The Enforcement in the Mediterranean of United Nations Resolutions on Large-Scale Driftnet Fishing

Tullio Scovazzi

I. Large-Scale Driftnet Fishing

As described in United Nations General Assembly Resolution 44/225 of 22 December 1989, fishing with large-scale pelagic driftnets is "a method of fishing with a net or combination of nets intended to be held in a more or less vertical position by floats and weights, the purpose of which is to enmesh fish by drifting on the surface or in the water". "Large-scale driftnet fishing" has been defined as "a method of fishing in which a gillnet composed of a panel or panels of webbing, or a series of such gillnets, with a total length of two and one-half kilometers or more is placed in the water and allowed to drift with the currents and winds for the purpose of entangling fish in the webbing"[1].

This method of fishing is considered highly indiscriminate and wasteful. In addition to targeted species of fish, non-targeted fish, marine mammals, sea birds and turtles may also become entangled in large-scale pelagic driftnets, either in those in active use or in those that are lost or discarded[2].

---

1 This article is based on a paper presented at a Conference on "The Magnuson-Stevens Act: Sustainable Fisheries for the 21st Century?", held at Tulane University, New Orleans, United States. — Section 206c, 2, of the *Magnuson-Stevens Fishery Conservation and Management Act* of the United States (Public Law 94-265), as amended by 11 October 1996.

2 On driftnet fishing see M. Savini, "La réglementation de la pêche en haute mer par l'Assemblée Générale des Nations Unies — A propos de la Résolution 44/225 sur les grands filets maillants dérivants", *AFDI* 36 (1990), 777 et seq.; FAO Legislative Study 47, *The Regulation of Driftnet*

In the case of driftnets, the basic instrument is Resolution 46/215 of 20 December 1991, according to which the United Nations General Assembly unanimously recommended a moratorium by 31 December 1992 on all large-scale pelagic driftnet fishing, as regards the high seas of the world's oceans and seas, including enclosed and semi-enclosed seas[3]. This recommendation has been reaffirmed several times, most recently by General Assembly Resolution 51/36 adopted on 21 January 1997[4].

The prohibition of large-scale driftnets is embodied in a number of regional treaties relating to specific seas and in several pieces of domestic legislation[5]. One of the most interesting examples of legislation in this field has been enacted by the United States. The *High Seas Driftnet Fisheries Act* (United States Public Law 102-582 of 2 November 1992)[6] aims at affirming the policy of the United States to, *inter alia*, "secure a permanent ban on the use of destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing beyond the exclusive economic zone of any nation"[7].

Fishing *on the High Seas: Legal Issues*, 1991, with papers by E. Hey, W.T. Burke, D. Ponzoni and K. Sumi; T. Scovazzi, "La pesca con reti derivanti nel Mediterraneo", *Rivista Giuridica dell'Ambiente 7* (1992), 523 et seq.; M.C. Maffei, "Reti derivanti e protezione delle specie", *ibid.*, 706 et seq.

3 The preamble of the resolution recognizes that "a moratorium on large-scale pelagic driftnet fishing is required, notwithstanding that it will have adverse socio-economic effects on the communities involved in high seas pelagic driftnet fishing operations" and notes that "the grounds for concerns expressed about the unacceptable impact of large-scale pelagic driftnet fishing ... have been confirmed and that evidence has not demonstrated that the impact can be fully prevented".

4 By this resolution the General Assembly "reaffirms the importance it attaches to compliance with its resolution 46/215, in particular to those provisions of the resolution calling for full implementation of a global moratorium on all large-scale pelagic driftnet fishing on the high seas of the world's oceans and seas, including enclosed seas and semi-enclosed seas".

5 See notes 52 and 53.

6 The act is based on the precautionary principle: "Members of the international community have reviewed the best available scientific data on the impacts of large-scale pelagic driftnet fishing, and have failed to conclude that this practice has no significant adverse impacts which threaten the conservation and sustainable management of living marine resources" (Section 2 lit. (a), 3).

7 If applied to the Mediterranean, the United States legislation on high seas driftnets presents a strange peculiarity. As it refers to the marine areas "beyond the exclusive economic zone of any nation" this legislation

Under the Act, the Secretary of Commerce shall "identify each nation whose nationals or vessels are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation". No later than 30 days after identification, the President of the United States shall enter into consultations with the government of the identified nation "for the purpose of obtaining an agreement that will effect the immediate termination of large-scale driftnet fishing by the nationals or vessels of that nation beyond the exclusive economic zone of any nation". If the consultations are not satisfactorily concluded within 90 days, the President shall direct the Secretary of the Treasury to prohibit the importation into the United States of fish, fish products and sport fishing equipment of the identified nation. Additional economic sanctions are to be imposed if the importation prohibition already imposed is insufficient to cause the identified nation to terminate large-scale driftnet fishing, or if the latter has retaliated against the United States as a result of that prohibition (Section 102 lit. (b), 4)[8].

II. Concerns about Large-Scale Driftnet Fishing in the Mediterranean

In recent years there have been growing concerns about the practice of driftnet fishing in the Mediterranean, where these nets are used for fishing migratory species of high commercial value, such as tuna and swordfish. The concerns are also reflected in the report on "Large-scale Pelagic Driftnet Fishing and its Impact on the Living Marine Resources of the

---

covers the Mediterranean today, as no exclusive economic zones have been established by the coastal States yet. But it would not apply any more if the coastal States were to create such zones. In this case the Mediterranean would consist entirely of exclusive economic zones and no room would be left for the high seas (and for the *High Seas Driftnet Fisheries Act* as well). Neither is it clear how the *High Seas Driftnet Fisheries Act* can apply to the fishing zones which have been established by four Mediterranean States, namely Tunisia, Malta, Algeria and Spain (see note 42).

8 The provisions on identification and sanctions for large-scale driftnet practices were incorporated and expanded in the present Section 206 of the *Magnuson-Stevens Fishery Conservation and Management Act* (see note 1). In the findings of the Act it is stated that "the use of large-scale driftnets is expanding into new regions of the world's oceans, including the Atlantic Ocean and Caribbean Sea".

World's Oceans and Seas" issued on 25 September 1996 by the United Nations Secretary-General[9].

The information provided for the report by the FAO and Greenpeace International (a non-governmental organization active in the field of the environment) singled out Italy as the major culprit responsible for driftnet fishing activities. For instance, according to the FAO:

> "Currently, the major area for large-scale pelagic drift-net fishing is the Mediterranean Sea, with vessels being predominantly of Italian flag or origin"[10].

According to Greenpeace International:

> "(...) large-scale pelagic drift-nets continued to be used in the Mediterranean Sea. The biggest fleet was still the Italian one, with more than 600 licensed boats. Other Mediterranean countries might be developing their fleets and/or buying nets from Italy. Despite some efforts by the European Commission to ensure effective enforcement by European Union member States of the legislation on drift-nets, Italian drift-netters had continued to operate with large-scale nets, longer than the legal maximum length of 2.5 km"[11].

Greenpeace further stated that:

> "considering the lack of control in international waters in the Mediterranean, it was very likely that fleets from other countries used illegal large-scale drift-nets. According to an Italian Government report, vessels from Japan, the Republic of Korea, Morocco, Tunisia, Turkey, Algeria, Malta and Albania were currently using high seas drift-nets in the Mediterranean Sea"[12].

---

9 Doc. A/51/404 of 25 September 1996. The report takes into account the information provided by States, International Organizations and Non-Governmental Organizations.

10 *Ibid.* para. 20.

11 *Ibid.* para. 36.

12 *Ibid.* para. 39.

This statement determined a reply by the Republic of Korea[13].

III. "(...) in defiance of the law of their own country and of the rest of the world"

As regards Italy, the *High Seas Driftnet Fisheries Act* was applied on 16 February 1996 by the United States Court of International Trade in deciding the Case *The Humane Society of the United States and others vs. Ron Brown, Secretary of Commerce, and Warren Christopher, Secretary of State*[14]. The Court concluded that identification of Italy as a nation whose nationals or vessels were conducting large-scale driftnet fishing beyond the exclusive economic zone had been unlawfully withheld and unreasonably delayed by the government of the United States.

---

13 "In paragraph 39 of the report reference is made to a Greenpeace report which refers to an Italian Government report alleging that Korean vessels are "currently using high seas driftnets in the Mediterranean Sea". The Government of the Republic of Korea has taken all necessary measures to suspend driftnet fishing operations by Korean vessels on the high seas since 1 January 1993, including the revocation of fishing licences, in compliance with A/RES/44/225 of 22 December 1989, A/RES/45/197 of 21 December 1990 and A/RES/46/215 of 20 December 1991. At considerable financial and social cost, the Korean Government has taken measures to scrap all remaining 139 driftnet fishing vessels and to retain fishermen for alternative employment. In the light of the fact that the Goverment of Korea has faithfully implemented all General Assembly resolutions relevant to driftnet fishing, the inclusion of this unsubstantiated information in the above-mentioned report is regrettable. I would like to take this opportunity to confirm to you that no vessels of the Republic of Korea are currently engaged in driftnet fishing operations on the high seas": letter of 18 November 1996 by the Republic of Korea to the Secretary-General of the United Nations, in U.N. *Law of the Sea Bulletin* 33 (1997), 90.

14 *Federal Supplement*, Vol. 920, 178 et seq. This article will not consider the interesting question of the standing of the plaintiffs. On this the Court held *inter alia* that "members of the plaintiff organizations are harmed by the diminishing numbers of dolphins and whales in and around the Mediterranean Sea as a result of large-scale driftnet fishing in Italy" (*rectius*: on the high seas by Italian fishing vessels); "and that, because cetaceans are migratory, cetacean fatalities from driftnet fishing in the Mediterranean may diminish the number of dolphins and whales to be viewed by their watchers elsewhere" (p. 204).

The evidence which supported the decision of the Court consisted of reports of surveys made by Greenpeace International in the 1993, 1994 and 1995 fishing seasons[15], reports by the European Commission[16], statements by United States diplomats[17], the Secretary of State[18] and officials from the Department of Commerce.

It also appears that the United States Department of Commerce sought to obtain the assistance of the Department of Defense to use intelligence assets to monitor and report on the identity and location of vessels fishing with driftnets in the Mediterranean[19]. Surprisingly enough, the results were disappointing. With only one exception[20], the naval forces made no sightings of large-scale driftnets on the high seas areas of the Mediterranean. According to a statement made in September 1994 by a State Depart-

---

15 For example, in the 1995 fishing seasons "Greenpeace reported encountering an Italian vessel fishing 28 miles off the coast of a Greek island with an estimated 10 kilometer net. Greenpeace reported the deployment in international waters of two other 8–10 kilometer driftnets by Italian vessels and its seizure of 2.2 and 2.5 kilometer segments of those nets. Greenpeace reported that it observed another Italian vessel fishing 17 miles southwest of a Greek island. Greenpeace provided the name and registration number of the vessel and reported that its radar showed a 10 kilometer length of the driftnet deployed by that vessel" (*ibid.*, 185).

16 "The European Commission has found that the Italian Government has not implemented the European Union driftnet regulation uniformly or fully. In 1994 the European Commission reported that Italian national controls and monitoring of driftnets are generally weak" (*ibid.*, 186).

17 "As of March 1994 a U.S. Ambassador stated that he believed that the Italian Government had not provided credible evidence of measures to bring Italian nationals and vessels into compliance with U.N., EU and Italian driftnet restrictions" (*ibid.*, 186).

18 "The Secretary of State concluded in November 1993 that 'there is convincing evidence that driftnet fishing is taking place' and 'there is compelling evidence that the Government of Italy is aware of the existence of the fishery'", (*ibid.*, 188).

19 A memorandum of understanding between the United States departments of Transportation, Commerce and Defense, signed on 11 October 1993, provides that the United States will utilize the surveillance capabilities of the Department of Defense to locate and identify vessels suspected of violating A/RES/46/215.

20 The United States Navy sighted a vessel located 12.5 n.m. from the coast which was deploying a net of 6 n.m. Another vessel deploying a 12 n.m. driftnet was located only 11 n.m. from the coast, i.e. in the Italian territorial sea and not on the high seas (*ibid.*, 189).

ment official, the lack of sightings was attributed to higher operational priorities of the Navy rather than absence of driftnets in the water[21].

After considering all the evidence available, the Court reached the following conclusion:

> "All the documents and materials produced by the defendants ... give reason in the mind of an ordinarily intelligent person to believe that Italians continue to engage in large-scale driftnet fishing in the Mediterranean Sea in defiance of the law of their own country and of the rest of the world"[22].

However, as the Court noted, rather than identifying Italy, the United States officials had limited themselves to repeated diplomatic contacts with their Italian counterparts to give them the opportunity to take corrective action. All these diplomatic efforts proved to be only "moderately successful", as conceded by the Secretary of Commerce[23].

The Court did not accept the argument put forward by the defendants that the Secretary of Commerce did not abuse his discretionary powers in not identifying Italy. The Court found that the United States Government "may have been influenced by the historical goal of maintaining good relations with foreign sovereigns"[24]. However commendable the maintenance of the best possible foreign relations may have been, the Court concluded that the *High Seas Driftnet Fisheries Act* did not require it[25].

On 28 March 1996 the United States Secretary of Commerce identified Italy as a nation conducting large-scale driftnet fishing on the high seas. The two governments entered into consultations[26] that have so far prevented the adoption of sanctions[27].

---

21 *Ibid.*, 189.

22 *Ibid.*, 192.

23 *Ibid.*, 188.

24 *Ibid.*, 191.

25 *Ibid.*, 192.

26 "In this case, Italian officials have not challenged U.S. action. Rather, they have immediately acknowledged the concerns raised and have admitted that they have had difficulties in regulating their own fishermen": J.A. Duff, "Recent Applications of United States Laws to Conserve Marine Species Worldwide: Should Trade Sanctions be Mandatory?", *Ocean & Coastal L.J.* 3 (1996), 1 et seq.

27 For these results see under VI.

IV. Vacillation

The picture that emerges from the decision rendered by the United States Court of International Trade is rather surprising. On one side, the policy of the Italian government is qualified as being wavering and vacillating. On the other, it is said that the government of the United States did not believe what the mind of an ordinarily intelligent person would have believed[28]. If the impression formed by the Court were true, how could vacillation, on one side, and incredulity, on the other, be explained?

The fact that the Italian government policy on the issue of driftnets had been vacillating before the Court's decision can hardly be denied. More elements can be added to the picture given by the Court, as an impressive series of regulatory measures on driftnets was enacted in Italy in the period between July 1989 and August 1991. A summary of this see-saw period is provided hereunder.

First, a decree of 30 March 1990 of the minister of Merchant Marine[29] authorized the use of driftnets under certain restrictions relating to the size of meshes (not less than 320 mm) and nets (not more than 35 m in height and 5 km in length).

Second, the legitimacy of the decree was contested by some environmental organizations as being in conflict with the Convention on the Conservation of European Wildlife and Natural Habitats in Europe (Berne, 19 September 1979), to which Italy is a party. On the grounds of the non-selective character of driftnets, the Administrative Tribunal of the Region of Lazio provisionally suspended the application of the decree (Order of 27 July 1990). The provisional suspension was confirmed by the Council of State (Order of 27 July 1990)[30].

Third, with the purpose of implementing the two orders, the minister of Merchant Marine prohibited the use of driftnets[31].

Fourth, by a decree of 9 May 1991 the Region of Sicily, which is entitled to a legislative competence in the field of fisheries, allowed the use of driftnets in the territorial waters around the region by vessels registered in Sicilian ports[32]. The fishermen of some other Italian regions protested, blocking the navigation across the strait of Messina.

---

28 See note 22.

29 *Gazzetta Ufficiale della Republica Italiana* (hereinafter: GURI) No. 76 of 31 March 1990.

30 On the final Decision see note 38.

31 Decree of 30 July 1990 (GURI No. 177 of 31 July 1990). Financial measures were enacted in order to indemnify the fishermen who were prevented from fishing.

32 *Gazzetta Ufficiale della Regione Sicilia*, Part I, No. 25 of 18 May 1991.

Fifth, by a decree of 22 May 1991[33] the minister of Merchant Marine decided to allow driftnets as a provisional measure until a specific European Community driftnets regime entered into force. In the preamble the decree recalled the existence of a situation of public disorder. The decree provided for a more restrictive regime on the size of meshes (not less than 350 mm) and nets (not more than 30 m in height and 2.5 km in length) which would ensure more selective fishing. The decree also established a marine sanctuary for the protection of cetaceans in a vast area of the Ligurian Sea where driftnet fishing is prohibited.

Sixth, the application of the minister's decree was once again provisionally suspended by the Administrative Tribunal of the Region of Lazio (Order No. 642 of 1991)[34].

Seventh, the minister of Merchant Marine again prohibited fishing with driftnets (decree of 18 July 1991)[35].

Eighth, under the pressure of public disorder (again a blockade of the strait of Messina), the minister of Merchant Marine allowed fishing with driftnets, although under a more restrictive regime (decree of 6 August 1991[36]) while waiting for a European Community regime to be adopted.

Ninth, on 22 January 1992 the European Community adopted Regulation No. 345/92, laying down technical measures for the conservation of fishery resources[37]. It prohibits the use of driftnets longer than 2.5 km. It is applicable to all vessels operating in waters under the sovereignty or jurisdiction of Member States or registered in a Member State.

Tenth, on 22 April 1992 the Administrative Tribunal of Lazio decided on the merits that the above mentioned decrees of the minister of Merchant Marine of 30 March 1990, 22 May 1991 and 6 August 1991 were legitimate. The Tribunal, although admitting that the state of the maritime environment was worrying, held that there was not enough evidence to show that driftnets could be considered as an indiscriminate means of capture of protected species prohibited by the Berne Convention[38].

---

33 GURI No. 121 of 25 May 1991.

34 Also the application of the Sicilian Decree was suspended by an order of the Administrative Tribunal of the Region of Sicily.

35 GURI No. 176 of 29 July 1991.

36 GURI No. 185 of 8 August 1991.

37 *Official Journal of the European Communities* (hereinafter: OJEC) No. L 42 of 18 February 1992.

38 The Tribunal made no reference whatsoever to the precautionary principle, which was apparently unknown to it.

Eleventh, in 1994 the Italian minister of Agriculture took an unfortunate step[39]. She announced that Italy would ask the European Community for an extension from 2.5 to 9 km for the maximum length for driftnets permitted under Community Regulation No. 345/92. Worse than the announcement itself were the reported doubts on the willingness of the Italian government to enforce the applicable rules:

> "The Department of State was aware of reports that the Italian Minister of Agriculture had directed Italian authorities *not* to apply driftnet restrictions until the European Union acted on the Italian proposal. The State Department considered Italy's request for a derogation to be an admission that Italian driftnet vessels extensively use driftnets longer than 2.5 km. The State Department viewed Italy's request for a derogation as revealing a lack of will on the part of the Italian Government to put an end to Italian large-scale driftnet fishing[40]".

The whole picture is described in the following way (including some colourful details) in a report made in 1994 by a United States official:

> "All of the Sicilian port directors told of the great pressure fishermen are putting on them to cease and desist their enforcement efforts. Many fishermen are relatives or lifelong friends of the authorities, making their job especially difficult. Also adding to the difficulty has been the wavering position of the GOI (Government of Italy) on the issue. The director of the port of Isola Delle Femmine said that in the mid-1980's the GOI issued driftnet licenses very liberally, hence the fleet grew past market saturation to over 600 boats. Then when the GOI supported the UN moratorium on driftnets over 2.5 km, they had not realized that this length was not economically feasible for their fleet. He claims the GOI then told fishermen to continue as they had been and ignore the law. After being pressured by environmentalist groups, in international fora, and by the USG (United States Government), the GOI finally decided to enforce the law. This vacillating policy has left fishermen frustrated and angry.
>
> All the port directors pointed to the fact that a driftnet fisherman cannot make a living using less than 8 km of driftnet line since the net is cast in zigzag formation and does not proceed straight backward from

---

39 In the meantime the competence on fisheries had been transferred from the abolished Ministry of Merchant Marine to the Ministry of Agriculture.

40 1996 Decision of the United States Court of International Trade (see note 14), 187.

> the boat. If only 2.5 km are used, the net only extends 500 meters behind the boat. Since swordfish do not travel in schools, the limit is not economically feasible"[41].

The vicissitudes of the Italian measures on driftnets are far from being a model of consistency. In fact the minister of Merchant Marine was in quite a difficult position, trying somehow to strike a balance between the opposing pressures applied by fishermen, environmentalists, administrative courts and the public treasury. Finally, European Community Regulation No. 345/92 acted as a *deus ex machina* in preventing further domestic vacillations. In 1994, when the whole story seemed close to resolution, the reports that the Italian minister of Agriculture was preparing to ask the European Community for an exemption to the 2.5 km length limit for driftnets reopened Pandora's box. This also prompted the non-governmental organizations to make use of the legal system of the United States, instead of insisting on Italian domestic pressures whose results were far from being promising.

The moral of such a lengthy story may be found in an argument put forward by the minister of Merchant Marine during the procedure before the Council of State:

> "Driftnet fishing constitutes the basis of a social and economic system which directly involves about 3,500 fishermen, without mentioning those involved in connected activities. If fishing is suddenly prohibited, it is evident that this community will suffer grave and irreparable damage. Gradual conversion is instead necessary. (...) An indiscriminate prohibition of driftnets would immediately cause Italian fishermen to be replaced by foreign fishermen, free from any obligation whatsoever".

This goes to the heart of the question. The persistent absence of exclusive economic zones in the Mediterranean[42] and the lack of an effective international regime for the management of Mediterranean fisheries may have easily foreseeable consequences. What is the use of assuming conservation burdens and causing domestic troubles if foreign fishermen cannot be prevented from fishing with driftnets just beyond the 12-mile limit of the Italian territorial sea? What is the benefit for marine mammals and other non-targeted species if they are destined to be entangled in foreign, if not

---

41 The report is reproduced in the 1996 Decision of the United States Court of International Trade (see note 14, 194).

42 However, four fishing zones have already been established in the Mediterranean, namely by Tunisia (in 1951), Malta (in 1978), Algeria (in 1994), and Spain (in 1997). They are delimited according to different criteria.

Italian, driftnets anyway? The problem of drifnets in the Mediterranean is not limited to the relations between two countries (for instance, Italy and the United States). It is a problem relating to a whole regional sea.

V. Incredulity

Explanations can perhaps also be found for the attitude of incredulity manifested by the United States. If the United States had firmly insisted on the adoption of sanctions against Italy, the legal aspects of the case would have been complex, if not difficult, to handle and the result by no means certain. It is in these respects useful to review the obligations that presently bind Italy in the field of large-scale driftnets. The source of these obligations is either treaty law or customary international law.

1.) The most precise treaty law obligation arises from European Community law[43], namely from the already mentioned Regulation No. 345/92, which prohibits the use of driftnets longer than 2.5 km. The prohibition was recently reaffirmed by Regulation No. 894/97 of 29 April 1997[44]. However, European Community law binds Italy *vis-à-vis* the other fourteen Member States, and not *vis-à-vis* the United States of America.

2.) Although expressed in less direct terms, an interdiction of the use of large-scale driftnets can also be found in the Convention on the Conservation of European Wildlife and Natural Habitats in Europe (Berne, 19 September 1979), to which Italy is a party. Article 8 and Appendices III and IV of the Berne Convention prohibit the use of all indiscriminate means of capture (including nets if applied for large-scale or non-selective capture or killing) of certain species (including cetaceans). There is no reason to think that the term "nets" is only related to birds and does not also include means of capture that could endanger bigger animals which swim and do not fly, such as marine mammals[45]. Again, the rights and obligations arising from the Berne Convention do not regard the United States, which is not a party to it.

3.) Arts. 65 and 120 of the UNCLOS, which cover both the exclusive economic zone and the high seas, lay down the right of States or competent international organizations to prohibit, limit or regulate the exploitation

---

43 The inclusion of Community law in the category of treaty law is made here for reasons of simplification and does not exclude the *sui generis* nature of Community law.

44 OJEC No. L 132 of 23 May 1997.

45 However the already mentioned Decision rendered on 22 April 1992 by the Administrative Tribunal of Lazio (see note 38) did not apply the Berne Convention to the case of driftnets.

of marine mammals more strictly than provided for by the ordinary rules on exploitation of living resources. These provisions are a clear illustration of the idea that certain species may be protected for their intrinsic value, irrespective of any economic consideration on their possible yield as sources of food. But they hardly give a State the right to adopt sanctions for fishing activities carried out by foreign vessels on the high seas. In any case, the United States, which is not yet a party to UNCLOS, could not invoke it against Italy (which is a party to it).

4.) The rights and obligations arising from the General Agreement on Tariffs and Trade (GATT) (Geneva, 30 October 1947)[46] are a major element in the issue of the legality of sanctions against the use of driftnets on the high seas. GATT provides that no prohibitions or restrictions other than duties, taxes or other charges shall be instituted or maintained by a party on the importation of products of the territory of another party (article XI). However, under article XX of GATT, the parties may adopt or enforce "measures (...) (b) necessary to protect human, animal or plant life or health; (...) (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

In 1991 and 1994 article XX was given very strict interpretations by GATT Dispute Settlement Panels in the reports on the two well-known Cases on *United States Restrictions on Imports of Tuna* (United States vs. Mexico[47] and United States vs. European Community and the Netherlands[48]). In both cases the Panels concluded that the United States import prohibitions on tuna and tuna products were not covered by the exceptions provided for in article XX and were contrary to other provisions of GATT. It is not possible to discuss here the merits of the two reports, which have

---

46 On the recent environmental developments within the GATT see T. Schoenbaum, "International Trade and Protection of the Environment: The Continuing Search for Reconciliation", *AJIL* 91 (1997), 268 et seq.

47 *ILM* 30 (1991), 1594 et seq. The Panel concluded that the exhaustible natural resources protected under article XX (g) were only those within the territorial jurisdiction of the country concerned.

48 *ILM* 33 (1994), 839 et seq. The Panel concluded that if "article XX (b) were interpreted to permit contracting parties to impose trade embargoes so as to force other countries to change their policies within their jurisdiction, including policies to protect living things, and which required such changes to be effective the objectives of the General Agreement would be seriously impaired" (para. 5.38).

been criticized by many writers[49]. It is sufficient to recall that these two important precedents did not support the trade sanctions decided by the United States.

It is therefore difficult to find precise treaty law provisions in force between Italy and the United States which prevent Italy from using driftnets or allow the adoption of trade sanctions by the United States.

The picture may be different if customary international law is taken into consideration to determine the *communis opinio* of States on the issue of driftnets. Today there is a growing awareness that states should "promote the development and use of selective fishing gear and practices that minimize waste in the catch of target species and minimize by-catch of non-target species" (para. 17.46, c, of Agenda 21[50]). This awareness is also a result of the already quoted General Assembly resolutions on driftnets[51] and is reflected in new concepts, such as cooperation for sustainable fisheries development and flag State responsibility. The prohibition of large-scale driftnets is embodied in a number of regional treaties relating to specific seas[52] and in several domestic legislations[53].

Nevertheless, it is not easy to rely on instruments not directly binding on a specific State, such as soft law declarations (including the resolutions of the General Assembly) or treaties not in force for that State to determine the existence of a customary rule binding on it. The borderline between

---

49 See, among many others, F. Francioni, "GATT e applicazione extraterritoriale di norme nazionali sulla conservazione delle specie marine", in: U. Leanza (ed.), *La pesca e la conservazione delle risorse biologiche nel mare mediterraneo*, 1993, 87.

50 Agenda 21 is the Action programme adopted in 1992 in Rio de Janeiro by the United Nations Conference on Environment and Development (UNCED).

51 See under I.

52 Under the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Wellington, 29 November 1989) the parties undertake to prohibit their nationals and vessels from engaging in driftnet fishing activities within the Convention Area (article 2). See also the Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, *ILM* 33 (1994), 936 et seq. Under article 1 lit. (a) of Annex 2 of the recent Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic Area (Monaco, 24 November 1996), "no vessel shall be allowed to keep on board, or use for fishing, one or more drift nets whose individual or total length is more than 2.5 kilometres", *ILM* 36 (1997), 790 et seq.

53 For example, driftnets are prohibited under the legislation of Spain (Decree of 22 October 1990, in *Boletín Oficial del Estado* No. 255 of 24 October 1990).

customary law and evolutionary trends which have not yet crystallized into precise legal provisions may be uncertain.

VI. Recent Developments

Irrespective of the merits of the legal arguments that could be put forward on both sides, the problems existing between Italy and the United States on the issue of high seas driftnets may perhaps find a solution in the near future. The main recent developments are the following.

After the 1996 Decision of the United States Court of International Trade, meetings were convened between the competent authorities of the two countries in order to deal with the threatened sanctions. They could have very heavily affected Italian exports covering edible fish products, non-edible fish related products and non-edible partial fish products.

In July 1996 the Italian minister of Food Resources issued a press communiqué, which was released "with reference to the remarks of the Government of the United States". In itself, the communiqué cannot be considered as a bilateral agreement. It is a unilateral statement on future Italian policy on the issue of driftnet fishing. Irrespective of its precise qualification, the communiqué can be seen as embodying certain unilateral obligations freely undertaken by the declaratory State. The main points of the statement are the following:

- Italy declares that the principles of responsible fisheries and of sustainable fisheries development are the commonly accepted basis to ensure both sound management of resources and profitable results for the fishermen themselves.
- Italy is aware of the fact that the interdiction of driftnets beyond 2.5 km, despite its social and economic consequences on traditional fishing activities, corresponds to a general trend of the international community, as embodied in A/RES/46/215 of 20 December 1991.
- Italy is ready to become a party to the International Convention for the Conservation of Atlantic Tunas (Rio de Janeiro, 14 May 1996) and to apply the measures decided by the relevant Commission (ICCAT)[54].
- Italy will present to the European Community a 200-billion lira programme for the conversion of the driftnet fishing sector.

---

[54] The area of competence of ICCAT encompasses all waters of the Atlantic Ocean, including the adjacent seas (and consequently also the Mediterranean).

- Italy reaffirms its duty to ensure that fishermen comply with legally binding provisions and to enforce them with adequate means.
- To allay Spain's concerns about illegal fishing activities off the Balearic Islands, Italy will prohibit mooring in Sardinian ports to driftnet fishing vessels registered in ports of other Italian regions.
- More severe sanctions will be introduced.

It appears today that most of the measures envisaged in the press communiqué of July 1996 have been adopted. Controls were intensified and illegal nets seized[55]. The instrument of accession of Italy to ICCAT was deposited on 6 August 1997[56]. On 28 April 1997 the Council of the European Community decided to establish specific measures to co-finance the Italian programme of conversion of driftnet fishing[57]. The beneficiaries of the programme, which has a voluntary basis, are fishermen who commit themselves to cease driftnet fishing or to change this practice into other fishing activities. Their driftnets must be destroyed, recycled or transformed[58].

However, the decree of 23 June 1996[59], which prohibited the mooring in Sardinian ports to driftnet vessels registered in other Italian ports, was

---

55 Data on driftnets controls for the period from January to September 1996 released by the Italian Ministry of Food Resources show that 329 inspections were made at sea and 621 in ports, 58 administrative violations were found and 55 illegal nets were seized. See also the circular letter of 13 March 1997 of the minister for Agricultural Policies (GURI No. 192 of 19 August 1997), where it is, *inter alia*, said that the control activities which the Italian authorities made have been appreciated by the United States and the European Community and have contributed to avoiding the embargo threatened by the United States (valued at 3,000,000,000 Italian lira).

56 Law 4 of June 1997, No. 169 (GURI Suppl. to No. 142 of 20 June 1997).

57 OJEC No. L 121 of 13 May 1997.

58 Technical measures for the implementation of the programme were adopted by a Decree of the minister of Food Resources of 23 May 1997 (GURI No. 134 of 11 June 1997), modified by a Decree of 26 June 1997 (*ibid.* No. 175 of 29 July 1997). See also a circular letter of 26 June 1997 of the minister for Agricultural Policies (*ibid.* No. 156 of 7 July 1997).

59 GURI No. 188 of 12 August 1996. Driftnet fishing in the territorial sea of Sardinia was already prohibited by regional law, 13 May 1988, No. 10 (GURI Special Series 3, No. 33 of 13 August 1988).

recently repealed[60]. More severe sanctions for illegal driftnet fishing have not yet been established by the Italian Parliament[61].

VII. Concluding Remarks

The driftnet issue between Italy and the United States deserves to be seen in the broader context of the present evolution of international law in the field of fisheries[62]. A number of soft law instruments and two multilateral treaties, which are not yet in force, reflect the present evolutionary trends in this field.

Important innovations have been introduced by the concept of responsible fisheries embodied in the Code of Conduct for Responsible Fisheries and adopted by the FAO Conference on 31 October 1995. The Code, which is voluntary[63] and global in scope, provides principles and standards applicable to the conservation, management and development of all fisheries and fishing operations. Several provisions of the Code address the issue of the impact of destructive fishing gear, methods and practices[64].

The concept of responsible fisheries entails flag State responsibility, as reflected in the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High

---

60 Decree of 23 October 1997 (GURI No. 283 of 4 December 1997).

61 However, by a circular letter of 16 April 1996 (GURI No. 102 of 3 May 1996) the minister of Food Resources instructed the enforcement authorities to institute proceedings for the mere fact that a vessel had illegal driftnets on board, without it being necessary that the vessel be caught while engaging in fishing activities. The circular letter refers to a decision rendered by the Court of Cassation on 28 November 1995.

62 On this evolution see M. Badenes Casino, *La crisis de la libertad de pesca en alta mar*, 1997.

63 "The Code is voluntary. However, certain parts of it are based on relevant rules of international law, including those reflected in the United Nations Convention on the Law of the Sea of 10 December 1982" (point 1.1 of the Introduction to the Code).

64 For example, principle 8.5.1 of the Code states as follows: "States should require that fishing gear, methods and practices, to the extent practicable, are sufficiently selective so as to minimize waste, discards, catch of non-target species, both fish and non-fish species, and impacts on associated or dependent species and that the intent of related regulations is not circumvented by technical devices. In this regard, fishers should cooperate in the development of selective fishing gear and methods. States should ensure that information on new developments and requirements is made available to all fishers".

Seas, adopted on 24 November 1993 by the FAO Conference under article XIV of the FAO Constitution[65]. The 1993 Agreement, which applies to all vessels that fish on the high seas, sets out a number of measures to be taken by States to ensure that fishing vessels flying their flag do not engage in activities that undermine the effectiveness of international conservation and management measures. For example, parties must not authorize any fishing vessel previously registered in the territory of another party that has undermined the effectiveness of conservation and management measures to be used for fishing on the high seas (article III, para. 5). In the case of contraventions of the provisions of the 1993 Agreement, Parties are under an obligation to apply sanctions of sufficient gravity to be effective in securing compliance with the requirements of the Agreement (article III, para. 8). Other provisions relate to compulsory authorizations for fishing vessels, effective exercise of flag State responsibilities, records of fishing vessels and exchange of information.

The trend towards strengthening international cooperation in high seas fisheries is emphasized by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, opened for signature in New York on 4 December 1995. The 1995 Agreement is based on the general principle that coastal States and States fishing on the high seas are under a duty to cooperate through the establishment of organizations or the conclusion of arrangements. On the one hand, all States having a real interest in the fisheries concerned may become members of a sub-regional or regional fisheries management organization or participants in such an arrangement (article 8, para. 3). On the other hand, only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such an organization or arrangement, shall have access to the fishery resources to which those measures apply (article 8, para. 4).

---

65 The 1993 Agreement is also applicable to the Mediterranean, as long as high seas areas are maintained therein. For example, article II, para. 3, applies "in any fishing region where bordering coastal States have not yet declared exclusive economic zones, or equivalent zones of national jurisdiction over fisheries". However, it may be asked whether the Mediterranean qualifies for this provision, since fishing zones have been established by some bordering countries (see note 42).

Further provisions of the 1995 Agreement determine the consequences of using prohibited fishing gear[66]. The obligation to ensure enforcement of fisheries management measures is primarily vested in the flag State (article 19). However, powers are also given to the other parties. In any high seas area covered by a sub-regional or regional fisheries management organization or arrangement, any State party member of the organization or arrangement may board and inspect vessels flying the flag of another State party for the purpose of ensuring compliance with conservation and management measures (article 21, para. 1). On notification by the inspecting State that there are clear grounds for believing that a vessel has engaged in any activity contrary to the conservation and management measures, the flag State shall either fulfil its obligation to take enforcement action or authorize the inspecting State to take such enforcement action as the flag State may specify (article 21, para. 7). When, following boarding and inspection, there are clear grounds for believing that a vessel has committed a serious violation[67] and the flag State has either failed to respond, or has failed to take the required action, "the inspectors may remain on board and secure evidence and may require the master to assist in further investigation including, where appropriate, by bringing the vessel without delay to the nearest appropriate port" (article 21, para. 8).

Some general conclusions can be inferred from the instruments quoted above. The idea underlying the recent developments in the field of fisheries seems to be that the high seas is no longer the province of *laissez-faire*. It is an area governed by the principles of sustainable fisheries development and flag State responsibility. The application of these principles can even lead, in extreme cases, to the exclusion of those States which persistently undermine the conservation and management measures agreed upon by the others, as well as to the adoption of enforcement measures on foreign vessels fishing on the high seas. The question of sufficiently selective fishing gear, methods and practices (which also includes, but is not limited only to, driftnet fishing[68]) is one of the main fields of concern in fishery matters. States should address the issue of the impact of destructive fishing

---

66 See M. Hayashi, "Enforcement by Non-Flag States on the High Seas under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks", *Geo. Int'l Envtl. L. Rev.* 8 (1996–97), 1 et seq.

67 "Using prohibited fishing gear" is specifically included among the serious violations (article 21 para. 11, lit. (e)).

68 According to the World Wide Fund for Nature, "destructive fishing techniques used in many regions of the world included bottom trawling, long-lining, poison and explosives" (para. 89 of the report quoted, see note 9).

gear, methods and practices by appropriate legal rules and should enforce them on vessels flying their flag.

However, international cooperation among all States having a real interest in the fisheries concerned is also a necessary prerequisite in high seas fisheries management. The proper place for this cooperation is the regional or sub-regional level, which should also be open to non-regional States.

In the specific case of the Mediterranean, the appropriate regional forum is the General Fisheries Commission for the Mediterranean (GFCM; until 1997 the name of the organization was "General Fisheries Council for the Mediterranean"). The GFCM was created by an agreement drawn up in Rome on 24 September 1949 pursuant to article 14 of the Constitution of FAO. It entered into force on 20 February 1952 and was amended in 1963, 1976 and, recently, in 1997. Twenty-one Mediterranean and Black Sea States[69] are members of the GFCM. The 1997 amendments enable the European Community to become a party to the GFCM. As participation to the GFCM is also open to States not belonging to the region, in 1997 Japan became a party to the agreement.

The GFCM has the purpose of promoting the development, conservation, rational management and best utilization of all marine living resources of "the Mediterranean and the Black Sea and connecting waters". This broad area of competence includes both the high seas and any coastal zones under national jurisdiction. In principle, the GFCM possesses relevant powers. By a two-thirds majority (each member having one vote) it can adopt recommendations on conservation and rational management of the resources (article III and V of the GFCM agreement). Members must put these recommendations into effect, unless they object within 120 days from the date of notification.

In the past the GFCM has mostly exercised scientific and consultative functions, in order to keep the state of the resources and fisheries under review. Only in 1995 did the GFCM for the first time adopt a binding recommendation (Resolution No. 95/1 relating to large pelagic longline vessels and the taking and landing of bluefin tuna). Two other binding recommendations were adopted in 1997, one of them relating to driftnets (Resolution No. 97/1 on the prohibition of keeping on board, or use of, one or more driftnets whose total length is more than 2.5 km).

---

69 Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Morocco, Romania, Spain, Syria, Tunisia, Turkey, Yugoslavia. The United Kingdom, which was a member of the GFCM, withdrew in 1968.

In conclusion: a State, either regional or non-regional, which has a real interest in a high seas fishery, also with respect to the protection of non-target species enmeshed in driftnets[70], should, as a first step, be prepared to participate in the existing regional organizations or arrangements in order to discuss the problem in the most appropriate forum. The threat of sanctions established under domestic legislation seems neither the first nor the best solution to a problem which, far from being bilateral, is a regional one.

---

70 It may be recalled that, according to the 1996 Decision of the United States Court of International Trade, the United States whale watchers also benefit from the biological wealth of the Mediterranean (see note 14).