

## *Spain and the Law of the Sea: 20 years under LOSC*

### Related agreements and Spain: Fish stocks and marine biological diversity

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#### (A) INTRODUCTION

Prior to the 1982 United Nations Convention on the Law of the Sea (LOSC),<sup>1</sup> there was no legal framework for a better management of marine resources. Since the adoption of LOSC, a new legal regime for the oceans has been established, giving State parties obligations for the management and use of marine and fishery resources within their areas of national jurisdiction, around 12 miles from the coast, where concentrates about 90% of the world's marine fishing concentrates.

In recent years the trend within fishing industry has grown in importance, with world fishery being one of the most dynamic and productive sectors of the food industry, bringing new opportunities to coastal states, which have tried to make the most of the growing international demand for fish and fish products by investing in fishing fleets and modern fishing facilities. However, despite existing international regulation in this area, the state of fish stocks is becoming more and more precarious, revealing the existence of a difficult balance between economic exploitation and preservation of marine resources: on the one hand, increasing competitiveness in the access to these resources, and, on the other hand, the need to establish a limitation to the uncontrolled increase in fishing exploitation.<sup>2</sup>

This present study analyzes the Spanish position with regard LOSC in order to establish the legal regime in an area of crucial importance to Spanish interests, namely fishing and access and management of marine biological resources.

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<sup>1</sup> UN Convention on the Law of the Sea, [1833 UNTS 3](#) (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter).

<sup>2</sup> FAO 2007 Information Summary on each country's fishery profile – [The Spanish Kingdom](#).

## (B) THE IMPORTANCE OF THE FISHING POLICY IN SPAIN: FROM EXPLOITATION TO CONSERVATION?

Spain has been, and is, one of the world's great fishing powers, being among the top five, and the second most important in fish farming. This is indicated by the size of the fleet (tonnage and power), the volume of catch and the value of the fish landed. Currently there are about 18,000 fishing boats catching 13,000,000 tons of fish every year and employing 74,798 crew members and more than 200,000 Spanish people working at sea, especially as fishermen. In its economic scale, fishery accounts for 0,5% of the Spanish GDP. It also has an exploitable national area for fisheries of 862.459 km<sup>2</sup>, comprising both, the exclusive economic zone (EEZ) and the Fisheries Protection Zone in the Mediterranean<sup>3</sup>.

In 1952, Peru, Chile and Ecuador declared within the country's jurisdiction the waters between the coast and 200 miles out and, in 1976, the United States followed this practice in order to lead the negotiations of the United Nations Convention on the Law of the Sea. In this context, the Americans managed to get the waters resulting from this extension to be considered exclusive economic zones (EEZ). On the basis of these declarations of extended zones and the later general practice among other States this meant that 90% of the world fishery resources were within the limits of the exclusive exploitation zones.

Following the example of its surrounding countries and the work of the UN Conference on the Law of the Sea having not yet been finished, Spain passed a law in 1978 about the EEZ for up to 200 miles from the coasts of the Atlantic Ocean and the Bay of Biscay, although it included a provision authorizing the Government to "agree to extend it to other Spanish coasts"<sup>4</sup>.

Spain was the last of the fishing powers to establish the EEZ and it was clearly needed so since the waters of the States where Spanish fishing boats used to fish were getting closed while the boats from those countries could continue fishing beyond the 12 miles of the Spanish territorial sea.

An important transformation of the international sea-fishing regime took place within the negotiations of the third United Nations Conference on the Law of the Sea<sup>5</sup> in the mid-70's. In fact, the establishment of the exclusive economic zone up to 200 miles appeared, in which the coastal State has sovereign rights over the exploration and exploitation of the living and non-living resources of the sea, its bed and subsoil. With the establishment of the EEZ, the coastal States had sovereign rights over the living and non-living resources of the sea, its bed and subsoil between the 12 and 200 nautical miles but in turn, it limited the growth of fishing quantities<sup>6</sup>. These rights were confirmed both by the state practice in this regard<sup>7</sup>, and by the international<sup>8</sup>. The coastal State also has jurisdiction

<sup>3</sup> Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean ([BOE No. 204](#), 26 August 1997), amended by Royal Decree 431/2000, 31 March 2000 ([BOE No. 79](#), 1 April 2000).

<sup>4</sup> Art. 1(1) and first final disposition Law 15/1978, 20 February 1978, on the Economic Zone ([BOE No. 46](#), 23 February 1978).

<sup>5</sup> Resolution 2750C (XXV), of 17 December 1970.

<sup>6</sup> See Art. 56(1)(a) LOSC.

<sup>7</sup> For instance, Art. 64 of the Lomé IV Convention, signed on 15 December 1989, signed by the European Community, its 12 State members, and 68 African Countries and Caribbean and Asia, states that: "The Community and the ACP States recognize that coastal States exercise sovereign rights for the purpose of exploring, exploiting, conserving and managing the

regarding the protection and preservation of the marine environment, which also has an effect on the legal status of fishery<sup>9</sup>.

These rights are limited by correlative duties. Among others, the coastal State must determine the allowable amount of catch in its EEZ and must take preservation and management measures to make sure the fishing reserves within it EEZ are not threatened by an excess of exploitation. It also has the duty to preserve or re-establish such fish stocks at levels that can produce the maximum sustainable yield, in accordance with the appropriate environmental and economic factors, including the economic needs of the coastal fishing communities and the special needs of the developing States. This should take into account the sub-regional, regional and worldwide international minimum standards suggested. In addition, they must also take into account the effects on specific species associated with the catch.<sup>10</sup>

In this regard, the coastal State shall promote the objective of optimum use of the living resources in the EEZ<sup>11</sup>, a principal that was established to ensure that there was no waste or wasted resources, especially since many developing States have major food problems. To achieve this objective, each coastal State must determine its own capacity to catch living resources in their area and, in the case that they do not have enough capacity to exploit the total catch allowed, give access to other States to catch the surplus through agreements or other arrangements.

This new regulation had immediate and very damaging consequences for Spain: it meant the closure of access to traditional fishing grounds located in third countries and in waters which until then had had the status of international and free fishing ones and, consequently, the loss of fishing rights limiting the expansionist processes of long-distance industrial fleets that had operated for many years with little control and restriction<sup>12</sup>.

Faced with these limiting prospects, the adoption of bilateral fishery agreements allowed Spain to receive significant relief for its fishing fleet. Although initially the bilateral agreements were signed between Spain and different coastal countries, when it entered the EEC in 1986 their competence to sign fishery agreements was assumed by the Community. Since then, and due to the progressive exhaustion of fishing grounds, the EEC has been forced to carry out reforms in its fishery policy, incorporating the need that future fishery agreements signed with third countries were based on the

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fishery resources of their respective exclusive economic zones in conformity with current international law" (Boletín Oficial del Estado, of 10 December 1991).

<sup>8</sup> For instance, the Arbitral Award in the *Case concerning filleting within the Gulf of St. Lawrence between Canada and France*, 17 July 1986, [19 UNRIIA 225-296](#).

<sup>9</sup> Art. 56(1)(b)(iii) LOSC. It should be noted, however, that the powers granted to the coastal State in the EEZ zone do not affect freedom of navigation and overflight and of the laying submarine cables and pipelines, and other internationally lawful uses of the sea related with these freedoms the States have rights on, according with LOSC (art. 58-1 of LOSC). That is to say that all the high sea freedoms prevail in favour of the third States except for the freedom of fishing. At the same time, the third States must comply with the laws and regulations adopted by the coastal State in accordance with the provisions of LOSC and other rules of international law. (art. 58-3 of LOSC).

<sup>10</sup> Art. 61(1)-(3) LOSC.

<sup>11</sup> Art. 62(1) LOSC.

<sup>12</sup> The most affected countries by the implementation of the 200 miles of exclusive economic zones were those which had more presence in the international fishing grounds, such as Japan, the Soviet Union and Spain.

promotion of sustainable fishing<sup>13</sup>. Thus, access to the waters of third countries would be limited to surplus stocks, as stated in article 62 of the United Nations Convention on the Law of the Sea.

As already stated, in 1997 the Spanish Government established a “Fisheries Protection Zone in the Mediterranean Sea” defined by an imaginary line for the conservation of fishery resources,<sup>14</sup> which recognized the “sovereign rights for purposes of conservation of living marine resources, as well as for the management and control of fishery activity”<sup>15</sup>, but not for the purposes of exploitation of such resources. Three years later the co-ordinates established had to be partially changed when they realized that by mistake they had measured the extent of the area out from the coastline, instead of in from the outer limit of the territorial sea.<sup>16</sup> Whichever way, this provision left a regulatory void in the western part of the Mediterranean between Spain and Morocco.

Subsequently, in 2013, the Government resorted to the first final provision of the 1978 Law on Economic Zones to establish an EEZ in the Northwestern Mediterranean<sup>17</sup>. However, the Decree maintains the shortcomings of the previous one (that established the fishing protection zone in the Mediterranean), leaving a legal void, without sufficient reasons to justify it, in the area between Spain and Morocco located between the eastern limit of the EEZ in the Atlantic and the western limit of the EEZ in the Mediterranean.

### (C) FISHERIES AND MARINE RESOURCES IN LOSC NEGOTIATION AND THE SPANISH POSITION

During the negotiations of LOSC, the subject of fishing led to strong discussions on fisheries between two groups or categories within States. On the one hand, coastal States, especially developing coastal States, were interested in exercising control over fishing catch where the distribution areas went beyond the 200 miles. On the other hand, States with large deep-sea fishing fleets, were resistant to any restriction of the traditional freedom of fishing on the high seas, as it would seriously affect their fishing interests. The consensus finally reached reflects the delicate balance between the two positions, establishing vague and imprecise obligations, a fact that in practice causes divergent interpretations of the regime of straddling and highly migratory fish stocks.

<sup>13</sup> See the Communication from the Commission on the Reform of the Common Fisheries Policy (“Roadmap”). COM (2002) 181 final of 28 May 2002.

<sup>14</sup> This imaginary line started from Punta Negra-Cabo de Gata, “in 36°43’35” N 002°09’95” W. At this point, the straight baseline passes, delimiting the inner end of the Spanish territorial sea in that area. From said interior point, the fishing protection zone extends 49 nautical miles in direction 181° (S 00° W) to another point located at 35°54’05” N and 002°12’00” W and continuing eastward to the equidistant line with neighbouring countries, drawn in conformity with international law, up to the marine boundary with France.

<sup>15</sup> Arts. 1 and 2 of the Royal Decree 1315/1997.

<sup>16</sup> Art. 1 Royal Decree 431/2000, of 31 March, amending Royal Decree 1315/1997, of 1 August, establishing a fisheries protection zone in the Mediterranean ([BOE No. 79](#), 1 April 2000).

<sup>17</sup> This extends from the outer limit of the territorial sea to a point of coordinates 35° 57,46’ N / 2° 5,31’ W, located in course 173° of Cabo Gata and distant 46 miles from the same, continuing eastward to the equidistant line with the neighbouring countries, drawn in conformity with international law, up to the maritime boundary with France.

The interests of coastal States and high seas fishing were based on the 1958 Geneva Convention on the high seas; on fishing and conservation of the living resources; on the recognition of the freedom to fish in high seas with the obligation to adopt conservation measures or cooperate with other States in the adoption of such measures; and the obligation to cooperate with other States in the management and conservation over living resources in the high seas. In addition, the negotiating text also established some obligations regarding populations of species found on both sides of the limit between the exclusive economic zone and the high seas, highly migratory and catadromous species<sup>18</sup>.

In this sense, Article 87 LOSC establishes the traditional principle of freedom of the high seas. This freedom applies to nationals of all the States, either coastal or landlocked. However, although section e) of paragraph 1 from this article solemnly proclaims the freedom to fish on the high seas, such affirmation is not absolute, since the same provision refers to the conditions set out in Section 2 of Part VII, entitled “Conservation and Management of the Living Resources of the High Seas” (Articles 116 to 120 LOSC); provisions which subject such freedom to the conventional obligations of the States and certain specific rules which, in general, concern the protection of species. On the other hand, the same article 87 LOSC states that the freedoms referred to in this article shall be exercised “with due regard” to the interests of other States in exercising their freedom of the high seas. It is the concept of solidarity which imposes that obligation implying that the right of each State to be limited proportionally by the rights of other States.

The general obligation of conservation is established in Article 117 LOSC. According with this article, all the members of the international community have the duty to take the measures with respect to each country’s nationals necessary for the conservation of the living resources on the high seas and to co-operate with other States in the adoption of such measures. On the other hand, article 194(5) LOSC binds the States to take all the individual and joint measures to protect and preserve the rare and vulnerable ecosystems as well as the habitat of the species and other forms of decimated, threatened or endangered marine life.

In this context, the basic position of Spain before the General Assembly in 1971<sup>19</sup>, focused on searching for the balance between the economic interests of the States in the use and exploitation of the sea and the political ones in matters of security. But the matters derived from economic and social development required a satisfactory answer regarding the exploration and exclusive exploitation of the resources from the continental shelf, and the enjoyment by the coastal States of preferential rights in the conservation and use of fishing resources in a wide-enough area of the sea adjacent to their coasts.

The Spanish position particularly on fisheries and fishing resources was based on the need to acknowledge within the text of the convention the historical right of certain fishing fleets to fish in areas where they had traditionally been fishing.

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<sup>18</sup> Official Records of the Third United Nations Conference on the Law of the Sea, vol. IV (United Nations publications, bulletin no. S.75.V.10), text A/CONF.62/WP.8, Part II.

<sup>19</sup> Intervention of Gregorio López Bravo, of 1 October 1971, reprinted in J.A. de Yturriaga, *La actual revisión del Derecho del Mar: Una perspectiva española. Textos y Documentos* (Instituto de Estudios Políticos, Madrid, 1975), vol. II (2), at 374-375.



Despite the diplomatic pressure exerted in this sense, finally the letter of the convention did not reflect the aspect of the historical rights, but it did ask the countries to reduce the damages for the nations which had “usually fished” in the area. Thus, thanks to the Spanish position, it was possible to protect the habitual fishing States’ interest and weakened the fishing rights of States in disadvantaged geographic situations within the EEZ. Even so, Spain abstained in this vote on LOSC, particularly because of the regulations over the straits and the restrictions on the activity of its fishing fleet, as well as considering that the texts adopted by the conference did not constitute a codification or expression of customary Law. Thus, Spain did not sign the Convention until the last moment, on the 4<sup>th</sup> of December 1984, and ratified it 13 years later, on the 15<sup>th</sup> of January 1997.

At the time of signing and ratification<sup>20</sup>, the Spanish Government made an interpretative declaration on Articles 69 and 70 of the Convention<sup>21</sup>, regarding the access to fishing in economic zones of third States. In particular, it states that:

“a) Articles 69 and 70 of the Convention, states that the access to fishing in the Exclusive Economic Zone of third party States by fleets of developed land-locked States or which are in a disadvantageous geographical location, is conditional on the coastal States in question having previously provided access to fleets of the States that have been fishing regularly in the Exclusive Economic Zone in question.

b) With respect to Article 297, and notwithstanding the provisions of that Article in relation to the settlement of disputes, Articles 56, 61 and 62 of the Convention do not allow the faculties of the coastal State to be considered discretionary regarding the determination of allowable catch, their exploitation capacity and the allocation of surpluses to other States.”

The strong pressure which the traditional freedom of high seas fishing has been subject to, due to the problem of straddling and highly migratory fish stocks, has not only occurred at a theoretical level. In fact, there have been several coastal States which have sought to extend unilaterally their competence in fishing matters beyond the two hundred miles, based on the presence of ichthyologic species on the high seas that move into maritime areas under their national jurisdiction or that come from these areas. In addition, several fisheries treaties, both bilateral and multilateral, have recognized these powers in favour of coastal States. In order to manage the different interests involved, the 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter UNFSA) was adopted, which seeks to give effect to LOSC in terms of assuring long-term conservation and the sustainable use of these fish stocks.

#### (D) 1995 AGREEMENT ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS (UNFSA)

The references to fishing resources and marine biodiversity arise above all in the need to conserve and manage this biodiversity on the high seas, including the management of bottom fishing (methods of fishing in the sea floor), in a manner consistent with LOSC, the 1993 FAO Compliance Agreement, the Convention on Biological Biodiversity (CBD) and the FAO Code of Conduct for Responsible

<sup>20</sup> Instrument of Ratification of the United Nations Convention on the Law of the Sea, done in Montego Bay on December 10, 1982 ([BOE No. 39](#), 14 February 1997).

<sup>21</sup> Declarations Nos. 2 and 3 made by the Spanish Government on 4 December 1984.

Fisheries<sup>22</sup>. For the purpose of this study, the 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), linked to LOSC is also of interest.

Already in the Third United Nations Conference on the Law of the Sea, attempts were made to grant greater rights to coastal States with regard to straddling fish stocks.<sup>23</sup> In this sense, the negotiating Conference did not seek to determine the regime that was to govern fishing on the high seas, but rather what surface area would remain on the high seas after the jurisdiction of coastal States was extended. During informal negotiations, proposals were made for the inclusion of a specific reference to the “special interest” of coastal States in relation to fish populations overlapping in their exclusive economic zones and on the high seas, in particular, in the regulation and exploitation of straddling and highly migratory fish species on the high seas. In relation to the former, the Convention provides where the same populations of associated species are found in both the EEZ and area beyond and adjacent to it, the coastal State and the States fishing these stocks shall try to agree on the necessary measures for the conservation of the population in the adjacent area. With respect to the latter, LOSC only provides that coastal States and other States whose nationals fish on them cooperate in order to ensure conservation and promote the optimum use of those resources throughout the region, both within and outside the EEZ.

Despite the pressure of States with a broad platform, no provisions were included in the text, although the Group of 77 submitted a similar proposal to the Conference on the recognition of a “special interest” of the coastal State beyond the limit of 200 miles. Finally, the amendment was not included and the negotiating text remained unchanged<sup>24</sup>.

The lack of determination of LOSC in this matter and the conflicting interests made it necessary to adopt a new agreement: the Agreement for the implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), was adopted in New York on 4 August 1995<sup>25</sup>. Under this Agreement, State Parties undertake to cooperate, both within and outside the areas under their jurisdiction, either directly or through regional or subregional fishing organizations and arrangements. The concept of “responsible fishing” already included in the Declaration of Cancun of 1992 and which was based on LOSC lies in: a) ensuring the long-term survival of these stocks by promoting their sustainable use, b) guaranteeing that the measures taken are based on sound scientific data, and c) promoting follow-up of the precautionary principle under Article 6 of the Agreement. The long-term conservation, management and sustainable use of the living marine resources of the world’s oceans and seas and the obligations of States to cooperate to that end, in accordance with international law, are reflected in the relevant provisions of

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<sup>22</sup> Available at FAO website [here](#).

<sup>23</sup> On this question, see the contribution in this volume by de Yturriaga Barberán on “[Spain at UNCLOS](#)”.

<sup>24</sup> See José Luis Meseguer, “Le régime juridique de l’exploitation de stocks communs de poissons au-delà des 200 milles”, *Annuaire français de droit international* (1982), at 28.

<sup>25</sup> United Nations Conference on Fish Stocks whose territories are within and outside the exclusive economic zones and on highly migratory fish stocks. New York, 12 to 30 July 1993. Background Paper, A/CONF.164/INF/5, 8 July 1993.

the Convention, in particular the provisions on cooperation set out in Part V and Section 2 of Part VII of the Convention, and developed in the UNFSA.

With this aim, State parties may adopt and implement: the appropriate conservation and management measures; establishing maximum allowable catch and level of fishing effort; agreement on participation rights; and undertaking monitoring, control, surveillance and enforcement. Only States which are members of the organization or participate in the corresponding arrangement, or commit to apply the measures adopted by one or the other, shall have access to fishing resources on the high seas to which such measures are applicable<sup>26</sup>.

In this context, and in order to ensure the effectiveness of the Spanish fishing sector, Spain became a party to several agreements on fishing cooperation in limited geographic areas, as well as to agreements on protected or highly migratory species. Bilateral fishing agreements that Spain took part in with European, African and American countries should be highlighted, which regulated the conditions for obtaining a temporary fishing permit for Spanish vessels operating in jurisdictional waters of other States or on the high seas. This practice was complemented by the creation of a large number of joint fishing companies. These are understood to be formed in a foreign country and in accordance with its legislation, which Spanish fishing companies constitute in association with natural or legal persons from that country in order to jointly exploit sea fishing resources. This situation was completely altered by Spain's accession to the European Communities. The then European Community (EEC) did not establish a common policy on this matter until 1983 and it did not apply it to the Mediterranean Sea. A long transitional period was established for the full integration of Spain into the Community fisheries policy. During this period, the access of Spanish fishing vessels to the Community waters and resources depended on the number of vessels allowed in Spain and the quota allocated to Spain on the total allowable catches (TACs) of the species subject to TACs and to quotas.

The EEC, in its process of extending the common fisheries policies to the high seas, has recognized the interest in fish stocks both within the area of 200 miles of jurisdiction and in an area beyond and adjacent to it. Thus, the ruling of the Court of Justice of the European Communities of 25 July 1991, raised by the Commission against Spain, meant bringing forward the international legal treatment over straddling fish stocks.<sup>27</sup>

The negotiations under this Agreement were focused on analysing how the problems of straddling and highly migratory fish stocks affect the interests of both coastal States, regarding the conservation and management of the resources within their 200-mile zones, and of States fishing on the high seas, with respect to the conservation and management of living resources on the high seas. Obviously, these issues can only be resolved through cooperation and collaboration, and this was provided for in

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<sup>26</sup> See Articles 2, 7(1), 8(1), 10 and 8(4) of the Agreement on the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 December 1995, entered into force 11 December 2001), [2167 UNTS 3](#).

<sup>27</sup> *Commission of the European Communities v. Kingdom of Spain* ([Case C-258/89](#)) European Court Reports, 1991/5, at 1.



the 1982 Convention<sup>28</sup>. However, these provisions did not solve the basic conflict on rights that constituted the core of the problem and which affected the interests of the Spanish fleet.

The Agreement, as an international treaty linked to LOSC, contains provisions that develop it, but also introduces new provisions not considered in LOSC. Some of them, although not provided in the Convention, do not contradict it, but others are particularly striking because they are incompatible with the Convention's provisions. Among them, should be mentioned the extension of the Agreement to States that are not party to it, requiring the implementation of enforcement measures on the high seas against ships of States other than the recognized flags, and the legitimate use of force by the inspecting State, when, and to the extent necessary, to ensure the safety of inspectors or when they are prevented from carrying out their duties<sup>29</sup>.

These Articles, not only contradict LOSC, but also the Agreement itself, which provides that none of its provisions should be construed to prejudice the rights and jurisdiction of States in accordance with the Convention<sup>30</sup>.

Despite its shortcomings, both Spain and the EC chose to become parties to the Agreement. Spain signed it in 1996 and the EC decided to join it in 1997, making seven interpretative declarations together with the Member States. It was agreed that the States and the Community would simultaneously present their respective instruments of ratification and acceptance, as well as the corresponding declarations. During the parliamentary process, the Spanish Government—at the request of the Ministry of Agriculture and Fisheries—asked 'las Cortes' (General Courts) to authorize the ratification of the Agreement together with six declarations—similar, but not fully in line with those agreed in the EC—and two more. In the face of this discrepancy, the Parliament through an amendment made it possible to recover the text of the Community declarations, while maintaining the supplementary Spanish declarations.

The most relevant interpretative declarations refer to the fact that Spain understands that no provision of the Agreement can be interpreted as contrary to the freedom of the high seas, recognized by international law; therefore it considers that the expression "States whose nationals fish on the high seas", should not provide new grounds for jurisdiction based on the nationality of persons fishing on the high seas different from the principle of jurisdiction of the flag State; and that in the application of Article 21, Spain is to understand that, when the flag State declares that it intends to exercise its authority over a fishing vessel sailing under its flag, the authorities of the State carrying out the inspection shall not endeavour to exercise any authority over such ship. The main justification for such statements was based on a double argument: on the one side, it was considered

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<sup>28</sup> In accordance with Article 63(2) LOSC, the coastal State and the States fishing those fish stocks in the adjacent area shall seek "either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area". In accordance with Article 64, paragraph 1, coastal States and other States whose nationals fish the highly migratory species in the region "shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum use of such species throughout the region, both within and beyond the exclusive economic zone".

<sup>29</sup> Articles 17(2), 18, 21(8) and 22(1) of the New York Agreement of 1995.

<sup>30</sup> J.A. de Yturriaga, 'Acuerdo de 1995 sobre conservación y ordenación de las poblaciones de peces transzonales y altamente migratorios', 7 *Anuario Argentino de Derecho Internacional* (1996-1997), at 60.

that the normative provisions could constitute dangerous precedents, which contravene international standards, enshrined in the Convention on the Law of the Sea, in consolidating the interests of coastal States compared to those of countries that carry out long-distance activities, such as Spain and whose situation would be seriously affected. And, on the other hand, to grant a guarantee and greater legal certainty to the application of the above-mentioned international Agreement, so that it is subject to the rules contained in the Convention on the Law of the Sea.

Subsequently, in 2001, Spain proposed in the EC Group on the Law of the Sea that it and the other member States should include the two added declarations, but there was widespread rejection and Great Britain and the Council itself, objected to the position that Spain made the aforementioned declarations alone. After intensive discussions—in which Spain argued that if its alternative proposal was not accepted, the entire legislative process would have to be restarted for the ratification of the Agreement, due to the mandate received from ‘las Cortes’—a commitment was reached that all member States would submit the seven declarations agreed, and Spain the two additional ones as a private application. As a consequence, on 9 December 2003, the EC and its member States incorporated the Agreement on the agreed terms<sup>31</sup>.

Undoubtedly, this new agreement represented a new challenge for remote-fishing States that, like Spain, habitually fish on the high seas. However, Spain had already experienced fishing restrictions resulting from the Act of Accession of the European Communities<sup>32</sup> and accepted with certain passivity the limitations that the Agreement entailed for Spanish interests, especially, in relation to freedom of fishing on the high seas, freedom of navigation and the principle of exclusive State jurisdiction over their ships in that space<sup>33</sup>.

Despite the adoption of this agreement, the delicate question of the competence of States on the high seas beyond their EEZ was raised by Spain before the International Court of Justice (ICJ) in 1997, following the assault, arrest and detention of the Spanish fishing boat “Estai” by Canada while fishing on the high seas. The importance of the controversy, known as the “halibut war”, is the confrontation of important interests at stake: the freedom to fish on the high seas, and the conservation of fishing resources. In its judgement of 4 December 1998<sup>34</sup>, the ICJ stated that it had no jurisdiction to rule on the substance of the claim. Accepting that the Canadian reservation in exempting itself from the mandatory jurisdiction of the Tribunal was given that the disputes arose from administrative and conservation measures adopted by Canada with respect to vessels fishing in the area and was subject to the regulation of the Northwest Atlantic Fisheries Organization and related to those measures, as well as their application.

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<sup>31</sup> J.A. de Yturriaga, ‘The European Community and Some Problems of the Law of the Sea Concerning Fisheries’, in *Mélanges de droit de la mer offerts à Daniel Vignes* (Brussels, 2009), 292-296.

<sup>32</sup> Instrument of Ratification of the Treaty done in Lisbon and Madrid on 12 June 1985, concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and the European Atomic Energy Community (BOE No. 1, of 1 January 1986).

<sup>33</sup> See Instrument of Ratification of the Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 concerning the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, done in New York on 4 August 1995 ([BOE No. 175](#), of 21 July 2004).

<sup>34</sup> *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, ICJ Reports 1998, p. 432.

Through this analysis, it is seen that, although Spain has not always given the marine environment the importance it deserves in terms of conservation of fishing resources, it is worth noting that it has been one of the pioneer States to oppose fishing with gill and drift nets. A Ministerial Order of 1981 regulated the use of both drift and minor fixed gear. This Order was dictated exclusively for the Mediterranean Sea since in it, the use of these fishing nets was most noteworthy. Almost a decade later, the Spanish State saw the appearance of drift fishing nets of great length and mesh size, used for catches of large migratory pelagic species. The high catch capacity of these nets has a very negative impact on the marine ecosystem as a whole. Thus, the Ministry of Agriculture, Fisheries and Food adopted an Order of 1990 prohibiting the use of drift gear, although it still allows them to be used as minor gear in the Mediterranean area. Despite these good practices in achieving “sustainable fishing”, this is subject to the guarantee of freedom of fishing on the high seas, the right of navigation of fishing vessels beyond 200 miles and the principle of exclusive jurisdiction of the flag State over their ships, which remain, to date, the general rule and not the exception.