

## A Pollock-Fishing Agreement for the Central Bering Sea

*William V. Dunlap\**

### Introduction

A multilateral convention to protect the Bering Sea pollock fishery from over-exploitation was agreed in February 1994 by representatives of the two coastal states and four fishing nations. The agreement is significant on at least two levels: as a means of protecting the Bering Sea pollock fishery, which has been consistently over-fished and seriously threatened in recent years, and as a model for future agreements on the multilateral management of high seas fisheries.

The *ad referendum* text of the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (the 'Donut Hole agreement') was initialed on 11 February 1994 by representatives of the two Bering Sea coastal states - Russia and the United States - and the four other nations whose vessels have regularly fished the Bering Sea for pollock prior to 1989 - China, Japan, Poland, and South Korea. It was signed on 16 June 1994 by representatives of China, Korea, Russia and the United States. Japan and Poland are expected to sign it in the near future. The convention will enter into force thirty days after Russia, the United States, and any two of the four other states have ratified it (Donut Hole Agreement, 1994: Article XVI(2)).<sup>1</sup>

After three years of negotiations, which already had resulted in a moratorium on pollock fishing in the Donut Hole (Joint Resolution, 1992), the agreement was reached in Washington DC, at the Tenth Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea. Nine previous conferences had been held in Washington, Tokyo, Moscow, and Seoul, beginning in February 1991.

### The Donut Hole

The Donut Hole is a high seas enclave of approximately 55,000 square nautical miles in the Aleutian Basin of the central Bering Sea, entirely surrounded and defined by the seaward limits of the Russian and United States exclusive economic zones (EEZ).<sup>2</sup> (See map.) It lies north of the Aleutian archipelago between the 55°N and 60°N parallels,

and straddles the 180° meridian about midway between the Kamchatka Peninsula and the Alaskan mainland. It lies almost entirely on the North American side of the US-Russia convention line of 1867. The Donut Hole encompasses approximately 8% of the Bering Sea (Alexander, 1974: 168).

Under customary and conventional international law, coastal states have an obligation to regulate fisheries within the EEZ to prevent over-exploitation (LOSC, 1982: Article 61) and to promote optimum utilisation of living resources (LOSC, 1982: Article 62). Furthermore, they may have special or superior rights and interests in fish stocks that straddle the boundary between the EEZ and the high seas (LOSC, 1982: Article 63(2); Kwiatkowska 1993: 329, 331). Nevertheless, even if coastal states have prescriptive jurisdiction to regulate straddling stocks or highly migratory species beyond their EEZs, it is clear under international law that they have no enforcement jurisdiction on the high seas over ships flying the flag of another state;<sup>3</sup> a ship on the high seas is subject to the enforcement jurisdiction only of its flag state.<sup>4</sup>

The Bering Sea contains some of the world's most valuable fisheries and, in recent years, has been the most important fishing ground for the United States fishing industry. Fishing in United States waters of the Arctic Ocean, the Bering Sea, and the North Pacific Ocean is under the jurisdiction of the North Pacific Fishery Management Council (NPFMC), operating under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act, 1976). A combination of factors, including overcapitalisation of the fishing industry and the nationalisation in the late 1980s of access to fisheries in the United States and Soviet EEZs, led foreign fishing vessels into the unregulated high seas of the Donut Hole, through which the pollock passed as it moved back and forth between the regulated Russian and United States EEZs (Miovski, 1989: 527-528). Systematic overfishing, beyond the jurisdiction of both coastal states, threatened the future not only of the Bering Sea pollock stock but also of other species that compete for pollock in and around the Bering Sea. United States State Department figures show that the annual pollock catch in the Donut Hole rose from 363,000 metric tons in 1985 to 1,447,614 metric tons in 1989 and

then plummeted to 917,371 metric tons in 1990 and 292,399 metric tons in 1991 (Canfield, 1993: 229-263). It was widely believed that foreign vessels were using the Donut Hole not only for systematic overfishing beyond coastal state jurisdiction but also as a staging area for illegal forays into United States waters (Canfield, 1993: 260 & n.14; Mioviski, 1989: 528 n.7; Miles and Burke, 1989: 348; Egan, 1988).

### Background and Negotiations

The emerging law of the sea, as exemplified by the 1982 United Nations Convention on the Law of the Sea (LOSC) and subsequent developments, has not yet provided a satisfactory framework for establishing comprehensive conservation and management schemes for straddling and transboundary fish stocks, such as the pollock of the Donut Hole. Nevertheless, the LOSC constitutes the general framework within which the debate is conducted,<sup>5</sup> and the text of the convention is the source of a variety of theories upon which control of fisheries management and conservation can be based.<sup>6</sup> For example, Articles 116(c)-120 impose a duty on states to cooperate in the conservation and management of living marine resources of the high seas and could support an argument justifying multilateral measures (Mioviski, 1989: 534-537). In another approach, Articles 56 (coastal state rights in managing living resources), 61(3)-(4) (conservation of living marine resources), 63(2) (fish stocks that overlap the high seas and one or more EEZ boundaries), 87(2) (freedom of the high seas to be exercised with due regard for interests of other states), and 116(b) (right to fish on the high seas, subject to rights, duties, and interests of coastal states), read together, have been taken to require multilateral regional management of straddling stocks (Mioviski, 1989: 537-546). A third approach suggests that Articles 122 and 123 (enclosed and semi-enclosed seas), in conjunction with Articles 87 and 116(b), can be read so as to permit the establishment of a bilateral coastal state regime based on the Bering Sea's status as a semi-enclosed sea (Mioviski, 1989: 556-562), though on its face Article 123 does not provide any rights to coastal states beyond those already available in the EEZ or territorial sea (Miles and Burke, 1989: 349).

These approaches all suffer from the same drawbacks. The most apparent is the absence of enforcement mechanisms beyond the 200-mile limit. No less vexing is the conflict of interests faced by the United States and Russia in their dual roles as coastal states with rights and duties in the EEZ and as major maritime nations with significant

commercial and security interests in maintaining the traditional maritime freedoms.

As a general rule, the United States, fearful of setting a precedent that could lead to further ocean enclosure, has rejected the semi-enclosed sea approach and others that involve the imposition of coastal state jurisdiction over activities of other states on the high seas (Canfield, 1993: 265; Miles and Burke, 1989: 349). Dissenting voices within the United States have not been so cautious, however. In 1988, four United States senators sponsored a nonbinding resolution, which was adopted unanimously, urging the United States government to enter into talks with the Soviet Union with the goal of a bilateral agreement to impose and enforce a moratorium on pollock fishing in the Donut Hole (Senate, 1988).

The first of the ten conferences opened in Washington DC, in February 1991. Subsequent conferences were held in Tokyo, in July-August 1991; Washington, November 1991; Washington, April 1992; Moscow, August 1992; Washington, January 1993; Tokyo, June- July 1993; Seoul, October 1993; and Washington, November-December 1993 (Joint Press Release, 1994).<sup>7</sup> It was at the Fifth Conference, on 14 August 1992, that all six states agreed a moratorium for 1993 and 1994 on pollock fishing in the Bering Sea, including both EEZs as well as the high seas (Joint Resolution, 1992).

The approach ultimately adopted, a multilateral convention agreed by all interested parties, resolves the enforcement problem as between the parties themselves, but, like the others, is unable to deal definitively with the intractable and probably inevitable problem of nonparties and new entrants.

### The Convention

The Donut Hole Agreement is a relatively brief, straightforward document. It consists of a Final Act of three pages; the Convention, consisting of a Preamble and 20 articles in 12 pages; a two-page annex; and a five-page Record of Discussions identifying some intentions of the parties regarding means of implementing and interpreting the agreement.

#### A. General Provisions

The parties appear to have deliberately avoided any language that could have strengthened or seemed to have supported any side in the ongoing debate over

the freedom to fish on the high seas and coastal state enforcement of fishery provisions. The Preamble barely mentions the LOSC, simply noting its adoption, and makes no reference to any legal rights or obligations. Otherwise, it merely "*recognis[es] the urgent necessity to cooperate in taking measures for the conservation and management of pollock resources in the central Bering Sea consistent with international law*".

The Convention Area is defined as "*the high seas area of the Bering Sea beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of the coastal States of the Bering Sea is measured ....*" (Article I) The Convention declares that its objectives are to establish an international regime for conservation, management, and utilisation of pollock resources (Article II(1)), to restore and maintain pollock resources at a level that will permit maximum sustainable yield (Article II(2)), to cooperate in gathering factual information concerning pollock and other living marine resources in the Bering Sea (Article II(3)), and, optionally, to provide a forum for considering conservation and management measures for other living resources in the area (Article II(4)).

The agreement calls for the convening of an Annual Conference of the parties (Article III(1)(a)) and the establishment of a Scientific and Technical Committee (Article III(1)(b)). The Annual Conference will rotate among the parties (Article VI(1)) and will elect a Chairperson and Vice-Chairperson annually (Article VI(3)). It will perform some functions commonly associated with a secretariat (Article IV(1)(e) and (2)) and will serve as a forum for a broad number of issues related to the convention (Article IV(c)-(m)). The chief United States negotiator has said that reliance on annual meetings instead of a permanent standing body will save money and will ensure that governments stay involved and pay close attention to all issues (Colson, 1994: 3).

#### B. Catches and Quotas

The Annual Conference's key role will be to establish annually the allowable harvest level (AHL) (Article IV(1)(a)) and the individual national quota (INQ) (Article IV(1)(b)) for the following year. In setting the AHL and the INQ, the Annual Conference is to "*take full account of the reports and recommendations of the Scientific and Technical Committee*" (Article IV(3)). Decisions will be taken by majority vote (Article V(3)), each party having one vote (Article V(1)). On matters of substance, however, decisions will be taken by

consensus; a matter will be deemed to be of substance if any party considers it so (Article V(2)). The determination of the AHL (Article VII(1)) and the INQ (Article VIII(1)) will be by consensus.

More important, perhaps, than the voting procedure is the default position built into the determination process. One of the major drawbacks of multilateral conventions on straddling stocks has been the opt-out procedure by which a party may decline to participate in the following year's quota system if it disagrees with the limit or quotas or with the empirical assessment on which they were based. The European Community, for example, has frequently opted out of the Northwest Atlantic Fisheries Organisation (NAFO) national quotas because of disagreement over quotas for Spain and Portugal, which joined the EC several years after the NAFO national quotas had been established (Kwiatkowska, 1993: 335). While the consensus requirement for establishing the AHL and the INQ may, at first glance, appear to be an invitation to a veto by any party displeased by the majority view, in fact such impasses are avoided by the designation of a fallback, or default, position for both the AHL (Article VII(2)) and the INQ (Article VIII(2)).

#### 1. Allowable Harvest Level

Under any circumstances, the AHL for the succeeding year is to be based upon an assessment by the Scientific and Technical Committee of the pollock biomass for the entire Aleutian Basin (Article VII(1)). Article VII(2) provides that if consensus cannot be reached, the AHL shall be determined according to provisions laid down in Part 1 of the Annex. Read in conjunction with the Annex, the reference to a failure to reach consensus appears to refer to a (failed) consensus on the pollock biomass as well as to a (failed) consensus on an AHL. The Annex sets forth a process by which the Aleutian Basin pollock biomass will be established by agreement between two institutions, one designated by the United States, the other by Russia (Annex, Part 1(a)). If these institutions cannot establish a figure because of insufficient scientific and technical information, then the pollock biomass will be set automatically by basing it on the United States institution's calculation of the pollock biomass of the Specific Area, a region of the United States EEZ in the southeast corner of the Aleutian Basin (Annex, Part 1(b) (note)). (See map.) For purposes of establishing the AHL, the pollock biomass of the Specific Area is deemed to be 60 per cent of the Aleutian Basin pollock biomass (Annex, Part 1(b)).

The Annex then sets out rules for calculating the AHL from the pollock biomass. If the biomass is less than 1.67 million metric tons, the AHL will be set at zero and there will be no directed fishing on the Aleutian Basin pollock stock (Annex, Part 1(c)). If the biomass is set at 1.67 million metric tons or more, but less than 2.0 million metric tons, the AHL will be 130,000 metric tons; if the biomass is 2.0 million metric tons or more but less than 2.5 million metric tons, the AHL will be 190,000 metric tons. If the biomass is 2.5 million metric tons or more, the AHL will be determined by consensus at the Annual Conference (Annex, Part 1(d)). This referral of the issue to the Annual Conference appears to create the possibility of a second deadlock (inasmuch as the Annex procedure will not have been utilised in the first place unless there will already have been a deadlock at the Annual Conference), and the convention does not designate a procedure for breaking or circumventing an impasse in these circumstances. Perhaps the hope is that with so much pollock available for the taking there will be no serious problem in reaching consensus. Nevertheless, if the Annual Conference's determination is consistent with the formula applicable to a smaller biomass, 2.5 million metric tons would not appear to allow an AHL anywhere near the 1.447 million metric tons taken in the peak year of 1989 (Canfield, 1993: 262-263 (Table 2)).<sup>8</sup>

To elect a default position based on the figures of one of the interested parties may seem unusual. Nevertheless, the parties apparently agreed that the United States' position was reliable because its information is arrived at publicly and because the policies based on it will be applied in the United States EEZ against American fishermen as well as on the high seas against others (Colson, 1994: 3).

## 2. Individual National Quotas

The procedures for circumventing an impasse in determining the INQ are considerably more vague than those regarding the AHL. Article VIII(1) provides:

*"The Annual Conference shall establish by consensus the INQ for the succeeding year for each Party, the total of which shall not exceed the AHL, with the understanding that an INQ shall not be transferred to any other Party or non-party."*

Article VIII(2) goes on to provide:

*"If every effort to achieve consensus has failed, the Parties agree that fishing for*

*pollock in the Convention Area shall take place pursuant to the provisions of Part 2 of the Annex"*.

Part 2 of the Annex remands the issue to the Annual Conference, to be resolved by consensus. Rather than appointing a new decisionmaker, as in the case of an impasse over the AHL, now the decisionmaker remains the same but the method of allocating shares is changed. Instead of setting INQs, the Annual Conference is to establish *"an effective management system for the pollock fishery in the Convention Area"* (Annex, Part 2). The management system is to be based on the recommendations of the Scientific and Technical Committee (Annex, Part 2(a)); take into account the fishing efforts, capacity, and efficiency of each party (Annex, Part 2(b)); not prejudice the opportunity for the fishing vessels of all parties to participate in the fishery (Annex, Part 2(c)); and establish a starting date, a monitoring system, and procedures for closing the fishery, as well as other, appropriate conservation and management measures (Annex, Part 2(d)). It appears that in practice this will mean a fishing season available to vessels of all parties and set to close when the allowable harvest level has been taken (Colson, 1994: 5).

## C. Scientific Research

The Scientific and Technical Committee is to include at least one member from each party. Its primary functions are to compile, exchange, and analyse information on fisheries harvests and fish stocks (Article IX(1)). It will meet annually prior to the Annual Conference, to which it will report the results of its meeting (Article IX(2), including the AHL for the following year and other recommendations regarding the conservation and management of pollock (Article IX(4)). The committee is to attempt to adopt its reports by consensus; failing that, reports shall include the differing views of the representatives to the committee (Article IX(3)).

Article X obligates the parties to cooperate in conducting scientific research on pollock resources, specifically migratory patterns in and beyond the Donut Hole, and in exchanging scientific data and standardising methodologies (Article X(1)). The parties are to submit fisheries data annually, including catch and effort statistics and the time and area of fishing operations (Article X(2)). Any party is entitled to bilateral consultations on accommodating scientific observers from the requesting party on any fishing vessel of the requested party in the Donut Hole (Article X(3)).

In years in which the AHL is zero, the Annual Conference may authorise trial fishing operations, conducted under a research plan submitted by parties and approved by the Annual Conference based upon recommendations of the Scientific and Technical Committee (Article X(4)).

#### *D. Enforcement*

Enforcement provisions fall into four broad categories: a general obligation for parties to enforce the treaty provisions and make violations of them an offence, mandatory measures to be imposed on fishing vessels to aid enforcement, the establishment of a mandatory observer program, and consent to boarding and inspection of vessels by officials of other states.

As a general matter, each party is obligated to ensure that its nationals and vessels comply with the provisions of the convention (Article XI(1)), to ensure that its vessels fish for pollock in the Donut Hole only with specific authorisation (Article XI(2)(a)), and to make fishing for pollock in violation of the convention an offence (Article XI(2)(b)).

To aid enforcement, each party must require its vessels to (1) use real-time satellite position-fixing transmitters while in the Bering Sea (Article XI(3)(a)), (2) give other parties 48 hours' advance notice of intention to enter the Donut Hole (Article XI(3)(b)), and (3) give other parties 24 hours' advance notice of the location of transshipments of fish and fish products to transport vessels (Article XI(3)(c)).

The agreement commits the parties to establishing an observer program (Article XI(5)), including the training and certification of observers (Article XI(5)(b)), the objective of which is a significant level of coverage by on-board observers sent by states other than a vessel's flag state (Article XI(5)(c)). Observers will be expected to monitor the vessels' activities as they relate to the implementation of the convention's conservation and management measures, including those relating to fishing activities, the location of fishing activities, incidental catch, and fishing gear (Article XI(5)(e)). Observers will report their findings to flag-state parties and to their own parties (Article XI(5)(e)). Each vessel fishing for pollock in the Donut Hole will be required to accept one observer from a party other than its own flag state if requested by the other party. Otherwise, the vessel must have an observer from its own state (Article XI(5)(a)).

The agreement permits each state party to enforce the terms of the convention against the vessels of other state parties (Article XI(6)(a)). Duly authorised officials of any party may inspect the vessel (other than crew quarters and engineering spaces), the catch, fishing gear, and relevant documents and logbooks, and may question the master, the fishing master, and other officers (Article XI(6)(b)). If an inspection reveals a violation, the flag state is to be notified promptly and is to conduct a prompt investigation and order the vessel to cease its violation, and, in appropriate cases, to leave the Donut Hole immediately (Article XI(7)(a)).

In the case of specified serious violations when the flag state is unable to assume immediate control of the fishing vessel, officials of the boarding party are authorised to continue the boarding until flag-state officials board the vessel or otherwise carry out their responsibilities (Article XI(7)(b)). The specified offences are fishing for pollock in the Donut Hole when the AHL is zero (Article XI(7)(b)(i)(1)), when pollock fishing is not permitted (Article XI(7)(b)(i)(2)), or after the vessel's party has reached its INQ (Article XI(7)(b)(i)(3)); operating in the Donut Hole without specific authorisation (Articles XI(7)(b)(ii), XI(2)(a)); and operating without an observer or without an operable real-time satellite position-fixing transmitter (Article XI(7)(b)(iii)).

Only the flag state may try the offence and impose penalties. States are under an obligation to take into account evidence provided by other state parties, as well as to provide, in accordance with their own laws and regulations, evidence that may be under their control (Article XI(7)(c)). Penalties under flag-state law are to reflect the seriousness of the infraction (Article XI(7)(d)).

#### *E. Dealing with Nonparties*

One of the serious weaknesses of any multilateral regime of this sort is that, under international law, it can be enforced against only those states that consent to join the regime. This agreement is somewhat remarkable in that it has been joined, though only tentatively so far, by all the states with any significant current interest in the pollock of the Donut Hole. It is all the more so in that there is no international legal obligation for coastal states with adjacent EEZs to cooperate in conserving and developing overlapping stocks,<sup>9</sup> or for coastal states and fishing states to enter into such cooperative arrangements for high-seas fisheries, even when the fish stocks overlap the boundaries of one or more

EEZs.<sup>10</sup> It is always possible, of course, that at any time one or more other states will choose to fish for pollock in the Donut Hole, and there is little that the United States and Russia, as coastal states, or the parties as a group, can do within the rules of international law to compel compliance with the terms of this convention.<sup>11</sup>

Under the terms of the convention, the following options are available: Once the convention comes into force, the parties may, by unanimous consent, invite other states to become parties (Article XVI(4)). If vessels of nonparties are engaging in fishing operations that could adversely affect the attainment of the convention's objectives, the parties are to "*invite the attention*" of the nonparty to the operations (Article XII(1)); encourage, consistently with international law, the nonparty to respect the provisions of the convention (Article XII(2)) and "*take measures, individually or collectively, which are consistent with international law, and which they deem necessary and appropriate, to deter such operations*" (Article XII(3)).

#### F. Other Terms

If disputes arise between the parties regarding the interpretation or application of the convention, the parties are to "*consult among themselves with a view to having the dispute resolved by available peaceful means of their own choice*" (Article XIII).

Any party may propose an amendment to the convention by providing the text to the Depository, which will circulate the proposal to the parties (Article XVII(1)). If half the parties request a meeting to discuss the proposed amendment, the Depository is to call a meeting to take place at least 60 days after the circulation of the proposal (Article XVII(2)). An amendment will enter into force when ratified by all parties.

Even though the Annex is regarded as an integral part of the convention (Article XIV(1)), its amendment procedure is different. Amendments to the Annex are to be considered by the parties after adoption by the Annual Conference (Articles XIV(2), IV(1)(1)) and will enter into force when ratified by all parties.

After the convention has been in force for three years, any party may withdraw 12 months after notifying the Depository in writing of its intention to withdraw (Article XVIII). The United States will serve as the Depository (Article XX).

## Conclusion

Even though the Donut Hole agreement applies only to the high seas sector, leaving the two EEZs to be governed by their respective states, it does form the basis of a consistent pollock management policy for the entire Aleutian Basin. In the Record of Discussions appended to the *ad referendum* text, the representatives of Russia and the United States stated that pollock fishing within their EEZs should be suspended when the Aleutian Basin pollock biomass is less than 1.67 million metric tons (Record of Discussions, Part B(2)(a)(i)), which is identical to the biomass that is to trigger a suspension of pollock fishing in the Donut Hole (Annex, Part I(c)). When pollock fishing is permitted, AHLs in the EEZ should be set in accordance with the provisions of the Convention (Record of Discussion, Part B(2)(a)(ii)). Furthermore, it is clear from the history of the negotiations leading up to the agreement that the primary goal of the two coastal states has been the establishment of a consistent fisheries policy for the entire Bering Sea. This is in accord with what Barbara Kwiatkowska describes as "*a noticeable tendency [in state practice] to ensure the consistency of measures applicable to the high seas with those adopted by the coastal states in the EEZ/EFZ*" (Kwiatkowska, 1993: 333).

Along the same lines, Russia is attempting to control fishing for Bering Sea pollock in the Okhotsk Sea, both within and beyond its EEZ. As a result of talks in Moscow between Russia's federal Fishing Industry Committee and the Chinese Ministry of Agriculture, China has announced that its vessels will cease pollock-fishing operations beyond the Russian EEZ in the second half of 1994 and will seek a quota for pollock within the EEZ (ITAR-TASS, 1994). Meanwhile, there have been reports that Russia has ordered a halt to Poland's pollock fishing in the Russian Okhotsk Sea EEZ and that Poland has offered to pay for fishing quotas, buy part of Russia's catches, and set up joint ventures in the Russian Far East to catch and process fish (RIA, 1994).

At first glance, at least, the agreement appears to balance successfully the conflicting interests with which Russia and the United States must each contend in their dual roles as coastal states and maritime powers. They have gained an agreement that tilts substantially in favour of the coastal state interests in conserving and managing marine living resources. At the same time, they have avoided the diplomatic and political pitfalls associated with the various theories of jurisdiction based on the LOSC

provisions. By basing this rather considerable control over the Donut Hole's high-seas fisheries on a multilateral convention, rather than on legal assertions of coastal state jurisdiction over straddling stocks, the agreement offers no precedent or encouragement to other coastal states (with perhaps less interest in maintaining broad maritime freedoms) that might be considering imposing unilateral or regional regimes in the high seas off their coasts.

---

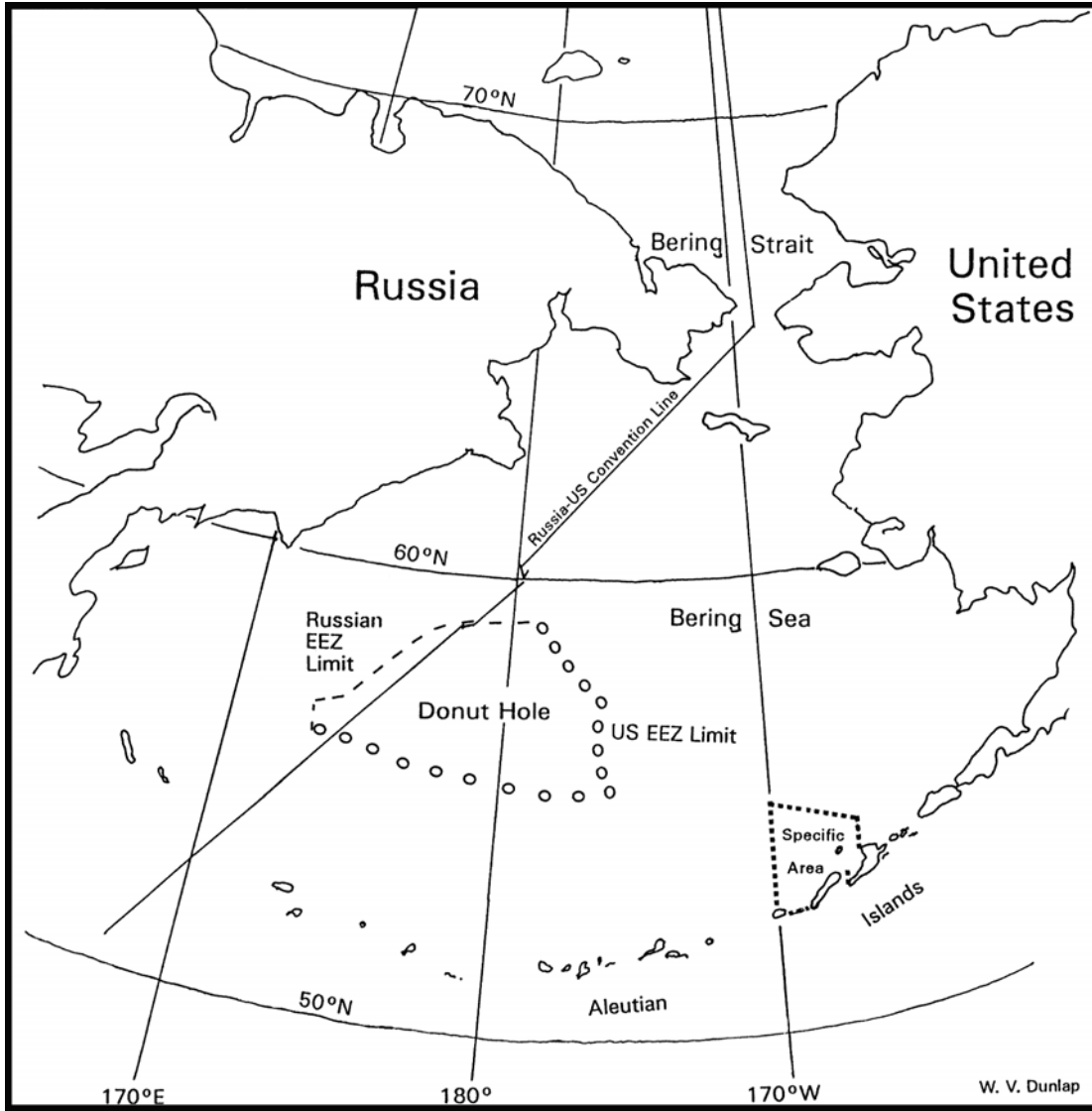
## Notes

- 1 Hereinafter, references to the Donut Hole Agreement will be by article or segment only.
- 2 The abbreviation 'EEZ' is used to indicate any maritime zone established in accordance with the provisions of Part V of the LOSC, whether it is designated an exclusive economic zone (United States), economic zone (Russia), or exclusive fishery zone (Canada).
- 3 There are narrow exceptions related to piracy (LOSC, 1982: Articles 105, 100), the slave trade (LOSC, 1982: Articles 99, 110), and illegal broadcasting (LOSC, 1982: Articles 109, 110), and unrelated to legitimate fishing operations.
- 4 Absence of jurisdiction does not necessarily preclude state efforts to regulate activities of other states' vessels, however. See note 11, below.
- 5 Although the LOSC will not come into effect until 16 November 1994 (and has not been ratified by any of the parties to the Donut Hole negotiations) it nevertheless provides the basis for most discussion of the management of transboundary fish stocks, in the Donut Hole and elsewhere (e.g., Kwiatkowska, 1993; Mioviski, 1989; Hayashi, 1993). This is, in part, because LOSC to some extent reflects customary international law; the provisions relating to the EEZ and environmental protection were adopted by consensus at the Third United Nations Conference on the Law of the Sea and are widely reflected and continue to be developed in state legislative and treaty practice and in debates in the United Nations (Kwiatkowska, 1993: 328; Larson, 1994).
- 6 Mioviski, 1989 describes the textual basis and the practical implications of each of the theories mentioned here, and others not relevant to this paper.
- 7 For a brief history recounting the outcome of each of the first six conferences, see Canfield, 1993: 269-270. For a description of early US-Soviet discussions, see Wolfe, 1989.
- 8 Based on figures from the US State Department.
- 9 Although Hey argues to the contrary ("*coastal states are to cooperate directly or through appropriate sub-regional or regional organisations and adopt the measures necessary to coordinate and ensure the conservation and development of such stocks*", 1989:53), Hayashi seems to have the better textual argument ("*[I]t is clear from the expression 'seek ... to agree' that Article 63(1) does not contain an obligation to conclude an argument. Rather, it contains a pactum de negotiando, implying an obligation to enter into negotiations in good faith with a view to reaching an agreement on necessary measures*" (Hayashi, 1993:249). See LOSC 1982, Article 63(1): "*Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organisations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.*"
- 10 The argument in the previous note regarding duties of states with adjacent EEZs applies, *mutatis mutandis*, to coastal states and states fishing in adjacent high seas areas, the applicable provision in the latter case being LOSC 1982, Article 63(2): "*Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organisations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.*" While there are significant differences between the two paragraphs of Article 63, in this respect they are identical. For a discussion of the differences, see Hey, 1989: 54-57.
- 11 In a comparable situation, however, Canada has recently enacted legislation authorising Canadian officials to board, inspect and search foreign fishing vessels found within the NAFO regulatory area, which is outside the Canadian EEZ. (Reuters, 1994; Canadian Fisheries Amendment, 1994).

## References

- Alexander, Lewis (1974) 'Regionalism and the Law of the Sea: The Case of Semi-enclosed Seas', in *Ocean Development and International Law* 2(2): 151-186.
- [Canada Fisheries Amendment 1994]. An Act to Amend the Coastal Fisheries Protection Act, 1st Session, 35th Parliament, 42-43 Elizabeth II, 1994.
- Canfield, Jeffrey L. (1993) 'Recent Developments in Bering Sea Fisheries Conservation and Management', in *Ocean Development and International Law* 24: 257-289.
- Colson, David (1994) 'US Calls for Better Compliance with World Fishing Pacts', remarks of Ambassador David Colson at Third Annual Pacific Rim Fisheries Conference, Beijing, 8 March 1994. USIS Wireless File 03/08/94.
- [Donut Hole Agreement, 1994]. Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea. Washington DC, 11 February 1994, *ad referendum* text. Not in force.
- Egan, Timothy (1988) 'Foreign Trawlers Accused of Violating US Zone', in *The New York Times*, 21 January 1988, sec. A, p. 1:4; sec. B, p. 9:3.
- Hayashi, Moritaka (1993) 'The Management of Transboundary Fish Stocks under the LOS Convention', in *The International Journal of Marine and Coastal Law*, 8(2): 245-261.
- Hey, Ellen (1989) *The Regime for the Exploitation of Transboundary Marine Fisheries Resources: The United Nations Law of the Sea Convention, Cooperation between States*, Dordrecht: Martinus Nijhoff.
- ITAR-TASS News Agency (1994) (World Service, Moscow, in English, 0953 G.M.T., 20 May 1994). Reported in BBC Summary of World Broadcasts, May 27, 1994.
- Joint Press Release (1994) Tenth Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea, 11 February 1994, Washington DC.
- Joint Resolution (1992) Fifth Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea, 14 August 1992, Moscow.
- Kwiatkowska, Barbara (1993) 'The High Seas Fisheries Regime: at a Point of No Return', *The International Journal of Marine and Coastal Law*, 8(3): 327-358.
- Larson, David L. (1994) 'Conventional, Customary, and Consensual Law in the United Nations Convention on the Law of the Sea', in *Ocean Development and International Law* 25(1): 75-85.
- [LOSC, 1982]. United Nations Convention on the Law of the Sea 1982. Adopted Montego Bay, Jamaica, 10 December 1982. Enters into force 16 November 1994.
- [Magnuson Act, 1976]. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. ss. 1801-1882).
- McNeill, J. H. (1991) 'America's Maritime Boundary with the Soviet Union', in *Naval War College Review*, 44, 3:46-57.
- Miles, Edward L. and Burke, William T. (1989) 'Pressures on the United Nations Convention on the Law of the Sea 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks', in *Ocean Development and International Law* 20: 343-357.
- Miovski, Lourene (1989) 'Solutions in the Convention of the Law of the Sea to the Problem of Overfishing in the Central Bering Sea: Analysis of the Convention, Highlighting the Provisions Concerning Fisheries and Enclosed and Semi-Enclosed Seas', *San Diego Law Review* 26: 525-574.
- Reuters (1994) 'Pirate' Fishing Boats Driven Off by Canada', in *The Chicago Tribune*, 7 June 1994, p. 14 (final edition).
- RIA News Agency (1994) (Moscow, in English, 1543 G.M.T., 20 May 1994). Reported in BBC Summary of World Broadcasts, May 27, 1994.
- [Senate 1988]. Senate Resolution 396, 100th Congress, 2d Session. *Congressional Record*, 21 March 1988 p. 4500 (microfilm edition).
- Wolfe, Edward E. (1989) 'US Responsibilities in International Fisheries Matters', *Department of State Bulletin*, July 1989: 56-58.
- \* William V. Dunlap is an associate professor of law at the Quinnipiac College School of Law (formerly the University of Bridgeport School of Law), Bridgeport, Connecticut, USA, on leave at the Scott Polar Research Institute, University of Cambridge.





Source: Adapted from McNeill, 1992: 49.