



# CONSERVATION ON THE HIGH SEAS

Harmonizing International  
Regimes for the Sustainable  
Use of Living Resources



Simone Borg

NEW HORIZONS IN ENVIRONMENTAL AND ENERGY LAW

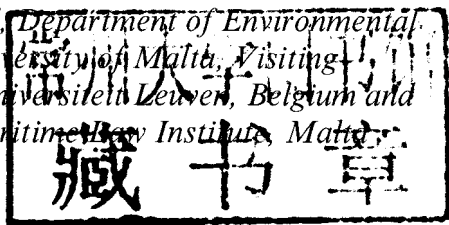
# Conservation on the High Seas

Harmonizing International Regimes for the Sustainable Use of Living Resources

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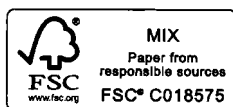
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# Foreword

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It is over three decades since the adoption by the Third United Nations Conference on the Law of the Sea of the treaty with that name containing general provisions on the living resources of the sea and it is more than a half century since the initial consideration of this subject by the International Law Commission. Observably, the effort devoted to fisheries conservation and management at national and international levels has increased enormously since the 1950s and very substantially in the past three decades. During the earlier years, the conservation of marine living resources on the high seas was regulated by a specialized branch of international law commonly referred to as fisheries law. In addition, during this interval, the scope of international concern grew noticeably to include the overall general condition of the marine environment, its characteristics and contents. This development occurred under the aegis of another specialized branch of international law, namely environmental law, which addresses *inter alia* the conservation of wildlife in general.

These regimes adopt different methodologies but share the same objective, namely conservation of high seas living resources through sustainable use. The 1982 Convention on the Law of the Sea sought to achieve a balance between the different perspectives underlying the regulation of the conservation and sustainable use of high seas living resources and the right of freedom of fishing. Nevertheless the general provisions of the United Nations Convention on the Law of the Sea (UNCLOS) did not help to resolve fragmentation resulting from the different strategies, standards and rules that different applicable regimes have adopted. Subsequent state practice may also not be in conformity with the applicable UNCLOS provisions themselves but the Convention's provisions serve as a basis for objection. These circumstances have led to fragmentation providing conflicting legal interpretation as to what constitutes conservation and sound management of marine living resources on the high seas.

The changes and interactions of the decision processes involving the law of the sea, fisheries law and environmental law from an international perspective, are the main focus of Simone Borg's comprehensive work, moving beyond a study of UNCLOS alone. The major theme of

the book is the evolution of agreements, both on fisheries and on more general environmental matters that have been negotiated following the creation of UNCLOS. The discussion is organized about the competence of states to proscribe for the issues involved, about the prescriptions that result from the exercise of this competence and their enforcement. The title of the book itself captures the essence of the analysis, namely the need to harmonize international regimes that seek to achieve sustainable use of living resources beyond national jurisdiction. The introductory chapter spells out the methodology of the project, calling attention to the developing fragmentation as agreements are required for specific fisheries over time and to the resulting need for their harmonization. The following chapters are organized thus; jurisdiction to regulate high seas living resources (Chapter 2); the specific content of the general obligation to conserve high seas resources (Chapter 3); specialized conservation measures for particular categories of species (Chapter 4); specific elements of the general conservation regime for high seas living resources, including promotion of compatibility between measures adopted unilaterally by high seas fishing states and consideration of the precautionary and ecosystem approaches (Chapter 5); the general regime for seeking compliance and enforcement on the high seas involving flag state jurisdiction (Chapter 6); the specific elements involved in compliance and enforcement actions, including registration of fishing vessels, control, monitoring and surveillance, reporting, observers, port state controls, and dispute settlement (Chapter 7); and the conclusion summarizing the major causes for fragmentation of regimes and recommendations for harmonizing regimes (Chapter 8).

In order to identify major conflicts, the author has traced the history behind the applicable UNCLOS provisions and then carried out a comparative analysis between later developments and the same provisions. She highlights the four main types of normative conflicts that may arise between different regimes: those arising as a result of prior and subsequent norms addressing the same circumstances, conflicts between special and general rules, laws emerging from different sources and the diverse application of the same rules in different contexts. The author then skilfully identifies potential and apparent conflicts according to the basic elements constituting any regime aiming at the conservation of living resources on the high seas, namely jurisdiction, regulation of conservation, enforcement, the link with scientific research and institutional capacity as a basis for cooperation amongst stakeholders. Simone Borg's discussion, as a whole, is a formidable piece of work that highlights the great range and variety of prescriptive and enforcement measures that are necessary to

cope with widespread fishing activity over the vast part of the world ocean beyond national jurisdiction. The resulting analysis particularly emphasizes the important and continuing need for cooperative action to realize the enormous benefits available from high seas living resources.

William T. Burke  
Professor of Law Emeritus  
University of Washington School of Law

# Preface

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Having practised as an environmental lawyer in the public sector for 15 years, I have always been intrigued by the invasive nature of environmental law and its influence on other legal fields that had evolved before it. Securing the sustainability of stocks was already a fundamental aspect of international fisheries law when the 1992 Earth Summit highlighted the need for regulating the utilization of natural resources on the basis of sustainable development. Nevertheless UNCED has been highly influential upon the development of fisheries law in these last two decades. It stressed, amongst other things, the need for a more holistic perspective and sought the integration of socio economic issues into environmental concerns and vice versa. Since 1992, the International community has struggled to come to terms with translating this common objective into substantive norms so as to ascertain the sustainable use of high seas living resources. Above all, it sought to elicit the legal obligations and the required methodology to reach this goal. This process, however, also exposed the fragmentation of applicable international regimes addressing the conservation of high seas living resources. This is mainly due to its different sources and the diverse interpretation of the same legal terms as perceived by various international fora. I believe it was the perplexed feelings of my non-legal colleagues, who expect the law to be both certain and specific, which instilled in me the desire to write on this subject.

Carrying out research to assess to what extent harmonization may be achieved amongst the applicable regimes regulating the sustainable use of high seas living resources has proved to be a more fascinating subject than I ever imagined. The conservation of high seas living resources is a perfect example of how international law, in its infinite variety, has become super specialized as it adapts to contemporary needs and expectations, despite its dependency upon a primitive law-making system. Marine living resources have immensely diverse characteristics and life cycles. They roam freely, ignoring jurisdiction claims pertaining to human-made boundaries. They remain an essential source of sustenance not only for humans and states' economies but also for biodiversity in its entirety. In sum, effectively regulating the sustainable use of such resources is, euphemistically speaking, a tall order. Furthermore a harmonized regime is a *sine qua non* for

ensuring the conservation of stocks that constitute a vested interest for many stakeholders.

This research project has also been in itself an unforgettable experience due to my mentor, Professor W.T. Burke, whose standing as a professor of maritime law, and of fisheries law in particular, is legendary. I am very grateful for his support, guidance and patience, especially for his frank remarks and constant encouragement. It has been an honour to work under his tutorship. I would also wish to express my deep gratitude towards Professor David Attard, Judge International Tribunal for the Law of the Sea and Director of IMLI, who has always encouraged me to pursue my studies and to whom I am especially grateful for introducing me to the subject of international environmental law at the beginning of my career. I am indebted to Dr Evelyn Meltzer for generously sharing with me her matrices on RFMOs, whilst she was still doing her research work. I am also very grateful to Dr Matthew Camilleri at FAO, who has made it possible for me to visit the FAO library and access FAO documents. Thanks also go to the staff at the IMO International Maritime Law Institute for their cheerful disposition when visiting the library. I wish to thank all the people at Edward Elgar Publishing involved in the making of this book, especially the editors of this series, Zen Makuch and Kurt Deketelaere who are both good friends and colleagues, Ben Booth, Laura Seward, Gillian Wright and Madhubanti Bhattacharyya, for making this dream a reality. I also wish to express my gratitude towards my many friends for their unity and prayers; when times were tough they kept me going. Above all I thank my family: my father for instilling within me love for learning and my mother for teaching me how to bear it all when pursuing it. I thank my daughters heartily for bearing with me these last three years. They will be relieved to hear that finally, 'mum has finished writing her book about sea creatures'. To my husband Paul, I am especially grateful for believing in me, for making it possible, for being there to listen. This work is yours just as much as it is mine.



# Abbreviations

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ACCOBAMS	Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area
Am. J. Int. L.	American Journal of International Law
BYBIL	British Year Book of International Law
CBD	United Nations Convention on Biological Diversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CITES	Convention on International Trade in Endangered Species of Wild Flora and Fauna
CMS	Convention on Migratory Species of Wild Animals
COP	Conference of the Parties
EEZ	Exclusive Economic Zone
EU	European Union
FAO	Food and Agriculture Organization
FSA	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
GFCM	General Fisheries Commission for the Mediterranean
HMS	Highly Migratory Species
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Convention for the Conservation of Atlantic Tuna
ICCAT PWG	ICCAT Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
IJMC	International Journal of Marine and Coastal Law
ILC	International Law Commission
IMO	International Maritime Organization

IOTC	Indian Ocean Tuna Commission
IPOU	International Plan of Action
ISBA	International Sea Bed Authority
IUCN	International Union for the Conservation of Nature
IUU	Illegal, unreported and unregulated fishing
IWC	International Whaling Commission
MEA	Multilateral Environmental Agreement
MSY	Maximum sustainable yield
NAFO	North Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Organization
NEAFC	North East Atlantic Fisheries Commission
NGO	Non-Governmental Organization
ODIL	Ocean Development and International Law Journal
OSPAR	Convention for the Protection of the Marine Environment of the North East Atlantic
RFMO	Regional Fisheries Management Organization
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice
SFS	Straddling Fish Stocks
SPAMI	Specially Protected Areas of Mediterranean Importance
TAC	Total Allowable Catch
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
VMS	Vessel Monitoring System
WCED	World Commission on Environment and Development
WCPFC	Western and Central Pacific Fisheries Commission
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization
Yb IEL	Yearbook of International Environmental Law

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- 1949 Agreement for the Establishment of a General Fisheries Commission (Council) for the Mediterranean (in 1997 by Agreement Parties changed Council to Commission, Burhenne, 949:72); in force 20 February 1952 **48, 70, 191, 229, 236, 243**
- 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission, Burhenne, 949:41; in force 3 March 1950 (IATTC) **173, 182, 191, 236**
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- 1978 Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries (NAFO), Burhenne, 978:79; in force 1 January 1979 **12, 48, 67–9, 71, 74, 136–7, 172, 229, 233, 235, 237–8, 241, 278**
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*This work is dedicated to my daughters,  
Raquel Ann and Michaela Ruth.*



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