The customary international law nature of the UNCLOS EEZ fisheries regime and its application to a non-State party to UNCLOS: The Peruvian case

José Manuel Pacheco Castillo

United Nations – The Nippon Foundation of Japan Fellowship Programme 2022

Disclaimer

The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations, The Nippon Foundation of Japan, or the Ministry of Transport and Communications of Peru.

ABSTRACT

The origins of the EEZ may be traced from the pursuit of the establishment of a new maritime zone focused on the conservation and sustainable use of natural resources, breaking the traditional dichotomy of the territorial sea and high seas. General State practice led to the EEZ's codification in UNCLOS and its consideration as customary international law, even before UNCLOS entered into force. Although debatable if there is general agreement on what specific rights and obligations of the EEZ regime have reached this customary status, the coastal State's sovereign rights over natural resources may be considered as such with no or little objection. In times when stocks fished at biologically unsustainable levels are constantly increasing, there is a need for reinforcing the fisheries regime of the EEZ, which turns into the axis of the said sovereign rights. To achieve sustainable fisheries, the UNCLOS EEZ fisheries regime must be applied uniformly. In this regard, the attention turns to those States that have not yet adhered to the "Constitution for the Oceans". Therefore, this work aimed to identify what customary international law rights and obligations as reflected in the UNCLOS EEZ fisheries regime of which Peru, as a non-State party to UNCLOS, applies or must apply in its maritime domain. The findings in this work reveal that although the fisheries regime in the maritime domain is compatible with the customary international law as reflected in the UNCLOS EEZ regime, some adjustments in national law should be taken, as well, as the decision to access treaties related to this subject.

ACKNOWLEDGMENTS

To Jesus, my lord, and savior.

To Sandrita.

Words seem not enough to express my deepest gratitude to The Nippon Foundation for supporting me in taking this academic experience that ended with this research. Then, hard work and sharing of all this knowledge will be my commitment in appreciation for your unlimited kindness.

I could not have undertaken this work without the valuable support and training of the UN Division for Ocean Affairs and the Law of the Sea team. My deepest gratitude to Ms. Valentina Germani and Vanessa Arellano for their kindness and advice for succeeding in this academic journey. I would also like to thank my 2022 colleagues for making this such an unforgettable experience. You made me feel at home, so never forget there is a home for you in Peru.

A million thanks to the World Maritime University and the WMU-Sasakawa Global Ocean Institute for hosting me during the second phase of this fellowship. Law of the sea became my academic passion, so there were no better persons to discuss this than professor Ronan Long and professor Zhen Sun. Your expertise, wise advice, and heed for supervising my work made me feel confident about writing a work that I wish can open new doors to Peru.

Finally, to my everlasting strength, my family. I am indebted to you for all I am. Therefore, this endeavor is for you either on earth or those, like my adorable mom, who are waiting in the beyond. Thank you for teaching me my priorities: God, Peru, family, and yo“U”.

LIST OF ACRONYMS

CBD	Convention of Biological Diversity
CCS	Convention on the Continental Shelf
CFCLRHS	Convention on Fishing and Conservation of the Living Resources of the High Seas
CHS	Convention on the High Seas
CTSCZ	Convention on the Territorial Sea and the Contiguous Zone
DICAPI	Directorate General of Captaincies and Coast Guard
EEZ	Exclusive Economic Zone
EU	European Union
IAMSAR	International Aeronautical and Maritime Search and Rescue
IATTC	Inter-American Tropical Tuna Commission
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICNT	Informal Composite Negotiating Text
ILC	International Law Commission
IMO	International Maritime Organization
ISNT	Informal Single Negotiation Text
ITLOS	International Tribunal for the Law of the Sea
LD	Legislative Decree that regulates the strengthening of the Armed Forces in the competencies of the National Maritime Authority – General Directorate of Captaincies and Coast Guard
MDA	Maritime Domain Awareness
OL	Organic Law for the sustainable use of natural resources
PCA	Permanent Court of Arbitration
PRODUCE	Ministry of Production

PSMA	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing
RFMO	Regional Fisheries Management Organization
RIAA	Reports of International Arbitral Awards
RSNT	Revised Single Negotiating Text
SIMTRAC	Aquatic Traffic Identification and Monitoring System
SPRFMO	South Pacific Regional Fisheries Management Organization
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNGA	United Nations General Assembly
US	United States

LIST OF TREATIES

1. 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 (adopted 4 August 1995, entered into force 11 December 2011) 2167 UNTS 3.

2. Agreement on Port State Measures to prevent, deter and eliminate illegal, unreported and unregulated fishing (adopted 22 November 2009, entered into force 5 June 2016) Registration number 54133. No UNTS volume number has yet been determined for this record.

3. Agreement on the Conservation of Albatrosses and Petrels, done 19 June 2001, 2258 UNTS 257 (entered into force 1 February 2004).

4. Agreement related to a Special Maritime Frontier Zone (adopted 4 December 1954).

5. Agreement relating to Measures of Supervision and Control of Maritime Zones of the Signatory Countries (adopted 4 December 1954).

6. Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 16 November 1994) 1836 UNTS 3.

7. Agreement relating to the issue of permits for the exploitation of the maritime resources of the South Pacific (adopted 4 December 1954).

8. Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945).

9. Complementary Convention to the 1952 Santiago Declaration (adopted 4 December 1954).

10. Convention for the establishment of an Inter-American Tropical Tuna Commission (adopted 31 May 1949, entered into force 3 March 1959) 1951 UNTS 4.

11. Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (adopted 27 June 2002, entered into force 27 August 2010).

12. Convention on Fishing and Conservation of the Living Resources of the High seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285.

13. Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (adopted 14 November 2009, entered into force 24 August 2012) 2899 UNTS 211.

14. Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

15. Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.

16. Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205.

17. Declaration on the Maritime Zone (adopted 18 August 1952, entered into force 18 August 1952) 1006 UNTS 326.

18. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

LIST OF CASES

Decisions of International Courts and Tribunals

Permanent Court of Internacional Justice

1. The S.S. "LOTUS" (France v. Turkey) (1927) P.C.I.J., Series A, No. 10.

2. Jurisdiction of the European Commission of the Danube, Advisory Opinion, (1927) P.C.I.J., Series B, No. 14.

International Court of Justice

1. Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949, p.4.

2. Colombian-Peruvian asylum case, Judgment of 20th, 1950: I.C.J. Reports 1950, p. 277.

3. Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951, p. 139

4. South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, p. 6.

5. North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3.

6. Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3.

7. Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p. 253.

8. Tunisia v. Libyan Arab Jamahiriya, Judgment of 24 February 1982, p. 18.

9. Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 246.

10. Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13.

11. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.

12. Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993, p. 38.

13. Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61.

14. Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014, p. 3.

15. Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment I.C.J. (21 April 2022).

International Tribunal for the Law of the Sea

1. M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10.

2. Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280.

3. M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014, p. 4.

4. Request for Advisory Opinion by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p.4.

5. M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44.

Permanent Court of Arbitration

1. The South China Sea Arbitration, Philippines v. China, Award, PCA Case N° 2013-19, ICGJ 495 (PCA 2016), 12 July 2016.

Other arbitral tribunals

1. Island of Palmas case (Netherlands, USA) Decision of 4 April 1928. RIAA Volume II, p. 829.

2. Dispute. concerning Filleting within the Gulf of St. Laurence (*La Bretagne*) (Canada/France) Decision of 17 July 1986. RIAA Volume XIX, p. 225.

3. Concerning the delimitation of maritime areas between Canada and France. Decision of 10 June 1992. RIAA Volume XXI, p. 265.

Decisions of National Courts and Tribunals

Decisions of National Courts and Tribunals

1. United States v. Smith 18 U.S. (5 Wheaton) 153, 161 (1820).

2. The Paquete Habana, 175 US 677 (8 January 1900).

3. Judgment of the Constitutional Tribunal of Peru of 20 January 2006. Exp. N° 2689-2004-AA/TC (Asunto EMERGIA S.A.).

4. Constitutional Chamber of the Supreme Court of El Salvador. Judgment 73-2013 of 31 August 2016.

TABLE OF CONTENTS

INTRODUCTION

Fishing is to be considered the oldest human use of the sea.[1] It has traditionally been a source of animal protein and minerals needed for good nutrition of human beings. In addition, it has fostered economic growth while creating numerous jobs and promoting commerce. Fish is used for creating derivative products such as fish meal, fish oil, or animal food, which reveals its utmost importance for development. Its sustainable use has not been a serious concern of the international community as a whole until the twentieth century, though. In addition, the use of living resources has been a challenge faced with the development of the law of the sea. Although the ocean is one unity in a physical sense, from a legal perspective, States have divided it into different maritime zones.[2] Therefore, the conservation and utilization of living resources within the framework of the law of the sea turns critical.

The history of the law of the sea may be traced from the fifteenth-century tensions between the States' claims of sovereignty and freedom regarding the use of the oceans.[3] Thus, up to the end of the nineteenth century, the law of the sea was mainly customary in origin.[4] States agreed that traditionally there were two maritime spaces namely, the territorial sea and the high seas. Encouraging legal certainty, formal codification endeavors took place during the twentieth century. Within the framework of the League of Nations, the 1930 Hague Conference witnessed debates regarding the juridical nature of the seas, particularly on topics such as territorial waters, piracy, the exploitation of marine resources, and the legal status of State-owned merchant ships.[5] No treaty was adopted as a result of this conference.

Further efforts for the codification of the law of the sea were taken in the framework of the work of the ILC in 1949. As a result, UNCLOS I was convened in 1958 following the mandate of UNGA Resolution 1105 (XI).[6] Although four law of the sea treaties were adopted, there was no consensus on the breadth of the territorial sea. Notably, by this time, States recognized the special interest of the coastal State in the maintenance of the productivity of the living resources

[1] Robin Churchill, Vaughan Lowe and Amy Sanders, *The Law of the Sea* (4th Edition, Manchester University Press 2022) 513.
[2] Yoshifumi Tanaka, *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea* (Ashgate 2008) 1.
[3] See the *Bull Inter Caetera* of 14 May 1493 where Pope Alexander VI donated territories to Spain and Portugal; Tulio Treves, 'Historical Development of the Law of the Sea' in Donald R. Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 2.
[4] Ibid.
[5] Churchill et al. (n 1) 21.
[6] United Nations General Assembly Resolution 1105 (XI), *International conference of plenipotentiaries to examine the law of the sea*, (21 February 1957).

on the high seas. In this regard, following UNGA Resolution 1307 (XIII),[7] UNCLOS II was convened in 1960 to address the breadth of the territorial sea and the fishery limits; however, no agreement was reached. Through UNGA Resolution 2750 C (XXV)[8] it was decided to convene UNCLOS III in 1973. This time, as UNGA Resolution 3067 (XXVIII)[9] shows, the mandate of the conference was adopting a treaty dealing with all matters relating to the law of the sea.

UNCLOS III was held between 1973 and 1982. As a result, the United Nations Convention on the Law of the Sea[10] was adopted on 10 December 1982. Among its main achievements, one must highlight the recognition of the Area and its resources as the common heritage of mankind[11] and the conventional establishment of the EEZ, an area beyond and adjacent to the territorial sea up to a maximum of 200 nautical miles measured from the baselines from which the breadth of the territorial sea is measured and where the coastal State enjoys, among others, sovereign rights for the exploration and exploiting, conserving and managing the natural resources, whether living or non-living.[12]

The fisheries regime of the EEZ is built from the sovereign rights of the coastal State regarding natural resources. Thus, UNCLOS established a zonal management approach and a species-specific approach.[13] Concerning the zonal management approach within the EEZ, UNCLOS prescribed article 61 which deals with the conservation of living resources, while article 62 addresses the utilization of them. Regarding the species-specific approach, one can find that article 63 deals with shared and straddling species, article 64 addresses the highly migratory species, article 65, deals with marine mammals, article 66, anadromous stocks, and article 67 with catadromous species.

[7] United Nations General Assembly Resolution 1307 (XIII), *Convening of a second United Nations conference on the law of the sea*, (10 December 1958).
[8] United Nations General Assembly Resolution 2750 C (XV), *Reservation exclusively for peaceful purpose of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea*, (17 December 1970).
[9] United Nations General Assembly Resolution 3067 (XXVIII), *Reservation exclusively for peaceful purpose of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of the Third United Nations Conference on the Law of the Sea*, (16 November 1973).
[10] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.
[11] Article 136 of UNCLOS.
[12] Article 56 of UNCLOS.
[13] Yoshifumi Tanaka, *The International Law of the Sea* (3rd Edition, Cambridge University Press 2019) 284.

Article 58.1 of UNCLOS prescribes that all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of the treaty, the freedoms referred to in article 87 of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms. In addition, article 58.3 mandates that in exercising these rights and performing their duties under UNCLOS in the EEZ, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State following the provisions of UNCLOS and other rules of international law in so far as they are not incompatible with Part V (EEZ regime) of the treaty.

The abundant practice of States claiming an EEZ led international tribunals to refer to the custom nature of this institution.[14] Thus, a chamber constituted within the ICJ determined that the UNCLOS provisions on the EEZ are consonant with general international law.[15] In addition, the plenary of the ICJ stated that the institution of the EEZ, with its rule of entitlement because of distance, is shown by the practice of States to have become a part of customary law.[16] The freedom of navigation through the EEZ as a guarantee by the coastal State was also addressed by the ICJ.[17] Noteworthy, even some States which are not a party to UNCLOS have established an EEZ.[18]

Despite the said juridical nature of the EEZ as reflected in UNCLOS, one may note a lack of consensus about the specific rights and obligations which are part of the customary international law that are opposable to all States, even those that are not a party to UNCLOS. In other words, even though there is certainty in the identification of the EEZ institution as part of customary international law, the specific content is debatable. One may argue that the very core of the fisheries regime, namely, the coastal sovereign rights over marine living resources are customary international law. However, the customary nature of the rights and obligations of the whole EEZ fisheries regime requires further assessment. This turns critical when

[14] According to Churchill et al., "although the universal establishment of 200-mile EEZs would embrace no more than about 36 per cent of the total area of the sea, that area contains around 85 per cent of all presently commercially exploitable fish stocks." Churchill et al. (n 1) 254.
[15] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246, para. 94.
[16] *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13, para. 34.
[17] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, para. 214.
[18] See, for instance, Chapter V of the Organic Law of Aquatic Spaces, approved by Decree N° 1446 of 17 November 2014, in Venezuela; article 574 of the Civil Code (as amended in 2004) in El Salvador; Decree by the Council of Ministers N° 86/11264 of 17 December 1986, in Türkiye; Proclamation N° 5030 of 10 March 1983, in the United States; or the seventh article of Law N° 10 of 4 August 1978, in Colombia.

acknowledging that the coastal State must guarantee certain rights of third States as the ones established by article 58 of UNCLOS. In light of this issue, the case of Peru, a State not a party to UNCLOS, will be assessed.

Peru is located in the central and western parts of South America, with a coastline of more than 3,080 kilometers in length. Historically, the Peruvian State has contributed to the creation of the EEZ by the issuance of the Supreme Decree N° 781 in 1947 and the 1952 Santiago Declaration along with Chile and Ecuador. Peru participated in the UNCLOS III and supported the establishment of the EEZ which was an achievement for the Latin American States that sought a new maritime space for the conservation and sustainable use of natural resources.

According to article 54 of the current Peruvian Constitution, the maritime domain of the State includes the sea adjacent to its coasts, as well as the seabed and subsoil thereof, extending out to a distance of 200 nautical miles measured from the baselines established by law. In addition, in its maritime domain, the State exercises sovereignty and jurisdiction, without prejudice to the freedoms of international communication, in accordance with the law and treaties ratified by the State.

This constitutional provision raised doubts about Peru claiming a 200 nautical miles territorial sea. However, and as will be demonstrated in this work, today this is not an accurate assertion since Peru claims to have a 200 nautical maritime domain compatible with UNCLOS' maritime zones, due to the respect of the customary international law as reflected in the said treaty. Once again, the question remains on what are those specific rights and obligations Peru is compelled to comply with, particularly for the fisheries regime, considering that the maritime domain, geographically, is one single maritime space.

Therefore, the present work will address the customary rights and obligations reflected in the UNCLOS EEZ fisheries regime as opposable to Peru, a State not a party to the "Constitution for the Oceans". To this aim, the UNCLOS EEZ fisheries regime and the Peruvian national law and its applicability to third States will be assessed to identify what customary international law rights and obligations as reflected in the UNCLOS EEZ fisheries regime of which Peru applies or must apply in its maritime domain. In addition, this work will come up with recommendations for further actions such as the issuance or modification of national law or the

ratification or accession of international binding instruments, concerning the fisheries regime, if needed.

This research will be divided into two parts. The first part will address the EEZ and its customary international law nature. To that purpose, it will contain two chapters, the first one concerning the customary international law as a source of international law of the sea, and the second one regarding the EEZ. The second part of the thesis will deal with the Peruvian maritime domain and the UNCLOS fisheries regime in the EEZ. This part will also contain two chapters, the first one regarding the doctrine of the maritime domain and the second one the assessment of the maritime domain through applicable fisheries law and its path as a compatible maritime zone with the UNCLOS' fisheries regime in the EEZ.

PART ONE: THE EXCLUSIVE ECONOMIC ZONE AND ITS CUSTOMARY INTERNATIONAL LAW NATURE

Chapter 1: Customary international law as a source of international law of the sea

Law can be defined as a system comprising the interaction between subjects which is valued (either positively or negatively) by them to come up with rules for living in society.[19] In this regard, international law is the body of rules which the subjects of international law have created to achieve the goals set by the international community. As mandated by article 1 of the UN Charter, the main goal of modern international law includes international peace, friendly relations among States, and international cooperation. To this end, all the rules within this legal system must be applied and interpreted.

The said rules are commonly known as sources of international law. There are material and formal sources. The former denotes the provenance of the substantive content of the rule,[20] while the latter reflects the mechanism through which a valid rule has been created. Sources aid to identify a rule within international law and ascertaining its validity, which can be defined as the specific form of existence of a rule.[21] The validity includes the identification of who participated in the creation of the new law and how they came up with its existence. For this work, the focus will be on the formal sources of international law

Commonly, the formal sources of international law may be found in article 38 of the Statute of the ICJ:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

    a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

    b. International custom, as evidence of a general practice accepted as law;

[19] Gattās Abugattās, 'La Teoría Tridimensional en el Derecho Internacional' in Carlos Calderón et al., *Personas, Derecho y Libertad. Nuevas perspectivas. Escritos en Homenaje al Profesor Carlos Fernández Sessarego* (Motivensa 2009) 1000-1002.
[20] Hugh Thirlway, *The Sources of International Law* (2nd Edition, Oxford University Press 2019) 6.
[21] Jean D'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press 2011) 50.

c. The general principles of law recognized by civilized nations;

d. Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Although it specifically refers to the tools available to the ICJ to decide in a dispute, article 38 is generally accepted as a complete statement of the formal sources of international law.[22] There is no hierarchy among this list of sources, however, one must note that from a positivistic and voluntarist perspective,[23] treaties are the first to be assessed to identify the rights and obligations of States. On the contrary, despite its proliferation, treaties leave many international topics untouched, and States have the discretionary power to become a party to them or not.[24] This reveals the importance of customary international law that, in principle, applies to all States.

1.1. Customary international law

1.1.1. Concept

International custom reflects (or more specifically, is) the general practice accepted as law. This source of international law allows the studying of the rules that are bound to all the States of the international community unless for those who persistently object to them. Customary international law is a usage felt by those who follow it to be an obligatory one.[25] Then, the existence and content of such rules can be deduced from the practice and behavior of States, which represents quite a challenge,[26] since, as one may be aware, the law cannot be divorced

[22] Ian Brownlie, *Principles of Public International Law* (6th Edition, Oxford University Press 2003) 5.
[23] See dissenting opinion of Judge Tanaka in *South West Africa*, Second Phase, Judgment, I.C.J. Reports 1966, p. 6, para. 300.
[24] Mark Weston Janis, *International Law* (7th Edition, Wolters Kluwer 2015) 44.
[25] James Brierly, *The Law of Nations: An introduction to the International Law of Peace* (4th Edition, Oxford University Press 1949) in Janis (n 24) 44. The idea of custom as a source of legal rules is ancient. Roman law knew an "unwritten law consisting of rules approved by usage; for long-continued custom approved by the consent of those who use it imitates a statute". The Institutes of Justinian. The Elements of Roman Law 45 (4th Edition, 1956).
[26] Malcolm Shaw, *International Law* (9th Edition, Cambridge University Press 2021) 62.

from politics or power.[27] The identification of customary international law is of major importance in international relations[28] and reflects the characteristics of the decentralized international system.[29]

Sometimes named "custom", "international custom", "international customary law", "the law of nations" or "general international law",[30] this general practice accepted as law reflects the consensus approach to decision-making with the ability of the majority to create new law binding, in principle, upon all.[31] In other words, what is sought is a general recognition among States of a certain practice as obligatory. Its generality and acceptance have been stated to be considered the universal law of society.[32]

To ascertain the existence and content of a rule of customary international law, the two-element approach must be followed[33] or fulfilled.[34] This is to identify if there is a general practice and if this practice is accepted as law, which means that practice was done in the belief that it was required, permitted, or prohibited as a matter of law.[35] The following paragraphs will address these elements.

1.1.2. Elements

1.1.2.1. General practice

This practice is referred primarily to the practice of States that contribute to the formation, or expression, of rules of customary international law.[36] Notwithstanding the State's leading role, one must acknowledge that the practice of international organizations can contribute to the formation or expression of customary international law in certain cases.[37] These cases arise more clearly when the member States have transferred exclusive competencies to the

[27] Ibid, 67.
[28] Last paragraph of the Preamble of United Nations General Assembly Resolution 73/203, *Identification of customary international law*, A/RES/73/203 (20 December 2018).
[29] Shaw (n 26) 62.
[30] UN GAOR, 73th Session, *Report of the International Law Commission*, UN Doc A/73/10 (2018)123, para. 2.
[31] Shaw (n 26) 62.
[32] United States v. Smith 18 U.S. (5 Wheaton) 153, 161 (1820).
[33] ILC (n 30) 124, Conclusion 2.
[34] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, at p. 44, para. 77.
[35] ILC (n 30) 125, para 2.
[36] ILC (n 30) 130, Conclusion 4.1; see the *Libya/Malta Continental shelf* case: the substance of customary law must be "looked for primarily in the actual practice and opinio juris of States". *Continental Shelf* case (n 16) para. 29.
[37] ILC (n 30) 130, Conclusion 4.2.

international organization.[38] The latter is important for the assessment of fisheries law since many regional approaches have been created to address this topic and there are some examples where exclusive competencies have been given to the international organization to manage marine living resources.[39]

For its consideration as a general practice, it has to be general, meaning that it must be sufficiently widespread and representative, as well as consistent.[40] The widespread characteristic does not require universal practice but an extensive practice indicating a settled practice.[41] The representativeness of the practice means the participation of those States that had the opportunity or possibility of applying the alleged rule,[42] this includes necessarily the States whose interests are especially affected by the said practice.[43]

Consistency refers to uniformity. Then, although it is not expected that the practice under assessment is in absolutely rigorous conformity with the rule,[44] it must be virtually or substantially uniform,[45] which means that contradictory practices will indicate a lack of consistency. Since the assessment of the practice involves its context, one must assure that a similar context is present to weigh objectively the said uniformity.[46]

In addition, no particular duration is required for the general practice.[47] Although classic notions of customary international law were referred to as certain maxims and customs consecrated by long use,[48] ancient usage,[49] or, immemorial usage,[50] today, the passage of only a short period is not necessarily, or of itself, an obstacle to the formation of a new rule of

[38] Ibid, 131, para. 6.
[39] See the European Union and the work of the RFMOs.
[40] ILC (n 30) 135, Conclusion 8.1.
[41] *North Sea Continental Shelf case* (n 34) para. 77.
[42] ILC (n 30) 136, para 3.
[43] *North Sea Continental Shelf case* (n 34) para. 74.
[44] *Military and Paramilitary Activities in and against Nicaragua* (n 17) para. 186.
[45] ILC (n 30) 137, para. 7. See also *North Sea Continental Shelf case* (n 34) para. 74.
[46] S.S. "LOTUS" (France v. Turkey) (1927) P.C.I.J., Series A, No. 10, 21.
[47] ILC (n 30) 136, Conclusion 8.2.
[48] Emer de Vattel, The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns XV (1797) in Janis (n 24) 44.
[49] In the *Paquete Habana case*, the US Supreme Court stated the following: By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have recognized as exempt, with their cargoes and crews, from capture as prize of war. The Paquete Habana, 175 US 677 (8 January 1900).
[50] Judge Negulesco, of the European Commission of the Danube, Advisory Opinion, (1927) P.C.I.J., Series B, No. 14, 126; Shaw (n 26) 109.

customary international law.[51] In this regard, the general practice must be assessed to a greater degree in its generality, representativeness, and consistency as explained before.

A last consideration regarding the general practice lies in what practice can be assessed to be considered as an element of customary international law. Concerning the primary position of State practice for this topic, one must note that the conduct of the State may be exercised in its executive, legislative, judicial powers, or other functions on behalf of it.[52] This practice may be in different forms, including physical, verbal, and, in certain circumstances, inaction.[53] This practice must be assessed as a whole[54] and when it varies, the weight given to that particular practice must be reduced.[55]

Now, the bare fact that such things are done does not mean that they have to be done,[56] or said differently, acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.[57] Therefore the sole practice is not tantamount to customary international law, which leads us to address the *opinio juris*.

1.1.2.2. Opinio Juris

Francois Gény formulated the concept of *opinio juris sive necessitatis* as an attempt to differentiate legal custom from mere social usage.[58] Thus, *opinio juris* means that the practice in question must be undertaken with a sense of legal right or obligation.[59] This acceptance of the law must be distinguished from other motives such as comity, political expediency, or convenience.[60] Therefore, the States concerned must feel that they are conforming to what amounts to a legal obligation: the frequency or even habitual character of the acts are not in itself enough.[61]

[51] *North Sea Continental Shelf case* (n 34) para. 74.
[52] ILC (n 30) 132, Conclusion 5.
[53] Ibid, 133, Conclusion 6.1. In the *Asylum case*, for instance, the ICJ valued that Peru refrains from ratifying the 1933 and 1939 Montevideo conventions which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum, *Colombian-Peruvian asylum case*, Judgment of 20th, 1950: I.C.J. Reports 1950, p. 277.
[54] ILC (n 30) 134, Conclusion 7.1.
[55] Ibid, Conclusion 7.2.
[56] Shaw (n 26) 63.
[57] *North Sea Continental Shelf case* (n 34) para. 76.
[58] F. Gény, Meethode d'Interpretation et Sources en Droit Privé Positif, Paris, 1899, para. 110, in Shaw (n 26) 63.
[59] ILC (n 30) 138, Conclusion 9.1.
[60] Ibid, 139, para. 3; see *Asylum case* (n 61) 277.
[61] *North Sea Continental Shelf case* (n 34) para. 77.

According to the ILC, there is common ground between the forms of evidence of *opinio juris* and forms of State practice, indicating that the two-element approach may be assessed in the same material.[62] In addition, like the assessment of the practice, the psychological element must belong to the relevant States taking action and those in a position to react to it.[63] Therefore, not all States need to accept as law the alleged rule, because what is sought is a representative acceptance, together with no or little objection.[64]

Although the State's expressions that indicate an *opinio juris* may often be generated clearly in situations of controversies,[65] fisheries law turns particular at this point due to the abundant State practice indicating several examples of States taking actions or being in a position to react. This may be acknowledged whether from national conduct, in law or policies; from a regional perspective, such as the work within an RFMO; or a global view, like the participation within FAO or accepting the annual UN sustainable fisheries resolution.

As mentioned above, the origin of the law of the sea reveals that it was mainly customary. Therefore, its codification through the twentieth century facilitated and fostered its identification as general international law. Thus, the following paragraph will address the main information about the international law of the sea, its main treaty (UNCLOS), and its relationship to the customary international law rights and obligations reflected in it, to assess the EEZ fisheries regime.

1.2. International law of the sea

The ocean is of utmost importance to life on Earth and our future; it is a fundamental source of the planet's biodiversity and plays a vital role in the climate system and water cycle.[66] It provides oxygen to breathe, create numerous jobs, and contributes to food security. The ocean covers around 70% of our planet, making it a perfect area to canalize international communications through shipping and submarine cables and pipelines for instance. As one author has pointed out, "how inappropriate to call this planet Earth when it is quite clearly

[62] ILC (n 30) 140-141, para. 3.
[63] See *Fisheries case*, Judgment of December 18th, 1951, I.C.J. Reports 1951, p. 139; see Thirlway (n 27) 68-69.
[64] ILC (n 30) 139, para. 5.
[65] Janis (n 24) 49.
[66] Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development, Our ocean, our future, our responsibility: draft declaration, UN Doc A/CONF.230/2022/12 (Lisbon, 27 June – 1 July 2022) Annex, para 3. Available on: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/389/07/PDF/N2238907.pdf?OpenElement Accessed on 6 October 2022.

Ocean".[67] Thus, its relevance to human life leads to the need for regulation to guarantee its sustainable use; this is the reason for the existence of the international law of the sea.

The international law of the sea may be defined as the body of international rules (and principles)[68] that bind States and other subjects of international law in their marine affairs.[69] Among its main functions, the international law of the sea has established the spatial distribution of jurisdiction of States[70] and the mechanisms through which all subjects of international law must cooperate to achieve common goals. Contemporary challenges such as climate change, sea level rise, or the predation of marine living resources are to be addressed under the law of the sea scope of application. Thus, the ongoing State practice reflects the constant evolution of this body of international rules and principles.[71]

As one of the oldest branches of international law, the international law of the sea can be studied from the theory of the sources of international law. Therefore, the sources of article 38 of the Statute of the ICJ mentioned above are applicable. Although the origins of the international law of the sea reveal its customary nature, today, UNCLOS constitutes the major codification outcome for this law encompassing the main rules and principles to apply to the ocean. The law of the sea is not exhausted by UNCLOS, however, its importance, particularly for the establishment of maritime zones deserves the following lines.

1.2.1. UNCLOS: an overview

Little doubt must generate when ascertaining that UNCLOS is the most important conventional source of the international law of the sea.[72] According to the UNGA Resolution N° 3067 (XXVIII) of 1973, the Third United Nations Conference on the Law of the Sea, which required eleven sessions between 1973 and 1982, had the mandate to adopt a convention dealing with all matters relating to the law of the sea.[73] This was reflected in the third paragraph of the Preamble of UNCLOS asserting that the problems of ocean space are closely interrelated and

[67] This quote is adjudicated to Arthur C. Clarke.
[68] Churchill (n 1) 1.
[69] Tanaka (n 13) 3.
[70] Ibid.
[71] See, for instance, the BBNJ process; Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (2nd Edition, Bloomsbury Publishing 2016) 67.
[72] Robin Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald R. Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 24.
[73] UNGA Resolution (n 9) para 3.

need to be considered as a whole. This is also known as the "package deal" approach used by negotiators for the adoption of the treaty.

The object and purpose of UNCLOS may be found, among others, in paragraph four of its Preamble:

> *Recognizing* the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection, and preservation of the marine environment.

Currently, UNCLOS has 168 parties, including one international organization. The treaty has two implementing agreements,[74] one dealing with the activities in the Area, and the other dealing with straddling and highly migratory species. In addition, there is an ongoing treaty negotiation concerning marine biodiversity in areas beyond the national jurisdiction.

Among others, UNCLOS established maritime zones within and outside of the national jurisdiction and the regulation of the sustainable use of marine living resources. It must be underscored that UNCLOS uses the term living resources which can be understood as the living organisms of the oceans that comprise fish, cephalopods, crustaceans, and marine mammals.[75] For this work, we will address the maritime zones as prescribed by UNCLOS, with special emphasis on the regulation of marine living resources.

1.2.2. UNCLOS maritime zones and their relationship to marine living resources

UNCLOS divides maritime zones into two groups: maritime zones under national jurisdiction and maritime zones beyond national jurisdiction. The first group belongs to the internal waters,

[74] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 16 November 1994) 1836 UNTS 3; 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 (adopted 4 August 1995, entered into force 11 December 2011) 2167 UNTS 3.

[75] Nele Matz-Lück and Johannes Fuchs, 'Marine Living Resource' in Donald R. Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 492.

territorial sea, archipelagic waters, contiguous zone, exclusive economic zone, and continental shelf. The second belongs to the high seas and the Area.

For this work, some information regarding each maritime zone will be provided emphasizing its relations to marine living resources, except archipelagic waters (since Peru is not an archipelagic State) and the Area (due to its focus on non-living resources). This will be relevant to the case under assessment since the Peruvian maritime domain is, geographically, one single maritime space whose length is 200 nautical miles measured from the baselines.

1.2.2.1. Internal waters

According to article 8 of UNCLOS, the internal waters are the waters on the landward side of the baseline of the territorial sea. The sovereignty over the land territory of the coastal State extends to the internal waters.[76] This means that the coastal State exercises its sovereignty over natural resources in this maritime zone.

It must be stated that, if the establishment of a straight baseline has the effect of enclosing as internal waters areas that had not previously been considered as such, other States shall enjoy the right of innocent passage.[77] This right does not involve any entitlement regarding natural resources.

1.2.2.2. Territorial sea

According to article 2 of UNCLOS, the territorial sea is the adjacent belt of the sea to the coast whose breadth shall not exceed 12 nautical miles, measured from the baselines established by the coastal State. The sovereignty over the land territory of the coastal State extends to the territorial sea.[78] Therefore, the coastal State enjoys sovereignty over the natural resources in this maritime zone.

The other States enjoy the right of innocent passage.[79] While this right does not involve any entitlement to natural resources, the coastal States can issue and enforce law relating to

[76] Article 2.1 of UNCLOS.
[77] Article 8.2 of UNCLOS.
[78] Article 2.1 of UNCLOS.
[79] Articles 17 to 28 of UNCLOS.

innocent passage, among others, for the conservation of living resources of the sea and the prevention of infringement of fisheries laws and regulations.[80]

1.2.2.3. Contiguous zone

According to article 33 of UNCLOS, the contiguous zone is a sea belt adjacent to the territorial sea whose maximum breadth shall not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. The contiguous zone is functional for preventing and punishing customs, fiscal, immigration, or sanitary laws and regulations within the territory or territorial sea of the coastal State. In addition, the contiguous zone is also functional for the protection of underwater cultural heritage.[81]

There is no mention of natural resources in the contiguous zone regime. However, one must know that when a coastal State claims an exclusive economic zone, the contiguous zone overlaps it, making the same sea belt functional for natural resources but under the EEZ regime. If no EEZ is claimed, then the enforcement actions of the contiguous zone would be undertaken on high seas.

1.2.2.4. Exclusive economic zone

According to article 55 of UNCLOS, the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regimen established in Part V of UNCLOS. The EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 56 of UNCLOS prescribes that in the EEZ, the coastal has sovereign rights for the purpose of exploring and exploiting, conserving, and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone. The said article also prescribes that the State has jurisdiction with regard to the establishment use of artificial islands, installations, and structures; marine scientific research; and, the protection and preservation of the marine environment.

[80] Article 21.1.d-e of UNCLOS.
[81] Article 303.2 of UNCLOS.

The EEZ must be claimed, otherwise, it can be considered as high seas. Several States have claimed an EEZ since fish stocks in the EEZs embrace the majority of economically exploitable marine living resources.[82] For this work, more information about the EEZ will be provided in the next chapter.

1.2.2.5. Continental shelf

According to article 76.1 of UNCLOS, the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. In certain cases, the State can claim an extended continental shelf further than 200 nautical miles.

Following article 77.1 of UNCLOS, the coastal State exercises sovereign rights over the continental shelf to explore and exploit its natural resources. It must be highlighted that the said sovereign rights are exclusive to the coastal State in the sense that if it does not explore or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.[83]

Although the continental shelf and the EEZ belong to different regimes, they are interrelated.[84] Article 56.3 states that the rights set out in that article (sovereign rights and jurisdiction in the EEZ) concerning the seabed and subsoil shall be exercised in accordance with the regime of the continental shelf. In this regard, one must note that article 77.4 incorporates the living resources belonging to sedentary species, which are defined as organisms that, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

[82] Matz-Lück and Fuchs (n 75) 498.
[83] Article 77.2 of UNCLOS.
[84] As pointed out by the ICJ, the continental shelf and the exclusive economic zone "are linked together in modern law". *Continental Shelf* case (n 16) para. 33.

1.2.2.6. High seas

High seas are the parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a State or the archipelagic waters of an archipelagic State.[85] No State has jurisdiction over the high seas, nor sovereign rights. However, the flag State enjoys exclusive jurisdiction over the ship that is entitled to fly its flag, save in exceptional cases.[86]

Although the relevance of high seas fisheries has decreased due to the establishment of the EEZ where most stocks are harvested,[87] all States enjoy the freedom of fishing, which is tied to certain conservation and management duties as prescribed in articles 116 to 120 of UNCLOS. In addition, articles 63 and 64 of UNCLOS are relevant to the high seas since it includes straddling and highly migratory stocks whose habitat may be in the EEZ as well as on the high seas. For this, UNCLOS mandates the duty to cooperate.

In the following chapter, the EEZ will be addressed to study the customary nature of the rights and obligations that compounds its fisheries regime.

[85] Article 86 of UNCLOS.
[86] Article 92.1 of UNCLOS.
[87] Matz-Lück and Fuchs (n 75) 498.

Chapter 2: Exclusive Economic Zone

2.1. Historical background

2.1.1. Before UNCLOS

The post-Second World War time brought a long-range worldwide need for new resources. Thus, this period witnessed the beginning of unilateral declarations of coastal States extending their jurisdiction towards the sea, challenging the traditional dichotomy of the territorial sea and the high seas with an overlapping contiguous zone. In 1945, President Truman of the United States issued a proclamation by which the State reserves the natural resources of the subsoil and seabed of the continental shelf beneath the high seas under its jurisdiction and control for their conservation and prudence utilization.[88] For fisheries, another proclamation was issued by the United States to establish conservation zones on the high seas subject to its control and regulation.[89]

Following Truman's proclamations, some Latin American States claimed sovereignty over the continental shelf and the waters above.[90] This is the case, for instance, of Mexico[91] in 1945, Argentina[92] in 1946, and Chile[93] and Peru[94] in 1947. It must be noted that each declaration had its views regarding the motivation and terminology[95] for such claims. For example, both coastal States from the Pacific Ocean realized they had no extended continental shelves and lacked opportunities to exploit mineral resources, which is why they needed compensation.[96] Peru

[88] Proclamation N° 2667 of 28 September 1945.
[89] Proclamation N° 2668 of 28 September 1945. According to professor Attard, this proclamation was never applied. David Attard, *The Exclusive Economic Zone in International Law* (Claredon Press Oxford 1987) 2; see Treves (n 3) 11.
[90] Attard (n 89) 3.
[91] Presidential Declaration of 29 October 1945. The text of the declaration is in the newspaper "El Universal", Ciudad de México, from 30 October 1945. See Bernardo Sepúlveda Amor, 'La Política Exterior de México: Realidad y Perspectivas ‖ Derecho del Mar: Apuntes sobre el sistema legal mexicano (13 Foro Internacional 1972) 268-269; F. V. García Amador, *América Latina y el derecho del mar* (Editorial Universitaria 1976) 14.
[92] Presidential Decree N° 14708 of 11 October 1946.
[93] Presidential Declaration Concerning Continental Shelf, June 23, 1947. United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas, UN Doc. ST/LEG/Ser.B/1, at 6 (1951). The declaration was issued by President Gabriel González Videla.
[94] Supreme Decree N° 781 of 1 August 1947.
[95] See for instance the use of the concept of "Mar Epicontinental" used in article 1 of the said Argentinian Presidential Decree N° 14708 of 11 October 1946.
[96] Treves (n 3) 11.

asserted socio-economical needs[97], while Chile expressed its purpose to protect whaling and deep-sea fisheries.[98]

In addition, in 1952, Chile, Ecuador, and Peru adopted the "Declaration on the Maritime Zone" (commonly known as the "Santiago Declaration") in which they proclaim as a norm of their international maritime policy that they each possess exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts. The Declaration was based on the need to conserve and safeguard for their people the natural resources of the maritime zones adjacent to their coasts. While some States protested the Santiago Declaration, other States started to seek the establishment of a similar maritime space focusing on natural resources.

In the fulfillment of its mandate for making recommendations to encourage the progressive development of international law and its codification,[99] the ILC started in 1956 to prepare the base for the UNCLOS I which took place in 1958. The result included four treaties: CTSCZ,[100] CCS,[101] CHS,[102] and CFCLRHS.[103] Although substantive progress on the codification of the law of the sea was achieved, they did not arrive at a consensus to determine the breadth of the territorial sea. Noteworthy, the CFCLRHS stressed the coastal State's special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea[104] and mentioned that the problems of conservation of living resources on high seas need to be solved based on international cooperation.[105]

Indeed, States were concerned about the problems of overfishing and marine pollution off their coasts.[106] Therefore, the established maritime spaces namely, territorial sea and high seas with an overlapping contiguous zone, as a result of the 1958 conventions were unable to satisfy the States' concerns. Thus, during the UNCLOS II in 1960, States attempted unsuccessfully to

[97] Last paragraph of the Preamble of the Supreme Decree N° 781 of 1947.
[98] Myron H. Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A commentary* (Volume II Center for Oceans Law and Policy University of Virginia School of Law Martinus Nijhoff Publishers 1993) 494.
[99] Article 13.1.a) of the UN Charter.
[100] Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205.
[101] Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.
[102] Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.
[103] Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285.
[104] Article 6.1 of the CFCLRHS.
[105] Second paragraph of the Preamble of the CFCLRHS.
[106] Churchill et al. (n 1) 22.

define the breadth of the territorial sea and create a fisheries zone. The formula that could not be approved contemplated a 6 nautical miles territorial sea and a 6 nautical miles fisheries zone.

From this last conference, State practice started to turn to several claims of a specific maritime zone targeting natural resources. This is the case of the "patrimonial sea" mentioned in the Santo Domingo Declaration in 1972, the "economic zone" stated as a result of the 1972 Yaoundé Regional Seminar, or the very "exclusive economic zone" proposed by Kenya to the UN Seabed Committee in the same year. Therefore, one more conference on the law of the sea had to be convened.

2.1.2. UNCLOS' negotiations

Through the UNGA Resolution 2750 C (XXV) of 1970, it was decided to convene in 1973 a conference on the law of the sea which would deal with:

> the establishment of an equitable international regime -including international machinery- for the area and the resources of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and the contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment (including, inter alia, the prevention of pollution) and scientific research.[107]

Further, by UNGA Resolution 3067 (XXVIII) of 1973, it was decided that the mandate of the said conference shall be to adopt a convention dealing with all matters relating to the law of the sea (including the topics mentioned in the previous paragraph), bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole.[108] This approach was known as the "package deal" approach which implies a deal that embraces

[107] UNGA Resolution (n 8) para. 2.
[108] UNGA Resolution (n 9) para. 3.

several matters and has to be accepted as a whole, the less favorable items along with the favorable ones.[109]

UNCLOS III (1973-1982) was a milestone in international law negotiations, not only for the substantive issues that were to be discussed but also for the rules of procedures. Those rules required that "the Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted".[110] The purpose of this method was to avoid the issue that arose at UNCLOS II when the approval of a compromise solution failed by one vote.[111] However, as the end of the conference showed, votation was required for the approval of the treaty.

Negotiations within UNCLOS III reflected an intense debate between the States that supported a *sui generis* maritime zone targeting natural resources and States that sought to maintain the freedoms of the high seas as much as possible, particularly for the juridical scope of the new maritime zone. State practice, however, substantively supported the establishment of the exclusive economic zone as presented by Kenya in 1972. Indeed, by the 1974 Caracas session of UNCLOS III, some one hundred States declared their support for the 200 nautical miles EEZ.[112] This support was also highlighted by the ICJ in the *Fisheries Jurisdiction* case[113] (1974).

By 1975, the Informal Single Negotiation Text (ISNT) already included draft articles related to the concept of EEZ. These articles did not change substantially in the Revised Single Negotiating Text (RSNT) in 1976. A thorough assessment occurred to identify the juridical nature of the EEZ, whether to be considered a new maritime zone or a part of the high seas. The Informal Composite Negotiating Text (ICNT) of July 1977 contained, with slight changes, the EEZ regime as approved in 1982 as a new maritime zone that was not high seas and had as

[109] Chambers Twentieth Century Dictionary (1983 ed) quoted in G. Plant, 'The Third United Nations Conference on the Law of the Sea and Preparatory Commission: Models for United Nations Law-Making?' (1987) 36 The International and Comparative Law Quarterly N° 3, 525, 527.
[110] United Nations, *Final Act of the Third United Nations Conference on the Law of the Sea*, UN Doc A/CONF.62/121 (27 October 1982) para. 21. Available on: https://treaties.un.org/doc/source/docs/A_CONF.62_121-E.pdf Accessed 10 December 2022.
[111] Attard (n 89) 33.
[112] Ibid, 39.
[113] *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3, para. 53 and 54.

the main purpose the targeting of natural resources.[114] The negotiation texts of UNCLOS III were the base for several claims of EEZ around the world during the 70s and 80s.[115] This gave stability to the drafting articles.

Votation was required to approve the final text of UNCLOS. The result of the votation was 130 in favor, 4 against, and 17 abstentions. It must be recalled that two delegations did not participate in the vote. The Final Act was signed on 10 December 1982, at Montego Bay, Jamaica, on behalf of 140 States and nine other entities. Notably, Peru voted in favor of the final text of UNCLOS and signed the final act of UNCLOS III.

Thus, UNCLOS III agreed to establish the EEZ whose breadth shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured,[116] and where the coastal State has sovereign rights for exploring, exploiting, conserving, and managing the natural resources, whether living or non-living, along with specific jurisdiction for certain activities in it.[117]

2.2. Legal status of the EEZ fisheries regime and customary international law

2.2.1. Rights and obligations under UNCLOS

The addressing of the UNCLOS EEZ fisheries regime necessarily means that an EEZ must have been claimed.[118] This is concluded from a *contrario sensu* lecture of article 77.3 of UNCLOS which entitles the coastal State to a continental shelf *ipso facto* and *ab initio*.[119] If an EEZ is not claimed, therefore, the water column remains high seas. This turns complex when other institutions such as the exclusive fisheries zone, fishery protection zone, ecological protection zone,[120] or even the Peruvian maritime domain have been claimed. Nonetheless, until this point, one must stress that UNCLOS recognizes the coastal State the very important right to claim an EEZ as enshrined in Part V of the treaty.

[114] See S. P. Jagota, 'Developments in the UN Conference on the law of the sea: A third world review' (1981) 3 Third World Quarterly N° 2, 287-319.
[115] Churchill et al. (n 1) 294.
[116] Article 58 of UNCLOS.
[117] Article 56 of UNCLOS.
[118] Churchill et al. (n 1) 293.
[119] *North Sea Continental Shelf case* (n 34) para. 39.
[120] Churchill et al. (n 1) 296.

UNCLOS fisheries regime in the EEZ may be understood as the group of rights and obligations that are prescribed in the treaty for the coastal State and other States regarding fishing-related activities.[121] This fisheries regime is mainly contained in Part V but includes other provisions of the treaty. Therefore, an assessment of the relevant UNCLOS provisions will be addressed as contained in selected articles. It must be noted that this information will aid to identify which rights and obligations are part of customary international law.

2.2.1.1. Coastal States' rights

The EEZ fisheries regime turns into the axis of the sovereign rights over the natural resources of the coastal State. According to article 56.1.a) of UNCLOS, in the EEZ, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. The concept of sovereign rights is not tantamount to sovereignty, indicating that the EEZ is not a part of the coastal State territory.[122] However, one may recall the well-established principle of sovereignty over natural resources, leading to conclude that sovereign rights are indeed sovereignty focused on natural resources.[123] This is compatible with the functional nature of the EEZ as reflected in the words "for the purpose of".

The sovereign rights over natural resources imply exclusivity to the coastal State, saved in certain cases as specified in articles 62.2, 69, and 70 of UNCLOS as will be addressed. These exceptions made the sovereign rights in the EEZ differ from those recognized in the continental shelf regime, where the exclusivity is understood in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.[124] In the author's view, however from a broad perspective, if an EEZ has been claimed, both regimes are similar in that if another State wants to use the natural resources within those maritime zones, it will necessarily need the consent of the coastal State which enjoys the exclusivity of those natural resources.

---

[121] See the concept of "fishing related activities" in *M/V "Virginia G"* (Panama/Guinea-Bissau), Judgments, ITLOS Reports 2014, p. 4, para. 216.
[122] Alexander Proelss, 'Article 56, Rights, jurisdiction and duties of the coastal State in the exclusive economic zone' in Alexander Proelss (ed), *United Nations Convention of the Law of the Sea: A commentary* (C.H. Beck Hart Nomos 2017) 424.
[123] According to Judge Oda, "the mode of exercise of jurisdiction is no different from that exercised by the coastal State within its territorial sea and, so far as the development of the natural resources of the sea is concerned, its competence in the Exclusive Economic Zone is equivalent to that it enjoys in the territorial sea". Dissenting opinion of Judge Oda. ICJ, Tunisia v. Libyan Arab Jamahiriya, Judgment of 24 February 1982, p. 18, para. 124.
[124] Article 77 of UNCLOS.

Concerning the scope of the sovereign rights, ITLOS has asserted in the *M/V "Virginia G"* case the following:

> The term "sovereign rights" in the view of the Tribunal encompasses all rights necessary for and connected with the exploration, exploitation, conservation, and management of the natural resources, including the right to take necessary enforcement measures.[125]

The reference to "all rights" includes jurisdiction, whether prescriptive, enforcement, or judicial. In this regard, one may consider the jurisdiction prescribed in article 56.1.b) iii) of UNCLOS contains a right of the coastal State concerning fisheries since the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.[126] In this regard, it must be highlighted that UNCLOS provides more tools to the coastal State as the one prescribed in article 211.6 where, within the framework of the competent international organization (IMO), a defined area in the EEZ may be established for the prevention of pollution from vessels concerning, among others, the utilization or the protection of natural resources.

One can also find an example of prescriptive jurisdiction of the coastal State in article 62.4 of UNCLOS when describing the laws and regulations that other States must observe if given access to the surplus of the allowable catch. In the said article, UNCLOS provides a non-exhaustive list. Then, the coastal State can take diverse conservation and management measures that have to be observed by the foreign-flagged fishing vessels. These measures must be consistent with the whole regime set by UNCLOS.

In addition, article 73 of UNCLOS prescribes that in the exercise of its sovereign rights, the coastal State can take enforcement measures as may be necessary to ensure compliance with the laws and regulations adopted. The measures can include, *inter alia*, boarding, inspection, arrest, and judicial proceedings. Those enforcement measures shall be reasonable and necessary as concluded by ITLOS in the *M/V "SAIGA" (No. 2)* case.[127]

---

[125] *M/V "Virginia G"* (n 121) para 211.
[126] *Southern Bluefin Tuna* (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, para. 70.
[127] *M/V "SAIGA"* (N° 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, para. 155.

Other additional rights of the coastal State that can be found in the UNCLOS EEZ fisheries regime are the right to prohibit, limit, or regulate more strictly the exploitation of marine mammals (article 65) and the option to avoid the application of articles 69 and 70 of UNCLOS (which deal with the access for landlocked States and geographically disadvantaged States of the surplus of the allowable catch) when their economy is overwhelmingly dependent on the exploitation of the living resources in the EEZ (article 71).

2.2.1.2. Coastal States' obligations

In the exercise of its sovereign rights over the living resources in the EEZ, the coastal State has also to observe some obligations which can be divided into duties related to conservation, utilization, cooperation, and a due regard rule. It must be noted that all of these duties are interrelated as will be shown in the following paragraphs.

Concerning the obligations of conservation of the living resources, article 61 of UNCLOS prescribes that the coastal State shall ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by over-exploitation (article 61.2). These measures, including the determination of the allowable catch (article 61.1), must be designed to maintain or restore populations of harvested species at levels that can produce the maximum sustainable yield (article 61.3); one may consider the MSY as the main conservation goal for the living resources in the EEZ[128] since it means:

> The highest theoretical equilibrium yield that can be continuously taken (on average) from a stock under existing (average) environmental conditions without affecting significantly the reproduction process.[129]

The said measures have to take into account the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such species (article 61.4). In addition, the relevant information shall be contributed to and exchanged through competent international organizations, whether subregional, regional, or global (article 61.5).

[128] Churchill et al. (n 1) 535.
[129] FAO, *FAO Technical Guidelines for Responsible Fisheries N° 4. Fisheries Management* (Rome: FAO, 1997) 7.

The utilization duties as enshrined in UNCLOS begin by stating that, without prejudice to the conservation obligations, the coastal State shall promote the objective optimum utilization of the living resources in the EEZ (article 62.1). Thus, the coastal State has to determine its capacity to harvest the living resources of the EEZ, whereby if not possible to harvest the entire total allowable catch, the coastal State has to give other States access to the surplus through agreements or other arrangements (article 62.2), taking into account articles 69 and 70, related to landlocked and geographically disadvantaged States. In addition, the coastal State is obliged to give due notice of conservation and management laws and regulations adopted as the ones erected by the commented article 62.4 (article 62.5).

Concerning the cooperation duties, UNCLOS addresses them from the species-specific approach. Thus, concerning the shared or straddling stocks (article 63) and the highly migratory stocks (article 64), the coastal State is obliged to cooperate through the appropriate international means, including conservation and optimum utilization measures. In the case of marine mammals, the coastal State shall cooperate with a view of conservation and, regarding cetaceans, work through the appropriate international organization (article 65). In the same vein, UNCLOS prescribes cooperation obligations for the coastal States regarding anadromous stocks (article 66) and catadromous stocks (article 67), particularly, when the species has migrated to waters outside its jurisdiction.

Although outside of Part V, it has been recognized that article 192 ("States must protect and preserve the marine environment") is to be applied in all maritime zones. Therefore and recalling the content of such obligations,[130] one must conclude that the coastal State must take sufficient measures to conserve the living resources and protect and preserve the marine environment. This general obligation has an intrinsic relationship with the duties already revised in the paragraphs above.

Finally, the regime includes a due regard rule. Article 56.2 poses the obligation on the coastal State to have due regard to the rights and duties of other States and act in a manner compatible with the provisions of UNCLOS when exercising its rights and performing its duties. These limits are necessary since the performance of rights and obligations cannot be intended to be

[130] See footnote 126.

absolute.[131] This obligation has its counterpart in the rights of other States in the EEZ as prescribed in article 58.1 of UNCLOS. It must be noted also that article 58.3 of UNCLOS poses the same due regard obligation to other States when exercising its rights and performing its duties in a foreign EEZ.

2.2.1.3. Other States' rights

In the EEZ, all the States enjoy, subject to the relevant provisions of UNCLOS, the freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms (article 58.1). In addition, UNCLOS prescribes that articles 88 and 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with the EEZ regime (article 58.2).

Therefore, within the fisheries regime of the EEZ, foreign-flagged fishing vessels are entitled to exercise the right of freedom of navigation. However, the coastal State has the right to observe that these vessels do not undermine its fisheries management measures.[132] This raises the challenge of whether a coastal State may be impeding the freedom of navigation if strict measures are taken. Certainly, this must be addressed on a case-by-case basis and taking into account the due regard rule applicable to the coastal State and other States; as well as other applicable international law rules as may be IMO regulations.

Following the mentioned coastal State obligation in article 62.2, UNCLOS prescribes that other States, having particular regard to landlocked and geographically disadvantaged States, have the right to participate in the exploitation of an appropriate part of the surplus of the living resources of the EEZ of the coastal State of the same subregion or region in the terms establish through bilateral, subregional, or regional agreements (articles 69 and 70).

2.2.1.4. Other States' obligations

The obligations of other States can be divided into the ones exigible when access to the surplus of the total allowable catch has been granted and in a due regard rule.

[131] Gemma Andreone, 'The Exclusive Economic Zone' in Donald R. Rothwell et al. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 165.
[132] Alexander Proelss, 'Article 58, Rights and duties of other States in the exclusive economic zone' in Alexander Proelss (ed), *United Nations Convention of the Law of the Sea: A commentary* (C.H. Beck Hart Nomos 2017) 450.

If a foreign State has been granted access to the surplus of the total allowable catch, their nationals fishing in that EEZ shall comply with the conservation measures and other terms and conditions established in the law and regulations of the coastal State (article 62.4). This represent also an obligation of the flag State in terms of effectively exercising its jurisdiction and control in administrative, technical, and social matters over ships flying its flag as prescribed in article 94. This is a due diligence obligation as concluded by ITLOS.[133]

In addition, when given access to the surplus, landlocked and geographically disadvantaged States shall not directly or indirectly transfer to third States the rights vested upon them under articles 69 and 70 (article 72).

Concerning the due regard obligation, UNCLOS mandates that other States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State (article 58.3).

Although not an obligation involving the geographical space of the EEZ of the coastal State, other States shall cooperate regarding certain living resources whose habitat includes that EEZ. This is the case of the shared and straddling stocks (article 63) and highly migratory stocks (article 64), marine mammals (article 65); anadromous stocks (article 66); and, catadromous stocks (article 67).

2.2.2. Rights and obligations that have become customary international law, particularly on the EEZ fisheries regime

Considering the identified UNCLOS rights and obligations of the coastal State and other States in the EEZ fisheries regime, this part of the work will comment on the norms that have become customary international law. As seen in the lines above, to acknowledge the identification and content of a norm that is customary international law, the two-element approach is essential, namely, the general practice and the *opinio juris*. However, due to time constraints for this research, the following lines will be focused on findings of the jurisprudence of relevant international tribunals (mainly from ICJ) and specialized doctrine, considered as subsidiary

[133] See for instance *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (SRFC), Advisory Opinion of 2 April 2015, ITLOS Reports 2015, p. 4, para. 129.

means for the determination of rules of law as prescribed by article 38.1.d) of the statute of the ICJ.

During the first years of the second half of the twentieth century and despite the valuable efforts of developing States to establish an *ad hoc* maritime zone focused on natural resources, the concept of an exclusive economic zone in international law was still some long years away.[134] Substantial progress was the establishment of fishery zones, though. Indeed, in its *Fisheries Jurisdiction* case[135] (1974), the ICJ ruled that "the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea"[136] has crystallized as customary law.

Although the ICJ stated in 1974 that the extension of that fishery zone was up to 12 nautical miles from the baselines,[137] the abundant State practice evolved into considering the 200 nautical maximum lengths and therefore a part of customary international law.[138] It must be noted that in this fishery zone the coastal State was entitled to explore, exploit, conserve and manage offshore fisheries.

The importance of this assertion lies in that, as pointed out in the *La Bretagne* arbitration, the EEZ and fishery zone "are regarded as equivalent with respect to the rights exercised therein by a coastal State over the living resources of the sea".[139] Therefore it can be argued that in so far as the coastal State rights, the fishery zone is to be "included in the exclusive economic zone concept".[140] This leads us to argue that since the institution of the EEZ has crossed the threshold to become customary international law, the essential reason for its establishment, namely, the sovereign rights for the purpose of exploration, exploitation, conservation, and management of natural resources, have followed the same path.

Within the negotiations in UNCLOS III, the 200 nautical miles EEZ got widespread recognition.[141] In this regard, the ICJ, before the adoption of UNCLOS, stressed that "the

[134] *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61, para. 70.
[135] *Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3.
[136] Ibid, para. 52.
[137] Ibid.
[138] See Attard (n 89) 30 and 287.
[139] *Dispute concerning Filleting within the Gulf of St. Laurence* (La Bretagne) (Canada/France) Decision of 17 July 1986. RIAA Volume XIX, p. 225, para. 49.
[140] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 15) para 96.
[141] Separate Opinion of Judge Jiménez de Aréchaga in *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18, para. 115.

concept of the exclusive economic zone may be regarded as part of modern international law".[142] Indeed, over 60 States claimed 200 nautical miles EEZs or exclusive fishery zones before 1982.[143] Thus, the adoption of UNCLOS in 1982 and therefore the conventional establishment of the institution of the EEZ codified an already existing norm of customary international law due to the general acceptance in the international community as reflected in widespread national practice, which was deemed as permitted (or required) by law.

Even though UNCLOS entered into force in 1994, certain jurisprudence had already ascertained the EEZ's customary nature.[144] Thus, in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case[145] (1984), a special chamber of the ICJ stated that the not entry into force of UNCLOS does not detracts from the consensus reached during the conference in several provisions of the treaty such as the one concerning the continental shelf and the exclusive economic zone, which were adopted without objections.[146] In this regard, the chamber expressed that those institutions may be regarded as consonant at present with general international law.[147]

The plenary of the ICJ took the same view in the *Continental Shelf* case[148] (1986) where it stated the following:

> It is in the Court's view incontestable that […] the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law […].[149]

In this case, the ICJ also addressed the relationship between the exclusive economic zone and the continental shelf. Thus, the ICJ expressed that "the rights enjoyed by a State over its continental shelf would also be possessed by it over the seabed and subsoil of any exclusive economic zone *which it might proclaim*"[150] (emphasis added). Therefore, concluding that both institutions belong to different regimes, the ICJ added that "although there can be a continental

[142] Ibid, para. 100.
[143] Rothwell et al. (n 71) 213.
[144] Andreone (n 131) 161.
[145] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 15).
[146] Ibid, para. 94.
[147] Ibid.
[148] *Continental Shelf* case (n 16).
[149] Ibid, para 34.
[150] Ibid, para 33.

shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf".[151]

In the author's view, this confirms that the coastal State has the customary international law right to proclaim an EEZ up to a maximum of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured as reflected in article 57 of UNCLOS. This is a right that the coastal State can decide not to exercise. In this case, in principle, the water column will remain high seas. The question remains whether other institutions such as the exclusive fishery zones or even the Peruvian maritime domain are not to be considered as high seas. State practice[152] and jurisprudence[153] (particularly for delimitation controversies) show that the treatment can be tantamount to an EEZ. Then, it can be affirmed that any claim concerning the sovereign rights for the purpose of exploration, exploitation, conservation, and management of natural resources within the 200 nautical miles limit is in conformity with customary international law and therefore the water column would not be considered high seas.

To the author's understanding, the identification of the institution of the EEZ as part of customary international law, namely the customary right to proclaim an EEZ and the sovereign rights over natural resources, still does not exhaust the analysis of which rights and obligations within the UNCLOS fisheries regime have become customary international law. During this research, no evidence has been found regarding the whole rights and obligations of the fisheries regime to be considered as part of customary international law. Therefore, some comments will be given in respect of the specific provisions mentioned in this work.

In the *Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea* case[154] (2022), the ICJ had to decide a controversy by using customary international law since one of the States was not a party to UNCLOS. In doing so, the Court stressed that "by the time UNCLOS was concluded, the concept of the exclusive economic zone had already received widespread acceptance by States".[155] Then the ICJ went also on to highlight that around 130

[151] Ibid, para 34.
[152] The ICJ in the *Gulf of Maine* case said that "after coastal States had set up exclusive 200-mile fishery zones, the situation radically altered. Third States and their nationals found themselves deprived of any right of access to the sea areas within those zones and of any position of advantage they might have been able to achieve within them […]." *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 15) para. 235.
[153] See *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, p. 38, paras. 47 and 52; *Maritime Dispute* (Peru v. Chile), Judgment, I.C.J. Reports 2014, p. 3, paras. 178 and 179.
[154] *Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea* (Nicaragua v. Colombia) Judgment I.C.J. (21 April 2022).
155 Ibid, para. 56.

States, including parties and non-parties to UNCLOS, have adopted national law declaring an EEZ.[156] While one must be aware that a law's title or even jurisdictional assertion can be indicia of the establishment of an EEZ, the historical background of this institution indicates that the core, the fishery regime, is what is referred to in these norms.

Therefore, the ICJ in the mentioned case ascertained that:

> Customary rules on the rights and duties in the exclusive economic zone of coastal States and other States are reflected in several articles of UNCLOS, including Articles 56, 58, 61, 62, and 73 […].[157]

After this, the ICJ went into developing all the mentioned articles as prescribed by UNCLOS.[158] Therefore, concerning the UNCLOS EEZ fisheries regime, the coastal State's sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, as well as the jurisdiction with regard to the protection and preservation of the marine environment, are part of the customary international law (article 56.1.a) and 56.1.b).iii)).

Recalling the historical background of the EEZ, one must have little doubt whether the sovereign rights over natural resources are customary international law. This is also supported by doctrine.[159] The prevalence of sovereign rights has been evidenced even also when assessing their compatibility with alleged historic rights over natural resources, as shown by the *South China Sea* arbitration[160] or in the mentioned *Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea* case.[161]

The coastal State also has the customary international law right to take enforcement measures as may be necessary to ensure compliance with the laws and regulations adopted in the EEZ (article 73). However, one may be aware that article 73.1 provides an open list of possible enforcement measures. Then, the scope or content of the customary right would need further

[156] Ibid.
[157] Ibid, para. 57.
[158] Ibid, paras. 57 to 63.
[159] Churchill et al. (n 1) 256; Tanaka (n 13) 284; Andreone (n 131) 162.
[160] *South China Sea Arbitration*, Philippines v. China, Award, PCA Case N° 2013-19, ICGJ 495 (PCA 2016), 12 July 2016, para. 243.
[161] *Alleged Violations* (n 153) para. 227.

to be clarified when applied. In this regard, ITLOS in the *M/V "Virginia G"* case stated that confiscation is a compatible measure in terms of article 73.1 of UNCLOS.[162]

To the knowledge of the author, there is no evidence to determine whether the coastal rights prescribed in articles 65 and 71 are part of customary international law. One must note that some marine mammals are also included in highly migratory species. However, article 65 may be considered as *lex specialis* for these stocks. In addition, the conservation and sustainable utilization of some of them are within the framework of certain international organizations, which require membership. Therefore, one may question the generality and consistency of the practice, as well as the *opinio juris*. As far as the right to avoid access to the surplus of the allowable catch as prescribed by article 71, almost inexistence practice has been evidenced to determine objectively an overwhelming economic dependence on the exploitation of living resources.[163]

Turning to the coastal State obligations, although it has been stated that it is difficult to ascertain whether, and if so to what extent, the detailed duties acquired a customary nature,[164] it is secure now to consider the conservation and utilization of the living resources in the EEZ as duties under customary international law as prescribed by UNCLOS (articles 61 and 62).

The ICJ also recalled that when exercising its sovereign rights and jurisdiction in the EEZ, the coastal State has the customary obligation to have due regard to the rights and duties of other States and shall observe its other obligations under the law of the sea (article 56.2).[165] Finally, the ICJ also stressed that "it is not contested between the Parties that all States have the obligation under customary international law to protect and preserve the marine environment". Thus, article 192 of UNCLOS reflects a customary international law duty of the coastal State.

As seen above, articles 63 and 64 imply the duty of cooperation. While UNCLOS prescribes the obligation to "seek to agree" in article 63 regarding shared and straddling stocks, it heightens the obligation to "shall cooperate" in article 64 concerning highly migratory stocks. These obligations may be understood as due diligence obligations,[166] therefore, the need to

[162] *M/V "Virginia G"* (n 121) para. 257.
[163] Professor Tanaka suggests that Iceland can be an example of this obscure provision. Tanaka (n 13) 487 and 489.
[164] Andreone (n 131) 162.
[165] *Alleged Violations* (n 153) para. 60.
[166] See for instance *Request for an Advisory Opinion* (n 133) para. 210.

reach an agreement is not required. States must negotiate in good faith as reflected in article 300 of UNCLOS. In addition, due to several State practices (including the practice of international organizations), it has been stated that they may be considered "part at least of the general principles of international law, if not of international custom".[167] Although the implementation of these provisions has raised discrepancies[168] and has been implemented by the UNFSA[169] (indicating a need for uniformity), it is acceptable to argue that these obligations are customary international law.

To the knowledge of the author, there is not enough evidence for considering obligations contained in articles 65 to 67 as customary international law. This is mainly for the specific resource which they target, leading to conclude that there is doubtfully a general practice, widespread and representative, seconded by the *opinio juris*. However, it must be noted that some authors consider the obligation to cooperate in article 65 as reflecting customary international law.[170]

The customary international law rights of other States in the EEZ are found in articles 58.1-2. As such, in a foreign EEZ, all States enjoy the freedom of navigation[171] and overflight, as well as other internationally lawful uses related to such freedoms. In the *Delimitation of maritime areas between Canada and France* award (1992), the arbitral tribunal recalled that the principle of freedom of navigation is guaranteed by article 58 of UNCLOS, "a provision that undoubtedly represents customary international law as such as the institution of the 200-mile zone itself".[172]

[167] Marion Markowski, *The International Law of EEZ Fisheries, Principles and implementation* (Europa Law Publishing 2010) 55.
[168] See, for instance, the dispute between Iceland, Faroe Islands and the European Union concerning the mackerel in James Harrison and Elisa Morgera, 'Article 63, Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it' in Alexander Proelss (ed), *United Nations Convention of the Law of the Sea: A commentary* (C.H. Beck Hart Nomos 2017) 509; or *Southern Bluefin Tuna case* (n 126) paras. 28.1.d, 29.1.d, and 90.1.e.
[169] 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 (adopted 4 August 1995, entered into force 11 December 2011) 2167 UNTS 3.
[170] See, for instance, Ted L. Mcdorman. 'Canada and Whaling: An analysis of article 65 of the law of the sea convention' (29 Ocean and Development & International Law 2, 1998) 179-194.
[171] In the *Military and Paramilitary Activities in and against Nicaragua* case, the ICJ state that "the freedom of navigation is guaranteed, first in the exclusive economic zone which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial water and on the high seas (Art. 87). *Military and Paramilitary Activities in and against Nicaragua* (n 17) para. 214.
[172] Case Concerning the delimitation of maritime areas between Canada and France. Decision of 10 June 1992. RIAA Volume XXI, p. 265, para. 88.

In addition, the ICJ stated that "the customary rules as reflected in Articles 88 to 115 of UNCLOS, and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with the regime of that zone".[173] This incompatible uses of the EEZ are related to the sovereign rights and jurisdiction of the coastal State. Finally, although it appears obvious, to exercise the customary rights contained in article 58, the exclusive economic zone must have been claimed, as the *M/V "Norstar"* case[174] shows.

Following ICJ's findings, article 62.2 of UNCLOS forms part of customary international law. Therefore, other States are to be given access to the surplus of the allowable catch when the coastal State does not have the capacity to harvest it, solely if agreements or other arrangements have been convened. This customary right also entails a particular regard for landlocked and geographically disadvantaged States to exploit the living resources of other States' EEZ (articles 69 and 70). However, information on the practical operation of articles 69 and 70 of UNCLOS seems to be scarce,[175] therefore it remains uncertain if this right and its extent have become customary international law.[176]

Other States in a foreign EEZ, when exercising their rights and performing their duties in the EEZ have the customary obligation to have due regard to the sovereign rights and jurisdiction of the coastal State in that zone (article 58.3). Customary international law obligations also include that its nationals fishing in a coastal State's exclusive economic zone shall comply with the conservation measures established in the laws and regulations adopted by the coastal State in conformity with UNCLOS (article 62.4).

In addition and as concluded by ITLOS in the *Request for Advisory Opinion Submitted to the Tribunal*[177] (2015), "the flag State is under an obligation to ensure compliance by vessels flying its flag with the relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone […] because they constitute an integral element in the protection and preservation of the marine environment".[178] Therefore, article 192 of UNCLOS reflects a customary international law obligation to other States in the EEZ.

[173] Ibid, para. 62.
[174] *M/V "Norstar"* (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 116.
[175] Churchill et al. (n 1) 452.
[176] Tanaka (n 13) 489.
[177] *Request for an Advisory Opinion* (n 133).
[178] Ibid, para. 120.

Following the position given about the coastal States' obligations under articles 63 and 64, they represent a customary international law obligation also for other States. To the knowledge of the author, there is not enough evidence for considering articles 65 to 67 and 72 contain customary international law norms.[179] The reasons for this are explained in the paragraph above when addressing the coastal States' customary rights and obligations.

[179] For article 65, see footnote 170.

PART TWO: THE PERUVIAN "MARITIME DOMAIN" AND THE UNCLOS' FISHERIES REGIME IN THE EEZ

Chapter 3: The doctrine of the "maritime domain"

3.1. Origins of the "maritime domain"

3.1.1. At a national level

3.1.1.1. The Supreme Decree N° 781

Within the context of the 1940s unilateral declarations, on 1 August 1947, with the purpose to guarantee the utilization of natural resources for its population and the country's economy, the Peruvian Supreme Decree N° 781 was issued by President José Luis Bustamante y Rivero and endorsed by Chancellor Enrique García Sayán. The said decree is a national instrument that in its first and second substantive provisions stated the following:

> To declare that the national sovereignty and jurisdiction *are extended* to the submerged continental or insular shelf adjacent to the continental or insular shores of the national territory, whatever the depth and extension of this shelf may be.
>
> To declare that the sovereignty and jurisdiction *are exercised* as well over the sea adjoining the shores of the national territory whatever its depth and in the extension necessary to reserve, protect, maintain, and utilize natural resources and wealth of any kind which may be found in or below those waters.[180] (emphasis added)

As a result of the previous declarations and through the third substantive provision, the Peruvian State reserved the right to establish the limits of the zones of control and protection of natural resources of which the seaward limit would be an imaginary parallel line to it at a distance of 200 nautical miles measured following the line of geographical parallels. It must be underscored that the fourth substantive provision of the supreme decree ended by noting that it does not affect the right to free navigation of ships of all nations according to international law.

[180] The translation of the Supreme Decree N° 781 is taken from paragraph 38 of the *Maritime Dispute* (n 153). It must be noted that it substantively differs from the translation available on DOALOS website and it does not contain the preamble.

The last paragraph of the Preamble of the Supreme Decree N° 781 stated the following:

> That, in the exercise of sovereignty and to safeguard the national economic interests, the State must set unmistakably the *maritime domain* of the nation, *within which* the protection, conservation, and vigilance of the natural wealth are *to be exercised*.[181] (emphasis added)

This is the first time that the "maritime domain" concept is mentioned in Peruvian national law. At first glance, one must note that the maritime domain is a geographical space (due to the words "within which") where the Peruvian State exercises sovereignty and jurisdiction to reserve, protect, maintain and utilize natural resources. However, to understand this institution, further assessment of the reasons behind the seaward extension of 200 nautical miles (geographical scope) and the legal aspects of the said decree are required.

3.1.1.2. Rationale for the 200 nautical miles breadth

Despite it has been said that the seaward limit of 200 nautical miles relies only on historical and political reasons,[182] the Peruvian thesis for the said distance is explained by geographical, physical, and biological characteristics that make the sea adjacent and its coast into a unique and indivisible ecosystem containing great natural wealth.[183]

The Peruvian coast which should be warm, rainy, and with exuberant vegetation due to its geographical location, is temperate, with almost no rainfall and mostly desert.[184] This is because of the presence of the Andes Mountains that go across Peru occupying several parts of its territory (impeding copious clouds that lead to severe precipitations) and, most importantly, because of the cold temperature of the sea adjacent to the coasts which in contribution with trade winds[185] produces layers of fog that drifts onto land impeding atmospheric changes that normally cause rainfall.[186]

---

[181] Translation done by the author.
[182] Churchill et al. (n 1) 257.
[183] Eduardo Ferrero Costa, 'Fundamento de la Soberanía Marítima del Perú hasta las 200 millas' (32 Derecho PUCP 1974) 38.
[184] Ibid.
[185] Ibid.
[186] National Geographic's Resource Library / Encyclopedic entry: *Desert*. Available on: https://education.nationalgeographic.org/resource/desert Accessed 6 September 2022.

Indeed, in the sea surrounding the Peruvian coast, there are a series of marine currents, which run from south to north, known as the Peruvian Current System or Humboldt Current. These currents have width variations during the year. Therefore, they can be divided into two phases: in spring and summer, the width of the current system decreases notably, reducing its width by an average of 35 to 50 nautical miles. In autumn and winter, the current system increases in width at a greater distance from the coast, which reaches approximately 200 nautical miles. These waters are cold and with a high content of mineral riches.[187]

Within the currents, the trade winds facilitate the upwelling, which is a process in which deep cold water rises towards the surface[188] because of winds that blow across the ocean surface pushing water away. This water, rich in nutrients, receives sun rays and through photosynthesis favors the existence of phytoplankton. In addition, the phytoplankton is used by zooplankton composed mainly of small crustaceans, mollusks, larvae of fish, or invertebrates in general that supports a certain population of fish and these in turn to large fish through the food chain.[189] This allows Peru to have one of the richest and most diverse seas in the world due to the abundance of living natural resources.[190]

In the autumn and winter width of the Humbolt current, scientific research proved the existence of abundant living resources, such as the case of whales, tuna, and anchovy, among others. In the case of the anchovy, scientific research has also shown that anchovy larvae were located up to a 187-mile width,[191] leading to the conclusion that shoals of anchovies reach at certain times of the year at least 200 nautical miles from the coast.[192] In this regard, anchovy represents an essential element of the Peruvian economy due to its use for direct and indirect consumption, this last one is reflected in the production of fish meals. Available statistics from 1948 to 1971 concerning the Peruvian capture of fish resources and exportations of fish products support the relevance of the anchovy to Peru,[193] for justifying and corroborating its 200 nautical miles claim back in 1947.

[187] Ferrero (n 183) 38.
[188] National Oceanic and Atmospheric Administration (NOAA) U.S. Department of Commerce: *What is upwelling?* Available on: https://oceanservice.noaa.gov/facts/upwelling.html Accessed 5 September 2022.
[189] Ferrero (n 183) 38.
[190] Supreme Decree N° 012-2019-DE, Supreme Decree that approves the Peruvian National Maritime Policy 2019 – 2030 of 20 December 2019.
[191] Tanaka (n 13) 149.
[192] Ferrero (n 183) 38.
[193] Ibid, 43-44.

In addition, that anchovy is the natural food of guano birds, whose deposit is an important fertilizer,[194] for its high content of nitrogen and phosphate.[195] Therefore, Peruvian agriculture was dependent on this fertilizer reflecting the ocean's natural resources' impact on food security and job opportunities. This also entails that the government decisions had to protect the whole identified ecosystem to guarantee that these economic activities are for the benefit of its own nationals; this is, controlling the overfishing of distant-water fishing fleets[196] and asserting that they are entitled to a natural compensation for the geography, namely the lack of a large continental shelf.[197]

That said, one must agree that the natural resources within the maritime domain are of utmost importance for Peru due to socio-economic reasons. Furthermore, based on similar reasons, some other States claimed the 200 nautical miles maritime zones such as Costa Rica (27 July 1948), El Salvador (7 September 1950), and Honduras (17 January 1951).[198]

3.1.1.3. Legal characteristics of the maritime domain claim

Concerning the legal aspects of the supreme decree, it must be underscored that it generated uncertainty as far as its scope and application. Indeed, the basic question was whether Peru claimed a 200 nautical miles territorial sea, extending its traditional 3 nautical miles, or if it was a new maritime zone with a specific mandate. Therefore, the following lines will provide relevant information regarding the different views on the maritime domain concept and the author's appreciation.

The supreme decree did not mention the institution of the territorial sea which -by that time- was already a well-established maritime zone recognized by general international law and whose principal pending issue was the determination of its length. As a matter of fact, by the

[194] Tanaka (n 13) 149; Attard (n 89) 9.
[195] Enrique García Sayán, 'La Doctrina de las 200 millas y el Derecho del Mar' (32 Derecho PUCP 1974) 15.
[196] Ann L. Hollik, 'The Origins of 200-Mile Offshore Zones' (Vol. 71, N° 3, AJIL 1977) 500. Peruvian Ambassador Juan Miguel Bákula Patiño exposed the concern of South Pacific coastal States due to the overfishing of foreign vessel to resources such as the tuna and whales. Indeed, from 1943 to 1953, tuna-clippers extracted 2,800 million of pounds, from which 2,540 million correspond to captures in the South Pacific. In addition, the case of whaling revealed that during those years the world production of whale oil was 615,500 tons, corresponding to the Antarctic and Pacific, mainly from Peru and Chile, 569,200 tons. Juan Miguel Bákula Patiño, *La imaginación creadora y el nuevo régimen jurídico del mar. Perú y Chile: ¿el desacuerdo es posible?* (Universidad del Pacífico 2008) 58-59.
[197] Tanaka (n 13) 149.
[198] Ibid.

time of the issuance of the decree, a previous supreme decree issued in November 1934 and the 1940 Regulations of National Captaincy had already acknowledged that Peru had a 3 nautical mile territorial sea.[199] Some authors agreed that the Supreme Decree N° 781 did not amend tacitly or implicitly the said national instruments.[200]

The concepts of sovereignty and jurisdiction to be exercised in the water column of the maritime domain are redundant since the latter is included in the former. Then, what should be understood by sovereignty? While classic thinkers postulated a notion of sovereignty as the absolute (or monopoly of the) power of the State derived from the decision of its population, today, the notion appears as a flexible concept that refers to the overall spectrum of actions that a State can independently take.[201] In this regard, one may talk of territorial sovereignty[202] as the first concept, while the second may represent a general notion of sovereignty, such as sovereignty over natural resources as used by the United Nations.[203]

In 1955, when asked if the Supreme Decree N° 781 was opposed to the Truman Proclamation (fisheries), President Bustamante y Rivero answered negatively. He stated that the US proclamation declared conservation and protection zones. Then, he asked, "are not the conservation and protection measures, the exercise of acts of authority such as the vigilance and control, or the administrative or penal jurisdiction, intrinsic attributions of sovereignty?"[204] This idea was addressed by the Peruvian Professor Alberto Ulloa Sotomayor, who called it "modal sovereignty", a notion which specifically targets on natural resources.[205]

Following the above concepts of sovereignty and jurisdiction, one must note a subtle but substantial difference between the first and second substantive paragraphs in the supreme decree (see emphasis added). While the first paragraph states that sovereignty and jurisdiction "are extended" to the continental shelf, the second paragraph prescribed that the said

[199] Juan Miguel Bákula Patiño, 'El Decreto de 1° de Agosto de 1947: Elogio y elegía' (109 Revista Peruana de Derecho Internacional 1997), 68.
[200] Ibid, 68-69.
[201] Within the context, Gilbert Gidel asserted that "Everyone here understands that sovereignty represents the set of competencies exercised under the base of international law"; quoted by Bákula (n 199) 66.
[202] See *Island of Palmas case* (Netherlands, USA). Decision of 4 April 1928. RIAA Volume II, p. 829-871.
[203] See United Nations General Assembly Resolution 1314 (XIII), *Recommendations concerning international respect for the right of peoples and nations to self-determination* (12 December 1958); or United Nations General Assembly Resolution 1803 (XVII), Permanent sovereignty over natural resources (14 December 1962); among others.
[204] José Luis Bustamante y Rivero, *Las Nuevas Concepciones Jurídica sobre el Alcance del Mar Territorial (Exposición de motivos del decreto supremo expedido por el Gobierno del Perú el 1° de agosto de 1947)* (Tipográfica Peruana, 1955) 6.
[205] Antonio Belaunde Moreyra, 'Categorías jurídico-conceptuales en el Derecho del Mar' (109 Revista Peruana de Derecho Internacional 1997) 98.

sovereignty and jurisdiction "are exercised" on the water column. The extension must be understood as a physical prolongation, while the exercise is a conceptual amplification (not a physical prolongation). In other words, the latter refers to the necessary competencies to fulfill the purpose of reserving, protecting, maintaining, and utilizing the natural resources and wealth of that water column.[206] This is confirmed by the last words of the quoted last paragraph of the Preamble of the decree ("to be exercised").

Finally, the supreme decree unmistakably states that it does not impede freedom of navigation as recognized by international law. As known by those years,[207] the innocent passage identified the territorial sea. Therefore, the supreme decree itself does not refer to a territorial sea. This, however, must be contrasted to the "Declaration on the Maritime Zone",[208] better known as the "Santiago Declaration", which used the term "innocent and inoffensive passage", as will be seen later.

The Supreme Decree N° 781 was protested by some States like Germany, the United Kingdom, and the United States.[209] In its protest note, the United States underscored that the principles of the initiatives presented by Peru and Chile differ considerably from the principles underlying the United States proclamations and thus appear to depart from the generally adopted principles of international law.[210] In addition, the protest was accompanied by particular actions -mostly from distant-water fishing fleets- that sought to ignore the establishment of the Peruvian maritime domain up to 200 nautical miles.

Even though the implementation of the supreme decree led to harsh political struggles, the Peruvian Government stood firm in its position and promoted new instruments in that regard, such as Law N° 11780,[211] the Petroleum Law which article 14 established that the Peruvian continental shelf extends up to a limit of 200 nautical miles measures from the baselines of the coast; as well as the Santiago Declaration which constitutes a political declaration.

[206] Bákula (n 199) 65. See Domingo García Belaunde, 'Teoría y Práctica de la Constitución Peruana' (Lima: Ediciones Justo Valenzuela) 160.
[207] See, for instance, *Corfu Channel case*, Judgment of April 9th, 1949, I.C.J. Reports 1949, p.4, 30 - 33.
[208] Declaration on the Maritime Zone (adopted 18 August 1952, entered into force 18 August 1952) 1006 UNTS 326.
[209] Ashley Roach and Robert W. Smith, *Excessive maritime claims* (3rd Edition, Martinus Nijhoff Publishers, 2012) 146.
[210] Bákula (n 196) 58-59.
[211] Law N° 11780 of 12 March 1952, Petroleum Law, repealing Laws N° 4452, 5839, 8527, 9485 and 10570. Available on: https://docs.peru.justia.com/federales/leyes/11780-mar-12-1952.pdf Accessed 6 September 2022.

Given the presented information, one must conclude that the 200 nautical miles distance was established due to geographical, physical, and biological reasons. In addition, the socio-economic impact of the sea adjacent to the Peruvian population made it critical for taking actions to reserve, protect, maintain, and utilize natural resources and wealth of any kind which may be found in or below those waters. The lines above prove that there was no clear intention to extend the territorial sea but to establish a maritime zone for specific purposes. Thus the exercise of sovereignty and jurisdiction was required for those purposes. In addition, the freedom of navigation must be a keystone argument of this position.

Notwithstanding this, in Peru, two opposite thoughts revealed that for some persons the maritime domain concept was equivalent to a 200 nautical miles territorial sea, while the other group supported that the maritime domain was a new maritime zone targeting natural resources. The first group was named "territorialists", while the second was named "zonists". It must be noted that in several cases the territorialists posed arguments *ad verecundiam* since important authorities -biased by an extreme nationalism view- chose the extended territorial sea, rather than substantive legal assessments.

Remarkably and as will be mentioned later, the maritime domain concept was tacitly included in a space named "maritime zone" by the Santiago Declaration. Therefore, an assessment of the impact of the doctrine of the maritime domain at a regional level will be done to understand its internationalization.

3.1.2. At a regional level

3.1.2.1. The 1952 Santiago Declaration

Within the context of the "First Conference on the exploitation and conservation of the marine resources of the South Pacific" in 1952, Chile, Ecuador, and Peru signed the "Santiago Declaration".[212] Despite the term "declaration", the international instrument constitutes a treaty that was ratified by Chile in 1954, and Ecuador, and Peru in 1955.[213] In addition, the declaration was registered in the UN Secretariat in 1976.

[212] See footnote 208.
[213] Colombia adhered to the treaty in 1980.

The Preamble of the Santiago Declaration states the following:

1. Governments have the obligation to ensure for their people the necessary conditions of subsistence and to provide them with the resources for their *economic development*.
2. Consequently, they are responsible for the *conservation and protection of their natural resources in order to secure the best possible advantages for their respective countries.*
3. Thus, it is also their *duty to prevent any exploitation of these resources*, beyond the scope of their jurisdiction, which endangers the existence, integrity, and conservation of these resources to the detriment of the peoples who, because of their geographical situation, possess irreplaceable means of subsistence and vital economic resources in their seas. (emphasis added)

Next, the substantive part of the declaration prescribes the following:

I. The *geological and biological factors* which determine the existence, conservation, and development of marine fauna and flora in the waters along the coasts of the countries making the Declaration are such that the *former extension of the territorial sea and the contiguous are inadequate for the purposes of the conservation, development and exploitation of these resources*, to which the coastal countries are entitled.

II. In the light of these circumstances, the Governments of Chile, Ecuador and Peru proclaim as a norm of their *international maritime policy* that they each possess *exclusive sovereignty and jurisdiction* over the sea along the coasts of their respective countries to a *minimum distance of 200 nautical miles from these coasts.*

III. The exclusive jurisdiction and sovereignty over this maritime zone shall also encompass *exclusive sovereignty and jurisdiction* over the sea-bed and the subsoil thereof.

[…]

V. This declaration shall be without prejudice to the necessary limitations to the exercise of sovereignty and jurisdiction established under international law to allow *innocent and inoffensive passage* through the area indicated for ships of all nations.

[…]. (emphasis added)

Taking into account the highlighted part of the declaration, the rationale and the navigational issue must be addressed.

3.1.2.2. Rationale for the Declaration

It was the first time that three States collectively proclaimed sovereignty and jurisdiction over a maritime zone to a minimum distance of 200 nautical miles from their coasts. From the legal point of view, although, it has been argued that this declaration challenged the international law of the sea of that time. One may consider that the purpose was to start a process that, in the wishes of Chile, Ecuador and Peru, would eventually lead to the formation of new customary international law.[214] Moreover, from a political point of view, the declaration may be taken as a counterweight from these Latin American States against the major maritime powers.[215] Above all, one must highlight that the main purpose of the declaration was targeting the natural resources of the adjacent sea.

In the context of the said conference, the three States also made a joint declaration on the problems of fisheries in the South Pacific[216] stressing their concern for the lack of conservation measures against the threads to the natural resources within the maritime zone under their jurisdiction and recommending, among others, the coordination of scientific research and the issuance of fishing permits only when the fishing activities are not in detriment of the targeted species.

The Preamble of the Santiago Declaration and the joint declaration assimilate the motivations supporting the issuance of the Supreme Decree N° 781; these are the socioeconomic needs and the consequential obligation of the State to conserve and protect natural resources. The declaration also recognizes that there are geological and biological factors that challenge the traditional extension of the well-established territorial sea and the contiguous zone to conserve and protect natural resources. As seen above, in sustaining its unilateral declarations, each State presented the specific issue that led it to claim the extension of jurisdiction toward the sea.

[214] Treves (n 3) 12.
[215] Jorge A. Vargas, *Mexico and the Law of the Sea: Contributions and promises* (Martinus Nijhoff Publishers 2011) 139.
[216] Declaración Conjunta Relativa a los problemas de la pesquería en el Pacífico Sur (Santiago, 18 de agosto de 1952). Available on: http://cpps.dyndns.info/consulta/documentos/legal/declaraciones/declarac_conjunta_pesq_pacif_sur_1952.pdf Accessed on 6 September 2022.

Therefore, the geographical, physical, and biological reasons exposed by Peru fits with this reasoning of the declaration.

On commenting upon the argument of natural compensation as reflected in the declaration, the Peruvian Government stressed that many countries have a broad submarine zone as a result of prehistoric geological upheavals and others have none.[217] Therefore, considering the natural resources that can be found in broad continental shelves, the impact on the economic progress[218] of States without these broad shelves would be critical. Then, even though this idea is not the sole basis for the Santiago Declaration, it is one of the most solid bases vis-à-vis other States and one that cannot be ignored.[219]

Notably, from the very title of the declaration, the States called it a "maritime zone", comprising the water column, seabed, and subsoil where they exercise exclusive jurisdiction and sovereignty. Thus, although there was no mention of the concept of the maritime domain, the purpose and the competencies (jurisdiction and sovereignty) of the declaration were the same as those established and pursued by the Supreme Decree N° 781, save for the inclusion of the word "exclusive". This supports the idea that the declaration followed the school of thought erected by the unilateral declarations of 1947.

The declaration did not require the three States to issue national law for its implementation,[220] though, during the conference it was recommended to issue national law to establish conservation measures for the natural resources within their jurisdiction. Therefore, it can be asserted that the declaration did not seek the establishment of an extended territorial sea, instead, it created a maritime zone with specific purposes.

3.1.2.3. Navigation issues in the Declaration

Though, one aspect that must be commented on is the navigation provision. The Santiago Declaration prescribes that it shall be without prejudice to the necessary limitations to the exercise of sovereignty and jurisdiction established under international law to allow innocent and inoffensive passage through the area indicated for ships of all nations. As commented

[217] *Records and Documents of the Third Meeting of the Inter-American Council of Jurists* (1956), 34, in Attard (n 89) 8.
[218] Alberto Ulloa, *Derecho Internacional Público* (4ta Edición, Volumen I, Ediciones Iberoamericanas 1957) 565.
[219] Attard (n 89) 8.
[220] Bákula (n 196) 61.

above, the institution of the innocent passage describes the existence of the territorial sea, therefore, some States interpreted the maritime zone as amounting to an extension of the territorial sea to 200 nautical miles.[221] The terms "exclusive sovereignty and jurisdiction" also supported this statement.

Then, one must weigh the arguments supporting the specific purposes of this new maritime zone against the navigations rights of third States to clarify the existence of an extended territorial sea. In the author's view, the emphasis allocated to the conservation and protection of natural resources and the background of the said declaration are critical factors to decant for the establishment of an *ad hoc* maritime zone. Furthermore, South Pacific State practice reveals that their supreme purpose in the application of the declaration was targeted to the natural resources on the sea adjacent to their coasts, as is reflected in the 1954 Agreements,[222] namely:

- ✓ Agreement relating to the issue of permits for the exploitation of the maritime resources of the South Pacific.
- ✓ The Complementary Convention to the 1952 Santiago Declaration.
- ✓ The Agreement relating to Measures of Supervision and Control of Maritime Zones of the Signatory Countries.
- ✓ The Agreement related to a Special Maritime Frontier Zone.

Following the above assessment, the 1947 unilateral declarations guided the motivations and substantive content of the Santiago Declaration. That said, one must highlight the relevance of the doctrine of the maritime domain as established by the Supreme Decree N° 781 in giving solid ground to the proclamation of a maritime zone devoted to the conservation and utilization of natural resources. This is, in the author's view, the internationalization of the maritime domain concept as a maritime zone for specific purposes and distant from a territorial sea claim. The following lines will address the maritime domain concept in the Peruvian constitutions and relevant national law, as well as further developments in the understanding of the said concept.

[221] Nordquist (n 98) 494.
[222] All of them were adopted on 4 December 1954 and are integral part of the agreements reached at the Conference on the exploitation and conservation of the marine resources of the South Pacific in 1952. Peru approved the said treaties by Legislative Resolution N° 12305 of 10 May 1955. See Maritime Dispute (n 153) paras. 71 to 85.

3.2. The debate and development of the doctrine of "maritime domain"

3.2.1. The Peruvian constitutions and other relevant national legislation

As international law of the sea was being developed,[223] there was an evident need to establish further maritime zones besides the classic territorial sea and high seas, including their maximum length. This was the case, for instance, of the contiguous zone in Article 24.2 of the CTSCZ (1958), as a result of UNCLOS I, or the almost achieved territorial sea and fisheries zone, of 6 nautical miles each, in UNCLOS II (1960). Thus, the establishment of a *sui generis* zone for the conservation and utilization of natural resources came through different names such as fisheries zone, patrimonial sea, economic zone, and exclusive economic zone; of which the last was generally accepted by States in UNCLOS III (1973-1982).

3.2.1.1. National debate leading up to UNCLOS

Within the context of UNCLOS III, the Peruvian delegation did not receive instructions for supporting a 200 nautical miles territorial sea.[224] Instead, they supported the establishment of a maritime zone exclusively for the conservation and utilization of natural resources. During the late 1970s, in Peru, however, the debate was at its most critical point concerning the juridical nature of the maritime domain, finding its height in the proximate constitutional debates.

Indeed, the 1978-1979 debate for a new Peruvian constitution was the forum for the exchange of views regarding the topic of the juridical nature of the 200 nautical miles maritime domain. As mentioned before, one view supported a 200 nautical mile territorial sea (territorialists), while the other supported a maritime zone for exclusive purposes, such as the conservation and utilization of natural resources (zonists).

Article 4 of the Rules of the Constituent Assembly of 1978 stated the following:

[223] See for instance the *Fisheries case* (n 71) 116; see also the *Fisheries Jurisdiction case* (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 175.
[224] Bákula (n 199) 86.

> The Constituent Assembly will function regularly in the Legislative Palace and, if the Plenary agrees, it may meet anywhere in the territory of the Republic, which includes the *200 miles of its territorial sea*. (emphasis added)

The relevant national law of those times was of utmost importance for the said debate, although there was no uniformity in the terminology used. The 1973 General Customs Law[225] used the concept of "jurisdictional waters" in articles 4 and 52. The 1978 Gold Metallic Mining Law[226] along with the 1979 Economic and Financial Decentralization[227] used the concept of "maritime zone of 200 nautical miles" in article 4. h) and its annex, respectively.[228] One must note, however, that there was the secret 1961 Law of the Navy[229] that was never published which mentioned a "200 nautical miles territorial sea". This law was repealed by the 1980 Organic Law of the Ministry of Navy[230] which did not mention the said territorial sea concept.

The constitutional debate brought to the table the majority of legal assessments presented in this work. Therefore, drafters, by majority vote, dismissed the option of including the term territorial sea in the 1979 Peruvian Constitution.[231] Instead, aware of the developments in UNCLOS III, they chose a flexible provision, preparing for future accession to UNCLOS and resembling the Supreme Decree N° 781 as for the name of the said maritime zone:

> Article 98.- The maritime domain of the State comprises the sea adjacent to its coasts, as well as its sea bed and subsoil up to a distance of two hundred nautical miles measured from the baselines established by law. In its maritime domain, Peru *exercises* sovereignty and jurisdiction, without prejudice to the freedom of international communications, pursuant to the law and the treaties ratified by the Republic. (emphasis added)

Article 98 of the 1979 Peruvian Constitution confirms that the maritime domain is the name of the Peruvian geographical maritime zone, including the water column and the seabed and

[225] Law Decree N° 20165 of 2 October 1972.
[226] Law Decree N° 22178 of 9 May 1978.
[227] Law Decree N° 22836 of 26 December 1979.
[228] See García (n 206) 163.
[229] Law N° 13508 of 6 February 1961.
[230] Law Decree N° 23088 of 11 June 1980.
[231] Domingo García Belaunde, *Constitución y Dominio Marítimo* (Instituto Iberoamericano de Derecho Constitucional 2002) 15.

subsoil up to a distance of 200 nautical miles.[232] Notably, when referring to sovereignty and jurisdiction, the quoted provision used the term "exercises", omitting the term "extends" as prescribed in the supreme decree. Furthermore, it reiterated the respect for freedom of navigation, pursuant to the law and the treaties ratified by the Republic.

The President of the 1978-1979 Constituent Assembly's Principal Commission declared that the "State Constitution has adopted, with great prudence and realism, a flexible formula on our marine space".[233] Indeed, the last part of the provision must be understood as leaving a clear path for Peru to ratify UNCLOS since then, the said sovereignty and jurisdiction would be applied according to a ratified treaty.

Peru voted in favor of the final text of UNCLOS and signed the final act of UNCLOS III. These actions were criticized by a certain part of the population. Even though the 1979 Constitution had a clear provision regarding its flexibility towards the end of UNCLOS III,[234] the conflict between territorialists and zonists prevented the Government to ratify UNCLOS, arguing that there was a need for further assessment of the treaty. Notwithstanding the territorialists opposition to an EEZ as an *ad hoc* maritime zone, it must be noted that by this time, many coastal States have already claimed an EEZ.

3.2.1.2. Amendments Post UNCLOS

The current 1993 Peruvian Constitution took the same draft and included it without major changes in Article 54. However, this time drafters decided to include an overall provision concerning the geographically territorial unity and its competencies within the air space:

> Article 54.- The territory of the Republic is inalienable and inviolable. It includes the soil, the subsoil, the maritime domain, and the superjacent airspace.

[232] Further, by Law N° 23856 of 24 May 1984, the Peruvian Maritime Domain was called as "Mar de Grau". There was no mention about the territorial sea.
[233] Luis Alberto Sánchez: 'Sobre las 200 millas', Article published in Peruvian Journal Expresso of 23 October, p.15, in Reply of the Government of Peru in the context of the *Maritime Dispute* case (Vol. I, 9 November 2010) p. 10, para. 20.
[234] García (n 231) 16-17.

> The maritime domain of the State comprises the sea adjacent to its coasts, as well as its sea bed and subsoil up to a distance of two hundred nautical miles measured from the baselines established by law.
>
> In its maritime domain, the State *exercises* sovereignty and jurisdiction, without prejudice to the freedom of international communications, pursuant to the law and the treaties ratified by the State.
>
> The State exercises sovereignty and jurisdiction over the airspace above its territory and adjacent sea up to the limit of two hundred nautical miles, without prejudice to the freedom of international communications, pursuant to the law and the treaties ratified by the State. (emphasis added)

One must agree that this drafting -at least its first paragraph- does not aid in the purpose of sustaining that the maritime domain is not equivalent to a territorial sea. Still, the overall view of the national law issued as a result of the 1993 Constitution, using the term "jurisdictional waters" as an equivalent of the maritime domain, and the further developments of this constitutional provision, clarify the juridical nature of the maritime domain. Indeed, there was no national law issued mentioning that the maritime domain is tantamount to a territorial sea.[235] In this respect, one can see, for instance, the 2005 Peruvian Maritime Domain Baselines Law[236] or the 2012 Legislative Decree that regulates the strengthening of the Armed Forces in the competencies of the National Maritime Authority - General Directorate of Captaincies and Coastguards.[237]

On commenting on the mentioned article 54 of the Constitution, an author has stated that the maritime domain is not a geographical space but a juridical relationship that refers to the State's capacity to exercise its sovereignty and jurisdiction. In addition, this author has affirmed that the Constitution does not specify a unique space.[238] To the understanding of the author of this

[235] Special assessment needs the article 71 of the Supreme Decree N° 011-2006-ED, Regulation of the General Law of the Cultural Heritage of the Nation, which prescribes: "'Underwater cultural heritage' are all those goods that have the importance, value, and meaning referred to in articles II and III of the Preliminary Title of the Law, that are submerged under water, be it the Peruvian territorial sea, the lacustrine spaces, riverside and other aquatic areas of the national territory, partially or totally, periodically or continuously, for at least 50 years […]." The hierarchy of the norm is less than a law and the constitution, therefore, it is incompatible with the current national law and must be amended.
[236] Law N° 28621 of 3 November 2005.
[237] Legislative Decree N° 1147 of 10 December 2012.
[238] Speech of Ambassador Manuel Rodríguez Cuadros in virtual round table named "¿Debe el Perú ratificar la Convención del Mar, luego del Fallo de la Haya?" organized by Instituto Latinoamericano de Derecho Internacional y Relaciones

work, the geographical space in article 54 is evidenced by the words “comprises” and “in its” in the second and third paragraphs, respectively. Furthermore, in its 2009 memorial presented to the ICJ within the context of the *Maritime Dispute* case, Peru stated that the maritime domain is in line with the geographical extension of the EEZ.[239] This assertion must lead us to conclude also that this geographical space does not consider the internal waters as recognized by international law. Regarding the juridical relationship, it is inevitable to agree since the background of the maritime domain demonstrates that the term “exercises” sovereignty, and jurisdiction was chosen to target this capacity.

By the year of approval of the current Peruvian Constitution (1993), UNCLOS was already adopted (and therefore the EEZ was established) (1982), and only one year after, it entered into force (1994). In addition, by this time the EEZ was already considered part of the customary international law. Thus, the concept of sovereignty and jurisdiction as proposed by the Supreme Decree N° 781 and reflected in the said constitution was accepted in the regime of the EEZ as the term “sovereign rights and jurisdiction”,[240] targeting natural resources and accepting the freedom of navigation. The acceptance of the EEZ is considered a victory for the South Pacific Latin American States.[241] For all this, when drafting its current constitution, one must agree that Peru had a careful observance of the contemporary international law of the sea recently approved.

3.2.2. Further developments

The content and interpretation of the maritime domain doctrine as enshrined in article 54 of the 1993 Constitution had been developed by certain documents such as jurisprudence, unilateral actions, and a report of the UN Secretary-General, leaving no doubt that it is a maritime zone compatible with UNCLOS, and clarifying that Peru does not claim a 200 nautical miles territorial sea.

Internacionales (ILADIR), 10 July 2020. Available on: https://www.facebook.com/188394013828/videos/1151823548537317 Accessed 3 November 2022.

[239] See footnote 252.

[240] See Article 56 of UNCLOS.

[241] See United Nations, *Letter dated 28 April 1982 from the representatives of Chile, Colombia, Ecuador and Peru to the President of the Conference*, UN Doc A/CONF.62/L.143 (29 April 1982). Available on: https://digitallibrary.un.org/record/30069 Accessed 3 November 2022.

In its 1998 report on oceans and the law of the sea, the UN Secretary-General made a summary of national claims to maritime zones stating the following:

> One Latin American State, a non-party to the Convention, claims a single 200-nautical-mile area called "maritime domain" expressly recognizing freedoms of navigation and overflight beyond 12 miles. For this reason, the maritime area of that State is listed in a separate category under "others" instead of being classified as a territorial sea extending beyond 12 nautical miles.[242]

As evidence, the report emphasizes that the maritime domain concept is not comparable to the territorial sea due to its respect for the freedom of international communications,[243] beyond the 12 nautical miles.

Convinced by the flexibility of the concept of the maritime domain, in 2001 the Executive Power through his Excellency Ministry of Foreign Affairs, Ambassador Javier Pérez de Cuéllar, submitted for consideration of the Congress of the Republic the approval of UNCLOS and the Part XI Agreement.[244] Within the Peruvian Congress, in 2004 the Foreign Affairs Commission approved the request and recommended that for adherence to the treaty there must be a national *referendum* due to its alleged incompatibility with the Constitution.[245]

Indeed, according to some views inside the Congress, the fact that article 54 of the 1993 Constitution falls into Chapter I "State, nation and territory" of Title II "State and nation" means that the maritime domain is the territory of the State and it is not compatible with the EEZ regime. To the author's understanding, this is a methodology matter in which the drafting technique used reflects the unity of the Peruvian geographical space. This is why the maritime domain and the superjacent airspace in the same article 54 are subject to the freedom of international communications, pursuant to the law and the treaties ratified by the State, including the customary international law.

---

[242] United Nations General Assembly, 53rd Session, *Oceans and the Law of the Sea, Report of the Secretary-General*, UN Doc A/53/456 (5 October 1998) para. 99.
[243] Reply of the Government of Peru in the context of the *Maritime Dispute* case (Vol. I, 9 November 2010) p. 11, para. 22.
[244] Document OF RE (TRA) N° 3-0/74 2001 received by the Congress on 31 May 2001.
[245] Dictamen recaído en el Proyecto de Resolución Legislativa N° 813/2001-CR, que propone aprobar la adhesión del Perú a la Convención de las Naciones Unidas sobre el Derecho del Mar y el Acuerdo Relativo a la Aplicación de la Parte XI de dicha Convención.

In 2006, while commenting on the concept of freedom of international communications in article 54 of the 1993 Constitution, the Constitutional Tribunal, supreme interpreter of the constitution, stated that the *ius communicationis* constitutes a principle of public International Law,[246] as affirmed by the International Court of Justice in the *Corfu Channel Case* (United Kingdom v. Albania).[247] In this regard, the Constitutional Tribunal argued that the principle of freedom of international communications is manifested in the innocent passage through the territorial sea,[248] the freedom of navigation, overflight, and laying of submarine cables in the exclusive economic zone,[249] and in the very principle of freedom of the high seas.[250]

One may note, however, that the innocent passage is not tantamount to freedom of navigation. Although the Constitutional Tribunal suggested that both institutions are subsumed in the principle of international communications, they are exercised in different maritime zones, namely, territorial sea (or internal waters by article 8.2 of UNCLOS) for innocent passage, and EEZ and high seas for freedom of navigation. The challenge, in this case, is that Peru claims a single maritime space. Therefore, further clarification on this issue is needed, mainly, if Peru has implemented the institution of the innocent passage, which constitutes customary international law.[251]

Some years later in 2009, within the context of the delimitation process with Chile in the ICJ, the Peruvian memorial included in its allegations that, with respect to the water column:

> Peru has consistently claimed an exclusive maritime domain extending to a distance of 200 nautical miles from its baselines, which is in line with the geographical extension and the purpose of the institution of the EEZ as set forth in Article 56 of the 1982 Convention on the Law of the Sea.[252]

This indicates that the maritime domain is indeed a maritime zone with a geographical perspective.

[246] Judgment of the Constitutional Tribunal of Peru of 20 January 2006. Exp. N° 2689-2004-AA/TC (Asunto EMERGIA S.A.), para. 3.
[247] *Corfu Channel Case* (n 207) 22.
[248] Constitutional Tribunal (n 246) para. 4.
[249] Ibid, para. 5.
[250] Ibid, para. 6.
[251] *Military and Paramilitary Activities in and against Nicaragua* (n 17) para. 214.
[252] Memorial of the Government of Peru in the context of the *Maritime Dispute* case (Vol. I, 20 March 2009) p. 64, para. 3.10.

In addition, in 2012, the Peruvian Government made statements supporting that Peru's 1993 Constitution, its internal law, and practice are in full conformity with the contemporary law of the sea.[253] Further, it was stated that the "maritime domain" is applied in a manner consistent with the maritime zones as prescribed by UNCLOS. Thus, in its judgment of 27 March 2014, the ICJ stated the following:

> […] Peru's Agent formally declared on behalf of his Government that "[t]he term 'maritime domain' used in [Peru's] Constitution is applied in a manner consistent with the maritime zones set out in the 1982 Convention". *The Court takes note of this declaration which expresses a formal undertaking by Peru*.[254] (emphasis added)

The ICJ made clear that the declaration of Peru's Agent constituted a unilateral act,[255] by which Peru bound itself to apply in its "maritime domain" the customary international law of the sea, as reflected in UNCLOS. Therefore, the concepts of sovereignty and jurisdiction that appear in the 1993 Peruvian Constitution are to be understood under this source of international law as reflected in the "Constitution for the Oceans".

To the author's understanding, this is the decisive reason why the dichotomy of thoughts between the territorialists and zonists came to an end. Indeed, from now on, the Peruvian Government is bound by this unilateral act, leaving no doubt to the international community that the maritime domain is not a claim for a 200 nautical miles territorial sea, but instead it represents a *sui generis* maritime zone compatible with UNCLOS as far as those provisions that reflect customary international law.

Furthermore and as Judge *ad hoc* Orrego Vicuña pointed out:

> Had the "maritime domain" been considered a territorial sea claim, the Court would have had no alternative but to declare Peru's Application inadmissible, since it cannot proceed to delimitate maritime areas that area in breach of the contemporary law of the sea, as the delimitation of a 200-nautical-mile territorial sea clearly is.[256]

[253] CR 2012/27, Public sitting held on Monday 3 December 2012, at 3 p.m, at the Peace Palace, President Tomka presiding, in the case concerning the Maritime Dispute (Peru v. Chile), p. 22, para. 26.
[254] *Maritime Dispute* (n 153) para. 178.
[255] See *Nuclear Tests* (Australia v. France), Judgment, I.C.J. Reports 1974, p. 253, para. 43-44 and 51.
[256] Separate, partly concurring and partly dissenting, opinion of Judge *Ad Hoc* Orrego Vicuña, *Maritime Dispute* (n 153), p. 128, para. 10.

Peru corroborated its position in its instrument of ratification to the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean:[257]

> […] Equally, given that Peru is not a party to the United Nations Convention on the Law of the Sea of 10 December 1982 or 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 of 1995, *Peru wishes to emphasize that those rules are applicable in so far as they form part of customary international law or reflect general principles of law.*[258] (emphasis added)

Concerning international instruments, either multilateral or bilateral, Peru is a State party to several treaties which were adopted under the umbrella of UNCLOS provisions and even mentioned UNCLOS in the Preamble or its substantive provisions.[259] In addition, Peru has shown its support for non-binding international instruments which reflect UNCLOS provisions.[260] This can be considered as a confirmation of the *opinio juris* of Peru regarding customary international law reflected in UNCLOS. As a corollary of this international perspective, Peru currently is actively participating in the negotiations of the international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction which would become the third implementing agreement to the Convention.

Finally, by Supreme Decree N° 012-2019-DE of 20 December 2019, the Peruvian Government issued the National Maritime Policy 2019-2030. While describing the reasons for issuing this national policy, it was stated that the "lack of national consensus on certain matters of the sea has not allowed Peru to date to participate in the main oceanic regime constituted by the United Nations Convention on the Law of the Sea (UNCLOS)". In recognition of this reality, the

[257] Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (adopted 14 November 2009, entered into force 24 August 2012) 2899 UNTS 211.
[258] Status of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFMO). Available on: https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/convention-on-the-conservation-and-management-of-high-seas-fishery-resources-in-the-south-pacific-ocean-sprfmo/#eight Accessed on 15 July 2022.
[259] This is, for instance, the case of the Agreement on the Conservation of Albatrosses and Petrels approved by Legislative Resolution N° 28281 of 24 June 2004, ratified by Supreme Decree N° 011-2005-RE of 26 January 2005, and entered into force for Peru 1 August 2005 (see article XIII).
[260] See, for instance, the Code of Conduct for Responsible Fisheries, Rome, FAO, 1995. 41 p.

priority objective N° 1 of the National Maritime Policy is to "strengthen the influence of Peru in international maritime affairs".

As one moves forward to today's State practice, it must be noted that the maritime domain concept is not an unused or strange term anymore, though, far from what it means to Peru. Indeed, within the framework of the IMO, the IAMSAR Manual introduced the term 'maritime domain awareness' (MDA) meaning "the effective understanding of any activity associated with the maritime environment that could impact upon the security, safety, economy, or environment".[261]

The goal of MDA is to develop a shared understanding of developments and threats at sea.[262] In this context, States such as the United States[263] or the United Kingdom[264] have defined the "maritime domain" as the following:

> All areas and things of, on, under, relating to, adjacent to, or bordering on a sea, ocean, or other navigable waterways, including all maritime-related activities, infrastructure, people, cargo, vessels, and other conveyances.

The term maritime domain is now used as a security-related concept that goes beyond a geographical perspective. Furthermore, the European Union stated that there is not yet an agreed definition of the maritime domain, however, the EU maritime domain is commonly referred to as the water under the sovereignty and jurisdiction of the EU Member States (in most cases up until a 200 nautical miles EEZ) under UNCLOS, including maritime surveillance activities carried out in other maritime areas where the EU has security interests.[265] This must call Peru's attention to favor legal certainty on this contemporary use of the term in maritime security.

---

[261] IMO and ICAO, International Aeronautical and Maritime Search and Rescue Manual (IAMSAR Manual), (Vol. I, 10th Edition, 2016). Glossary, xii.
[262] See Christian Bueger, 'From Dusk to Dawn? Maritime Domain Awareness in Southeast Asia' (Contemporary Southeast Asia Vol. 37, N° 2, 2015) 157-182.
[263] US National Security Presidential Directive 41/Homeland Security Presidential Directive 13 (NSPD-41/HSPD-13).
[264] Presented to Parliament by the Secretary of State for Transport by Command of Her Majesty, August 2022). Available on: https://www.gov.uk/government/publications/national-maritime-security-strategy Accessed 8 September 2022.
[265] Such as the gulf of Aden outside the horn of Africa to protect our merchant vessels from piracy attacks and all the maritime-related activities carried out by EU bodies or Member States under civil and military authority in accordance with our obligations under international and EU law (such as search and rescue operations or fisheries control operations). Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014SC0225&from=EN Accessed 8 September 2022. See also Australia: MERCATOR Maritime Domain Strategy 2040. Available on: https://www.navy.gov.au/sites/default/files/documents/MERCATOR_2040.pdf Accessed 8 September 2022.

As seen above, in its “maritime domain” Peru is committed to applying the provisions of UNCLOS that have passed the threshold of customary international law and general principles of law. This is overwhelming proof that it is not possible anymore to support the idea that Peru claims a 200 nautical miles territorial sea. In addition, today’s State practice within the framework of IMO has developed the concept of the maritime domain related to security matters, which does not have the same meaning given by Peru. Therefore, this urges Peru to take action to clarify its position in today’s State practice within the international community.

Today, due to political reasons, the Government has been prevented to adhere to UNCLOS, although Peruvian State practice is in line with the contemporary international law of the sea. At this point, however, the remaining question would be how to understand the rights and obligations of the different maritime zones established in UNCLOS since the Peruvian Constitution only recognizes one single maritime space of 200 nautical miles measured from the baselines. Therefore, and considering the information developed in Part I of this thesis, the present assessment will address the fisheries regime of the EEZ and the Peruvian fisheries law to identify its compatibility or legal gaps that need to be solved.

Chapter 4: The "maritime domain" through applicable fisheries law and its path as a compatible maritime zone with the UNCLOS' fisheries regime in the EEZ

This chapter aims to present what is the applicable fisheries law applicable to Peru. Despite the focus will be placed on the maritime domain, it must be recalled that some laws applicable to other maritime zones are of major relevance to waters within the Peruvian jurisdiction (for instance, the law concerning straddling and highly migratory stocks). To this purpose, the chapter will include information regarding some treaties Peru is bound to concerning marine living resources; Peruvian national law prescribing fisheries regulation, including which national institution oversees to enforce of the said law; and, transversally to this information, the extent all these provisions assimilate to the EEZ fisheries regime in UNCLOS. In addition, recommendations to the Peruvian Government concerning the law identified will be provided.

It must be noted that the following legal instruments refer, among others, to "marine living resources", "hydrobiological resources", "fisheries", or "fish". All of these allusions refer to the natural resources as discussed in this work.

4.1. Applicable fisheries law in Peru

4.1.1. Global and regional law

Article 55 of the 1993 Peruvian Constitution states that the treaties concluded by the State and in force are part of the national law. Therefore, all treaties to which Peru has consent to be obliged by and in force belong to the relevant fisheries law to be assessed in this work. Thus, a brief mention of the global treaties and regional treaties dealing with natural resources in the Peruvian maritime domain will be addressed.

4.1.1.1. Global treaties

Although the following treaties do not exhaust the global treaties to which Peru is a State party and address related topics to the marine living resources in the maritime domain, it contains important information that must be highlighted. Notably, these treaties are interlinked to UNCLOS as will be shown accordingly.

The Convention on Biological Diversity[266] (CBD) was adopted on 5 June 1992 and entered into force on 29 December 1993. Peru approved the CBD by Legislative Resolution N° 26181 of 11 May 1993. The treaty entered into force for Peru on 29 December 1993. According to the CBD, the contracting parties shall implement the treaty concerning the marine environment consistently with the rights and obligations of States under the law of the sea.[267] Therefore, it can be argued that it refers to the law as reflected in UNCLOS.

Article 1 of the CBD states that the objectives of the treaty are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.

Among the terms used by the CBD, one must highlight the concept of "biological resources" and "ecosystem". For the first one, article 2 states that it "includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity". In the case of the second, the same article prescribes that it means a "dynamic complex of plant, animal, and micro-organism communities, and their non-living environment interacting as a functional unit".

Further, recalling the UN Charter and the principles of international law, article 3 of the CBD dictates that State have:

> the *sovereign right to exploit their own resources* pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. (emphasis added)

As pointed out by the FAO, fish is a major component of global biodiversity, being the aquatic environment the place where 70 percent of the biomass of animals live in.[268] Therefore, there is an intrinsic relationship between CBD and the goal of achieving sustainable fisheries through

[266] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.
[267] Article 22.1 of the CBD.
[268] Committee on Fisheries. Thirty-fourth Session. 1-5 February 2021. Biodiversity mainstreaming across fisheries and aquaculture. COFI/2021/9.1.

conserving and sustainably using marine living resources, as well as its associated species and their habitat. This is also true when referring to areas beyond national jurisdiction, since article 5 of the CBD calls for cooperation between contracting parties, directly or, where appropriate, through competent international organizations. This allows to broach UNCLOS provisions on the conservation and utilization of living resources, along with the one on straddling and highly migratory species.

Next, the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas[269] (Compliance Agreement), approved on 1 November 1993, has the objective to enhance the role of flag States and ensure that a State strengthens its control over its vessels to ensure compliance with international conservation and management measures.

The treaty entered into force on 24 April 2003. The Peruvian instrument of acceptance was deposited on 23 February 2001, therefore, the treaty also entered into force for Peru on 24 April 2003. The second paragraph of the Preamble of the Compliance Agreement recognizes that under international law as reflected in UNCLOS, States have to cooperate for the conservation of living resources on the high seas.

Thus, article 1.a) of the Compliance Agreement prescribes that "international conservation and management measures" means:

> measures to conserve and manage one or more species of living marine resources that are adopted and applied in accordance with the relevant rules of international law as reflected in the 1982 United Nations Convention on the Law of the Sea. Such measures may be adopted either by global, regional, or subregional fisheries organizations, subject to the rights and obligations of their members or by treaties or other international agreements.

In addition, for the Compliance Agreement, "fishing vessel" means any vessel used or intended for use for the commercial exploitation of living marine resources, including mother ships and

[269] Agreement to Promote Compliance with international Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered into force 24 April 2003) 2221 UNTS 91.

any other vessels directly engaged in such fishing operations.[270] The extension of the concept of fishing vessels to those who aid in fishing operations represents important progress for the conservation and sustainable use of hydrobiological resources, mainly due to the offshore practices of fleets that seeks to prevent monitoring, control, and surveillance of coastal States.

Although this treaty targets fishing vessels on high seas, it is notable that State parties, such as Peru, recognize the objective to ensure compliance with international conservation and management measures adopted and applied following relevant international law as reflected in UNCLOS. This is also applicable when dealing with measures concerning straddling and highly migratory species which entails the customary international law obligation to cooperate. Therefore, it has relevance for areas within national jurisdiction.

Finally, the Agreement on port State measures to prevent, deter, and eliminate illegal, unreported, and unregulated fishing[271] (PSMA), adopted on 22 November 2009, has the objective to prevent, deter, and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.[272]

The treaty entered into force in June 2016. Peru approved it by Legislative Resolution N° 30591 of 23 June 2017 and ratified it by Supreme Decree N° 040-2017-RE of 6 September 2017. The treaty entered into force for Peru on 12 October 2017. The Preamble of the PSMA recalls relevant provisions of UNCLOS and the UNFSA. In addition, it prescribes that nothing in the treaty shall prejudice the rights, jurisdiction, and duties of the Parties under international law. This implies not affecting the sovereignty of Parties over their internal, archipelagic, and territorial waters, or their sovereign rights over their continental shelf and in their EEZ.[273]

Although the PSMA mainly targets port State measures, one may stress that it has interesting terms to which Peru is bound. Thus, according to article 1.a), for "conservation and management measures" it is understood measures to conserve and manage living resources that

[270] Article 1.a) of the Compliance Agreement.
[271] Agreement on Port State Measures to prevent, deter and eliminate illegal, unreported and unregulated fishing (adopted 22 November 2009, entered into force 5 June 2016) Registration number 54133. No UNTS volume number has yet been determined for this record.
[272] Article 2 of the PSMA.
[273] Article 4.1.a) of the PSMA.

are adopted and applied consistently with the relevant rules of international law including those reflected in UNCLOS.

In addition, one may highlight the term "fish" as all species of living marine resources, whether processed or not;[274] "vessel", as any vessel, ship of another type, or boat used for, equipped to be used for or intended to be used for, fishing or fishing related activities; and "fishing-related activities", as:

> any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear, and other supplies at sea.

Notably, for the conservation and utilization of natural resources, mainly the enforcement measures, Peru must apply the terms as developed by the PSMA.

The mentioned treaties are relevant for the fisheries regime in the maritime domain and address important UNCLOS provisions related to the EEZ fisheries regime. Thus, Peru has the sovereign right to exploit its natural resources, saved by the obligation to conserve and sustainably use them, as pointed out by the CBD and article 56.1.a) of UNCLOS. This obligation comprises the concept of "ecosystem" which calls for taking measures for the associated species and the habitat of the said natural resources.

As seen in the Compliance Agreement and the PSMA, Peru recognizes the validity of the conservation and management measures taken within the framework of UNCLOS, including those related to hydrobiological resources that occur within national jurisdiction and on the high seas. This broaches articles 61 to 64 of UNCLOS, for the conservation and utilization of marine living resources, as well as the straddling and highly migratory stocks. Finally, the quoted treaties provide important terms such as "fish", "fishing vessel", "vessel", and "fishing-related activities", that are useful for the Peruvian fisheries regime.

[274] Article 1.b) of the PSMA.

4.1.1.2. Regional treaties

Concerning the regional treaties, the constitutive treaties of the RFMOs to which Peru is a State party will be addressed. It must be recalled that UNCLOS provides specific provisions for straddling and highly migratory stocks as well as those marine living resources on the high seas. As for the former, UNCLOS mandates the obligation to cooperate. Thus, through the UNFSA, articles 63 and 64 of UNCLOS were developed by means of, among others, the incorporation of principles to ensure the long-term conservation and sustainable use of the said stocks and the establishment of cooperation mechanisms, such as the subregional and regional fisheries management organizations and arrangements.

The first to mention is the constitutive treaty of the Inter-American Tropical Tuna Commission (IATTC). The IATTC was created by the Convention between the United States of America and the Republic of Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission,[275] adopted on 31 May 1949. The treaty entered into force on 3 March 1950. Peru approved the constitutive treaty of the IATTC by Legislative Resolution N° 27462 of 18 May 2001 and ratified it by Supreme Decree N° 040-2001-RE of 11 June 2001. The treaty entered into force for Peru on 27 July 2002.

Following the relevant rules of international law and to ensure the long-term conservation and sustainable use of the fish stocks covered by the treaty,[276] the Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica[277] (Antigua Convention) was adopted on 27 June 2003. The treaty entered into force on 27 August 2010. Peru approved the Antigua Convention by Legislative Resolution N° 30785 of 6 June 2018 and ratified it by Supreme Decree N° 032-2018-RE of 20 July 2018. The treaty entered into force for Peru on 21 November 2018.

According to the first and second paragraphs of the Preamble of the Antigua Convention, the Parties to this treaty:

[275] Convention for the establishment of an Inter-American Tropical Tuna Commission (adopted 31 May 1949, entered into force 3 March 1959) 1951 UNTS 4.
[276] Article II of the Antigua Convention.
[277] Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (adopted 27 June 2002, entered into force 27 August 2010).

> Aware that, in accordance with the relevant provisions of international law, as reflected in the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, all States have the duty to take such measures as may be necessary for the conservation and management of living marine resources, including *highly migratory species, and to cooperate with other States in taking such measures;*
>
> Recalling the *sovereign rights* of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in UNCLOS, and the right of all States for their nationals to engage in fishing on the high seas in accordance with UNCLOS. (emphasis added)

The area of application of the Antigua Convention comprises the area of the Pacific Ocean[278] including waters under national jurisdiction. The fishery resources covered by the Convention are the stocks of tunas and tuna-like species and other species of fish taken by vessels fishing for tunas and tuna-like species in the Convention area.[279] As the resources targeted by the Convention are highly migratory, cooperation is required under customary international law. This is the main reason for the creation of the IATTC. In addition, article V.2 addresses the principle of compatibility, by prescribing the following:

> The conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible, in order to ensure the conservation and management of the fish covered by this Convention.

This compatibility principle as quoted in the Antigua Convention is also addressed by article 7 of the UNFSA. Thus, this principle calls for more tangible measures rather than a due diligence duty to cooperate as prescribed by UNCLOS. It must be noted that this principle does not alter the recognized sovereign rights over natural resources of the coastal States as mentioned in the second paragraph of the Antigua Convention mentioned above.

[278] Article III of the Antigua Convention.
[279] Article I.1 of the Antigua Convention.

Next, Peru is also a member of the South Pacific Regional Fisheries Management Organization (SPRFMO), due to its condition as a State party to the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean[280] (SPRFMO Convention), adopted on 14 November 2009. The treaty entered into force on 14 November 2009. Peru approved the treaty by Legislative Resolution N° 30386 of 15 December 2015 and ratified it by Supreme Decree N° 071-2015-RE of 16 December 2016. The treaty entered into force for Peru on 5 February 2016.

The third and fourth paragraphs of the Preamble of the SPRFMO Convention state the following:

> *Recognizing* that under international law […] States have a duty to cooperate with each other in the conservation and management of living resources in the areas of the high seas and, as appropriate, to cooperate to establish sub-regional or regional fisheries organizations or arrangements with a view to taking the measures necessary for the conservation of such resources.
>
> *Taking into consideration* that, under international law reflected in the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, coastal States have water under national jurisdiction within which they exercise their sovereign rights for the purpose of exploring, exploiting, conserving and managing fishery resources and conserving living marine resources upon which fishing has an impact.

In addition, according to article 2 of the treaty, the objective is, through the application of the precautionary approach and an ecosystem approach to fisheries management, to ensure the long-term conservation and sustainable use of fishery resources and, in so doing, to safeguard the marine ecosystems in which these resources occur.

The area of application of the SRPFMO convention covers high seas,[281] and it includes, among others, the straddling fishery resources. Currently, jack mackerel and jumbo flying squid are

[280] See footnote 257.
[281] Article 5 of the SPFRMO Convention.

the main commercial resources fished in the SPRFMO area.[282] As the characteristics of straddling fish stocks are to occur both within the EEZ and on high seas,[283] article 4 of the SPRFMO Convention is of utmost importance. Among their main provisions, this article states the following:

1. The Contracting Parties recognize the need to ensure the compatibility of conservation and management measures established for fishery resources that are identified as straddling areas under the national jurisdiction of a coastal State Contracting Party and the adjacent high seas of the Convention Area *and acknowledge their duty to cooperate to this end.*

2. Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure the conservation and management of straddling fishery resources in their entirety. In developing compatible conservation and management measures for straddling fishery resources Contracting Parties shall:

    a. Take into account the biological unity and other biological characteristics of the fishery resources and the relationship between the distribution of the resources, the fishing activities for those resources, and the geographical particularities of the region concerned, *including the extent to which the fishery resources occur and are fished in areas under national jurisdiction*; […] (emphasis added)

As seen in the further developments about the interpretation of the maritime domain, Peru recognizes general international law as reflected in UNCLOS and UNFSA. This is also evidenced by the Preamble paragraphs of the Antigua Convention and the SPRFMO Convention quoted lines above. The importance of dealing with highly migratory and straddling fish stocks is the recognition by the Peruvian State of the obligation to cooperate for their conservation and management measures. This conventional duty also stipulates that the said measures must take into account, among others, the fishing activities towards those resources that occur in areas under national jurisdiction, namely, the maritime domain. Finally,

[282] See SPRFMO website. Available on: https://www.sprfmo.int/ Accessed 11 November 2022.
[283] See article 63.2 of UNCLOS.

the principles recognized by Peru through these treaties represent its willingness to go beyond the customary international law duty to cooperate.

4.1.2. National law

4.1.2.1. Overview of the relevant law

The origins and development of the concept of the maritime domain reveal the intrinsic link between this maritime space and the natural resources in it. As seen in article 54 of the 1993 Constitution, over this maritime space, Peru exercises sovereignty and jurisdiction. Concerning the said natural resources, article 66 of the Peruvian Constitution states the following:

> Natural resources, renewable and non-renewable, are the heritage of the Nation. *The State is sovereign in its use.*
>
> The conditions of its use and its granting to individuals are established by an organic law. The concession grants to its owner a real right, subject to said legal norm. (emphasis added)

Notably, the word sovereignty is used to refer to natural resources, supporting the concept of modal sovereignty as mentioned in this work. Indeed, it is a well-established principle in international law that the "rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and of the well-being of the people of the State concerned".[284] This constitutional provision also resembles article 56.1.a) of UNCLOS[285] whereby it can be suggested that this sovereignty over the use of natural resources is tantamount to the sovereign rights for the purpose of exploration and exploitation, conservation, and management of the natural resources, whether living or non-living.

It is true, however, that article 56.1.a) applies to the spatial scope of the EEZ, meaning theoretically from 12 nautical miles up to 200 nautical miles, while the Peruvian maritime

[284] United Nations General Assembly Resolution 1803 (XVII), Permanent sovereignty over natural resources (14 December 1962) para. 1.
[285] See also article 193 of UNCLOS.

domain goes from the baselines up to 200 nautical miles. Therefore, in the author's view, the compatibility of this sovereignty over natural resources as prescribed by the Peruvian Constitution with the sovereign rights of UNCLOS 56.1.a) that reflects customary international law will depend on the observance of the conservation and utilization of customary duties (see, for instance, articles 61 and 62 of UNCLOS) performed by the Peruvian State, as enshrined in its relevant law. This also requires Peru to clarify its maritime zones through national law as will be suggested later.

Notwithstanding the last, one must note that along with the right to the use of natural resources, the general obligation to conserve a protect the environment is a requirement *sine qua non* as accepted by the international community.[286] Therefore, article 67 of the Peruvian Constitution prescribes the following:

> The State determines the national policy on the environment. *Promotes sustainable use of natural resources*. (emphasis added)

In conjunction with article 66 of the Constitution, these provisions recall Principle 21 of the 1972 Stockholm Declaration[287] and article 193 of UNCLOS.[288] Its relevance to fisheries lies in, as pointed out by the ITLOS, that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.[289] This was also supported by the PCA in the *South China Sea* arbitration.[290] Then, the general obligation to protect and preserve the marine environment includes the conservation of living resources in the maritime domain.

Peruvian national law has developed the constitutional provisions mentioned in this work. Therefore, the Organic Law for the sustainable use of natural resources, the General Fisheries Law along with its regulations, and the Legislative Decree that develops the competencies of the National Coast Guard along with its regulation will be addressed. It must be noted that

[286] See article 192 of UNCLOS: "States have the obligation to protect and preserve the marine environment".
[287] Principle 21 of the Declaration states: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within jurisdiction or control do not cause damage to the environment of other State or of areas beyond the limits of national jurisdiction".
[288] Article 193 of UNCLOS states: "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.
[289] *Southern Bluefin Tuna case* (n 126) para. 70.
[290] *South China Sea Arbitration* (n 160) para. 956.

special emphasis will be given to the General Fisheries Law and its regulations. Previously, brief information regarding the national institutions in charge of the implementation of the said laws, namely, the Ministry of Production and the Directorate General of Captaincies and Coast Guard, will be provided.

4.1.2.2. National institutions to issue and enforce the law

According to article 3 of the Legislative Decree N° 1047, Legislative Decree that approves the Law of Organization and Functions of the Ministry of Production (PRODUCE), the Ministry is exclusively competent in matters of fishing and aquaculture regulation, industrial fishing, medium and large aquaculture companies, industrial standardization, and regulation of supervised products. In addition, PRODUCE is competent in a shared manner with the Regional Governments, as appropriate, in matters of artisanal fishing, micro, and small aquaculture companies, promotions of the industry, and internal trade in the field of its jurisdiction.[291]

Concerning fisheries, PRODUCE, through the Vice Ministry of Fisheries and Aquaculture, has, among others, the following functions:

- ✓ Formulate, coordinate, execute and supervise the fishing and aquaculture development policy, following the respective national policy.
- ✓ Propose or approve norms, guidelines, and strategies, among others, on the sustainable development of fishing and aquaculture activities within the framework of their competencies.
- ✓ Direct, execute and supervise the fulfillment of the commitments assumed by treaties, conventions, and other international, regional, and subregional instruments or bilateral agreements in matters of fishing and aquaculture; as well as for the conservation of hydrobiological species and their environment, including genetic diversity and/or its derivate products, and those related to the use of modern biotechnology, in coordination with the sectors involves and within the scope of their competencies.

[291] Legislative Decree N° 1047 of 25 June 2008.

- ✓ Promote research, technological development, and innovation in fishing and aquaculture, considering the traditional practices associated with fishing and aquaculture of indigenous peoples when appropriate.
- ✓ Supervise the application of the norms for the fight against illegal, unreported, and unregulated fishing, in coordination with the competent authorities, when appropriate.[292]

On the other hand, following article 1 of the Legislative Decree N° 1147, the Directorate General of Captaincies and Coast Guard (DICAPI) manage aquatic areas, activities carried out in the aquatic environment, ships, naval artifacts, aquatic facilities, and vessels in general, the operations they carry out and the services they provide or receive, to ensure the safety of life at sea, navigable rivers and lakes, the protection of the aquatic environment, and suppress illicit activities within its jurisdiction, in compliance with national regulations and international instruments to which Peru is a party.[293]

Among others, DICAPI has the following functions:

- ✓ Regulate the technical, operational, and administrative aspects of all matters related to activities carried out in the aquatic environment and/or coastal strip, to ensure the protection and safety of human life, the protection of the aquatic environment, and the prevention of contamination by ships, naval artifacts, and installations in the aquatic environment and coastal strip, within the scope of its competencies.
- ✓ Exercise control and surveillance actions in the aquatic environment and riverside strip to protect and ensure the safety of human life, protect the environment, and prevent its contamination, within the scope of its competencies.
- ✓ Carry out maritime, river, and lake police duties; as well as repress illicit activities in the aquatic environment and the riverside, following national regulations, international instruments to which Peru is a party, and other international law regulations on the matter that may apply to the Peruvian State.
- ✓ Grant navigation permits to foreign-flagged ships and naval artifacts that need to operate in the aquatic environment.

[292] Article 14 of the Supreme Decree N° 002-2017-PRODUCE of 2 February 2017.
[293] Article 2 of the Legislative Decree N° 1147 of 10 December 2012.

- ✓ Control scientific research activities carried out in the aquatic environment, without prejudice to the authorization that other authorities must issue.
- ✓ Supervise the performance of seafarers, fishing personnel, recreational nautical personnel, pilots, divers, and others dedicated to aquatic activities, within the scope of their competencies.[294]

These are the main institutions that deal with fisheries in Peru, particularly, for the issuance of law and the enforcement of it. Following, specific Peruvian law regarding fisheries will be addressed to assess its compatibility with UNCLOS fisheries regime provisions that reflect customary international law.

4.1.2.3. The Organic Law for the sustainable use of natural resources

As mandated by the second paragraph of article 66 of the Peruvian Constitution, the conditions for the use of natural resources were to be sanctioned by an organic law. Therefore, Law N° 26821, Organic Law for the sustainable use of natural resources (OL),[295] regulates the system of sustainable use of natural resources, including marine living resources, as they constitute the Nation's heritage, establishing their conditions and the modalities of granting them to individuals.[296]

The OL's objective is to establish an adequate framework for the promotion of investment, seeking a dynamic balance between economic growth, the conservation of natural resources and the environment, and the integral development of the human person.[297] Through the OL, the State promotes the transformation of natural resources into sustainable development,[298] which can be understood as the "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[299]

Article 6 of the OL must be highlighted:

[294] Article 12 of Supreme Decree N° 015-2014-DE of 26 November 2014.
[295] Law N° 26821 of 25 June 1997.
[296] Article 1 of OL.
[297] Article 2 of OL.
[298] Article 7 of OL.
[299] United Nations General Assembly, Our Common Future: Report of the World Commission on Environmental and Development, A/42/427 (4 August 1987) para 27.

> The State is sovereign in the use of natural resources. Its sovereignty translates into the *competence* it has to *legislate and exercise executive and jurisdictional functions over them*. (emphasis added).

Thus, the OL recognizes the substantial content and scope of the sovereignty over natural resources. In the author's view, this is essential to understand the meaning of sovereignty as prescribed in the Supreme Decree N° 781 and the Peruvian Constitutions (1979 and 1993) concerning the maritime domain. This allows us to broach the following UNCLOS provisions: article 56.1.a) - b), concerning the sovereign right and jurisdiction over the EEZ; article 61, regarding the conservation of living resources; article 62, concerning the utilization of the living resources (particularly 62.4); and article 73, dealing with the enforcement of laws and regulations of the coastal State.

The OL states that natural resources must be used sustainably, which implies the rational management of natural resources, considering their renewal capacity, avoiding their overexploitation, and replacing them qualitatively and quantitatively, if applicable.[300] Then, one must point out that this goal is pursued, among others, by article 61.2 of UNCLOS when requiring the State to ensure that the maintenance of the living resources in the EEZ is not endangered by overexploitation; or article 62.1 of UNCLOS whereby the coastal State is obliged to promote the objective of optimum utilization of the living resources in the EEZ.

In addition, the OL prescribes that all use of natural resources by individuals gives rise to an economic compensation that is determined by economic, social, and environmental criteria.[301] This does not apply to peasant or indigenous communities for the use of natural resources for their existence and ancestral uses.[302] This is of utmost importance considering that many ancestral communities have been established on Peru's coast, and more than half of the Peruvian population lives on the coast. This proximity to the coast may be seen as a reason for supporting the need to establish clear maritime zones, mainly, to ascertain the rights and obligations of the territorial sea.

[300] Article 28 of OL.
[301] Article 20 of OL.
[302] Articles 17 and 18 of OL.

Concerning transboundary natural resources, article 28 of the OL states that the aspects relating to their management shall be governed by treaties on the matter or, failing that, by special legislation. Inevitably, UNCLOS provisions on straddling or shared fish stocks (article 63) and the highly migratory fish stocks (article 64) that encourage cooperation between the concerned States must be raised. Thus, this is compatible with the Peruvian practice which involves the participation in two RFMOs for straddling and highly migratory species as seen in this work, namely, the SPRFMO and the IATTC.

Finally, article 7 prescribes that the State is responsible for promoting the sustainable use of natural resources through special laws on the matter, sustainable development policies, generating of infrastructure to support production, promotion of technological scientific knowledge, free initiative, and product innovation. For the said special laws that regulate the sustainable use of natural resources, article 13 mandates that they will specify the sector or sectors of the State responsible for the management of resources and will incorporate coordination mechanisms with other sectors. Therefore and following the mentioned functions of PRODUCE, it is mandatory to address the main provisions of the General Fisheries Law and its regulations.

4.1.2.4. The General Fisheries Law and its regulations

The Law Decree N° 25977, General Fisheries Law (GFL), was issued on 7 December 1992. Accordingly, its regulations were issued by Supreme Decree N° 01-94-PE on 14 January 1994. With the purpose to foster legal and economical certainty, the said Regulations were amended by Supreme Decree N° 012-2001-PE of 13 March 2001 (hereinafter, “Regulations”). While the GFL was issued under the framework of the 1979 Constitution, the Regulations were issued under the framework of the 1993 Constitution. This gives consistency to the meaning of the maritime domain along both constitutions as addressed in this work.

4.1.2.4.1. The purpose of the law and its regulations

According to article 1 of the GFL, the purpose of the law is to regulate fishing activity to promote its sustained development as a source of food, employment, and income, and to ensure responsible use of hydrobiological resources, optimizing economic benefits, in harmony with the preservation of the environment, and the conservation of biodiversity. Notably, the first

article of the GFL highlights the importance of the utilization of natural resources along with the preservation and conservation of the marine environment. Indeed, articles 76 to 99 of the Regulations address different topics related to the protection of the marine environment and its relationship with fishing activities.

4.1.2.4.2. The object and the institution in charge

Article 2 of the GFL stipulates the following:

> The hydrobiological resources contained in the *jurisdictional waters of Peru* are national heritage. Consequently, *it corresponds to the State to regulate the comprehensive management and rational exploitation of said resources*, considering that fishing activity is of national interest. (emphasis added)

Following the discussion on the juridical nature of the maritime domain, the GFL uses the concept of "jurisdictional waters". In addition, the said article is clear in recognizing the State's jurisdiction over natural resources. Concerning the competencies of the State, according to article 74 of the GFL, PRODUCE is the governmental institution in charge of dictating the regulations at the national level related to fishing activity. Article 4.1 of the Regulations specifies that fishing activities, for the purposes of its administration, include all the activities that directly or indirectly have the aim of using the living resources of the sea.

As mentioned in this work, the sovereign rights over natural resources as prescribed in article 56.1.a) of UNCLOS, which reflects customary international law, includes all rights for and connected with the exploration, exploitation, conservation, and management of the natural resources. This includes the jurisdiction whether prescriptive, enforcement, or judicial. Therefore, article 56.1.b).iii) must be also included as covered by Peruvian national law. The said norms are also in the same vein as article 6 of the OL for the sustainable use of natural resources quoted above.

One may note as well that the quoted article 2 of the GFL states that the fishing activity is of national interest. In this regard, article 5 of the GFL stipulates that fishing activity is recognized as a permanent task of a discontinuous nature, due to the random nature of hydrobiological

resources. This goes in line with the priority objective N° 2 of the National Maritime Policy[303] which seeks to "strengthen productive activities in the maritime field, in a rational and sustainable manner". The above provisions highlight the importance of fishing activities for Peru in its maritime domain, supporting the purpose of exercising sovereignty and jurisdiction.

4.1.2.4.3. Management measures

Concerning management measures of hydrobiological resources, the first paragraph of article 9 of the GFL prescribes that PRODUCE, based on available scientific evidence and socio-economic factors, determines, according to the type of fisheries, the fishing management systems, the permissible catch quotas (total allowable catch), the fishing seasons and zones, the regulation of fishing effort, fishing methods, minimum catch sizes and other regulations that require the preservation and rational exploitation of hydrobiological resources.

A fishing management system is a set of rules and actions that allow managing a specific fishery, based on updated knowledge of its biological fishing, economic and social components.[304] This management system must consider access regimes, total allowable catch, the magnitude of the fishing effort, closed periods, fishing seasons, minimum catch sizes, prohibited areas or reserves, arts, gear, fishing methods, and systems, as well as the necessary monitoring, control and surveillance actions.[305] When establishing a fishing management system, PRODUCE must reconcile the principle of sustainability of fishery resources or conservation in the long term, with obtaining the greatest economic and social benefits.[306]

Currently, PRODUCE has issued at least 11 fishing management systems among which the tuna,[307] anchovy for direct human consumption,[308] Peruvian hake,[309] deep-sea cod,[310] mackerel and jack mackerel,[311] and giant squid[312] are the more representative in the Peruvian maritime domain. According to article 13 of the Regulations, the fisheries or hydrobiological resources

[303] Supreme Decree N° 012-2019-DE of 20 December 2019.
[304] Article 10 of GFL.
[305] Article 12 of GFL.
[306] Article 11 of GFL. It is inevitable to recall that this management system concept resembles the fisheries management provisions (article 7) of the 1995 FAO Code of Conduct for Responsible Fisheries, whose provisions -partly- are based on relevant international, including UNCLOS.
[307] Supreme Decree N° 032-2003-PRODUCE.
[308] Supreme Decree N° 010-2010-PRODUCE.
[309] Supreme Decree N° 016-2003-PRODUCE.
[310] Ministerial Resolution 236-2001-PE.
[311] Supreme Decree N° 011-2007-PRODUCE.
[312] Supreme Decree N° 014-2011-PRODUCE.

that are not specifically considered in any fishing management system will be governed by general rules as contained in the Regulations and other provisions that may be applicable.

Within the said fishing management systems, PRODUCE may issue and update conservation measures.[313] This is the case with the establishment of the total allowable catch set for specific hydrobiological resources either by time or by zones. Thus, for instance, the Ministerial Resolution N° 00462-2021-PRODUCE has established the total allowable catch of jack mackerel in 54 293 tons and the total allowable catch of mackerel in 37 000 tons in the Peruvian maritime domain for 2022. In addition, the Ministerial Resolution N° 00230-2022-PRODUCE has established the total allowable catch of anchovy in 486 500 tons in the south zone of the maritime domain from July to December of 2022. Some quotas may also be influenced by the RFMO of which Peru is a member, as the case of the tuna shows.

Following article 46 of the GFL, PRODUCE is the only authority allowed to issue fishing permits. These fishing permits may be granted either for the operations of national fishing vessels or foreign-flagged fishing vessels.[314] The permits are temporary and require payment in favor of the Peruvian State as represented by PRODUCE. The second paragraph of article 9 of the GFL prescribes that the administrative rights granted (such as the mentioned fishing permits)[315] are subject to the management measures that employing legal instruments of a general nature PRODUCE dictates. In other words, the fishing permits must be given in strict observance of the said management measures.

Notably, for the regulation of hydrobiological resources in the maritime domain, based on available scientific evidence, the said resources may be classified in the following:

- ✓ Unexploited: when the resource is not exploited;
- ✓ Underexploited: when the level of exploitation that is exercised allows surplus margins for the extraction of the resource; and,
- ✓ Fully exploited: when the level of exploitation reaches the maximum sustainable yield.

[313] See Supreme Decree N° 008-2012-PRODUCE and Ministerial Resolution N° 00365-2020-PRODUCE.
[314] Article 42.c).
[315] The GFL also refers to concessions and authorization. However, for the purposes of this work, the focus is placed in the fish permits.

If the hydrobiological resource is fully exploited, PRODUCE will not issue fishing permits.[316] In the case of underexploited resources, PRODUCE may issue fishing permits seeking its sustainable utilization.[317] Finally, concerning unexploited resources, PRODUCE fosters the research of these resources.[318]

The species associated with or dependent upon harvested species have been included in the Regulations in article 19 while prescribing the faculty of PRODUCE of limiting the access of determined hydrobiological resources when its sustainability is endangered and in article 134.12 while describing that not communicating to PRODUCE the extraction of these associated or dependent species is an infraction related to the extractive activity.

The national law described above reveals its compatibility with the customary obligations dealing with the conservation of living resources as reflected in article 61 of UNCLOS. In addition, it is reasonable to admit that Peru aims for the optimum utilization of living resources in the maritime domain, as reflected in article 62.1 of UNCLOS. To the knowledge of the author, however, it was not possible to find any law that establishes the capacity of the State's fleet to harvest the allowable catch. Finally, and as mentioned before, the objective of the GFL and its regulations includes the preservation of the marine environment, as reflected in article 192 of UNCLOS. Thus, one must note that this goal is embedded in Peru's practice concerning the management of natural resources.

4.1.2.4.4. Foreign-flagged fishing vessels

Concerning the fishing activities of foreign-flagged fishing vessels in the maritime domain, article 8 of the GFL states the following:

> The extractive activity by foreign-flagged vessels will be supplementary or complementary to that carried out by the existing fleet in the country and will be subject to the conditions established in this Law and its Regulations, as well as in the international agreements that Peru celebrates on the matter which may not contravene the requirements commonly demanded by Peruvian legislation.

[316] Article 12 of Regulations.
[317] Article 15 of Regulations.
[318] Article 16 of Regulations.

Article 47 of the GFL adds the following:

> The operations of foreign-flagged fishing vessels in Peruvian jurisdictional waters may only be carried out on the *surplus of the permissible catch not taken advantage of hydrobiological resources by the existing fleet in the State*, subject to the terms and conditions established in the national legislation on preservation and exploitation of hydrobiological resources and inspection and control procedures.
>
> Foreign shipowners must prove domicile and legal representation in the State. (emphasis added)

According to article 50 of GFL, foreign shipowners, through their representatives, will request the respective fishing permit, subject to the specific regulations that govern each fishery. In addition, within the Regulations, one must highlight that the shipowner of the foreign-flagged fishing vessel must present a guarantee letter in favor of PRODUCE as an assurance that it will attend to all the obligations under Peruvian national law.[319] In addition, the fishing vessels must have a satellite tracking system.[320] Also, the vessels must have on board one PRODUCE observer.[321] Finally, concerning the crew, 30% must be Peruvian.[322]

The said national law allows foreign-flagged fishing vessels to undertake fishing activities in the Peruvian maritime domain as long as it involves the surplus of the permissible catch which was not taken by the existing Peruvian fleet. To the knowledge of the author, there is no provision in the GFL or the Regulations that specify the national capacity to harvest the total allowable catch. However, from the very drafting of the mentioned law, it is clear that the fishing activities of foreign-flagged fishing vessels are essentially supplementary. Peru then applies the customary obligation as reflected in article 62.2 of UNCLOS.

One must note that neither the GFL nor the Regulations specify the relevant factors which are prescribed in article 62.3 of UNCLOS. One may admit, however, that the study of giving such

[319] Article 67 of Regulations.
[320] Article 68 of Regulations.
[321] Article 69 of Regulations. The Regulations prescribe that the observer must be from IMARPE which is a scientific institution of PRODUCE.
[322] Article 70 of Regulations.

surplus is implicitly embedded in the assessment PRODUCE does when giving fishing permits since they consider the biological-fishing, economic and social components as prescribed in the respective fishing management system. It must be stressed that there is no mention of the developing landlocked or geographically disadvantaged States when addressing the said surplus. Finally, the due notice of the regulations as reflected in article 62.5 of UNCLOS is met from the publicity principle as evidenced in article 51 of the Peruvian Constitution.[323] There is partial compatibility with customary obligations reflected in article 62 of UNCLOS.

4.1.2.4.5. Straddling and highly migratory

Article 7 of the GFL states the following:

> The *regulation adopted by the State* to ensure the conservation and rational exploitation of hydrobiological resources in jurisdictional waters *may be applied beyond 200 nautical miles*, to those multizonal resources that migrate towards adjacent waters or that, come from these towards the coast due to their food association with other marine resources or because it corresponds to breeding or rearing habitats.
>
> Peru will promote the adoption of international agreements and mechanisms in order to ensure compliance with such regulations by other States, subject to the principles of responsible fishing. (emphasis added)

When mentioning "multizonal", the first paragraph of the said article seems to refer to straddling and highly migratory species as reflected in articles 63 and 64 of the EEZ regime in UNCLOS. However, in the author's view, this provision is not in line with the limits outlined in article 57 of UNCLOS. Therefore, there is no regulation adopted by the State that can be applied beyond 200 nautical miles which are high seas. The second paragraph of the quoted article tends to refer to regional arrangements concerning conservation and rational exploitation. Notwithstanding, again, the norms adopted under an RFMO belong to an international organization and not to the implementation of national law.

[323] The said article states the following: "The Constitution prevails over all legal norms; the law, over the rules of lower hierarchy, and so on. *Publicity is essential for the validity of any norm of the State*". (emphasis added)

This article must be also contrasted with the OL which states that concerning transboundary natural resources, their management shall be governed by treaties on the matter, or failing that by special legislation. Practice shows that no Peruvian law concerning the conservation of straddling or highly migratory species is implemented beyond the maritime domain. Instead, Peru has shown its observance of international law when becoming a member of RFMOs which deals with this kind of stock. This reflects the observance of customary international law as reflected in articles 63 and 64 of UNCLOS.

Although not customary international law, the obligations of cooperation of articles 65 to 67 concerning, marine mammals, anadromous, and catadromous species, that have migrated to other jurisdictional waters, would fit in the Peruvian practice. This is by no means an obstacle to criticizing the drafting of article 7 of the GFL, which needs to be amended.

4.1.2.4.6. Monitoring, control, and surveillance

The management measures include monitoring, control, and surveillance actions. In this regard, article 100 of the Regulations prescribes that PRODUCE will carry out the monitoring, control, and surveillance of fishing activities, for which purpose it will implement the necessary mechanisms for strict compliance with the obligations assumed by the users. These activities involve, among others, inspections and satellite tracking. For the last one, PRODUCE has issued Supreme Decree N° 026-2003-PRODUCE, which addresses the regulations of the Satellite Monitoring System, named "SISESAT". The said actions are in line with the sovereign rights and jurisdiction which are customary international law reflected in UNCLOS.

4.1.2.4.7. Enforcement

Article 76 of the GFL states some prohibitions regarding fishing activities, such as:

- ✓ Carry out fishing activities without the corresponding concession, authorization, permit, or license, or in contravention of the provisions that regulate them.
- ✓ Extract, process, or commercialize unauthorized hydrobiological resources, or do so in areas other than the signs on the concession, authorization, permit or license, or in reserved or prohibited areas.

- ✓ Using unauthorized fishing implements, procedures, or gear and gear, as well as taking on board or using fishing gear or systems other than those permitted.
- ✓ Destroy or damage mangroves and estuaries.
- ✓ Transshipping the fishing product or disposing of it without prior authorization before reaching the port.
- ✓ Provide incorrect or incomplete information to the national authorities or deny them access to the documents related to the fishing activity whose presentation is required.

In addition, article 77 of the GFL prescribes that any action or omission that contravenes or fails to comply with any of the rules contained in the GFL, its Regulations, or other provisions on the matter constitutes an infraction. Therefore, article 78 of the GFL mandates that natural or legal persons who violate the provisions established in this Law, and all the regulatory provisions on the matter, will be creditors, depending on the seriousness of the offense, to one or more of the following sanctions:

a) Fine.
b) Suspension of the concession, authorization, permit, or license.
c) Confiscation.
d) Definitive cancellation of the concession, authorization, permit, or license.

When addressing the enforcement provisions, the GFL states that PRODUCE can coordinate with other national institutions. Thus, according to article 69 of the GFL, for the purposes of fishing activity, the Ministry of Defense, through DICAPI (also known as the Maritime Authority), exercises functions contemplated in its respective regulations, regarding the registration, inspection, and control of fishermen and fishing vessels, as well as what regarding the training of on-board personnel. In addition, article 70 states that the Ministry of Defense, through the Maritime Authority and in accordance with the regulations issued by PRODUCE, exercises the function of control and protection of hydrobiological resources, in addition to those functions inherent to the safety of human life at sea and the protection of the marine environment.

As seen above, the coastal State, in the exercise of its sovereign rights, can take enforcement measures as may be necessary to ensure compliance with the laws and regulations adopted by the State. This is recognized in article 73 of UNCLOS which reflects a norm of customary

international law. It must be noted that the GFL includes confiscation as a sanction for committing infractions. This is in line with the findings of ITLOS in the *M/V "Virginia G"* case.[324] Concerning the enforcement actions, some comments will be given regarding the participation of DICAPI.

4.1.2.5. The Legislative Decree N° 1147 and its regulations

The Legislative Decree N° 1147, Legislative Decree that regulates the strengthening of the Armed Forces in the competencies of the National Maritime Authority – General Directorate of Captaincies and Coast Guard (LD) was issued on 10 December 2012. Its regulations were issued by Supreme Decree N° 015-2014-DE (hereinafter, "LD Regulations") on 26 November 2014. Both national laws were issued within the framework of the Constitution of 1993.

According to article 2 of the LD, its scope of application includes, among others, the aquatic environment comprised of the maritime domain and internal waters, as well as navigable rivers and lakes, and insular areas, including islands located in the aquatic environment of Peru; ships and vessels that are in Peruvian jurisdictional waters and those with a national flag that are on the high seas or in jurisdictional waters of other countries, in accordance with the treaties to which Peru is a party and other international law regulations on the matter applicable to the Peruvian State; and the natural and legal persons, whose activities are carried out or have scope in the aquatic environment, without prejudice to the powers of the competent autonomous sectors and bodies.

The LD introduces the concept of the aquatic environment which includes the maritime domain and the internal waters. This solves the omission in the Constitution which does not refer to the latter. In addition, the LD refers to jurisdictional waters, supporting the consistency in Peruvian national with regard to the juridical nature of the maritime domain. Notably, the LD states that other international law regulations apply to Peru besides the treaties to it is a State party. This accurate provision allows referring to other international law sources as the customary international law studied in this work.

[324] *M/V "Virginia G"* (n 121) paras. 251-255.

Following the functions of DICAPI stated in this chapter, article 1 of the LD states that this Maritime Authority ensures the safety of human life at sea, navigable rivers and lakes, the protection of the aquatic environment, and suppresses illegal activities within the scope of its jurisdiction, in compliance with national regulations and international instruments of which Peru is a State party. Therefore and as prescribed by article 18 of the LD, DICAPI is empowered to apply and enforce national regulations and international instruments applicable to Peru. It should have been recommendable to follow the formula of article 2 of the LD which enables the application of other sources of international law, as is the case in the fisheries regime.

The LD Regulations have specific rules applicable to fishing vessels and fishermen. Some of them will be highlighted. According to article 58 of the LD Regulations, DICAPI carries out control and supervision tasks for compliance with the regulations issued by PRODUCE regarding hydrobiological resources. These tasks are within the scope of jurisdiction of DICAPI mentioned above. One may note that this is an example of coordination between national institutions as evidenced in the law issued by PRODUCE.

LD Regulations prescribes in article 30.5 that for fishing navigation is understood as the navigation carried out by ships or naval devices, in fishing activities, or in support of them. Further, it says that it is carried out by ships and naval devices of a national or foreign flag, in accordance with national regulations, international instruments to which Peru is a State party, and other international law regulations on the matter that may be applicable to the Peruvian State. This last part opens the path for referring to the application of customary international law.

Article 59 of the LD Regulations, however, mandates the following:

1. Foreign-flagged fishing vessels must carry out *extractive activities* in the aquatic environment, as long as they have express authorization from the Ministry of Production and *navigation permission from the General Directorate*. Peruvian-flagged vessels must have a fishing permit issued by the Ministry of Production.

2. Foreign fishing vessels that are caught without having the permits indicated in the previous paragraph, *must be detained and made available to the port authorities* so that

> they can initiate the corresponding administrative procedure. Likewise, the competent authority must be informed of the fact. (emphasis added)

At least from the quoted national law until now, there is no definition of the fishing vessel but a definition of fishing navigation is provided. Thus, according to the LD Regulations, fishing navigation is carried out by a ship or naval device, either Peruvian-flagged or foreign-flagged involved in fishing activities or supporting them. In addition, this navigation is carried out following, among others, international law applicable to Peru. Then, one must recall the freedoms recognized by article 58 of UNCLOS, particularly the freedom of navigation, which reflects customary international law.

This last may be contradicted by the requirement of permission to navigate for foreign-flagged fishing vessels (in addition to the fishing permit issued by PRODUCE) as prescribed by article 59 of the LD Regulations. It must be noted that according to article 34.1 of the LD Regulations, all foreign-flagged operating in the Peruvian maritime domain, except for those carrying out commercial traffic, must have a navigation permit granted by DICAPI, in addition to the operating permit. It can be argued that if the vessel is not in operation within the maritime domain it will not be required a navigation permit. This needs further clarification, including the position about the innocent passage, since the maritime domain is a single maritime zone.

As seen above, not having this navigation permit can lead to the detention of the ship and its sending to a Peruvian port. As addressed in this work, the navigation of foreign-flagged fishing vessels in waters under national jurisdiction is still a challenge as evidenced by State practice. While customary international law mandate freedom of navigation, it may collide with the also customary international law sovereign rights to take measures to, *inter alia*, protect natural resources.

This freedom of navigation of course is not absolute since there is a customary international law obligation of other States to have due regard when exercising their rights and performing their duties as reflected by article 58.3 of UNCLOS. As seen above, the freedom of navigation may also be applied with restrictions as established by IMO such as the establishment of a defined area in the EEZ, according to article 211.6 of UNCLOS; the traffic separation schemes; or even the safety zones that the coastal State can establish around artificial islands, installations, and structures prescribe by article 60 of UNCLOS.

One may note also that the term “extractive activities” in article 59.1 of the LD Regulations would leave behind other vessels which are involved in fishing activities such as the ones supporting the extractive vessels or even involved in bunkering activities. One may recall that article 4.1 of the Regulations of the GFL specifies that fishing activities include all the activities that directly or indirectly have the aim of using the living resources of the sea. Furthermore, as seen in international instruments to which Peru is a party, such as the Compliance Agreement or the PSMA, and in judgments delivered by ITLOS, the said vessels are also to be considered fishing vessels. Then, this article 59 of the LD Regulations would require further clarification.

Article 117.1 of the LD Regulations prescribes that any fishing vessel that has a fishing permit, is included in the lists of fishing vessels authorized to carry out extractive activities by PRODUCE, and complies with the provisions of the said institutions, must request a departure from DICAPI in the established formats, before proceeding to fishing activities. The said departure, as well as the arrival at the port, must be informed to port authorities.[325] In supporting the enforcement of conservation measures, DICAPI can deny the departure of fishing vessels when there are closed seasons of a particular hydrobiological resource.[326]

Among other provisions, the LD Regulations require that all fishing vessels, including foreign-flagged ones, must have the equipment for the safety and protection of human life at sea and the respective safety certificates on board as appropriate;[327] must carry out fishing activities in the areas expressly authorized;[328] and, must have communications equipment, to be able to connect with their ships and the coastal stations of the Maritime Authority.[329] In addition, fishing vessels are forbidden to:

- ✓ Wash warehouses, throw organic waste from fish, within bays or restricted areas of the sea, rivers, or lakes. These activities are allowed outside the twelve nautical miles of the coastline.
- ✓ Transport passengers, merchandise, and/or materials foreign to its activity, unless expressly authorized by DICAPI in exceptional cases.

[325] Article 117.2 of LD Regulations.
[326] Article 117.3 of LD Regulations.
[327] Article 60 of LD Regulations.
[328] Article 61 of LD Regulations.
[329] Article 64 of LD Regulations.

- ✓ Carry out fishing operations in the areas of anchorage, transit of ships, restricted areas, and especially sensitive maritime zones constituted within the framework of the IMO.
- ✓ Using explosives, polluting substances, or other prohibited toxic elements for fishing or possessing said material, is considered a very serious offense.
- ✓ Carry out fishing operations with unauthorized gear.
- ✓ Paralyze operations of fishing vessels while they are in navigation or have hydrobiological species in their holds.
- ✓ Exceed its maximum load line or modify it.
- ✓ Discharge any harmful substance or element into the environment regulated by international conventions and national regulations.

Some of the prohibitions mentioned involve DICAPI's duty to protect the aquatic environment, which includes the maritime domain and internal waters. Thus, LD Regulations prescribe that pollution of the aquatic environment is the introduction into the aquatic environment of all matter, substance, or energy in any of its physical states and forms, which produces harmful or dangerous effects, such as destruction or damage to living resources, aquatic life and/or the coastal zone, dangers to human health, hindering aquatic activities, including fishing and other legitimate uses of the waters, deterioration of the quality of water for its use and impairment of the aquatic environment and places of recreation.[330]

About the last, article 698 of the LD Regulations states that for the protection of wild flora and fauna, recreational nautical, fishing, and marine extraction activities with motorized vessels less than 2 nautical miles from the shore of the surfaces of the islands and points located on the Peruvian coast are not allowed, except those carried out for habitat observation purposes. This can be considered another reason to support the establishment of maritime zones in the Peruvian jurisdictional waters.

In supporting the tasks of monitoring, control, and surveillance, DICAPI has implemented the Aquatic Traffic Identification and Monitoring System (SIMTRAC). This system constitutes an effective control instrument during navigation in the aquatic environment established with the purpose of determining the position and monitoring the operations of vessels, facilitating maritime search and rescue operations, contributing to the safety of human life, contributing to

[330] Article II.50 of LD Regulations.

the protection of the aquatic environment, and contributing to the suppression of illegal activities.[331]

In this regard, national vessels must comply with the regulations of SIMTRAC. Likewise, foreign-flagged vessels are subject to the provisions of SIMTRAC, when they have a valid navigation and/or fishing permit issued by the DICAPI and the competent authority respectively.[332] The LD Regulations stipulate that the SIMTRAC is applied following the international instruments to which Peru is a State party and other norms of international law on the matter that may apply to the Peruvian State.[333]

The national law commented on above refers to the customary international law right to take enforcement measures as may be necessary to ensure compliance with the laws and regulations adopted as reflected in article 73 of UNCLOS. In addition, there is coordination between DICAPI and PRODUCE for the said purpose. Then, one must note that within the main functions of DICAPI, the protection of the environment is a transversal priority when controlling all activities taken in the aquatic environment, which includes the maritime domain and internal waters. This leads us to conclude the observance of the customary duty reflected in article 192 of UNCLOS.

In the view of the author, there must be further clarification about the implementation of the customary right of other States to the freedom of navigation as reflected in article 58.1 of UNCLOS. As commented above, this also has to be addressed under the scope of the customary obligation of due regard reflected in article 58.3 of UNCLOS and the sovereign rights of the coastal State which is the axis of the whole fisheries regime. Finally, it is beneficial that the Peruvian law quoted mentions the application to Peru of other international law besides treaty law since it gives legal certainty about the application of the customary international law. This must be the parameter of interpretation of all the Peruvian national laws.

[331] Article 181 of LD Regulations.
[332] Article 179.1 of LD Regulations.
[333] Article 179.2 of LD Regulations.

4.2. Recommended steps to be taken by the Peruvian Government

4.2.1. International treaties to be ratified or acceded

This work took us to the main reason why the Peruvian State until now has not taken the decision to adhere to UNCLOS. However, as seen above, this reason is no longer a legally solid and valid argument to be posed. As one may note, this requires political will, though. Therefore, further debates are required to keep discussing what are the best steps to be taken favoring the Peruvian interests towards the ocean. In this vein, it is the author's view these are the treaties Peru can adhere to reinforce its position in its maritime domain as well as its interests in spaces beyond national jurisdiction.

UNCLOS, and therefore Part XI Agreement, are treaties Peru needs to adhere to. Peru has substantially contributed to the establishment of the EEZ and applies the provisions of the fisheries regime in the EEZ that today are customary international law. This is not a barrier to making some adjustments to relevant national law. Besides the said compatibility in the fisheries regime between the Peruvian national law and UNCLOS provisions that reflect customary international law, Peru may state a declaration in terms of article 310 of UNCLOS when adhering to the treaty to refer to the harmonization of the applicable fisheries law.

As one author has stated,[334] the Peruvian State must reiterate its declaration that the exercise of sovereignty and jurisdiction mentioned by the Constitution are applied consistently with the maritime zones established by UNCLOS. In addition, Peru can add that for the sake of the natural resources and the environment, the Peruvian State does not authorize other States to carry out military exercises or maneuvers within 200 nautical miles, particularly those involving the use of weapons and explosives in the areas where Peru exercises sovereign rights such as the EEZ and the continental shelf. Finally, Peru may state that, according to article 297 of UNCLOS, it does not accept the dispute settlement procedures regarding the regulation of fisheries within its 200 nautical miles.

Peru may also benefit from all the obligations UNCLOS set for other States which operate within its 200 nautical miles. This can aid to strengthen the conservation of marine living

[334] Rodríguez (n 238).

resources, considering that not all the EEZ fisheries regime may have become customary international law. One may recall that this has been addressed by ITLOS in its 2015 Advisory Opinion, particularly, when developing the flag State duties to prevent, deter and eliminate IUU fishing.

This work has shown the Peruvian interest in straddling and highly migratory stocks. The Peruvian membership in the IATTC and SPRFMO supports this position. Then, along with UNCLOS, Peru should consider adhering to the UNFSA. The objective of this treaty is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through the effective implementation of the relevant provisions of UNCLOS.[335]

The constitutive treaties of IATTC and SPRFMO were adopted inspired by many provisions of the UNFSA. In the author's view, the provisions regarding the principles of precautionary approach[336] and compatibility,[337] along with the flag State duties[338] and compliance and enforcement measures[339] are of utmost importance to the Peruvian interests, including those beyond national jurisdiction. In addition, Peru must have the vision to increase the national fishing fleet which can do fishing beyond the maritime domain. Then, becoming a State party to the UNFSA will be beneficial to the access to hydrobiological resources for the national fishing fleet.

4.2.2. National law to be issued and/or amended

The compatibility between the UNCLOS EEZ fisheries regime and the maritime domain does not impede making some adjustments to the relevant national fisheries law. First, it is required that Peru clarifies the concept of the maritime domain in light of the customary international law assessed in this work. The suggested way to clarify this position would be to officially state what are those rights and obligations applicable to it and other States within the maritime domain.

[335] Article 2 of the UNFSA.
[336] Article 6 of the UNFSA.
[337] Article 7 of the UNFSA.
[338] Article 18 of the UNFSA.
[339] Part VI of the UNFSA.

Therefore, it is highly recommended to issue a national law developing the constitutional concept of the maritime domain and state the maritime zones recognized by Peru. This would include the establishment of the Peruvian EEZ along with the rights and obligations that are customary international law applicable to Peru and other States. This national law would also include the establishment of internal waters and the innocent passage. As seen in this work, both institutions have a certain relationship with the conservation and sustainable use of natural resources. Article 6 of the OL, prescribing that the sovereignty over the natural resources translates into the competence it has to legislate and exercise executive and jurisdictional functions over them, would be useful to the issuance of this law.

Considering the above suggestion, it must be noted that there is a case of another State not a party to UNCLOS (El Salvador) whose constitution prescribes sovereignty and jurisdiction over the sea adjacent to its coast until a distance of 200 nautical miles from the baselines.[340] By national law prescribed in article 574 of the Civil Code, El Salvador incorporated the maritime zones as established by UNCLOS. Thus, when interpreting the compatibility of El Salvador's Constitution and article 574 of the Civil Code, the Constitutional Chamber of the Supreme Court stated that:

> […] the Constitution does not refer to 200 nautical miles as the width of the territorial sea, but rather as a minimum extension up to which guarantee must be given to some manifestations of sovereignty and jurisdiction that can be modulated by the regulations of international law.[341]

Besides the position of a minimum (which accurately must be referred to as a maximum), the said experience may be helpful as a way to give further legal certainty to article 54 of the Peruvian Constitution, making special emphasis on the regulations for fishing activities that, as stated in the GFL, are of national interest.

Concerning the access of foreign-flagged fishing vessels to the surplus of hydrobiological resources in the maritime domain, it would be recommendable to amend article 47 of the GFL to include the requirement to establish the national capacity to harvest the total allowable catch.

[340] Fourth paragraph of article 84 of El Salvador's Constitution.
[341] Paragraph 1 of the decision of the Constitutional Chamber of the Supreme Court of El Salvador. Judgment 73-2013 of 31 August 2016. Translation done by the author.

This measure may be taken along with the issuance of a national policy regarding the increase of the national fishing fleet. In addition, some articles following article 47 of the GFL may include the particular regard to landlocked and geographically disadvantaged States mentioned in article 62.2 of UNCLOS, and the relevant factors to access the surplus as enshrined in article 62.3 of UNCLOS

Article 7 of the GFL must be amended according to customary international law. Thus, the drafting must procure to avoid mentioning that national law can be applicable beyond the 200 nautical miles of the maritime domain. This must be also clearly indicated if Peru decides to issue national law regarding its maritime zones. One must recall that, as for article 28 of the OL and the international law applicable through the constitutive treaties of the IATTC and the SPRFMO, Peru has a marked position regarding the straddling and highly migratory species.

Finally, article 59 of the LD Regulations must be revised for proper clarification or amendment. Even today the navigation of foreign-flagged fishing vessels within waters under national jurisdiction raises doubts in respect of the customary right of freedom of navigation. As stated in this work, the freedom of navigation is not absolute. Therefore, it must be understood in light of the customary obligation of due regard and other rules recognized by international law. In the author's view, the sole rule to require the permission of navigation needs further clarification as far as its purpose. It must be recalled that according to article 34 of the LD Regulations, all foreign-flagged vessels operating in the maritime domain, need a navigation permit, otherwise they can be detained and taken to port (article 59.2 of LD Regulations).

This revision needs also to incorporate the clarification of article 59.1 of the LD Regulations regarding the concept of fishing vessels. According to the treaties to which Peru is a party, such as the Compliance Agreement and the PSMA, the fishing vessel involves also those vessels that support the extractive actions. Therefore, the limitation of referring only to foreign-flagged fishing vessels carrying out extractive activities limits the scope of action of Peru concerning the conservation and sustainable use of its natural resources. One must recall that for the GFL, fishing activities involve direct and indirect activities.

Finally, it is recommended that further Peruvian national law concerning fisheries incorporates the formula prescribed by the LD by which other sources of international law apply to the maritime domain. This would strengthen the legal certainty of national fisheries law.

CONCLUSIONS

The main objective of this work was to identify what customary international law rights and obligations as reflected in the UNCLOS EEZ fisheries regime of which Peru, as a non-State party to UNCLOS, applies or must apply in its maritime domain. Therefore, some topics needed to be addressed such as the customary international law nature of the EEZ, particularly, of the fisheries regime; the doctrine of the Peruvian maritime domain and its juridical nature; and, the assessment of whether Peru needs to access any treaty or issue or amend national law, concerning the fisheries regime applicable in the maritime domain. The following are the findings of this work.

Today, the importance of marine living resources to the world is unquestionable. However, the stock fished at biologically unsustainable levels has been constantly increasing.[342] The international community then is called for taking solid steps to guarantee future generations meet their needs through the sustainable use of the said resources. This demands proper conservation and management measures to be carried out if fisheries' contribution to the nutritional, economic, and social well-being of the growing world's population is to be sustained.[343] The law of the sea is a crucial tool to achieve this goal.

The history of the law of the sea as assessed in this work shows that the conservation and management of marine living resources have been pursued on an exclusively zonal basis, with coastal States exercising rights over natural resources in a narrow belt of adjacent waters, and with a high seas were the freedom of fishing was granted.[344] Following the Latin American States' initiatives for creating a *sui generis* maritime zone focused on natural resources, the trend to increase such belt of adjacent waters was reflected in claims of the new law of the sea institutions such as fishery zone, patrimonial sea, economic zone, or EEZ, of which the last was established in UNCLOS.

The EEZ is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in part V of UNCLOS, under which the rights and jurisdictions of the coastal State

[342] According to FAO, the stock fished at unsustainable levels have been increasing since the late 1970s, from 10 percent in 1974 to 35.4 percent in 2019. FAO. 2022, The State of World Fisheries and Aquaculture 2022. Towards Blue Transformation. Rome, FAO, p. 46. Available on: https://www.fao.org/3/cc0461en/cc0461en.pdf Accessed 30 November 2022.
[343] FAO, *Report of the Expert Consultation on Technical Guidelines on Responsible Fish Trade*. FAO Fisheries Report N° 835, Rome, FAO, 2007, 23p, 10.
[344] See also Rothwell et al. (n 71) 599.

and the rights and freedoms of other States are governed by the relevant provisions of the said treaty.[345] Due to the general State practice along with its *opinio juris*, the EEZ crossed the threshold to be considered customary international law. This was evidenced by jurisprudence that concluded that its customary nature was reached even before UNCLOS entered into force. Then, theoretically, the rights and obligations of the EEZ must be applied, in principle, by all States.

However, there is no general agreement on what are the specific rights and obligations that are customary international law in the EEZ regime. Certainly, one can consider that the very core of the institution, namely, the sovereign rights to explore, exploit, conserve, and manage the natural resources, whether living or non-living, of the waters superjacent to the seabed and the seabed and its subsoil,[346] along with its maximum length of 200 nautical miles[347] have the same customary status. This is of utmost importance since the UNCLOS EEZ fisheries regime turns into the axis of the coastal State's sovereign rights over natural resources.

The said regime may be understood as the group of rights and obligations that are prescribed in UNCLOS for the coastal State and other States regarding fishing-related activities. Following relevant jurisprudence and doctrine, this work identified that, for the coastal State, customary rights are found in article 56.1.a), 56.1.b.iii), and 73 of UNCLOS, while customary obligations are found in articles 56.2, 61, 62, 63, 64, and 192 of UNCLOS. In addition, for other States in the EEZ, customary rights are found in articles 58.1, 58.2, and 62.2 of UNCLOS, while customary obligations are found in articles 58.3, 62.4, 63, 64, and 192 of UNCLOS. These rights and obligations are to be applied even by non-State parties such as Peru, which claims a 200 nautical miles maritime domain.

The Peruvian maritime domain is prescribed in article 54 of the 1993 Constitution. According to this provision, the maritime domain is a single maritime zone, comprising the adjacent to its coasts, as well as its sea bed and subsoil up to a distance of 200 nautical miles measured from the baselines established by law, where Peru exercises sovereignty and jurisdiction, without prejudice to the freedom of international communications, pursuant to the law and the treaties ratified by the State.

[345] Article 55 of UNCLOS.
[346] Article 56.1.a) of UNCLOS.
[347] Article 57 of UNCLOS.

This work concluded that Peru does not claim a 200 nautical miles territorial sea. For this, a special assessment deserved the Supreme Decree N° 781 of 1947 where the maritime domain was mentioned for the first time. Noting the difference between “to exercise” rather than “to extend”, it is clear that sovereignty and jurisdiction were meant to be tools by which Peru can achieve the goal of reserving, protecting, maintaining, and utilizing natural resources for socioeconomic reasons. This is why accurately it has been called modal sovereignty, recalling the well-established principle of sovereignty over natural resources as recognized by UN General Assembly Resolutions as quoted in this research. Article 66 of the Peruvian Constitution as well as article 6 of OL support this finding.

Furthermore and as noted by the UN Secretary-General in 1998, the freedom of navigation as guaranteed by the Constitution (reflected in the freedom of international communications) reveals the incompatibility for considering the maritime domain as a territorial sea claim. This has been also confirmed by the Constitutional Tribunal of Peru in considering that the principle of *ius communicationis* is manifested in the freedom of navigation.

In addition, it was concluded that on the application of the customary sovereign rights for exploration, exploitation, conservation, and management of natural resources within the 200 nautical miles, any claim of this nature would prevent the water column to be high seas. Therefore, although Peru still has not claimed an EEZ, the maritime domain is a valid claim under customary international law, making the water column, not the high seas.

Today’s Peruvian official position is to respect the customary international law as reflected in UNCLOS. This took the research to focus on what are those rights and obligations that Peru is bound to, concerning the fisheries regime in the maritime domain. Thus, this work found that there is compatibility between the UNCLOS EEZ fisheries regime that entails customary international law rules and the fisheries regime in the maritime domain, in the sense that there is not substantial opposition to the said regime. This was the result of assessing some treaties Peru is bound to, such as CBD, Compliance Agreement, PSMA, IATTC, and SPRFMO Conventions, along with national law such as the OL, the GFL, the Regulations, the LD, and the LD Regulations. This analysis found that some adjustments in national law need to be done, though. Also, it is highly recommended that Peru adhere to some treaties related to this subject.

As addressed in this work, the nature of the maritime domain as a single maritime zone hampers legal certainty about the implementation of rights and obligations of the fisheries regime. Therefore, there is a need to issue a national law describing the maritime zones within the maritime domain with their respective legal regimes. This would aid, among others, to establish the internal waters, where Peru enjoys sovereignty over natural resources and the innocent passage that entails the right to issue laws for the conservation of living resources and the prevention of infringement of fisheries law and regulations. Most importantly, it would establish the Peruvian EEZ when the State will exercise its sovereign rights over natural resources.

Concerning the access of foreign-flagged fishing vessels to the surplus of hydrobiological resources in the maritime domain, article 47 of the GFL should be amended to include regulations regarding the identification of the national capacity to harvest the total allowable catch. As recommended by this work, this may be also accompanied by national policies to increase the national fleet of fishing vessels, considering Peru's interests not only in the maritime domain but for natural resources in water beyond national jurisdiction, as the Peruvian membership of RFMOs shows. Article 47 of the GFL may also include the particular regard rule to landlocked and geographically disadvantaged States as reflected in article 62.2 of UNCLOS and the relevant factor to access the surplus as prescribed in article 62.3 of UNCLOS.

Turning to straddling and highly migratory species, article 7 of the GFL must be amended. Under customary international law as reflected in articles 57, 63, and 64 of UNCLOS, no national law can be applied beyond 200 nautical miles. Therefore, considering article 28 of the OL, Peru must adjust this article in line with its current practice which shows observance of the customary international law obligation to cooperate on these stocks. The membership of Peru to IATTC and SPRFMO, whose constitutive treaties, recall relevant provisions of UNCLOS and UNFSA, evidences the said practice.

As discussed, the customary right of freedom of navigation of other States in the coastal State's EEZ is not absolute due to the customary obligation of due regard and the customary sovereign rights over the natural resources of the coastal State. Nonetheless, article 59 of the LD Regulations needs clarification to understand its compatibility with the freedom of navigation. As recalled, under the said article, if the foreign-flagged does not hold a navigate permit, it can

be detained and taken to port. In addition, it would be recommendable that the same article clarifies the concept of the fishing vessel because it appeared to include only extractive vessels when the concept is broader as evidenced by article 4.1 of the Regulations, the Compliance Agreement, or the PSMA.

Finally, it is recommendable that Peruvian national law concerning fisheries include the drafting of the LD in specifying that other sources of international law besides treaties apply to Peru. This is of utmost importance due to the Peruvian condition of State non-party to relevant treaties dealing with this subject, such as UNCLOS and UNFSA. Without prejudice to the foregoing, Peru must assess its accession to the mentioned treaties for the protection of its interests in natural resources within the maritime domain and waters beyond it.

The author believes that this research can foster further discussion about how to strengthen Peruvian national law and interests over the oceans, particularly, for the fisheries regime in the maritime domain. Peru's substantive contribution to the modern law of the sea, as enshrined in the establishment of the EEZ, must be honored by decisive steps to support the guarantee of sustainable fisheries for the generations to come.

BIBLIOGRAPHY

UN General Assembly Resolutions

1. United Nations General Assembly Resolution 1105 (XI), *International conference of plenipotentiaries to examine the law of the sea*, (21 February 1957).

2. United Nations General Assembly Resolution 1307 (XIII), *Convening of a second United Nations conference on the law of the sea*, (10 December 1958).

3. United Nations General Assembly Resolution 1314 (XIII), *Recommendations concerning international respect for the right of peoples and nations to self-determination* (12 December 1958).

4. United Nations General Assembly Resolution 1803 (XVII), *Permanent sovereignty over natural resources* (14 December 1962).

5. United Nations General Assembly Resolution 2750 C (XV), *Reservation exclusively for peaceful purpose of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea*, (17 December 1970).

6. United Nations General Assembly Resolution 3067 (XXVIII), *Reservation exclusively for peaceful purpose of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of the Third United Nations Conference on the Law of the Sea*, (16 November 1973).

7. United Nations General Assembly Resolution 73/203, *Identification of customary international law*, A/RES/73/203 (20 December 2018).

Other international instruments

1. Declaración Conjunta Relativa a los problemas de la pesquería en el Pacífico Sur (Santiago, 18 de agosto de 1952).

2. United Nations, *Letter dated 28 April 1982 from the representatives of Chile, Colombia, Ecuador and Peru to the President of the Conference*, UN Doc A/CONF.62/L.143 (29 April 1982).

3. United Nations, *Final Act of the Third United Nations Conference on the Law of the Sea*, UN Doc A/CONF.62/121 (27 October 1982).

4. FAO, *FAO Code of Conduct for Responsible Fisheries* (Rome: FAO, 1995).

5. FAO, *FAO Technical Guidelines for Responsible Fisheries N° 4. Fisheries Management* (Rome: FAO, 1997).

6. United Nations General Assembly, 53rd Session, *Oceans and the Law of the Sea, Report of the Secretary-General*, UN Doc A/53/456 (5 October 1998).

7. IMO and ICAO, *International Aeronautical and Maritime Search and Rescue Manual* (IAMSAR Manual), (Vol. I, 10th Edition, 2016).

8. United Nations GAOR, 73rd Session, *Report of the International Law Commission*, UN Doc A/73/10 (2018).

9. United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development, *Our ocean, our future, our responsibility: draft declaration*, UN Doc A/CONF.230/2022/12 (Lisbon, 27 June – 1 July 2022).

Books

1. Alexander Proelss (ed), *United Nations Convention of the Law of the Sea: A commentary* (C.H. Beck Hart Nomos 2017).

2. Attard D., *The Exclusive Economic Zone in International Law* (Claredon Press Oxford 1987).

3. Bákula J., *La imaginación creadora y el nuevo régimen jurídico del mar. Perú y Chile: ¿el desacuerdo es posible?* (Universidad del Pacífico 2008).

4. Brownlie I., *Principles of Public International Law* (6th Edition, Oxford University Press 2003).

5. Bustamante y Rivero J., *Las Nuevas Concepciones Jurídica sobre el Alcance del Mar Territorial (Exposición de motivos del decreto supremo expedido por el Gobierno del Perú el 1° de agosto de 1947)* (Tipográfica Peruana, 1955).

6. Churchill R., Lowe V. and Sanders A., *The Law of the Sea* (4th Edition, Manchester University Press 2022).

7. D'Aspremont J., *Formalism and the Sources of International Law* (Oxford University Press 2011).

8. García D., *Constitución y Dominio Marítimo* (Instituto Iberoamericano de Derecho Constitucional 2002).

9. García F., *America Latina y el Derecho del Mar* (Editorial Universitaria 1976).

10. Janis M., *International Law* (7th Edition, Wolters Kluwer 2015).

11. Markowski M., *The International Law of EEZ Fisheries, Principles and implementation* (Europa Law Publishing 2010).

12. Nordquist M. (ed), *United Nations Convention on the Law of the Sea 1982: A commentary* (Volume II Center for Oceans Law and Policy University of Virginia School of Law Martinus Nijhoff Publishers 1993).

13. Roach A. and Smith R., *Excessive maritime claims* (3rd Edition, Martinus Nijhoff Publishers, 2012).

14. Rothwell D. and Stephens T., *The International Law of the Sea* (2nd Edition, Bloomsbury Publishing 2016).

15. Rothwell D., Oude Elferink A., Scott K. and Stephens T. (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015).

16. Shaw M., *International Law* (9th Edition, Cambridge University Press 2021).

17. Tanaka Y., *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea* (Ashgate 2008).

18. Tanaka Y., *The International Law of the Sea* (3rd Edition, Cambridge University Press 2019).

19. Thirlway H., *The Sources of International Law* (2nd Edition, Oxford University Press 2019).

20. Ulloa A., *Derecho Internacional Público* (4ta Edición, Volumen I, Ediciones Iberoamericanas 1957).

21. Vargas J., *Mexico and the Law of the Sea: Contributions and promises* (Martinus Nijhoff Publishers 2011).

Articles

1. Abugattās G., 'La Teoría Tridimensional en el Derecho Internacional' in Carlos Calderón et al., *Personas, Derecho y Libertad. Nuevas perspectivas. Escritos en Homenaje al Profesor Carlos Fernández Sessarego* (Motivensa 2009).

2. Bákula J., 'El Decreto de 1° de Agosto de 1947: Elogio y elegía' (109 Revista Peruana de Derecho Internacional 1997).

3. Belaunde A., 'Categorías jurídico-conceptuales en el Derecho del Mar' (109 Revista Peruana de Derecho Internacional 1997).

4. Bueger C., 'From Dusk to Dawn? Maritime Domain Awareness in Southeast Asia' (Contemporary Southeast Asia Vol. 37, N° 2, 2015).

5. Ferrero E., 'Fundamento de la Soberanía Marítima del Perú hasta las 200 millas' (32 Derecho PUCP 1974).

6. García D., ‘Teoría y Práctica de la Constitución Peruana’ (Lima: Ediciones Justo Valenzuela).

7. García E., ‘La Doctrina de las 200 millas y el Derecho del Mar’ (32 Derecho PUCP 1974).

8. Jagota S., ‘Developments in the UN Conference on the law of the sea: A third world review’ (3 Third World Quarterly N° 2 1981).

9. McDorman T., ‘Canada and Whaling: An analysis of article 65 of the law of the sea convention’ (29 Ocean and Development & International Law 2, 1998).

10. Plant G., ‘The Third United Nations Conference on the Law of the Sea and Preparatory Commission: Models for United Nations Law-Making?’ (The International and Comparative Law Quarterly N° 3 1987).

Relevant National law

Argentina

1. Presidential Decree N° 14708 of 11 October 1946.

Chile

2. Presidential Declaration Concerning Continental Shelf of 23 June 1947.

Colombia

3. Law N° 10 of 4 August 1978.

El Salvador

4. Civil Code (as amended in 2004).

Mexico

5. Presidential Declaration of 29 October 1945.

Peru

6. Supreme Decree N° 781 of 1 August 1947.

7. Law N° 11780 of 12 March 1952 (Petroleum Law).

8. Law Decree N° 20165 of 2 October 1972 (The General Customs Law was approved).

9. Law Decree N° 22178 of 9 May 1978 (Government declares metal gold mining to be of national interest).

10. Political Constitution of 1979.

11. Law Decree N° 22836 of 26 December 1979 (Economic and Financial Decentralization Law is issued by the Government).

12. Law N° 13508 of 6 February 1961 (Secret Law).

13. Law Decree N° 23088 of 11 June 1980 (Organic Law of the Ministry of Navy).

14. Law N° 23856 of 24 May 1984 (The maritime domain of the State, referred to in article 98 of the Political Constitution of the Republic is called “Mar de Grau”).

15. Law Decree N° 25977of 7 December 1992 (General Fisheries Law).

16. Political Constitution of 1993.

17. Supreme Decree N° 012-2001-PE of 13 March 2001 (Approval of the Regulations of the General Fisheries Law).

18. Law N° 28621 of 3 November 2005 (Law of baselines of the maritime domain of Peru).

19. Legislative Decree N° 1147 of 10 December 2012 (Legislative Decree that regulates the strengthening of the Armed Forces in the competencies of the National Maritime Authority – General Directorate of Captaincies and Coast Guard).

20. Supreme Decree N° 014-2015-DE of 26 November 2014 (Supreme Decree that approves the Regulation of Legislative Decree N° 1147, which regulates the strengthening of the Armed Forces in the competencies of the National Maritime Authority – General Directorate of Captaincies and Coast Guard).

21. Supreme Decree N° 012-2019-DE of 20 December 2019 (Supreme Decree that approves the Peruvian National Maritime Policy 2019 – 2030).

Türkiye

22. Decree by the Council of Ministers N° 86/11264 of 17 December 1986.

United States

23. Proclamation N° 2667 of 28 September 1945.

24. Proclamation N° 2668 of 28 September 1945.

25. Proclamation N° 5030 of 10 March 1983.

Venezuela.

26. Decree N° 1446 of 17 November 2014.

Other documents

1. Document OF RE (TRA) N° 3-0/74 2001 received by the Congress on 31 May 2001.

2. Dictamen recaído en el Proyecto de Resolución Legislativa N° 813/2001-CR, que propone aprobar la adhesión del Perú a la Convención de las Naciones Unidas sobre el Derecho del Mar y el Acuerdo Relativo a la Aplicación de la Parte XI de dicha Convención (2004).

3. Memorial of the Government of Peru in the context of the *Maritime Dispute* case (Vol. I, 20 March 2009).

4. Reply of the Government of Peru in the context of the *Maritime Dispute* case (Vol. I, 9 November 2010).

5. CR 2012/27, Public sitting held on Monday 3 December 2012, at 3 p.m., at the Peace Palace, President Tomka presiding, in the case concerning the Maritime Dispute (Peru v. Chile).

Webinars

1. Virtual round table "¿Debe el Perú ratificar la Convención del Mar, luego del Fallo de la Haya?" organized by Instituto Latinoamericano de Derecho Internacional y Relaciones Internacionales (ILADIR), 10 July 2020.