1 Introduction

1.1 THE OBJECTIVES, METHODOLOGY AND SCOPE OF THIS BOOK

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) requires States to maintain the sustainability of fish stocks\(^1\) and to cooperate in the taking of conservation measures on the high seas. In order to fulfill these two obligations, states have concluded various agreements between themselves concerning fishing for identical species or in the same areas\(^2\) on the high seas. Ten years after the conclusion of UNCLOS, the 1992 United Nations Conference on Environment and Development (UNCED)\(^3\) served to emphasize, amongst other things, the need for states to adopt a holistic perspective towards conservation that aims to integrate environmental concerns into socio-economic needs. In the years that have followed, the international community has striven to come to terms with translating this holistic approach into substantive norms via the conclusion of new conservation treaties and by reviewing existing ones. In this manner, both UNCLOS and UNCED have strongly contributed to the specialization and fine-tuning of international law with respect to the sustainable use of living resources on the high seas. They have been less successful, however, in curbing its fragmentation, since coordination between the diverse fora which generated this accumulation of norms has often been lacking. The purpose of this book is to assess how these various applicable norms interrelate with each other. It aims to identify which legal techniques can be used when interpreting and applying these norms to harmonize their goals, methodologies and scope of applicability. Additionally, this book will demonstrate that in some cases, addressing gaps and conflicts in the existing legal framework may require the formulation of new instruments so as to provide a more coherent set of applicable norms. In both instances, harmonization cannot be achieved by riding roughshod over the diverse concerns of the parties concerned.\(^4\) On the contrary, all stakeholders need to be involved so as to facilitate compliance with a revised set of consistent legal benchmarks that will ensure a level playing field for all parties.

To address these objectives, the discussion in this book focuses upon
three basic legal aspects that are inherent to all international regimes aiming at the conservation of living resources on the high seas. These are:

- jurisdictional issues;
- the legal implications of the content of conservation obligations; and
- compliance and enforcement.

This chapter explains how international law, because of its dynamic character, develops to adapt to a variety of issues relating to these three main aspects. Its unity, however, may be challenged as it becomes more and more complex and specialized. This happens because the norms which evolve have different functions: some serve as a fallback, establishing basic rights and obligations; others specify more detail, adding on to and fine-tuning earlier and more general norms. As norms accumulate and interact, they may not always complement and supplement each other and may even appear to express different or conflicting rights and obligations. Chapter 2 assesses how jurisdiction over marine living resources has evolved in a manner that is intrinsically linked to the zone where they occur and the type of species they are. It discusses whether international regimes are coherent in determining who has jurisdiction over living resources on the high seas and how this affects the legal status of such species. Chapter 3 provides a comparative analysis on how the term ‘conservation’ is interpreted and translated into substantive norms under the various applicable regimes. The interface between legal obligations relating to conservation from a species-based approach is considered in Chapter 4. Chapter 5 examines how to achieve the systematic integration of conservation obligations as they emerge from a plurality of norms so as to ensure a level playing field for implementation purposes. Chapter 6 analyses the various compliance and enforcement measures adopted by these legal regimes to implement the regulatory framework. Chapter 7 proposes elements for a harmonized approach between the same. Other cross-cutting legal issues are also considered throughout the different chapters, including the link between scientific research and decision-making and the requirements for adequate institutional capacity.

The UNCLOS provisions relating to the conservation of marine living resources were negotiated and agreed to as part of a package, together with all the other provisions regulating State maritime activities. As the provisions on living resources on the high seas could not be voted upon separately, the use of generic legal language reflects the political compromise achieved during the UNCLOS negotiations. The 1982 Convention
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postpones the specific regulation of controversial issues, such as the allocation of fish catches on the high seas and the determination of the maximum sustainable yield. UNCLOS leaves these legal issues to be determined either by subsequent international agreements or according to the discretion of individual states. As a result, conflicting claims intensified and became more widespread after the conclusion of the 1982 Convention. The methodology adopted in this book is based on the premise that the provisions of the 1982 UNCLOS serve as a basis for objection vis-à-vis subsequent international regimes and state practice regulating the conservation of marine living resources. This is the underlying reason why the various chapters first examine the UNCLOS provisions and then carry out a comparative analysis between these same provisions and later developments in international law. This methodology serves to identify whether the current state of play manifests compatibility or perhaps even gaps and conflicts between the different norms since, unlike UNCLOS, subsequent treaties have sought to limit the discretionary nature of state parties on the kind of conservation measures they may adopt on the high seas to ensure the sustainability of stocks. This book focuses mainly on the applicable norms emanating from treaties. It also refers to those rules of customary international law recognized by international case law. At times the chapters also refer to the possibility that new customary rules may have evolved from state practice in more recent years but it needs to be stressed that in such circumstances this is merely hypothetical as their legally-binding nature has not yet been put to test.

The scope of this book is restricted to an assessment of international norms regulating the direct use of high seas living resources during anthropogenic operations that lead to their direct exploitation or incidental capture. This does not only include the harvesting of fish stocks but also any form of human activity that leads directly to the exploitation of all living resources occurring in maritime areas beyond national jurisdiction. It will not address anthropogenic activities that have an indirect, negative effect on the sustainability status of such resources, such as climate change or pollution from dumping, shipping or land-based sources. Similarly conservation regimes applicable in other maritime jurisdictional zones apart from the high seas do not fall within the direct scope of this work. These two aspects will be marginally referred to, so as to demonstrate that an effective conservation regime for the high seas does not only depend upon adopting legal measures to curb the unsustainable exploitation of living resources occurring therein, but also requires the efficient regulation of anthropogenic activities across all maritime zones.

There are various key terms used in this book that have a particular meaning for the purpose of this work.
‘Harmonization’ of norms is given the same meaning as that intended in the ILC Report of the Study Group of the International Law Commission entitled *Diversification and Expansion of International Law. Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law*. Harmonization does not mean uniformity; it is not intended as an exercise where the views of one legal stream prevail over those on the other side but rather as a means of systematic integration of the various sources of international law that may be applied in the circumstances. This implies that the relevant norms would all contribute towards achieving the same objectives by using compatible standards, rights and obligations. In the absence of a hierarchy of norms in international law, harmonization can be achieved even via certain techniques in legal interpretation. At other times, especially if there are gaps in the applicable laws or even normative conflicts, new legally binding instruments need to be formulated. States may also adopt non-binding instruments such as guidelines or codes of practice to achieve harmonization amongst applicable regimes. Harmonization in this sense reflects also what the provisions of the Vienna Convention on the Law of Treaties (VCLT) recommends, namely that users are to apply international law as an integrated whole.

‘Fishing’, ‘harvesting’ and ‘taking’ have been used interchangeably in this book to refer to the various forms of exploitation of living resources on the high seas.

‘Freedom of fishing’ entails the right of all states to have access to living marine resources on the high seas, which includes access for the purpose of exploitation.

‘Living marine resources’ does not only refer to fish or harvestable species but to all animal species that occur in the marine environment.

‘Harvestable species’ is used to refer to those marine species that are exploited for commercial reasons.

‘High seas’ has the same meaning as that provided by the 1982 UNCLOS.

‘Marine areas beyond national jurisdiction’ is used interchangeably with the term high seas, although in the case of living marine resources, the latter term also covers species that occur on the deep sea bed. It is to be noted that the 1982 UNCLOS does not actually regulate the latter. It refers to the deep sea bed as the ‘Area’ but it is only the mineral resources of the Area that are subject to the common heritage regime.
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- ‘Flag state’, ‘distant water fishing state’ and ‘high seas fishing state’ have been used interchangeably to refer to states which have vessels registered under their flag that exploit living resources on the high seas.
- ‘Applicable international regimes’ refers to the body of treaty rules that regulate living marine resources. The book does not aim to provide an exhaustive list of these treaties but the individual chapters focus upon the salient provisions of the most influential amongst these legal instruments, examining how they relate to the different aspects discussed therein.

1.2 DIVERSIFICATION AND FRAGMENTATION UNDER INTERNATIONAL LAW

International law is constantly evolving to regulate a wide variety of state operations that elicit international concern. Its dynamic and flexible nature allows it to diversify into an ever increasing myriad of norms so as to meet with the needs of its subjects. There is always the risk of fragmentation, however, when a more specialized body of norms deviates from the general perspective of international law and fails to integrate with or supplement other applicable rules. Apart from generating confusion and ambiguity in the law, fragmentation also increases the chance of conflict between the various legal sources and institutional practices. National law also deals with similar causes of fragmentation but, unlike international law, it is endowed with an established legal hierarchy as well as a centralized law-making and a law-enforcement body. These tools facilitate the national authorities’ task in overcoming substantive and institutional conflicts resulting from the accretion of legal instruments. Users of national law have a simpler life when it comes to discerning the applicable legal norm that regulates a particular activity under national legislation. One may refer to written legal instruments such as statutes, Acts of Parliament or subsidiary legislation and examine how these are interpreted by the courts. At most, one may further delve into the records of the debates that led to the negotiation and the formulation of the said legal instruments to comprehend better the goals and motives that led to their conclusion. In the case of common law systems court decisions may also be a source of law in themselves in the absence of a written legal instrument. National law endows the competent domestic authorities with the power to implement and monitor compliance with the legal obligations imposed therein. Any infringements are subject to arraignments by the police before the law courts that have compulsory jurisdiction. Apart
from awarding punishments and claims for damages, national law courts also have the executive power to ensure that offenders comply with the legal obligations imposed upon them. Under international law, there is no single legal body able to create laws binding on all states without their consent.\textsuperscript{17} There is no centralized executive authority entrusted with implementation and international courts and tribunals have no compulsory or comprehensive jurisdiction. It is sometimes difficult to trace the origins of a particular norm under international law and to ascertain when it took effect. In those cases where a plurality of norms may apply the subjects of international law cannot rely on an institutional set up or a hierarchy of laws like their counterparts within the national sphere. They must depend on other techniques to avoid and overcome fragmentation resulting from the specialization of international law into different legal fields.\textsuperscript{18}

1.3 A BRIEF OVERVIEW OF THE SOURCES OF INTERNATIONAL LAW

Users of international law require a different approach when it comes to identifying sources where the applicable norms are to be found. Apart from the absence of a centralized law making authority, most publicists insist that there is no \textit{a priori} hierarchy of sources under international law.\textsuperscript{19} The only exception is \textit{jus cogens} – peremptory norms of international law, which can only be superseded by another rule of the same status.\textsuperscript{20} Article 38(1) of the Statute of the International Court of Justice (ICJ) refers to treaties, customary international law and general principles of law as the formal sources that establish the position of the law \textit{per se}, whilst judicial decisions (binding on the contesting states that voluntarily submit their dispute for adjudication) and the writings of publicists constitute evidence of applicable international norms.\textsuperscript{21}

The chronology in the list of sources provided by article 38(1) has only an operational\textsuperscript{22} value. Although treaties ‘to which the contesting States are Parties’ top this list, it is because they usually provide clearer and more specific legal rights and obligations upon states than customary international law or general principles of law.\textsuperscript{23} Treaties are an explicit expression of the states’ consent; the day when a treaty norm comes into force is clearly identifiable and generally speaking they are more specialized in nature than other sources of international law. This may not always be the case, however, and one cannot ignore the possibility that a new customary rule may alter the content of an earlier treaty.\textsuperscript{24} One may also argue that prominence should be given to treaties because, apart from the clarity a
written text provides, it is adopted via a more transparent and democratic process.

On the other hand, some states may favour the application of international custom, which article 38(1)(b) defines ‘as evidence of general practice accepted as law’. Custom may be perceived as being more flexible than negotiating a multilateral treaty and therefore more likely to safeguard both national and international interests. This is what happens for instance, when one state acts unilaterally, contrary to the established position of international law at the time, and other States follow suit. If this new form of state practice acquires the requisite *opinio juris sive necessitatis* (that is, acceptance that such behaviour is legally binding), it crystallizes into custom. The problem with international custom is that unless its legal nature is tested and confirmed, its status as a norm of international law remains vague. Consequently, whenever this work discusses a customary rule of international law as an applicable source, it does so by referring to international case law, which has declared that there is evidence of its existence. In all other cases, one can only highlight that current state practice seems to *indicate* the possibility of the crystallization of a customary norm. It is certainly not within the competence of any author to assert the existence of a customary rule if its legal status has never been discussed and confirmed before an international adjudicating body.

The role of general principles of law is similar to that of international custom although principles establish overarching objectives of substantive or procedural law rather than specific rights and obligations. Thus, for example, one refers to sustainable development and the precautionary approach as emergent legal principles. Some publicists refer to the high seas freedoms as general principles of law. Principles are normally qualified and supplemented by more specific norms arising from treaties and custom. International case law has occasionally referred to and even based its decisions on the strength of such principles adhered to by the international community.

The role of international case law, although not a formal source in itself, cannot be underestimated. The decisions of international adjudicating bodies are binding only upon the parties to the dispute. They also provide evidence of the applicable international norms under particular circumstances. This book will often refer to a number of international disputes that have been settled before the ICJ and other international tribunals, since some led to landmark judgments that have influenced the course of behaviour of states in regulating the conservation of living resources in marine areas beyond national jurisdiction. States and international organizations have at times reacted to some of these decisions by conducting bilateral, regional and multilateral agreements to further develop the
law when international case law has exposed lacunae or the inadequacies of international law in promoting conservation. Like all the other sources, however, international case law must be evaluated in the light of later developments, especially if subsequent treaties were concluded to address the same topics or a new rule of customary international law has been acquiesced to by states.

The writings of publicists may also constitute evidence of international law and their contribution is particularly valuable when they address topics that are contentious or subject to conflicting interpretation. The Report of the Study Group of the International Law Commission entitled *Diversification and Expansion of International Law. Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law,* for example, discusses the problem of ambiguity and conflict in international law when a plurality of norms may apply and suggests legal techniques which can be used to overcome the problem.

More recently the term ‘soft law’ has raised various discussions as to whether it can be regarded as another source of international law. Soft law is used to refer to declarations, recommendations and resolutions that states adopt either at ad hoc meetings or at the various conferences organized by international organizations. United Nations General Assembly resolutions are considered to be an example of soft law. They are not, generally speaking, binding on member states but as this organ of the UN is the widest forum where states are represented, such resolutions constitute valuable evidence of the opinions of their governments. Similarly guidelines published by international organizations and declarations at ministerial meetings or summits which are adopted unanimously are also considered to be examples of soft law. States usually conclude such instruments with the intention of ensuring consistency in state practice and agreeing on certain standards in the implementation of international law. What distinguishes soft law from hard law is that states adopt the former type of instruments with the full knowledge that they are not legally binding. Hence the term ‘soft law’ is both misleading and a misnomer because what is not legally binding is not law. It must be stressed, however, that some instruments of soft law have generated concepts and principles that have eventually been incorporated in treaties or acquired the requisite *opinio juris* as customary rules of international law. The importance of soft law lies in mobilizing states to initiate discussions when issues of international concern arise, thereby facilitating the possible development of international norms where a lacuna exists or applicable treaties are too open-textured. In this context, the role of soft law in facilitating the harmonization of the applicable international regimes for the conservation of high living resources is crucial. As we shall see in the coming
chapters, many non-binding instruments published by the FAO provide guidance on the interpretation of terms and principles that are found in hard law instruments which address the conservation of living resources on the high seas. Furthermore some Resolutions or Decisions approved by conferences between the parties to treaties and international organizations may be binding upon the parties, whenever the constituent treaty provides for this methodology. If non-parties accept them they may even crystallize into custom.

This short discussion on the complexities surrounding the sources of international law sheds some light on the challenges that users face when identifying the applicable international norms. Fragmentation has further exacerbated this dilemma, particularly for judges sitting on international adjudicating bodies who must discern the position of international law in the circumstances and apply the law in its entirety. In fact the ICJ has reiterated the need to interpret and apply treaties in the context of and together with other relevant sources of the law. The plurality of norms that have developed since the conclusion of the UNCLOS negotiations that are found in a variety of international law sources have to be taken into consideration. According to the ICJ in the *Gabčikovo–Nagymaros Dam Case*, new standards are to be given proper weight not only when states contemplate new activities but also when continuing with activities agreed upon beforehand. The ICJ has not hesitated in accepting that a new customary rule may have evolved, which should prevail over an earlier treaty concluded between the parties.

There are various political and historical reasons behind the unprecedented accretion of norms which have occurred in these last few decades that also explain why there is an increased risk of conflict amongst the sources of international law. The post Cold War era has brought added value in the perceived role of international law from what was previously a legal framework that guarantees peaceful coexistence to one that also promotes mutual cooperation. Inter-state relationships have intensified during this period, leading to an exponential rise in the number of multilateral and regional treaties and a proliferation of international organizations. As discussed above, these developments have spawned an accumulation of new norms and facilitated subspecialization. The cohort of international norms that currently regulates the conservation of high seas living resources is tangible proof of this trend as international law adapts to contemporary needs and expectations so as to regulate conflicting interests over the same. Inevitably, as discussed in the first part of this chapter, this diversification also has its negative effects.

More recently, globalization has promoted liberalization of international trade and states have tried to mould international law to address
both the socio-economic benefits as well as the negative environmental impacts of this phenomenon, thereby increasing the potential for conflict between international environmental law and other international legal substreams. Various disputes before the Appellate Body of the World Trade Organization have been trade disputes on harvesting methods for imported fish products imposed by coastal states, claiming that such measures were adopted for conservation purposes. However, the distant water fishing states rebutted them, alleging that they constituted a breach of WTO rules since they were a barrier to trade.49

On a more positive note, the international community has witnessed an emerging hierarchy of values that have also influenced the evolution of international law. The ILC Draft Articles on the Responsibility of States for International Wrongful Acts reflect this trend and establish that particular importance should be attached to those obligations under the various sources of international law which express collective interests or obligations that are owed to the community as a whole.50 This approach has also increased the chances of conflict, because norms expressing a collective interest may not sit comfortably with established general principles of law. For instance, robust conservation standards that may impose closed fishing seasons on the high seas for endangered species challenge the general principle that states have right of access over living marine resources occurring in areas beyond their national jurisdiction.

1.4 THE CONSERVATION OF LIVING RESOURCES ON THE HIGH SEAS: A FRAGMENTED INTERNATIONAL LEGAL FRAMEWORK

The Report of the Study Group of the International Law Commission entitled Diversification and Expansion of International Law. Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law considers the applicable regimes addressing the conservation of living resources on the high seas to be one of the primary examples of fragmentation under international law. This is mainly due to the fact that the body of rules for the conservation of marine living resources on the high seas has developed on an ad hoc basis, as a reaction to the historical and political developments that have occurred throughout the centuries as referred to in the 1.3 above. It is only recently that there has been some effort to achieve coordination and integration between the applicable legal norms.53 The exploitation of marine living resources was originally subject to the closed sea doctrine and from the eighteenth century to the high seas freedoms.54 Throughout the twentieth century,
various conventions on the law of the sea\textsuperscript{55} addressed, amongst other issues, the conservation of marine living resources, albeit in general terms. The most recent of these conventions, the 1982 UNCLOS, is regarded as the primary, although not the only, source of international law regulating the conservation of marine living resources in various maritime jurisdictional zones. UNCLOS, popularly referred to as the constitution for the oceans, regulates a plethora of uses and resources of the sea, including the legal relationship between coastal states and distant water fishing states when it comes to the exploitation of living resources on the high seas. Many of its provisions are considered to have codified the customary international law that existed at the time when it was negotiated,\textsuperscript{56} whilst it is also considered to be a norm-creating treaty as some of its provisions served to generate new customary international rules.\textsuperscript{57} Nevertheless UNCLOS constitutes an international legal framework and does not establish specific, substantive legal measures as to how such conservation of living resources beyond national jurisdiction may be achieved. The negotiators expected it to be supplemented by more detailed international and regional legal instruments which either already existed at the time or which could be concluded at a later stage. This is evident from some of its provisions which refer to ‘generally accepted international rules and standards’\textsuperscript{58} and the various obligations upon flag states and coastal states to cooperate in relation to specific fish stocks\textsuperscript{59} and marine mammals.\textsuperscript{60} Furthermore, article 237 establishes that the provisions of Part XII on the Protection and the Preservation of the Marine Environment are ‘without prejudice to special conventions and agreements concluded previously and to agreements which may be concluded in furtherance of the general principles set forth in this Convention’.\textsuperscript{61}

Alongside the evolution of norms on the law of the sea, a specialized international regime on the exploitation of fisheries had originated by the end of the nineteenth century with the conclusion of the first treaties specifically regulating fisheries\textsuperscript{62} and the fur seal trade.\textsuperscript{63} This process, which further developed and intensified throughout the twentieth century led to the formulation of various regional Regional Fisheries Management Agreements (RFMAs) and Regional Fisheries Management Organizations (RFMOs). RFMAs establish fisheries management mechanisms without establishing a formal institution established under the agreement. This task is usually assigned to the Food and Agriculture Organization (FAO) or another RFMO or shared between the parties to the RFMA. The reason for adopting such an approach is that it may be too cumbersome for the parties to set up an institution for this purpose, when they can make use of existing mechanisms, allowing for more flexibility and better cost-effectiveness.\textsuperscript{64} On the other hand, RFMOs establish, via
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their constitutive treaty, a permanent institution that takes over both management and possibly enforcement responsibilities. Examples include the Convention on Future Multilateral Cooperation in Northwest Atlantic Fisheries (NAFO) and the Convention for the Conservation of the Southern Bluefin Tuna (CCSBT). The FAO can establish both RFMOs and RFMAs by virtue of articles VI\textsuperscript{65} and XIV\textsuperscript{66} of its Constitution. For the purposes of this work, any further use of the term RFMOs should be taken to also include RFMAs.

The major sources of international fisheries law consist of customary law as well as multilateral treaties and regional fisheries agreements that have evolved over time. The major treaties include:

- the 1946 International Convention for the Regulation of Whaling (ICRW);
- the 1950 Inter-American Tropical Tuna Commission (IATTC);\textsuperscript{67}
- the 1969 International Commission for the Conservation of Atlantic Tunas (ICCAT);
- the 1979 NAFO;
- the 1982 Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR);
- the 1993 FAO Compliance Agreement;
- the 1994 CCSBT;
- the 1995 Convention for the Conservation and Management of Pollock Resources in the Central Bering Sea (Donut Hole Convention);
- the 1996 Indian Ocean Tuna Commission (IOTC);
- the 1997 General Fisheries Commission for the Mediterranean (GFCM);\textsuperscript{69}
- the 2003 Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (SEAFO); and
- the 2004 Western and Central Pacific Fisheries Commission (WCPFC).

Whilst UNCLOS was under negotiation, the international community witnessed the rapid development of international environmental law, an emerging regime based mainly on treaties, which also addresses the conservation of living marine resources. Following the 1972 United Nations
Conference on the Human Environment (UNCHE), there was a proliferation of multilateral environmental agreements (MEAs). Some of these treaties also addressed the conservation of living resources on the high seas. The earliest examples include the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) and the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals. More recent MEAs include the 1992 Convention on Biological Diversity, the 1995 Agreement on the International Dolphin Conservation Programme (IDCP)\(^7\) and the 2001 Agreement on the Conservation of Albatrosses and Petrels (ACAP). Apart from these MEAs, one can also mention the various protocols on the conservation of marine biodiversity falling under the Regional Seas Programmes.\(^7\) The legal component of these Programmes consists of framework treaties that were originally promoted by the United Nations Environment Programme (UNEP) to protect the marine environment from a regional perspective.

Some treaties like CCAMLR and FSA are also considered to fall under the category of MEAs. The FSA was the first serious attempt to approximate the ultimate goals and objectives of the international fisheries regimes with those of MEAs and other sources of international environmental law. The FSA and the CBD also influenced other RFMOs and regional seas programmes to revise their constituent treaties and incorporate more holistic conservation goals.\(^7\) These developments have served to take into consideration not only the interests of coastal states and high seas fishing states but also environmental issues that concern all states.\(^7\)

One cannot ignore the influence of soft law instruments such as:

- UNCED’s Agenda 21 (particularly its Chapter 17);
- UNGA resolutions 46/215 Drift Net Moratorium, 49/118 on Bycatch and Discards, 54/32 on Illegal, Unreported and Unregulated (IUU) Fishing and 60/31 on Sustainable Fisheries;
- the 1995 Rome Consensus on World Fisheries;
- the 1995 Jakarta Mandate;
- the 1995 FAO Code of Conduct for Responsible Fisheries;
- the 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem;
- the 2002 Johannesburg Declaration on Sustainable Development;
- the 2002 WSSD Plan of Implementation;
- the 2005 Rome Declaration on Illegal Unreported and Unregulated Fishing;
- the Ministerial Declaration of the St John’s (Newfoundland) Conference on the Governance of High Seas Fisheries;
- the UN Fisheries Agreement; and
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- the 2005 APEC Joint Ministerial Declaration for the Bali Plan of Action Towards Healthy Oceans and Coasts.

The FAO has issued various other soft law instruments under the aegis of its Code of Conduct for Responsible Fisheries. These include Technical Guidelines, International Plans of Action (IPOAs) and the Strategy for Improving Information on Status and Trends in Capture Fisheries. As is evident from these developments, the distinction between international fisheries and international environmental soft law has become rather blurred and these instruments can easily be considered to fall under either stream.

This brief historical account of the regulation of living marine resources beyond national jurisdiction demonstrates its cross-sectoral nature and explains why it falls within the scope of various international regimes. Ultimately, issues relating to the application of laws in a particular context may also arise, as the conservation of harvestable species remains predominately under fisheries law, whilst the conservation of marine living resources in general is normally addressed by environmental law. As the judges of the International Tribunal on the Law of the Sea in the MOX Plant case held, the application of the same rules by different fora and institutions may vary due to ‘differences in respective context, object and purpose as well as the subsequent practice of parties and travaux preparatoires’.

Both international fisheries agreements and MEAs addressing the conservation of living resources on the high seas share a common objective but, as demonstrated above, they have developed in parallel. In the next chapters, we shall see how these two streams of international law have adopted different strategies, standards and rules to regulate these same goals. Furthermore, the diverse fora from where they originate tend to interpret differently the applicable norms that are common to both sectors, such as section 2 of Part VII of 1982 UNCLOS, which deals with the conservation of marine living resources on the high seas. The provisions of UNCLOS do refer to dependent and incidental species and many RFMOs regulate to limit bycatch and fishing effort. International fisheries regimes aim at the conservation of fish stocks but the rationale behind their objective is to ensure the harvesting of these species. Environmental law seeks, as its ultimate goal, the conservation of the marine living resources per se and regulates living resources whether they are harvestable or not. It tends to impose the same conservation measures for states in whichever capacity they act, whether they play the role of coastal states or flag states. Environmental law in its purest form considers the oceans as one habitat and envisages conservation of the species and the habitat as
one ecosystem. As already highlighted before this perspective is popularly referred to as the ‘ecosystem approach’. In recent years, the objective of conservation under environmental law has been assimilated with sustainable use due to the influence of the concept of sustainable development. Nevertheless, certain environmental groups, including legal experts, may distance themselves from this stance and sometimes interpret the obligation to take adequate conservation measures as implying non use rather than sustainable use. Since the 1992 United Nations Conference on Environment and Development (UNCED), however, states have not, generally speaking, pursued this preservationist approach when negotiating and applying MEAs. The efforts to approximate applicable legal regimes were taken more seriously after UNCED and the main soft law document of this Conference, Agenda 21, dedicated the whole of chapter 17 to the marine environment, which spurred both MEAs and fisheries agreements to ensure better coherence in their efforts towards regulating conservation in a sustainable manner. Together with the 1995 FSA, the 1992 CBD was a fundamental step ahead in this direction. The CBD, at its second conference of the parties, adopted the Jakarta Mandate for Marine and Coastal Biodiversity. This mandate articulates a programme of action for implementing the Convention’s provisions with respect to marine and coastal biodiversity and singles out for special attention amongst other issues sustainable use of marine and coastal living resources.

In turn, both international fisheries law and international environmental law operate within the wider realm of international law and its other ramifications such as maritime law, the law of the sea and the law of natural resources. The law of the sea establishes the generic obligation to take the necessary conservation measures when exercising the freedom of fishing but although important it relies on other legal streams to regulate the use of living resources on the high seas. Maritime law allows flag states the discretion to take unilateral conservation measures for their nationals fishing on the high seas and bestows upon them exclusive jurisdiction to ensure compliance and enforcement. It also requires flag states to cooperate with both coastal states and other flag states in taking conservation measures on the high seas, especially with respect to particular species. International law regulating the use of natural resources stresses that all states have a right to access those resources that occur in areas outside national jurisdiction. In conformity with the high seas freedoms, the appropriation of marine living resources on the high seas by any single state or group of states is prohibited. UNCLOS, in section II of Part VII, requires states to take conservation measures that ‘maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield as qualified by relevant and
economic factors’. The evolution of environmental treaties has continued to lay further emphasis on the sustainable use of such resources in order to ensure their conservation. As Orrego Vicuna observes, although originally international law regulated the availability of the resource to ensure the economic performance of the fishing industry, it has more recently started to address conservation issues required by environmental standards. The socio-economic issues addressed by the older sources of international law relating to high seas living resources acquired a different perspective and also had to accommodate environmental concerns. This process has given rise to new legal concepts and to the reinterpretation and reformulation of traditional principles of international law.84

1.5 HARMONIZATION: SYSTEMATIC INTEGRATION TO OVERCOME FRAGMENTATION

The fragmented nature of international law is not a recent phenomenon, so much so that the 1969 Vienna Convention on the Law of Treaties (VCLT) addresses the situation when the same set of facts is regulated by more than one legal source leading to incompatible results. Conflicts may be either apparent or genuine and inherent. Apparent conflicts may be ‘interpreted away’. In such cases the integrated approach serves to clarify any ambiguities found in the treaty provision when users refer to other treaties or other sources of international law. For instance, in the US–Mexico Shrimp Case,85 the WTO Appellate Body interpreted the WTO term ‘exhaustible natural resources’ in GATT article XX(g) with reference to 1982 UNCLOS, the CBD and CITES amongst other sources. It is not always possible to rely on interpretation as a legal technique to achieve harmonization amongst different applicable rules. This is what happens when there is a genuine and inherent conflict, which arises when the application of one norm is in direct breach of another. It could be a conflict between two commands, or between a command and a prohibition, or between a command and a right, or even between a prohibition and a right.86 In the first two cases the chance of conflict is inherent because the application of one norm leads to a breach of obligation under the other and therefore cannot be resolved by conflict-resolving techniques. In the other two cases there is a potential conflict, which will occur if the exercise of a specific right under one norm breaches another under the conflicting rule. Conflicts may happen not only when successive treaties address the same subject and have the same title, such as for example the various conventions on the law of the sea87 but also when more than one treaty may
be applied to regulate a particular situation. The *MOX Plant Request for Provisional Measures Order Case* referred to earlier, related to a nuclear facility namely, the MOX Plant at Sellafield in the United Kingdom, which Ireland claimed was causing negative effects on the environment as a result of its operations. The dispute was subject to the multilateral and general rules of UNCLOS, the regional rules of the OSPAR Convention (since the dispute related to pollution in the North Sea) and the application of EU *acquis communautaire* as embodied in the EURATOM treaty (because both parties are members of the EU). As a result, the dispute was raised at three different institutional procedures: under the international Tribunal for the Law of the Sea (ITLOS), under the compulsory dispute settlement procedure set up under the OSPAR Convention and before the European Court of Justice because of the EC/EURATOM treaty. Conflicts may also arise when two or more treaties regulate the same issues but have divergent objectives. For instance, the 1958 High Seas Fisheries Convention perceives conservation as a measure to ensure food security whilst more recent treaties such as the 1992 CBD and the 1995 FSA aim at conservation of the species *per se*. Additionally, conflicts may also occur when emerging norms are inconsistently applied to regulate similar circumstances, or when parties or different fora interpret the same treaty in a different manner.

Sometimes norms from different sources of international law may be eligible to regulate the same situation. If there is an apparent or an actual conflict between treaty and custom, the general trend is that the treaty provisions will prevail, whenever both states involved in the dispute are parties to the same treaty. Nevertheless a more recent customary rule of international law may have modified and superseded the treaty provisions. The onus of proof falls upon the contestant alleging the change in the law brought about by custom. The same can happen when a treaty refers to general principles of international law and any subsequent developments that seek to fine-tune it are interpreted as an infringement of the same general principles. One of the biggest bones of contention between states relates to the adoption of unilateral conservation measures by flag states on the high seas. Coastal or high seas fishing states consider that flag states cannot adopt measures that are inferior to those adopted via cooperation by other flag states harvesting identical species and/or fishing in the same marine areas beyond national jurisdiction. Their argument is based on the UNCLOS provision that requires all states harvesting species in this manner to cooperate. Flag states taking this approach, however, contend that any constraints on their right to take unilateral conservation measures hinder the general principle of freedom of access to these same resources codified under the 1982 UNCLOS. This conflict in
the interpretation and application of the UNCLOS provisions as further developed by subsequent treaties is dealt with in detail in Chapter 3.97

The VCLT provides that states are to ensure that a treaty is interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Apart from its context and other agreements that were concluded to this effect, state parties shall take into account ‘any relevant rules of international law applicable in the relations between the parties’. This implies that there is a presumption against conflict and that users must aim for the harmonization of applicable norms when they interpret treaties accordingly. Harmonization entails the identification of the most adequate legal techniques to avoid, minimize or mitigate conflict amongst the various sources of international law that may apply to a particular situation. Ideally, harmonization should be exercised at the negotiations stage, rather than as an afterthought, because in most cases it is the language of these same norms that gives rise to ambiguity and conflict every time the effects of political compromise lead to general provisions that leave too much discretion in the hands of the state parties. Apart from conflict prevention at the negotiations stage, the process of interpretation when a treaty is applied should be used to avoid conflict. Article 30 of the VCLT suggests the required legal techniques to achieve harmonization of conflicting treaty norms and regulates how a subsequent treaty may qualify an earlier treaty on the same subject.100 Amongst the compendium of international norms that regulate the conservation of living resources on the high seas, one finds examples of lex priori and lex posteriori. UNCLOS itself and the CBD take this situation into consideration.101 Article 30 of the VCLT applies when, ‘successive treaties relate to the same subject-matter’, and establishes that if a subsequent treaty specifies that it is subject to an earlier treaty or not in conflict with it, this should be interpreted to mean that the provisions of the earlier treaty ‘shall prevail’. If a treaty is not suspended although it has been replaced by another, it remains applicable vis-à-vis those states that are parties to it and which are also parties to the new treaty, insofar as it does not conflict with the provisions of the latter. The provisions of the earlier treaty would, however, still prevail if in the case of a dispute where it is applied, one of the states is a party to it but not to the new treaty. The use of certain terminology in treaties such as ‘without prejudice to’ and ‘further to’ are often utilized to overcome the potentially conflicting interpretation of subsequent treaties vis-à-vis the previous one.

The VCLT also refers to other procedural legal measures to ensure harmonization between applicable treaties, such as determining the hierarchy of laws according to the relationship between the lex specialis and the lex generalis. One can notice that the international legal sources which
regulate conservation of living resources on the high seas, range from norm-creating treaties like UNCLOS to subregional and bilateral agreements. Additionally, some norms relate to particular species like straddling stocks, marine mammals and anadromous species that raise issues of priority and specialization as the *lex specialis* that supplements and fine-tunes the *lex generalis*. A multilateral treaty may, because of its general nature, appear to be in conflict with more specialized norms emerging from subsequent treaties or possibly even customary international law that have developed at a later stage. The relationship between treaty law and customary international law may lead to the same situation of conflict between prior and subsequent legal sources addressing the same circumstances. A treaty in fact may predate the crystallization of a more recent customary rule of law.102

### 1.6 CONCLUSION

Living marine resources have diverse characteristics and life cycles. They roam freely ignoring human-made boundaries and jurisdictional claims arising therefrom. They also remain an essential source of sustenance not only for humans and states’ economies but also for biodiversity in its entirety. The conservation of such resources on the high seas constitutes a vested interest for the international community as a whole and any attempts to harmonize the interpretation and application of the various international regimes is not only in keeping with the VCLT provisions, but also a *sine qua non* for the effective conservation of high seas living resources. Confusion, ambiguity and conflicts amongst applicable norms would inevitably hamper and weaken any legal framework on conservation. As we shall see in the coming chapters, despite the innumerable legal and non-legal challenges that render the regulation of sustainable use of living resources on the high seas a near-to-impossible task, there have been some success stories amongst many failures. Harmonization is possible and happening to some extent. There have been various attempts and some good examples of convergence between fisheries law and environmental law but these two legal streams have interacted less successfully with maritime law and the law of the sea, which are the sources regulating jurisdiction, enforcement and the nationality of fishing vessels. Despite the importance and the requirement to seek harmonization techniques, this approach has its limitations and cannot fill in legal lacunae or disregard the obligations of specific norms that are still in force. It must be stressed that whilst there is a presumption against conflict of norms under international law,103 there is no similar presumption against change and
legal stability cannot hamper the dynamism of the law.\textsuperscript{104} Sometimes a temporary solution may be found as a political caveat but the stakeholders would at some point be constrained to negotiate new norms to resolve the conflict. A case in point is the imminent need to regulate bioprospecting for sedentary species on the deep sea-bed, outside the national jurisdiction of any state. This is discussed in Chapter 4. It is this requirement to replace ambiguity or overcome conflicting interpretation that often spurs states to call for the negotiation of new treaties. The FSA, for instance, sought to clarify UNCLOS’ general rules, which had left open to interpretation the rights and duties of the coastal states and how these impinge on the freedom of fishing of straddling stocks and highly migratory fish stocks on the high seas. Sometimes the legal status of successive treaties in relation to the previous ones they ought to have fine-tuned, remains nebulous. States are bound by treaties they are parties to and if the new treaty is not adhered to by those states that were parties to the previous treaty, then its purpose to generate clearer legal obligations remains in abeyance. Harmonization may therefore occur via the adoption of techniques in legal interpretation permitted under international law or the formulation of a new legally binding instrument. It will only serve its purpose if it takes into account the different interests of states involved. The underlying reason why international law diversifies itself into different legal streams is to ensure the required degree of flexibility to meet with these different interests. Indeed, progress is registered whenever, ‘the rules of maritime law have been the product of mutual accommodation, reasonableness and co-operation’. The words of the ICJ in the \textit{Fisheries Jurisdiction Case}\textsuperscript{105} sound as valid today, as on the day they were delivered.

\section*{NOTES}

1. See UNCLOS article 119(1)(a) which says, ‘In determining the allowable catch and establishing other conservation measures for living resources on the high seas States shall: take measures which are designed, on the best scientific evidence available to the States concerned to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environment and economic factors . . .’

2. See ibid, article 118.

3. The 1992 UNCED is also referred to as the Earth Summit. States at the Summit unanimously endorsed Agenda 21, an action plan which laid out how sustainable development and the sustainable use of natural resources may be achieved. See below at p 15.

4. See explanation of the term ‘harmonization’ for the purpose of this book, below p 4.

5. See speech by His Excellency Judge Gilbert Guillaume, President of the ICJ to the Sixth Committee of the United Nations General Assembly (UNGA), delivered on 27 October 2000, \textit{The Proliferation of International Judicial Bodies: The Outlook for...}
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6. Section 2 of Part VII of UNCLOS, articles 116–20 and the cross reference made in article 116(b) to articles 63(2), 64–7.
8. Ibid, at note 53.
9. Some fisheries agreements such as the North Atlantic Fisheries Organization (NAFO) impose conservation measures in the high seas areas within the jurisdictional scope of the agreement (NAFO Regulatory Area) that if not abided by, lead to the classification of the fish caught in the same area as illegal, unregulated and unreported fishing (IUU). IUU fish landings are prohibited by port States, Parties to the NAFO. See Chapter 6 for a discussion on the subject at pp 247–9. See also Ball, W.S. (1996), ‘The old grey mare, national enclosure of the oceans’ ODIL, 27(1–2), 97–124; Birnie, P. (1997), ‘Are twentieth-century marine conservation conventions adaptable to twenty-first century goals and principles?’ Part II, IJMC 12(4), 488–532.
11. See VCLT, article 31.
12. See UNCLOS, article 86 which says that the provisions of Part VII on the high seas apply to all parts of the sea that are not included in the exclusive economic zone (EEZ), in the territorial sea and in the internal waters of a state or in the archipelagic waters of an archipelagic state. Also subject to freedom of fishing in accordance with section 2 of Part VII of UNCLOS are those living resources occurring in the super-jacent water column of the continental shelf (beyond the territorial sea) where the coastal state has not declared an EEZ or an EFZ.
13. See UNCLOS, Part I, article 1(1) and Part XI, article 134.
15. Article 38 of the Statute of the International Court of Justice (ICJ), refers to a list of sources of international law, which the Court is to apply when settling disputes, namely: (a) International Conventions, whether general or particular, establishing rules expressly recognized by contesting States; (b) international custom, as evidence of general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of article 59 judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means of rules of law.’ Article 59 of the Statute of the ICJ establishes that judicial decisions of the International Court have no binding force except between the parties and in respect of that particular case. See Brownlie, I. (2003), Principles of Public International Law, 6th edn, Oxford: Oxford University Press, p 5.
16. See discussion on the MOX Plant Case, pp 14 and 17.
17. See Brownlie (2003), p 3.
22. See Pauwelyn (2003), p 94.
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29. Examples of such cases include the Corfu Channel Case, ICJ Reports (1949), 18; Right of Passage over Indian Territory (Preliminary Objection) ICJ Reports (1957) 141–2.
31. The FSA is an example. It was negotiated to supplement the UNCLOS provisions that require coastal states and flag states to cooperate when exploiting straddling and highly migratory fishstocks under articles 63(2), 64 and article 116(b) of UNCLOS.
32. See above, note 10.
34. See the separate opinion of Judge Lauterpacht in the South West Africa case (Voting Procedure), ICJ Reports (1955), 67 at 118–19.
37. Both the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment (UNCHE) and the 1992 Rio Declaration of UNCED are considered to be examples of soft law.
38. See Brownlie (2003), p 15 and Birnie, Boyle and Redgwell (2009), p 35.
39. Principles referred to in both UNCHE and UNCED. Declarations such as the precautionary principle have eventually been incorporated in treaties like the FSA and may be considered by states to have crystallized as norms of customary International law. See EC-Hormones: European Communities – Measures Affecting Livestock and Meat (Hormones), complaints by Canada (WT/DS48) and the United States (WT/DS26), panel and Appellate Body reports adopted on 13 February 1998. In this case the European communities claimed that their ban on hormone-treated beef, which the applicant states claimed were allegedly inconsistent with WTO rules for not being based on sound science, was justified with reference to the precautionary principle – a principle which in the EC’s view was part of customary international law.
40. This has been the role for example of the various Guidelines published by UNEP and Plans of Action promoted by the FAO.
41. For a detailed discussion on the role of soft law in this sense, see Birnie, Boyle and Redgwell (2009), pp 34–7.
42. The FAO has provided various Technical Guidelines on the Precautionary Approach, Fishing Operations, Fisheries Management, Sustainable Development Indicators, Illegal, Unregulated and Unreported Fishing (IUU) and the Ecosystem Approach. It also has formulated four International Plans of Action on seabirds, sharks, capacity and IUU. It has also provided a Fishery Resources Monitoring System. See Meltzer, E. (2009), The Quest for Sustainable Fisheries, Ottawa: NRC Research Press, p 12, Figure 2.1.
43. Some fisheries organisations for example use qualified majority voting, not unanimity, such that decisions would become binding on all parties if the constituent instrument
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so permits. See Meltzer (2009), pp 270–91. For example the North East Atlantic Fisheries Commission (NEAFC) which requires both simple and at times qualified majority voting from a quorum of two-thirds of the contracting parties. Any contracting party may object to a recommendation for management measures only. Since the amendment of the constituent treaty in 2004, parties are to provide in writing, reasons for objection and declare alternative conservation measures they will be taking.

44. See Jennings, R. (1981), ‘What is International Law and How Do We Tell It When We See It?’, 37 ASDI 59.
45. See Gabčíkovo–Nagymaros Case (Hungary-Slovakia), ICJ Reports 1997, para 140.
48. See ibid, p 19, where the author argues that the transformation of international law into a law of both co-existence and cooperation has led to the significant potential increase in conflict between applicable norms and has generated apparent and genuine conflicts between general international law and the different substreams of specialized norms as well as amongst the substreams themselves.
51. See also Barcelona Traction Case ICJ Reports (1970) 3. See also Birnie, Boyle and Redgwell (2003), pp 232–6.
52. See above, note 10, paras 1–4.
53. After the United Nations Conference on Environment and Development (UNCED) and the Cancun International Conference on Responsible Fishing in the year 1992, many fisheries agreements were reviewed to adopt an ecosystem approach. See Chapter 5 for a discussion on these developments at pp 182–7.
55. There were four 1958 United Nations Conferences on the Law of the Sea: the Convention on Fishing and Conservation of Living Resources of the High Seas, which defined conservation and came into force on 20 March 1966, the Convention on the High Seas, which codified fishing as one of the high seas freedoms and came into force on 30 September 1962, the Convention on the Continental Shelf in force on 10 June 1964 and the Convention on the Territorial Sea and Contiguous Zone in force on the 10 September 1964. All were done in Geneva. The 1982 UNCLOS addressed all the issues in these four treaties. It qualifies the freedom of fishing making it subject to the obligation to conserve living resources and regulates exploitation both on the high seas and in the areas subject to national jurisdiction. See Burke, W.T. (1996), Introduction: The Importance of the 1982 UN Convention on the Law of the Sea and Its Future Development, ODIL, 27 (1–2).
57. See Brownlie (2003), p 200 and footnote 145.
58. See UNCLOS, articles 119 and 197.
59. See UNCLOS, articles 63, 64, 66 (3)(c), 67(3).
60. Ibid, article 65.
61. Article 237(2) also stipulates that specific obligations assumed by states under special conventions with respect to the protection and the preservation of the marine
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environment should be carried out in a manner consistent with the general principles and objectives of the 1982 Convention.

62. The 1882 North Sea Over-Fishing Convention.
64. Examples of such agreements include the South Tasman Rise Agreement and the Central Bering Sea Donut Hole; see Meltzer (2009), p xxxiii.
65. RFMOs and RFMAs established under this article have only advisory powers and may at best only make recommendations; they are funded by the FAO. They are not considered as RFMOS and RFMAs according to the 1995 UN Fish Stocks Agreement definition of the same. The Fisheries Council for the Eastern Central Atlantic is an example.
66. These have a budget of their own from contributions made by the parties. The constituent treaty establishes the range of decision-making powers. The General Fisheries Commission for the Mediterranean is an example of such an RFMO.
67. This agreement is not in force.
70. As amended in 2005.
71. Each of these programmes has a legal component that includes a Convention and various Protocols issued thereunder such as, for example, the 1976 Barcelona Convention on the Protection of the Mediterranean Sea Against Pollution as amended in 1995, namely The Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its 1995 Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean. See also Chapter 2, p 29, footnote 35.
72. See above at note 53.
73. See Orrego Vicuna (1999), p 2.
75. See above at note 41.
77. See above at note 53. See Birnie, Boyle and Redgwell (2009), pp 385, 386. See also discussion in Chapter 5, pp 182–7.
78. See Birnie, Boyle and Redgwell (2009), pp 11–12.
79. See above at note 3. Agenda 21 is a soft law instrument which nonetheless has greatly influenced the trends adopted by treaties that address environmental issues and resource management since 1992.
80. The CBD came into force on 29 December 1993.
81. See CBD COP Decision II/10. See also CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) Recommendation III/2 as amended by COP III.
82. See Orrego Vicuna (1999), p 1.
83. Article 119(1)(a).
85. See above at note 49 *US-Shrimp WTO dispute* paras 128–32.
88. *MOX Plant Request for Provisional Measures Order Case (Ireland v United Kingdom)*,
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90. The FSA came into force on 11 December 2001.


93. See Pauwelyn, (2003), p 139.

94. See Brownlie (2003), pp 5, 18–19, where he explains that, 'They are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice.' He quotes as examples the freedom of the seas, principles of consent, reciprocity and equality of States. Furthermore he argues that, 'certain fundamental principles have recently been set apart as over-riding principles of jus cogens which may qualify the effect of more ordinary rules'.

95. See UNCLOS, article 118.

96. Ibid, article 117.


98. See VCLT, article 31(2)

99. Ibid, article 30(2), which establishes that, 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.' Article 30(3) provides, 'When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.'

100. Ibid.

101. See 1982 UNCLOS articles 237 and 311 and CBD article 22(1)–(2).

102. A treaty may be amended by a subsequent norm of customary law where acquiescence to the latter is recognized by state practice of the same parties to the treaty concerned; vide for example Air Transport Services Agreement Arbitration, 1963, ILR 38, 182.

103. See Right of Passage over Indian Territory (Preliminary Objections) ICJ Reports 1957, 142 where the judges of the ICJ held that a rule of interpretation must be such as to intend to produce effects in accordance with existing law not against.


105. Icelandic Fisheries Cases (United Kingdom and Germany v Iceland) (Merits), ICJ Reports, (1974) (para 53).