>

A few attempts were made to solve the Loophole dispute with negotiations. It has been pointed out that the formal negotiations began partly because the Icelanders, refusing to yield to political pressure, had rapidly acquired some 75 percent of the unregulated harvests in the Loophole, and partly because the coastal States were reluctant to stretch international law regarding unilateral enforcement measures beyond the EEZ, an issue that at the time was under negotiation at the UN.<sup>68</sup> Preliminary discussions between Norway and Iceland took place in the summer of 1993, but were inconclusive.<sup>69</sup>

The first formal trilateral negotiations took place in March 1995. The talks were based on a joint Norwegian-Russian proposal for a separate regime for the Loophole under which a proportion of the total TAC for cod in the Barents Sea would be set aside for the Loophole (based on zonal attachment), of which Iceland would catch a fixed amount.<sup>70</sup> In April 1995 Norway and Russia offered Iceland an 8,000 ton quota in the Loophole. The Icelandic delegation rejected the offer.<sup>71</sup> Serious attempts were made to solve the dispute before fishing began in 1996<sup>72</sup> without any results. At that point an outline of an agreement was on the table which stated that Iceland would obtain a quota in the Barents Sea in exchange for a quota in Icelandic waters to the Russians and Norwegians.<sup>73</sup> In December 1997 a formal meeting went on where the object was to move the talks forward.<sup>74</sup> Instead of a special regime for the Loophole, Norway and Russia offered

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<sup>67</sup> *Id.* at 24.

<sup>68</sup> SHARED STOCKS, *supra* note 29, at 184.

<sup>69</sup> Churchill, *supra* note 32, at 471.

<sup>70</sup> *Id.*

<sup>71</sup> *Fyrri boð endurtekið í alvöru*, Morgunblaðið, Oct. 12, 1995, at 6.

<sup>72</sup> Ólafsson, *supra* note 43.

<sup>73</sup> Egill Ólafsson, *Þrjú ár tók að koma viðræðum aftur á skrið*, Morgunblaðið, Mar. 9, 1999, at 32.

<sup>74</sup> *Id.*

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Iceland quotas in their EEZs in return for Norwegian and Russian fishing rights in Iceland's EEZ.<sup>75</sup>

In the fall of 1998 the negotiations began to move quickly towards a solution. At a meeting in February 1999 the Foreign Ministers of Iceland and Norway decided to try to solve the dispute for once and all. Three consultative meetings lead up to a framework being accepted by the Foreign Ministers of Iceland and Norway and the vice-foreign Minister of Russia in March 1999. In May the representatives of each state signed the Agreement Concerning Certain Aspects of Cooperation in the Area of Fisheries.<sup>76</sup> Furthermore, two protocols were signed.<sup>77</sup> The Norwegian Government showed some interest in solving both the Loophole dispute and another dispute between the countries concerning the Svalbard archipelago. The Icelandic Government did not share the same view.<sup>78</sup>

The basis for solving the dispute was moving the fisheries by Icelanders from the Loophole into Russian and Norwegian waters. It has been pointed out that although the Agreement does not say so expressly, the effect of it and its protocols is that Iceland will cease fishing in the Loophole.<sup>79</sup> This has been the case.

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<sup>75</sup> Churchill, *supra* note 32, at 472.

<sup>76</sup> The Agreement is in four official languages: English, Icelandic, Norwegian and Russian. The Norwegian text of the Agreement and the protocols is published as Norwegian Parliamentary Paper St. Prp. No. 74 (1998-99) *available at* [www.odin.dep.no/repub/98-99/stprp/74/](http://www.odin.dep.no/repub/98-99/stprp/74/) (last visited Jun. 29, 2009). The Icelandic and the English version of the Agreement, as its protocols, are published as Icelandic Parliamentary Paper 124. löggjafarþing Þskj. 2 – 2. mál *available at* <http://www.althingi.is/altxt/124/s/0002.html> (last visited Jun 29, 2009) [hereinafter the Loophole Agreement].

<sup>77</sup> The official name of the protocols are: “Protocol between the Government of Iceland and the Government of Norway under the Agreement between the Government of Iceland, the Government of Norway and the Government of the Russian Federation concerning Certain Aspects of Co-operation in the Area of Fisheries” [hereinafter Iceland-Norway protocol] and “Protocol between the Government of Iceland and the Government of the Russian Federation under the Agreement between the Government of Iceland, the Government of Norway and the Government of the Russian Federation concerning Certain Aspects of Co-Operation in the Area of Fisheries” [hereinafter Iceland-Russia protocol].

<sup>78</sup> Ólafsson, *supra* note 73.

<sup>79</sup> Churchill, *supra* note 32, at 472.

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According to Article 2 of the Loophole Agreement the Parties to it may agree on a reciprocal basis to exchange annual quotas in their respective EEZs, and to grant vessels of the other Parties access to fish quotas in their respective EEZs.<sup>80</sup> Details of the quota exchange are regulated in the protocols under the Agreement. In Article 1 of the bilateral protocols it is stated that of the 480,000 tons for North East Arctic cod, Iceland is allocated a total quota of 8,900 tons in 1999, divided equally between the EEZ's of Russia and Norway. In future years Iceland's share of the TAC is supposed to remain the same, i.e. 1.86%. In order to conduct a rational fishery policy, Iceland is allocated an annual by-catch quota of other species amounting to 30% of the Icelandic annual quota of the North East Arctic cod.<sup>81</sup> Should the TAC for cod in the Barents Sea fall below 350,000 tons, Iceland's quotas will be suspended, as will, correspondingly, Norwegian and Russian fishing possibilities in Iceland's EEZ.<sup>82</sup>

For the quota in Norwegian waters, Norway got the opportunity in the Icelandic EEZ to catch 500 tons of tuskfish, ling and blue ling in a longline fishery and 17,000 tons of capelin in 1999.<sup>83</sup> For subsequent years the quota is supposed to remain constant whereas the capelin quota will be adjusted proportionately to the annual Icelandic quota.<sup>84</sup> Interestingly, even though Article 2 of the Agreement speaks of an exchange of quotas on the reciprocal basis, the Iceland-Russia Protocol does not provide for any Russian fishing in Iceland's EEZ. According to the Iceland-Russia Protocol 1,669 tons of the Icelandic quota in the EEZ of Russia in 1999 and corresponding proportion in the following years shall be subject to payment. Russian authorities are supposed to

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<sup>80</sup> The Loophole Agreement, *supra* note 75, art. 2. The Loophole Agreement is neither a regional fisheries organization nor a regional fisheries arrangement, in the meaning of the Fish Stock Agreement because the latter Agreement only applies to the high seas. Article 3(1) of the Fish Stock Agreement provides that “[u]nless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction.” Fish Stock Agreement, *supra* note 28, art. 3(1).

<sup>81</sup> The Iceland-Russia and Iceland-Norway protocols, *supra* note 77, art. 2.

<sup>82</sup> *Id.* Article 1(3).

<sup>83</sup> The Iceland-Norway protocol, *supra* note 77, art. 5(1).

<sup>84</sup> *Id.* Article 5(2).

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offer Icelandic vessel owners this part of the quota at a price announced by Russia, taking into account the market situation.<sup>85</sup>

In an interview, Nikolaj A. Érmakov, the chief of the Russian Federal Committee of Fishery, stated that the signing of the agreement relieved tension between the countries. Furthermore, Érmakov asserted that the tension that was in the air every time when the representatives of the countries meet, was gone.<sup>86</sup> The Norwegian fishing industry was not as satisfied with the Agreement. It did not feel that the quotas that Norway had secured in Iceland's EEZ represented a reasonable balance compared with Iceland's quotas in Norway's EEZ.<sup>87</sup> John Kristen Skogan, a specialist in Norwegian foreign affairs, asserted that the quota that Norway and Russia got in Icelandic waters were minimal and they were just negotiated to mask the fact that Iceland had won the battle of the Loophole.<sup>88</sup>

One could ask why it took such a long time to reach an agreement regarding the Loophole. No clear answer seems available. The fisheries in the Loophole were booming in 1995. Icelandic fisheries vessels owners considered it beneficial to get more fishing experience to strengthen their position before negotiating, while Norwegian fisheries vessel owners believed that fishing by the Icelanders would decline and considered it better to wait instead of negotiating immediately.<sup>89</sup> Audun Marák, the spokesman for Norwegian fisheries vessels owners, concluded that the Icelanders had chosen to negotiate because fisheries in the Loophole were no longer profitable.<sup>90</sup>

One could also ask why the parties to the dispute did not involve the North East Atlantic Fisheries Commission ("NEAFC") which is responsible for the conservation and management of

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<sup>85</sup> The Iceland-Russia protocol, *supra* note 77, art. 1(4).

<sup>86</sup> Auðunn Arnórsson, *Samskiptin við Ísland komin í bezta lag*, Morgunblaðið, Aug. 24, 1999, at 24.

<sup>87</sup> Churchill, *supra* note 32, at 474.

<sup>88</sup> Ólafsson, *supra* note 69.

<sup>89</sup> Ólafsson, *supra* note 39.

<sup>90</sup> Ólafsson, *supra* note 69.

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the high seas fishery resources of the North-East Atlantic, including cod. The well known international lawyer Robin R. Churchill has pointed out that there are a number of possible reasons why the states concerned, especially Norway and Russia, chose not to involve NEAFC in regulating fishing in the Loophole.

First, NEAFC will probably have been perceived as a rather ineffectual organization . . . . Secondly, if NEAFC had become involved, there is no guarantee that it would have adopted measures with which Norway and Russia would have been satisfied . . . . Thirdly, it is likely that, had it become involved, NEAFC would largely have duplicated the work of the Norwegian-Russian Fisheries Commission, as both bodies base their management measures very largely on scientific advice from ICES.<sup>91</sup>

It seems quite safe to assert that respect for the conservation obligations described in section 2 of Part VII of UNCLOS seems not to have been on the top priority list of the Icelandic Government during the Loophole dispute even though the Government respected its duty under Article 118 to enter into negotiation with Norway and Russia. It could even be argued that Iceland violated its obligation under Article 300 whereas she abused the freedom of the high seas, not having due regard to the interests of Norway and Russia by not preventing fishing vessels registered in Iceland to overexploit the cod stock from the Loophole.<sup>92</sup>

## V. THE LOOPHOLE AND NEGOTIATION OF THE FISH STOCKS AGREEMENT

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<sup>91</sup> Churchill, *supra* note 32, at 479-480.

<sup>92</sup> It must be pointed out that, even though the Loophole dispute began more than a year before UNCLOS entered into force, Iceland was from the beginning of the dispute under an obligation under the Law of Treaties to refrain from acts which would defeat the object and purpose of UNCLOS that it had signed and ratified the convention. Article 18 of the Vienna Convention on the Law of Treaties read: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27 1980). Iceland is not a member of the Treaty, however many commentators believe that Article 18 constitute a codification of customary international law which means, according to them, that the obligation under Article 18 exists under customary international law. See J.S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT'L L. AND ECON 71 (1991).

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The conference that led to the Fish Stocks Agreement was held between 1993 and 1995. As mentioned the Loophole dispute coincided in time with the negotiation process. However, it seems not to have had a strong impact on the negotiations at the United Nations, as described by the Norwegian scholar Olav Schram Stokke:

Compared to some of the other regional straddling stock issues . . . the high seas problem in the Barents Sea had scant impact on the Fish Stock Conference. The relative strength of the major bargaining blocs was largely unaffected. Nor did the Loophole issue provide sufficient urgency to prompt structural leadership in the form of unilateral measures on the outer edge of international law.<sup>93</sup>

In August 1994, at the fourth session of the fish stock negotiations the Norwegian Minister of Fisheries accused Icelanders of being opportunistic and asserted that the Icelandic fisheries operations in the Loophole were not in conformity with the spirit of UNCLOS. The Icelandic delegation rejected the accusations and called them ill-founded assertions and explained Iceland's position regarding the negotiations at the UN.<sup>94</sup> Even though the Icelandic delegation rejected the accusations firmly, Iceland found itself in an uncomfortable situation, as explained by Stokke:

With regard to *bargaining power*, the three main antagonists in the Loophole dispute all belonged to the coastal state bloc during the negotiation of the Fish Stocks Agreement; but each state also had a tradition of distant water fishing operations. True to tradition, Iceland was one of the original members of the so-called core group, the group of coastal states that played a very active role in the process that led up to the Fish Stocks Conference. Throughout the negotiations, the core group remained a salient forum for joint action, including the drafting of proposals on controversial issues. When a large fleet of Icelandic vessels became engaged in controversial high seas activities in the Barents Sea, however, Iceland's participation in the core group became more problematic.<sup>95</sup>

Iceland advocated various measures that were supposed to lead to more responsible fishing at the Third United Nations Conference on the Law of the Sea and other international forums; on the other hand because of the decreased cod catch, the Loophole fishing was in Iceland's short-term interest. It could therefore be argued that Iceland's position was quite contradictory during the negotiations that led to the Fish Stock Agreement.

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<sup>93</sup> SHARED STOCKS, *supra* note 29.

<sup>94</sup> Þorsteinsson, *supra* note 56, at 28-29.

<sup>95</sup> SHARED STOCKS, *supra* note 29.

## VI. THE RELATIONSHIP BETWEEN THE LOOPHOLE DISPUTE AND THE DISPUTE ABOUT SVALBARD'S FISHERY ZONE

Early in the twentieth century, coal deposits were discovered on the previously unimportant archipelago of Spitzbergen.<sup>96</sup> In order to establish a regime for exploitation, a unique multilateral treaty<sup>97</sup> was drafted in which Article 1 recognizes that Norway has “full and absolute sovereignty” over the archipelago. However, the Spitzbergen Treaty in Article 2, 3, 6 and 7 guaranteed to nationals of all states-signatories free access and the right to hunt, fish and extract minerals subject to nondiscriminatory controls promulgated by Norway. It has been noted that “Norway’s sovereignty was obviously far from ‘full and absolute,’ but was seen as a necessary structure for establishing a system of governance over terra nullius.”<sup>98</sup> For more than 50 years the Spitzbergen Treaty was implemented smoothly. However, the establishment of the 200 nm fishery protection zone surrounding Svalbard caused some turbulence.<sup>99</sup> The reason why a fishery protection zone was established for Svalbard rather than a EEZ was to try to avoid provoking a controversy over whether the 1920 Treaty applied to the waters around Svalbard.<sup>100</sup> Various countries protested the establishment, including Iceland, the Soviet Union and the EEC.<sup>101</sup> In the fishery protection zone Norway has unilaterally passed on fishery protection regulations and

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<sup>96</sup> Allan Young, *Antarctic Resource Jurisdiction and the Law of the Sea: A question of Compromise*, 11 Brook. J. Int'l L. 45, fn. 107 at 67 (1985).

<sup>97</sup> Treaty Concerning the Archipelago of Spitzbergen, Feb. 9, 1920, 43 Stat. 1892, 2 L.N.T.S. 8 (1920-1921) [hereinafter Spitzbergen Treaty]

<sup>98</sup> Young, *supra* note, at 96.

<sup>99</sup> Mining and Svalbard's continental shelf has also caused disagreement. See Torbjørn Pedersen, *The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries*, 37 OCEAN DEVELOPMENT & INT. LAW 339, 342-348 (2006).

<sup>100</sup> See Churchill, *supra* note 32, at 469.

<sup>101</sup> Schram, *supra* note 31, at 234.

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distributed quota. Despite this unilateralism on behalf of Norway, its activities have not met with considerable resistance. Olav Schram Stokke has described why:

The Fishery Protection Zone established here by Norway has not been expressly recognised by other states involved in fisheries in the area, although the Norwegian regulations have generally been respected. Part of the explanation may be that Norway's coast guard has played it safe, in practice setting a somewhat higher threshold for reactions than in the economic zone off the Norwegian mainland.<sup>102</sup>

During the summer of 1993 Icelandic Fisheries Vessel owners became interested in the Svalbard area.<sup>103</sup> Their interest can be traced to the same causes in the case of the Loophole, i.e. the downfall of the quota for cod in Icelandic waters. Iceland signed the Spitzbergen Treaty May 30 1994 and ratified it the day after.<sup>104</sup> In the Foreign Ministers annual speech to the parliament in 1994 Iceland's main argument regarding the Svalbard issue were set forth.

Article 2 of the Spitzbergen Treaty from 1920 states that ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting on the islands and in their territorial waters. With declaring unilaterally the establishment of a fishery protection zone surrounding Svalbard Norway has hijacked the power to pass fishery protection rules and distribute quota as she pleases, without consulting other State Parties . . . We are of the opinion that an international court would reach the conclusion that the equality clause of the Svalbard Treaty should apply to the whole area.<sup>105</sup>

In September 1994 two trawlers owned by Icelanders, one registered in Iceland the other in Panama, were arrested in the fishery protection zone where they were fishing and brought to Tromsø in North Norway. Iceland protested the arrest of the ship registered in Iceland. However, the Icelandic Government pointed out that it had not encouraged the fisheries and that the captain and the owner were fully responsible.<sup>106</sup> It has been argued that the Icelandic Government

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<sup>102</sup> Olav Schram Stokke, *The Struggle over illegal, unreported and unregulated fishing in the Barents Sea*, at 2, available at <http://www.fni.no/doc&pdf/oss-kronikk-eng.PDF> (last visited Jun. 29, 2009).

<sup>103</sup> Ólafur Þ. Stephensen, *Málskot til Haag er tvíeggjað vopn*, Morgunblaðið, Feb. 29, 1996, at 28-29.

<sup>104</sup> ÓTTAR PÁLSSON & STEFÁN MÁR STEFÁNSSON, *FISKVEIÐIREGLUR ÍSLANDS OG EVRÓPUSAMBANDSINS* 162 (2003).

<sup>105</sup> Jón Baldvin Hannibalsson, *Skýrsla utanríkisráðherra um utanríkismál 1994*, available at: <http://www.althingi.is/dba->

[bin/unds.pl?xti=/wwwtext/html/118/10/r27103626.sgm&leito=Sk%FDrsIa%5C0utanr%EDkisir%E1%F0herra%5C0um%5C0utanr%EDkism%E1l#word1](http://www.althingi.is/dba-bin/unds.pl?xti=/wwwtext/html/118/10/r27103626.sgm&leito=Sk%FDrsIa%5C0utanr%EDkisir%E1%F0herra%5C0um%5C0utanr%EDkism%E1l#word1) (last visited Jun. 29, 2009) [translated by author].

<sup>106</sup> See Þorsteinsson, *supra* note 56, at 50.

regarded the fishing by the Icelandic trawlers as rather embarrassing, a kind of disaster that would just delay the solution of the countries dispute in the Barents Sea.<sup>107</sup> That sounds not unlikely.

Icelandic fishery vessels owners' claimed that they enjoyed fishing rights under the 1920 Treaty of Spitzbergen. However their claim was rejected by the Norwegian Supreme Court in *Public Prosecutor v Haraldsson et al.* in May 1996, after which Icelandic fishing in the zone significantly decreased, although such fishing did not cease altogether.<sup>108</sup> The Norwegian Government was interested to solve both the Loophole dispute and the Svalbard issue in its talks with the Icelandic Government. However, the Icelandic Government was not as interested. In 2004 the Icelandic Government decided to prepare to bring Norway before the International Court of Justice.<sup>109</sup> However, since then no official actions have been taken in that direction by the Icelandic government. If it is kept in mind that Norway is one of the few countries that are willing to lend Iceland money after the collapse of the Icelandic banking system<sup>110</sup> it is questionable how reasonable it is for the Icelandic government to advance the law suit in the nearest future.

## VII. DEVELOPMENTS IN ICELANDIC POLICY SINCE THE END OF THE LOOPHOLE DISPUTE

Since the mid-1990s Iceland's policy towards high sea fisheries has changed a bit. It is even possible to call the change dramatic. It is quite interesting to compare the debate during the Loophole dispute and the debate in Iceland about illegal, unregulated and unreported fishing (IUU fishing) the last few years. Instead of focusing heavily on the freedom of the high sea, the focus has been on eliminating beyond Iceland's EEZ, especially on the Reykjanes Ridge IUU fishing

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<sup>107</sup> *Id.* at 51.

<sup>108</sup> Churchill, *supra* note 32, fn. 9 at 471.

<sup>109</sup> *Ein hugur um dómstólaleiðina í ríkisstjórn.* Morgunblaðið. Aug. 18, 2004, at 4.

<sup>110</sup> *See Nordic Countries to Lend Iceland \$2.5 Billion*, ABC News. Nov. 20, 2008, available at <http://abcnews.go.com/Business/wireStory?id=6295569> (last visited Jun. 30, 2009).

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practice by foreign vessels flying flags of convenience. Calls for unilateral actions have occasionally been addressed both by the Federation of Icelandic Fishing Vessel Owners and politicians.<sup>111</sup> In a speech in December 2006 by Iceland's Ambassador to the United Nations at the General Assembly, this change in policy is reflected:

In Iceland's view, the development of exemptions from, and limitations to, the general principle of exclusive flag state jurisdiction with respect to fishing vessels on the high seas is paramount if our combat against these illegal and unregulated practices is to succeed. To put an end to such practices, their financial and economic incentives must effectively be removed and adequate enforcement and monitoring measures put in place. There is growing pressure among the international community to develop the necessary legal basis for meaningful and effective measures in order to eliminate IUU fishing practices. Efforts need also to be made to coordinate the activities of a number of organisations and agencies, including the FAO and the IMO, in meeting this urgent challenge. Should the combined efforts of the international community not bear the desired fruit, coastal states with substantial interests at stake could be constrained to contemplate taking unilateral action.<sup>112</sup>

A recent speech, given in June 2009, by the by the permanent representative of Iceland to the United Nations at the tenth meeting of the United Nations Open-ended Informal Consultative Process (UNICPOLAS) also reflects this policy change (albeit in a milder language):

[D]espite all these efforts to combat IUU fishing, such fishing is likely to continue. The measures taken certainly will make IUU fishing more difficult and less economically viable but in our view effective measures are needed to put an end to these practices. As we have stated earlier, what is required, in particular, are direct actions against vessels that have repeatedly been engaged in IUU fishing on the high seas and fly the flag of irresponsible flag States that are consistently in non-compliance with their obligations with respect to their vessels. These IUU vessels, that typically fly flags of convenience, should not be allowed to hide behind, and take advantage of, the exclusive jurisdiction of an irresponsible flag State. We need to further develop exemptions from, and limitations to, the general principle of exclusive flag State jurisdiction with respect to fishing vessels on the high seas.<sup>113</sup>

In the beginning of June 2007 the Icelandic Marine Institute recommended that the cod quota for the next year should be decreased about a third from the year before.<sup>114</sup> In July the same year the

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<sup>111</sup> See Bjarni Már Magnússon, *Þorskastríðsþráhyggja*, Morgunblaðið, Sep. 13, 2006, at 28.

<sup>112</sup> Hjálmar W. Hannesson, Remarks at the United Nations General Assembly (Dec. 7, 2006), available at: <http://www.utn.stjr.is/frettaefni/ymis-erindi/nr/3328> (last visited Jun. 29, 2009).

<sup>113</sup> Gunnar Pálsson, Statement by Ambassador Gunnar Pálsson Permanent Representative of Iceland to the United Nations (Jun. 17, 2009) available at [http://www.utanrikisraduneyti.is/media/Utgafa/Raeda\\_Dr\\_GP\\_Law\\_of\\_the\\_Sea.pdf](http://www.utanrikisraduneyti.is/media/Utgafa/Raeda_Dr_GP_Law_of_the_Sea.pdf).

<sup>114</sup> Morgunblaðið, *Hafró leggur til þriðjungs samdrátt í þorsksafla* (Jun. 2, 2007) available at: <http://www.mbl.is/mm/frettir/frett.html?nid=1272687> (last visited Jun. 29, 2009).

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Minister of Fisheries decided to follow these recommendations.<sup>115</sup> In 2008 the Minister decided not to increase the cod quota.<sup>116</sup> In January 2009 the Minister decided to increase the cod quota by about 30 thousand tons, from 130,000 to 160,000 tons. The decision was taken in the light of the current economic crisis.<sup>117</sup> In July 2009 the Minister decided that the the annual quota for cod 2009-2010 would be 150,000 tons.<sup>118</sup>

If it is borne in mind that Iceland has been involved in serious international disputes about cod and with the calls for unilateral actions on the high seas, it is possible that Iceland will be involved in some sort of an international dispute about cod in the near future.<sup>119</sup> However, it must be pointed out that the fight against IUU fishing on the Reykjaness ridge has been quite successful and that Iceland must be considered rather weak in the international forum because of the collapse of Icelandic banks. Because of this the likelihood that Iceland will engage in a dispute related to high seas fisheries must be rather low, at least at the moment.

## **VIII. CONCLUSION AND DISCUSSION**

The Loophole dispute is regarded by some as a black spot in Icelandic foreign affairs and inconsistent with Iceland's long term interests. The Loophole fisheries by Icelanders is a good

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<sup>115</sup> Ministry of Fisheries, *Leyfilegur heildaraflí fiskveiðiárið 2007-2008 og tillögur sjávarútvegsráðuneytisins vegna samdráttar í þorskafla*, available at: <http://www.sjavarutvegsraduneyti.is/frettir/sjreldra/nr/9277> (last visited Jun. 29, 2009).

<sup>116</sup> Ministry of Fisheries, *Ákvörðun um leyfilegan hámarksafla fiskveiðiárið 2008/2009*, available at: <http://www.sjavarutvegsraduneyti.is/frettir/frettatilkynningar/nr/9332> (last visited Jun. 29, 2009).

<sup>117</sup> Ministry of Fisheries, *Breytt aflamark í þorski* (Jan. 16, 2009), available at <http://www.sjavarutvegsraduneyti.is/frettir/frettatilkynningar/nr/9543> (last visited Jun. 30, 2009).

<sup>118</sup> Ministry of Fisheries, *Ákvörðun um leyfilegan hámarksafla fiskveiðiárið 2009/2010* (Jul. 10, 2009), available at: <http://www.sjavarutvegsraduneyti.is/frettir/frettatilkynningar/nr/9725> (last visited Oct. 22, 2009).

<sup>119</sup> It must be pointed out that Iceland is engaged in a dispute with Norway, the Faroese and the European Union regarding mackerel fishing. The focal point of that dispute is on the fishing of Icelandic vessels within the EEZ of Iceland and not on the high seas. See *Borg: Iceland imperiling mackerel*, Seafood News (Apr. 3, 2009), available at <http://www.seafoodsource.com/newsarticledetail.aspx?id=3049> (last visited Jun. 30, 2009); Ministry of Fisheries, *Regarding Icelandic Mackerel Fisheries in 2009* (Apr. 7, 2009), available at <http://eng.sjavarutvegsraduneyti.is/news-and-articles/nr/9633> (last visited Jun. 30, 2009).

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example of how short term interests of a very powerful group in domestic politics (the Federation of Icelandic Fishing Vessels Owners) can influence the foreign policy of a country. The Loophole dispute is also an example of how the zonal approach to ocean jurisdiction at UNCLOS led to problems because the framework, relying on politically defined boundaries, failed to take into sufficient account either the transboundary character of natural ecosystems or the movement of living resources.

In this study it has been argued that Iceland did not behave as a responsible fisheries nation and even violated its obligation under Article 300 of UNCLOS whereas she did not respect UNCLOS “due regard” obligation. Furthermore, it has been shown how dramatically the policy has shifted towards fighting foreign fisheries vessels sailing flags of convenience. For these reasons, it is hard to reach a conclusion other than Iceland’s fisheries policy, shown in its policy during the Loophole dispute, is an exhibition of *realpolitik* where profit is the major goal.

The conclusion of this paper is in line with the assertion of Baldur Thorhallsson and Gunnar Helgi Kristinsson that the Icelandic political elite has historically adhered to realism in international relations emphasizing on self determination and an evident economic profit.<sup>120</sup> The conclusion could be seen as a contrast to the view that small states aim to cooperate and avoid conflicts with others.<sup>121</sup> Perhaps then, the best way to understand Iceland’s behavior in the Loophole dispute is to focus on the corporatist interaction between governmental decision makers and the representatives of fisheries vessels owners. Otherwise, it is difficult to understand Icelandic behavior from the viewpoint of those small state studies that stress common external

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<sup>120</sup> Baldur Thorhallsson & Gunnar Helgi Kristinsson, *The Euro-sceptical political elite*, in ICELAND AND EUROPEAN INTEGRATION 145, 145 (Baldur Thorhallsson ed., 2004).

<sup>121</sup> See Jeanne A. K. Hey, *Introducing Small State Foreign Policy*, in SMALL STATES IN WORLD POLITICS: EXPLAINING FOREIGN POLICY BEHAVIOR 1, 5 (Jeanne A. K. Hey ed., 2003).

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behavior rather than examine domestic dynamics that can lead to differences even between small states themselves.

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