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# Fisheries data and the Law of the Sea Convention

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## **Keywords**

law, sea, fisheries, convention, data

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# Fisheries Data and the Law of the Sea Convention

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## **Abstract**

This article outlines the provisions of the Law of the Sea Convention (LOSC) concerning the collection and exchange of fisheries data. It also examines how the United Nations Fish Stocks Agreement has substantially strengthened the provisions of the LOSC in this area. The paper considers briefly the specific problems raised by the attempt to attribute a nationality to catch data, and the related problem of determining where the responsibility lies for reporting data in chartering arrangements.

## **Keywords**

1982 Law of the Sea Convention (LOSC); 1995 UN Fish Stocks Agreement; fisheries data; nationality of fish catches; chartering of fishing vessels; confidentiality of fisheries data

## **Introduction**

The purpose of this article is to outline the provisions of the 1982 Law of the Sea Convention (LOSC or the 1982 Convention)<sup>1</sup> concerning the collection and exchange of fisheries data, to see how the UN Fish Stocks Agreement (UNFSA or the Agreement)<sup>2</sup> has changed this. The article then considers two major sources of confusion in the area of data collection, namely, the attempt to give a nationality to a catch, and the related problem of chartering. The subject is quite extensive and systematic consideration of it is very much in its infancy. For example, the problems surrounding confidentiality of fisheries data is still largely unexplored.

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<sup>1</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* [ILM] 1261 (1982).

<sup>2</sup> 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, New York, 4 August 1995, entered into force on 11 November 2001 (1995) 34 ILM 1542.

## The International Law Regime

### *Internal Waters, Archipelagic Waters and the Territorial Sea*

The 1982 Convention does not make any reference whatever to the collection of fisheries data in these areas; indeed, it makes only passing references to fishing in respect of innocent passage and in respect of transit passage. Thus any specific obligation to report such data will need to be found in regional or subregional agreements.

### *The Exclusive Economic Zone*

The basic provisions concerning the Exclusive Economic Zone (EEZ) are set out in Part V of the 1982 Convention. The most important provision concerning data is set out in Article 61 (5), which deals with the conservation of the living resources. It states:

Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether sub-regional, regional, or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

The words “*available scientific information*” were probably employed in part to avoid imposing too onerous a burden on countries in the collection of data, especially developing States, or in the need to undertake scientific assessments of the living marine resources. This phrase was most probably linked to the requirement in Article 61 (2) that the coastal State shall take “*into account the best scientific information available to it*”. (Emphasis added.) Article 61 (5) reflects the increasing importance that was attached to exchange of information through international organizations. The reference to “*including states whose nationals are allowed to fish in the exclusive economic zone*” does not of itself emphasise a primary role of the flag state in providing data; indeed, it seems merely to underline the intention at that time for available information to be exchanged.

The other provisions in Part V which have a bearing on the issue are to be found in Article 62, which deals with the utilisation of the living resources. These are:

- Article 62 4 (d), which allows the coastal State to impose on “nationals of other States fishing in the exclusive economic zone”, amongst a number

of other conditions, laws and regulations relating to “specifying the information required of fishing vessels, including catch and vessel statistics and vessel position reports;”

- Article 62 4 (i), which relates to “terms and conditions relating to joint ventures or other co-operative arrangements”.

Overall, Part V does not mandate any specific or primary responsibility to collect data with respect to fishing in the EEZ. What is made clear, however, is that an obligation exists to exchange available information through competent international organizations.

### *The High Seas*

As with the EEZ, the 1982 Convention did not mandate any specific responsibility with regard to the collection of scientific data on the high seas. The principal provision is Article 119 (2), which provides:

available scientific information, catch and fishing effort statistics, and other scientific data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.

This obligation mirrors that which was found in respect of Article 61 concerning the EEZ, namely that there is an obligation to exchange information, etc. For practical purposes, this would nearly always be information provided by the flag State. The obligation to establish conservation measures for the high seas set out in Article 119 (1) presupposes that the State undertaking the fishing of these high seas stocks has access to the necessary data, or is able to provide it in order to arrive at meaningful conservation measures (although it is subject to that mischievous word “*available*”).

The simple regime laid down in the LOSC for the high seas is now modified substantially by the UNFSA. Indeed, insofar as straddling fish stocks and highly migratory fish stocks are concerned, we will see that it has also had some impact on the EEZ.

### *UN Fish Stocks Agreement*

The UNFSA reflects a much more elaborate and sophisticated approach to the collection of data. Whereas the 1982 Convention only addressed the question of collection and exchange of data in passing, it had come to be recognized that this should be addressed much more vigorously. Furthermore, the UNFSA

imposes quite specific obligations on States that are in contrast to those found in the LOSC, some of which, we have seen, are at best implied.

It is important to note that the UNFSA, with a few exceptions (e.g., Article 18) only applies to highly migratory fish stocks and straddling fish stocks beyond areas under national jurisdiction, though some of its provisions also apply in areas under national jurisdiction. In particular, the coastal State is to apply *mutatis mutandis* the general principles set out in Article 5, while Articles 6 (Precautionary Approach) and 7 (Compatibility of Conservation and Management Measures) shall also apply to such areas.

One of the general principles stated in Article 5 is of direct relevance to us here. Paragraph (j) provides:

collect and share, in a timely manner, complete and accurate data concerning fishing activities on, inter alia, vessel position, catch of target and non-target species and fishing effort, as set out in Annex I, as well as information from national and international research programmes.

Article 6, which sets out the precautionary approach, also makes reference to the need to collect data, for paragraph (d) provides: “develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment...”

It will be noted that these two provisions are cast in general terms. Where the fishing is taking place on the high seas, this will in almost all situations place the primary burden on the flag State. One possible exception here is that a coastal State, as a condition of granting an authorisation to a vessel to fish in its waters, might require that it report catches it makes on the high seas in adjacent areas.

The UNFSA also makes specific provision for the responsibility of the flag State. Article 14 sets out the following: “States shall ensure that fishing vessels flying their flag provide such information as may be necessary in order to fulfil their obligations under this Agreement. To this end States shall in accordance with Annex I...”

Here follows a number of detailed conditions regarding the collection and exchange of scientific, technical and statistical data. This is backed up by Article 18 which sets out Duties of the Flag State, which include among the measures to be taken by the flag State in paragraph 3 e):

requirements for recording and timely reporting of vessel position, catch of target and non-target species, fishing effort and other relevant fisheries data in accordance with subregional, regional, and global standards for the collection of such data.

All of these provisions are complemented by Annex I of the UNFSA. The chapeau to Article 1 of this Annex powerfully illustrates the progress made since the adoption of the LOSC in regard to increased recognition of the essential need for the collection of reliable data: “The timely collection, compilation and analysis of data are *fundamental* to the effective conservation and management of straddling fish stocks and highly migratory fish stocks.” (Emphasis added.) Only the limitation as to the stocks covered by the Agreement and the Annex (i.e., the straddling fish stocks and highly migratory fish stocks) obscures the progress made since 1982. The Annex sets out very elaborate provisions concerning data. It is important to note that the obligations are placed on both the flag State and more generally on States. Thus while the flag State has a specific obligation which is set out in Articles 14 and 18 above, it is clearly not put in such a way in this Annex as to exclude responsibility on the part of the coastal State from collecting data also.

However, in one very important respect, the Annex places particularly strong obligations on the flag State, for in Article 5, there is an obligation to ensure that vessels flying its flag send to its national fisheries administration, and where agreed, to the relevant subregional or regional fisheries management organization (RFMO) or arrangement, log book data on catch and effort, including data on fishing operations on the high seas. Likewise, in Article 7, concerning data exchange, it is stated: “Data collected by flag States must be shared with other flag States and relevant coastal States through appropriate subregional or regional fisheries management organizations or arrangements”.

Such organizations are also to compile such data and make them freely available in a timely manner and in an agreed format to all interested States.

### **The Purpose for which Fisheries Data Are Collected**

Both the LOSC and the UNFSA make it clear that the primary purpose of collecting fisheries data is to underpin decisions with respect to conservation and management of the resources. That said, it is unlikely that the data, having been collected, will be used only for that purpose. Thus, the data might be used, for example, directly or indirectly, to assist in identifying the origin of a catch for the purposes of trade rules concerning the origin of a particular item in trade (subject to any applicable confidentiality restrictions). However, it is important to keep in mind the basic purpose of the data collected, and that same information might only partly serve another purpose in another context. For example, in the area of fish processing, sales, and trade in the product, the data may have to be adapted to meet that purpose.

Fisheries data will also play an important role in determining the financial contributions to certain RFMOs; as, for example, is the case with the Western and Central Pacific Fisheries Commission. Regulation 5 of its Financial Regulations contains one of the following elements:

(c) a 70 per cent fish production component based upon a three-year average of the total catches taken *within exclusive economic zones* and in areas beyond national jurisdiction in the Convention Area of all the stocks covered by the Convention for which data are available . . . .

Most RFMOs have quite detailed guidelines on the provision of fisheries data.<sup>3</sup>

Fisheries data will also of course be useful in negotiations concerning access to EEZs where one of the issues is catch history. Indeed, Article 62(3) LOSC requires the coastal State to take into account a number of factors, including the need to “minimise economic dislocation in States whose nationals have habitually fished in the [EEZ]”.

Another area where the data might also play a role is in determining the parties to a negotiation on the management of a particular straddling fish stock or highly migratory fish stock. Related to this is the question of using fisheries data to determine the “catch history” of a particular country in a particular region (both within and beyond the EEZ), which will often be a major issue in negotiations. Another instance where the catch data can be used is to cross-check the accuracy of the statistics provided in respect of landings. There are no doubt numerous other instances where such data can (or do) serve another purpose.

### **Coordinating Working Party on Fishery Statistics: Nationality of the Catch**

The practice of the Coordinating Working Party on Fishery Statistics (CWP),<sup>4</sup> which was established in 1960, is intended to bring about some uniformity in this area. Following the recommendation of the UN Statistical Commission in 1954, the CWP adopted the policy of assigning fish catches to the country

<sup>3</sup> For an excellent and recent survey, see Robert Gillett, *Catch Attribution in the Western and Central Pacific Fisheries Commission*, February 2011 (WCPFC-TCC7-2011/23, 5 August 2011); [www.wpcf.int](http://www.wpcf.int).

<sup>4</sup> [www.fao.org/fishery/cwp/en](http://www.fao.org/fishery/cwp/en).



of the flag flown by the fishing vessel. However, the CWP has acknowledged that there were some situations where it was difficult to assign what it called “nationality”. These were: where the catch is transhipped, where the catch is unloaded in a foreign port, where the vessel is a flag of convenience, and where there is a joint venture between two countries or two or more nationalities. However, problems continued, and the CWP refined the criteria as follows, though retaining the flag as the principal criterion of “nationality”. The concept now reads: “That the flag performing the essential part of the fishing operations catching the fish shall be considered the paramount indication of the nationality assignment to the catch data.”

This may only be overridden when (a) the vessel is chartered by the host country to augment its fishing fleet, or (b) the vessel fishes for the country by joint venture contracts or similar agreements, and the operation of the vessel is an integral part of the economy of the host country. Furthermore, when the governments negotiate joint ventures or other contracts, in which vessels of one country land their catches at ports of another country, the assignment of nationality to such catches and landings data should be specified in the agreement.

A more basic question needs to be put, however. The reason for attributing nationality of the catch to the flag goes back to 1954, when the UN Statistical Commission decided that fish catches should be assigned to the country of the flag flown by the fishing vessel. That might have made sense in 1954 when the territorial sea was only three miles for most countries, and when fishery zones beyond the territorial sea were very much in their infancy. In other words, as a working rule for the high seas, it would then have made sense. However, once EEZs became the norm, it was clearly going to be unworkable. And that is before you insert emotional language such as the “nationality” of the catch!

It has to be said that reliance on the term “nationality” in reference to catch data is apt to convey unnecessarily the notion of proprietorship of the data in question. Furthermore, while there might be proprietorship of data in certain circumstances, the *provision* of data and dealing with their *attribution* are quite separate issues. Talking of ownership or nationality based on the flag merely obscures that fundamental point. Of course, a nationality might need to be attributed for the purpose of rules of origin in trade, but that raises other issues beside the data themselves. For example, if fish is caught within an EEZ by a foreign flagged vessel, the data will have at least two uses: one will be for the data to be attributed to the coastal State as fish obtained in its EEZ, while the same set of data might be used to support an argument to support historic catches by a flag State.

On the high seas, the situation is much more clear, as the flag State would be the obvious source of the data. The principal complication there is in respect of chartering of vessels or similar arrangements. As explained above, there are many reasons for collecting data, and talking of nationality as a one-size-fits-all is likely to lead to unnecessary confusion. In this regard (i.e., on the “nationality” of a catch), the 1982 Convention is silent. All it does is to give sovereign rights over the marine living resources to the coastal State, but until the fish are caught, they can hardly be said to have a nationality or, indeed, to be owned. Once caught, e.g., within an EEZ, the fish may well be regarded as belonging to (i.e., having the nationality of) the coastal State for certain purposes under national law. They may well continue (depending how the national law has chosen to characterise the matter, if at all), to be fish having the nationality of the coastal State even though caught by another flag State. But if, for statistical purposes, it is thought better to have the information provided by the flag State, even though caught within the EEZ of a different State, then that can be achieved without the need to attribute nationality to the data. Thus, it is most probably better not to talk about “nationality” in this context.

## Chartering

Chartering of fishing vessels is also a major source of confusion when it comes to data collection. On this the LOSC is also silent. The way chartered vessels are dealt with by RFMOs varies considerably from one RFMO to another.<sup>5</sup> The problem also lies in the term itself, for it is capable of covering at one extreme the bareboat or demise charter of a highly sophisticated purse seine vessel to, at another extreme, the “chartering” of a small vessel for the afternoon—more in the nature of a hiring arrangement. It also has to deal with so-called (and sometimes dubious) “parallel registration” practices. The main issue is to decide in what circumstances the chartered vessel has to report its catch as a flag state or as a coastal state. It is beyond the scope of this paper to explore the problems raised by chartering further here. However, it can be said that there is a need for some further work at both at the global and regional level to standardise practices and to avoid overlaps in practice that might lead to double reporting and under reporting.

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<sup>5</sup> See Gillett (*supra* n 3) for a review of chartering practices in different RFMOs.

Gillett<sup>6</sup> has proposed “zone-based attribution” or, in other words, the zone in which the fish is caught should be the area to which the catch is attributed. In the case of the EEZ, it would not matter whether it was a flag state or a coastal state or a chartered vessel, as the attribution would remain the same. On the high sea, the attribution would in most cases go with the flag. This approach would resolve many of the difficulties being encountered at present.

## **Conclusion**

The purpose of this article has been to identify the principal provisions of the LOSC concerning the collection of fisheries data, and to examine how these have evolved in the implementation of the LOSC and in practice. As we saw, the UNFSA developed considerably the somewhat terse provisions of the LOSC. However, much remains to be done at the global and regional level to formulate workable rules governing the collection of data, and establishing clear rules for data from chartered vessels, as well as removing outmoded concepts such as giving a “nationality” to catch data.

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<sup>6</sup> *Ibid.*, at 45.