

RIGHT TO FISH WITHIN THE BACKGROUND OF THE NEW LAW OF THE SEA: SPOILIATION OR CONSERVATION OF THE SPECIES?¹

Good afternoon, distinguished colleagues who in one way or another are involved in the maritime business. I want to extend a warm welcoming to the public officials here today, to the organizers and fellow panelists. Also, I want to express that it is a great honor to share this room with you, especially when it is a significant event where the Instituto Iberoamericano de Derecho Marítimo and the Maritime Law Association join for the first time to celebrate this Joint conference. We are pleased and honored to welcome you to our Island of Enchantment.

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My presentation deals with the following questions: What has been the impact of the Law of the Sea Convention on fishing and living resources? Has it helped to the conservation or, on the contrary, to deplete marine species?

These questions present issues of great importance to mankind. The issue goes beyond theoretical or abstract notions of international maritime law. Simply stated, the conservation of marine species is imperative because of the large human needs it meets. A great example of this are the nearly one billion people who use fish as a main source of protein and the commercialization of the fishing industry which represents billions of dollars and supports hundreds of million jobs worldwide. In addition, the fishing industry is very important for food security, poverty reduction and contributes to the welfare of society in

general; this not only from the point of view of commercial fishing but also in tourism. In many countries, where the tourism industry is very important, recreational fishing is a big attraction and generates significant income as well as jobs and indirect economic benefits. In a recent study by The Billfish Foundation it was estimated that fishing tourism generated 97 Million Dollars in 2011 to the economy of our sister country Panama.² There are other countries, which are known as a favorite destination of sport fishing such as Mexico, Costa Rica and Guatemala.

Before getting into the specific discussion of this presentation, it is necessary to give a few introductory notes on the Law of the Sea Convention (“Convention”) and why these

² Report released by “The Billfish Foundation” titled “Sportsfishing in Panamá: Size, Economic Impact and Market Potential” of February 5, 2013.

disputes relating to the preservation or spoliation of the species have emerged.

The treaty was adopted by the United Nations in 1982 and its main purpose was to regulate the various uses of the oceans. For these purposes, the Convention defined the different maritime zones, established measures to protect the marine environment and codified the already recognized common law as to the free navigation on the high seas.

This international treaty has had a significant impact on international maritime law and its acceptance has been almost unanimous. Currently, over 160 countries have ratified it.

One of the most important provisions contained in the Convention defines the different maritime zones and the jurisdiction and powers that each State may have on them. As we

all know, before the 18th Century, the prevailing theory in the control of the Coastal country, according to International law, was the focus of the freedom of the seas. Under this approach, no nation could claim legal jurisdiction over the seas. Political conflict and the development of military technology prompted European nations to recognize the need to control coastal waters for obvious security reasons. Hence, several countries established the limits of the territorial sea to protect their neutrality during the Napoleonic Wars. The famous 3 mile limit of territorial sea that arises during the 18th Century was based, allegedly, in the range of the cannon. This limit ceased to be effective in the 20th century with the development of longer-range weapons. From the point of view of fishing, European and Japanese fleets over fished species from 50 miles off the coast but without going in the territorial 3

mile limit of other countries. The Second World War brought an expansion of the jurisdictional claim over the seas. It also brought the development of technology that impacted fishing. As an example, nylon was initially used as a substitute for silk and replaced the use of cotton in the fishing nets. With these stronger nets, fishermen did not have to return to port so regularly for repairs. Commercial fishermen also had access to radar and other navigation systems developed for military use, allowing them to fish in areas that were traditionally exploited by nearby coastal countries. As problems arose with the limit of 3 miles, emerged, in turn, a movement to codify existing practices and establish new rules or standards of International law regarding Coastal jurisdiction.³ Thus, we eventually arrived, after several

³ For an interesting discussion on the development of Coastal and International jurisdiction, refer to the law review article, The Tuna War: Fishery Jurisdiction in International Law, by N. Peter Rasmussen, 1981 U.Ill. L.Rev. 755 1981

attempts to define and codify international standards, to the 1982 Convention, and the different maritime zones established by the Convention, as indicated before.

These important zones established by the Convention are the territorial sea, the contiguous zone, the exclusive economic zone and the high seas. Let us see, broadly, what areas are covered and what powers do the States have in each one.

First, the Convention extends the power of each State to establish the breadth of its territorial sea. This demarcation cannot exceed 12 nautical miles from the baseline.⁴ Within this maritime zone, the States have full sovereignty over the sea, airspace and subsoil.⁵

⁴ United Nations Convention on Law of the Sea, Part II, Art. 3.

⁵ Schoenbaum, Thomas J., Admiralty and Maritime Law, Practitioner Treatise Series, Vol. 1, sec. 2-14.

Next to the territorial sea is the contiguous zone. This maritime zone extends 12 additional nautical miles from the territorial sea. That is, the first two areas comprise a total of 24 nautical miles. Within the contiguous zone, States may take measures to prevent violations of its customs, fiscal, immigration and/or environmental laws.⁶

Furthermore, and adjacent to the contiguous zone, we find what is known as the exclusive economic zone. This maritime zone is considered one of the great concepts agreed in the Convention on the Law of the Sea. This exclusive economic zone extends 200 miles from the baseline and the coastal State has sovereign powers to regulate natural resources within that zone⁷.

For example, the Convention recognizes the powers to regulate

⁶ United Nations Convention on Law of the Sea, Art. 33.

⁷ United Nations Convention on Law of the Sea, Art. 57.

the minerals, fishing and all living resource in this zone. In addition, the costal State can regulate other economic activities such as energy production by the sea, its currents and wind⁸.

Finally, the Law of the Sea Convention defined the high seas as everything that is not part of the territorial sea, the contiguous zone and the exclusive economic zone⁹. The doctrine and practice have established that these areas are open or free for all States so none of them can appropriate any part of it or submit part of it to its sovereignty¹⁰.

The common law recognizes four freedoms on the high seas, (1) freedom of navigation, (2) freedom of overflight, (3) freedom to lay submarine cables and pipelines, and (4) freedom of fishing. The Convention codified these four freedoms widely

⁸ United Nations Convention on Law of the Sea, Art. 56.

⁹ United Nations Convention on Law of the Sea, Art. 86.

¹⁰ United Nations Convention on Law of the Sea, Arts. 87 y 89.

accepted and added 2 more. These are the freedom to construct artificial islands and the freedom of scientific research.¹¹

Having broadly defined the maritime zones, we can move to discuss the controversies raised in this presentation.

The problems between nations, as regards to the right to fishing and the Law of the Sea Convention, focus on the fact that the Convention recognizes the freedom of fishing on the high seas and imposes no restrictions on said practice. Overall, the result is unrestricted commercial fishing on the high seas, which has had the effect of greatly reducing the supply of fish in the exclusive economic zones of the States.

More specifically and concretely, overfishing in the high seas had and has the effect of greatly reducing the migratory fish populations that move between waters of the exclusive economic

¹¹ United Nations Convention on Law of the Sea, Art. 87.

zone and the high seas. This not only affects marine life in general, but it also affects the food supply, increases the costs of these products and brings problems of political nature between nations.

For example, since the 70s, these practices led to conflicts between proponents of overfishing and States seeking to protect the living resources in their areas. Some examples of this were the "Cod Wars" between Iceland and Britain and the "Tuna War" between Spain, Britain and France, and other cases where boats were confiscated, sailors were captured and violence was used.

This precarious situation prompted discussion among nations to develop some kind of agreement to regulate fishing on the high seas. When these discussions developed, the countries

with greater interest and concern about their fisheries were Argentina, Australia, Chile, Iceland and New Zealand.

Simply put, the Law of the Sea Convention did not have the desired effect of reducing fishing fleets. When the Convention was adopted, it was thought that it would reduce the high levels of fishing because fishing fleets would not be able to fish within the exclusive economic zones because of its size. However, the fishing industry adapted and started using refrigerated vessels with large storage capacity allowing them to stay for much longer periods at sea without returning to port. For this reason, the fisheries and fish populations that live between the exclusive economic zones and the high seas have been alarmingly reduced.

As a result, most States realized they had to take action to manage and prevent the continued reduction of the fish markets. A new international agreement was urgently needed, since in the early 90's, about 70% of the fisheries were under normal levels¹². The main causes were overfishing, accelerated by overinvestment in fishing fleets, often subsidized by the States themselves, and environmental pollution. In the course of several years, the “Agreement on the Conservation and Management of Straddling Fish Populations and Highly Migratory Fish Populations” (“Agreement”) was adopted. The Agreement entered into force on December 11, 2001, and has now been ratified by 79 countries. This is substantially less than the number of countries that have ratified the Law of the Sea Convention.

¹² See *Earth Summit +5, The Agreement on High Seas Fishing*, June 1997.

According to Fiji's ambassador, Satya Nandan, then president of the conference held to adopt said Agreement, “[t]he freedom to fish on the high seas no longer exists as it did under the old law of the sea. It is no longer a free-for-all”.¹³ Simply put, the States would have to cooperate in the regulation of fishing in the high seas, if not, fishing would be prohibited in these areas.

The main objectives of the Agreement, as set out in Article 5, are:

1. “Ensure long-term conservation and sustainable use of straddling fish and highly migratory fish populations...”
2. The States that are parties to the Agreement will have to take the necessary measures to develop and collect reliable scientific data and with it take the necessary

¹³ Ambassador Nandan expressed this during the conclusion of negotiations of the Agreement.

measures to ensure the long term survival of fish populations.

3. The States that are parties to the Agreement will have to assess the effects of fishing and human activities in the high seas.

4. They should reduce the contamination and use of selective fishing methods which ensures, at the highest level possible, the safety of the environment.

5. The States that are parties to the Agreement must take into account the interests of artisanal fishermen or those who are engaged in subsistence fishing.

6. Conduct scientific research in support of the conservation of fishery resources.

7. Implement methods of conservation of species through mechanisms for monitoring, control and surveillance.¹⁴

Another important aspect of the Agreement is the leading role given to regional organizations in its regulation and execution. The Agreement calls for establishing Regional Fisheries Management Organizations in areas where none currently exist. These Organizations should do their own research and data collection as well as the States that are parties to the Agreement. Based on this data and the status of fish populations, regional organizations will impose quotas to the States that fish on the high seas¹⁵. Perhaps the most important power that is conferred by this Agreement, and by extension to the Regional Fisheries Management Organizations, is the fact that only vessels

¹⁴ Agreement on the Conservation and Management of Straddling Fish and Highly Migratory Fish Populations, Article 2. See, also, *Earth Summit +5, The Agreement on High Seas Fishing*, June 1997.

¹⁵ Agreement on the Conservation and Management of Straddling Fish and Highly Migratory Fish Populations, Arts. 9 y 10.

of the States that choose to comply with the measures of these regional organizations may fish in fishing zones subject to them.

Certainly, the Agreement not only delegates to the coastal States the duty to collect data and to make scientific studies regarding fish stocks and especially what affects them. The Agreement provides that the States that are parties to the Agreement, which in turn are members of the Regional Fisheries Management Organizations, may inspect the fishing vessels that are fishing in their area, both in its exclusive economic zone and on the high seas, to ensure compliance with the Law of the Sea Convention, the Agreement and the regulations and fees of the regional organization. In that sense, not only the flag State has the authority to ensure that it is complying with its laws and measures established by the regional organization, but inspectors

from any State that is a party to the Agreement may inspect any vessel that is within the area under the supervision of the regional organization. This practice is different from governing port State inspections since these are carried out within their jurisdiction. This Agreement provides for member States inspectors to exercise the authority of the Fisheries Management Organizations in the high seas.

Moreover, nongovernmental organizations such as “Greenpeace” and “World Wide Fund for Nature” maintain that the Agreement does not address core issues to the protection of fisheries at risk and that it is necessary to give more power to the Agreement. For example, the Agreement does not address the issue of subsidies that governments provide to the fishing

industry.¹⁶ According to them, these subsidies are responsible for keeping in operation the large number of fishing vessels in the world. It has been estimated that there is an excess of fishing vessels and that these subsidies allow a high number of vessels to continue operating. In addition, there are other government subsidies directed towards new vessel construction, the purchase of fuel, tax exemptions, loans and loan guarantees.

Another issue that is not adequately addressed in the Agreement is the non-selective fishing gear used by some fishing fleets.¹⁷ The agreement mentions that this type of equipment should not be used, but does not prohibit its use. What it requires

¹⁶ <http://worldwildlife.org/threats/overfishing>

¹⁷ http://wwf.panda.org/what_we_do/how_we_work/conservation/marine/sustainable_fishing/reducing_impacts/fishing_gear/

is that the States that fish in the high seas use selective fishing gear “as far as possible”¹⁸.

As we have seen, the Law of the Sea Convention and the Agreement on Highly Migratory Fish Populations adopted various measures to control fish populations. The Agreement also requires the adoption of Regional Fisheries Management Organizations to implement the treaty and for the States that are parties to the Agreement, together with the regional organizations, to conduct scientific research and reliable data collection to take the necessary measures aimed at protecting fisheries.

However, the implementation of the Agreement has been tortuous. First, few of the Regional Fisheries Management Organizations, crucial to the implementation of the Agreement,

¹⁸ Agreement on the Conservation and Management of Straddling Fish and Highly Migratory Fish Populations, Art. 5(f).

have been created or operate the way they were intended. In addition, several countries with fishing operations on large scales have not signed or ratified the Agreement. Some notable examples are: Chile, Mexico, Peru, Poland, Thailand and Vietnam. In addition, there are cases like that of the United States that have not ratified the Law of the Sea Convention, but signed and ratified the Agreement of Highly Migratory Fish Populations.

A recent study conducted by the United Nations Organization for Aquaculture and Food entitled *The State of World Fisheries and Aquaculture 2012*, provides data that should make us think about how we can improve the current state of fisheries in our region and the world.¹⁹ The study details that since

¹⁹ United Nations Organization for Aquaculture and Food entitled *The State of World Fisheries and Aquaculture 2012*, p. 102.

the early 2000s, marine fisheries has been reduced significantly.²⁰

Notwithstanding this reduction, the percentage of overfished stocks has increased. That is, even if there is less fishing, the overfished species are increasing.²¹ Furthermore, the reduction of fishing is seen as a result of the significant reduction of fishery resources. That is, there are too many fleets looking for fewer fish.

This data shows that the status of the world marine fishery is getting worse and it has and will have negative effects on fish production²². We should be worried about this overexploitation for the negative economic and social consequences that would entail the systematic reduction of this natural resource.

²⁰ United Nations Organization for Aquaculture and Food entitled *The State of World Fisheries and Aquaculture 2012*, p. 3.

²¹ United Nations Organization for Aquaculture and Food entitled *The State of World Fisheries and Aquaculture 2012*, p. 14

²² *Id.*

The study adds that the situation is more serious in the straddling fish and highly migratory populations and calls to invoke the provisions of the Agreement as measures to protect them²³.

On the other hand, the Agreement has had very positive effects in some regions of the planet. In these areas the exploitation rates have been reduced and the recovery of overexploited fish stocks has increased. An example of this is the United States of America, where 67% of all their catches are on a sustained basis, New Zealand and Australia.²⁴

These achievements and successes can serve as examples to help achieve more effective management of fisheries worldwide. Without a doubt, the Agreement of highly migratory

²³ Id.

²⁴ Id.

fish populations has had the desired effect in few regions of the world. For this reason, we should study the implementation of the strategies and the ways in which these regional organizations have done it successfully. This way, we can modify and implement them in our regions and achieve and exceed their performance.

Among the number of recommendations made to the Regional Fisheries Management Organizations through studies and the recommendations of independent organizations, we can be summarize the following:²⁵

1. To ensure long-term sustainable exploitation of species.
2. Addressing the allocation of quotas to ensure the stability of Organizations.

²⁵ As an example, see, Best Practices Recommended for Regional Fisheries Management Organizations, Chatham House, www.chathamhouse.org.uk.

3. Obtain economic advantages such as transfer or lease of fishing rights.

4. Recognize the serious threat posed by illegal, unreported and unregulated fishing (“IUU”).

5. Allow the entry of new members to the organizations after they demonstrate their commitment and cooperation with international agreements, meaning the Convention and the Agreement, be it by ratifying these or through a written statement of commitment.

6. To have mechanisms to respond to environmental disasters; and

7. Adopting a cautious approach in the management of resources as an integral part of agreements processes and decision-making.

One of the issues mentioned in this list of recommendations is to work with the issue of IUU fishing. That is a big and genuine concern of the Regional Fisheries Management Organizations. There are approximately 218 countries involved in the commercial fishing industry. Of those countries, approximately 113 of them, more than half, do not report catches or provide inadequate information in their reports. Internationally, it is up to the country of the vessel's flag to watch over the fleets under its flag and to ensure that these comply with the regulations and measures adopted by regional organizations. The problem is that many countries are either unable or unwilling to regulate their commercial fishing fleets. Unfortunately, there are government officials in some countries wishing for the fishery products to arrive to their economy and do not have the interest to stop this

IUU fishing. This happens a lot, but not necessarily in all cases, with developing countries that depend on fishing as a primary food source.²⁶

There have been several attempts to take measures to prevent IUU fishing but there is no international law or of uniform application that discards this practice. It depends largely on the willingness of countries and in particular the relevant Regional Fisheries Management Organizations. A voluntary action plan to prevent, deter and eliminate IUU fishing, issued by the United Nations Organization on Food and Agriculture in 2001, considered the implementation of measures to prevent, deter and eliminate IUU fishing.²⁷ Some of these are:

²⁶ For more information on the problem and statistics related to IUU fishing go to *fao.org*.

²⁷ *Fao IPOA-IUU*.

- The fact that national legislation be adopted to combat IUU fishing.

- Countries should discourage persons or entities under its jurisdiction to register their ships under the flag of a country that is inconsistent with the requirements of the responsibilities under the flag of their own country.

- Countries should take consistent measures with international law in relation to vessels without nationality that engage in IUU fishing on the high seas.

- Countries should ensure to impose the most severe sanctions possible in relation to ships under their jurisdiction involved in IUU fishing, such as preventing offenders from benefitting from fishery products and adopt civil penalties.

- Not subsidize or extend economic benefits to vessels engaged in IUU fishing.

- Adopt monitoring and surveillance records to identify vessels engaged in IUU fishing.

- Adopt observer programs that travel on commercial fishing boats.

- The flag of the vessel should keep listings (with all the information of boats and owners) of all commercial fishing vessels authorized by that State.

- The requirement of detailed records of fishing.

- To demand that commercial fishing vessels are marked according to international standards.

- In the event that the port control authority of certain country has evidence that a ship that visits the port conducted IUU fishing,

the port control should not allow the fish to be offloaded or transferred to another ship in its ports and should take measures to notify the flag State of the ship.

- That countries cooperate bilaterally or multilaterally to develop compatible measures for the control of commercial fishing boats.

- Avoid that countries import fish where there is evidence that its capture comes from IUU fishing.

In summary, the lack of a law specifically defining in what way there can or cannot be fishing in the high seas, we need an effective, UNIFORM, cooperation among the Regional Fisheries Management Organizations to be able to control the overfishing in some areas; especially regarding highly migratory species that cross between the exclusive economic zones of the States and

the high seas, or between the contiguous economic zones of the States.