



Conservation issues in coastal waters: state sovereignty, indigenous peoples and international obligations

By Maxim Zadorin

*Small Master's Thesis
Masters of Laws in Law of the Sea
University of Tromsø
Faculty of Law
Fall 2011*

Contents

Chapter 1. Introduction	iii
1.1 Background and aim of the Master's thesis.....	iii
1.2 Delimitations and method.....	iv
1.3 Abbreviations and acronyms.....	v
1.4 List of legal sources	vi
Chapter 2. States' obligations for conserving coastal waters	1
2.1 States' 'sovereignty and jurisdiction' over territorial waters.....	1
2.1.1 'Conservation' definition and basic reasons for it.....	2
2.1.2 General types of fish species for coastal conservation.....	3
2.1.2.1 'Anadromous species'.....	4
2.1.2.2 'Catadromous species' and 'coastal species'.....	4
2.2 States' obligations to protect the environment in territorial waters.....	5
2.2.1 UNCLOS, Part XII: interpretation marks.....	6
2.2.2 CBD and 'precautionary approach'.....	6
2.2.3 Interaction between UNCLOS and CBD norms, CBD novels und updates.....	7
2.3 Opportunities and offers vis-à-vis fishery and neighboring states.....	9
2.3.1 'MPA' instrument.....	9
2.4 An illustration on how Russia has interpreted the international obligations on sustainable development.....	11
2.4.1 Environmental protection of territorial waters.....	11
2.4.2 Protection and management of fish resources.....	12
Chapter 3. Indigenous peoples' rights to fishery	15
3.1 Human and collective rights and a state's sovereignty: contradiction or consent?	15
3.2 International legal framework on indigenous peoples' fishery rights.....	16
3.2.1 Substantial rights: ICCPR, CERD Rec.26, ECHR, ILO 169.....	16
3.2.2 Procedural rights: CBD etc.....	18
3.2.3 Non-legally binding instruments: UNDRIP, FAO Code, Draft Nordic Sámi Convention.....	21
3.2.4 Russian acts on indigenous peoples rights: specificity and legal gaps.....	24
3.3 Indigenous 'traditional knowledge' and 'sustainable development': theory and international practice (cases).....	26
Chapter 4. Conclusion	30
4.1 Summary of the major findings with respect to the issues.....	30
References	34

Chapter 1. Introduction

1.1 Background and aim of the Master's thesis

The small master thesis is dedicated to the problem of coastal states' jurisdiction over their marine biological resources, the challenge of ratio between states' sovereignty and international obligations on conservation management and human rights (collective indigenous peoples' rights to fishery) and a sustainable use of marine living resources. The basic reason for the conservation policy is the environmental destruction. Fishing methods are often highly dangerous, and paradoxically the viability of some stocks is threatened by certain conservation restrictions, where targeting only larger fish alters the genetic diversity, which means the variability among living organisms from all sources, of the stocks and results eventually in smaller fish, and 'industrial fishing', where fish are not taken for human consumption but are processed into meal for use as cattle or poultry feed or as fertilizer can make reductions in seabird colonies¹.

The first doctrinal and political claim to the special rights on fishery was stated in the Middle Ages, where the famous Dutch commentator, Hugo Grotius, as the counsel to the East India Company, opposed the Portuguese claim that the Indian Ocean should be closed to trade by foreign vessels and attempted to justify the freedom of the sea. His work "Mare Liberum" presented this argument². The opposition to Hugo treatise was "Mare Clausum" by Selden³, who concluded that "the private possession of the sea had been a widely recognized fact of life"⁴.

At first impression, Grotius' "Mare Liberum" and Selden's "Mare Clausum" appear completely contradictory in their content. In fact, however, Selden did not deal with the open oceans; while the freedom of the sea which Grotius advocated did not pertain to the sea areas close to land. The claim to the possession of seas near the coast has become the basis of the present regime of the territorial sea. On the other hand, the concept of freedom of the seas has provided the foundations of the regime of the high seas. Thus, it can be seen that the division of the ocean into the high seas and the territorial seas has a most respectable historical base. The existence of two disparate regimes, namely exploitation under the full control of the

¹ Birnie et al., *International Law and the Environment* (2009) p. 703.

² Grotius, H., *The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the Eastern Indian Trade (translated by Magoffin, 1916)*, Carnegie Endowment for International Peace.

³ Selden, J., *The Right and Dominion of the Sea (translated by James Howell, 1668)*'.

⁴ Shigeru Oda, *International Law of the Resources of the Sea*, Sijthoff & Noordhof, 1979, p. 3.

coastal State and exploitation of sea resources free from interference by any country, is a fundamental presumption underlying the exploitation of sea resources⁵.

The master thesis is based on the legal analytical works of scholars as Shigeru Oda, Eric Molenaar, Brownlie, Hubold, Burke, Birnie, Stokke, Kaye, Jakobsen, Stacy, Bederman, Ilyasov, Guculyak, Hamilton and etc.

The aim of this thesis is threefold. Firstly, it analyzes and discusses in what manner international law limits state sovereignty with respect to nature conservation and fishery in the territorial waters. Secondly, it analyses state obligations due to international standards vis-à-vis indigenous peoples' fishing rights. This includes both rights to fish and procedural aspects related to the management of fisheries and traditional knowledge. Thirdly, the thesis illustrates how these recognized international obligations have been interpreted by domestic law by briefly describe relevant aspects of Russian law.

1.2 Delimitations and method

In avoiding unnecessary theoretical and historical factors this work is dedicated of more legal aspects on a coastal fishery of states. The main example of domestic law will be the Russian Federation, as one of the largest marine and fishing state. The work is divided into 2 parts.

The first part (2nd Chapter) raises the question of coastal states' jurisdiction and sovereignty on marine biological resources inside their territorial waters and the issue of conservation approaches under international agreements. The distinction among fish species is also very important, hence this part doesn't consider 'highly-migratory' and 'transboundary' species, habitats of EEZ and High Seas, but mostly 'anadromous' and 'catadromous' species of coastal waters. Further the application of UNCLOS and CBD is presented, showing the novels of biological diversity convention. The issue of vis-à-vis fishery among neighboring states and MPAs regime explains the complexity of coastal fishery norms. The final section demonstrates on the example of Russia the differences between domestic legislation and international norms on fishery and environmental protection.

The second part (3rd Chapter) concentrates attention on indigenous fishery rights, raising the question of coastal states' sovereignty prevailing over collective indigenous rights for fishing, and about bucking the trend. Henceforth international legal framework on indigenous peoples' rights on fishery is performed, beginning from substantial and procedural

⁵ Shigeru Oda, *ibid*, p. 4.

rights, ending with declarative norms at whole and specifically. Russia appears in this section as an example of inconsistent legislation on the issue. The final section organically leads to the ‘traditional knowledge’ of indigenous peoples as the instrument for ‘sustainable development’.

The method is based on an analysis of foremost international treaties and scholarly literature, to some extent international case law. The domestic Russian law has been translated by me, with the exception of the official English translation of the Russian Constitution. The specific problems are vague provisions, scarcity of literature and the challenge with the interpretation of the UNCLOS and the CBD.

1.3 Abbreviations and acronyms

CBD – Convention on Biological Diversity

CERD – Committee on the Elimination of Racial Discrimination

DNSC – Draft Nordic Sámi Convention

ECHR – European Convention on Human Rights

EEZ – Exclusive Economic Zone

FAO – Food and Agriculture Organization

FL – Federal Law

ICCPR – International Covenant on Civil and Political Rights

ILO – International Labor Organization

ICJ – International Court of Justice

ICSU - International Council for Science

MPA – Marine Protected Area

UNCLOS – United Nations Convention on the Law of the Sea

UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples

UNESCO - United Nations Educational, Scientific and Cultural Organization

UNFSA – United Nations Fish Stocks Agreement

TAC – Total Allowable Catch

TTP – Territories of Traditional Use

WCED - World Commission on Environment and Development

1.4 List of the most important legal sources

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, 1995. Folkerettslig tekstsamling, 1883-2007, 4.utgave, Cappelen Akademisk Forlag, 2008.
2. Convention on Biological Diversity, 1992. The Secretariat of the Convention on Biological Diversity (SCBD), URL: <<http://www.cbd.int/convention/text/>>.
3. C169 Indigenous and Tribal Peoples Convention, 1989, URL: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>>.
4. International Covenant on Civil and Political Rights, URL: <<http://www2.ohchr.org/english/law/ccpr.htm>>.
5. United Nations Convention on the Law of the Sea, 1982. Global and European Treaties, 2007, Editors Ole Kristian Fauchald and Bård Sverre Tuseth. Published with Support from the University of Oslo and Selmer Advokatfirma.
6. UN Declaration on the Rights of Indigenous Peoples, 2007, URL: <<http://www.un.org/esa/socdev/unpfii/en/drip.html>>.
7. Rio Declaration on Environment and Development, 1992, URL: <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>>
8. The Draft Nordic Sámi Convention, URL: <http://www.galdu.org/govat/doc/samekoneng_net.pdf>.
9. The Constitution of the Russian Federation, Article 69, “Russian Newspaper”, N 7, 21.01.2009.
10. Tax Code of the Russian Federation (Part II) dated August 5, 2000, N 117-FZ, “Russian Newspaper”, N 153-154, 10.08.2000.
11. Federal Law of 20.12.2004 N 166-FZ “On Fishing and Conservation of Aquatic Biological Resources”, “Russian Newspaper”, N 3661, 23.12. 2004.
12. Federal Law of 30.04.1999 N 82-FZ “On Guarantees of the Rights of Indigenous Numerically Small Peoples of the Russian Federation”, “Russian Newspaper”, N 90, 12.05.1999.
13. Federal Law of 07.05.2001 N 49-FZ “On territories of traditional nature of Indigenous Numerically Small Peoples of the North, Siberia and the Far East of the Russian Federation”, “Russian Newspaper”, N 88, 11.05.2001.
14. Federal Law of 07.02.2003 N21-FZ “On temporary measures to ensure the representation of Indigenous Numerically Small Peoples of the Russian Federation,

legislative (representative) bodies of constituent entities of the Russian Federation”, “Russian Newspaper”, N 26, 11.02.2003.

15. The Law of the Russian Federation from 19.02.1993 N 4520-1 (amended on 24.07.2009) “On state guarantees and compensation for those working and living in the Far North and similar areas”, “Russian Newspaper”, N 73, 16.04.1993.
16. The Charter of Murmansk Region, Article 21, Newsletter Bulletin “Statements of the Murmansk Regional Duma”, N 25, 14.01.2003.
17. The Unified List of Indigenous Numerically Small Peoples of the Russian Federation (RF Government Regulation of 13.10.2008 N 760 from 18.05.2010 N 352, from 7.06.2010 N 453 from 02.09.2010 N 669), The Ministry of the National Policy of Udmurt Republic website: <<http://www.minnac.ru/minnac/info/13884.html>>

Chapter 2. States' obligations for conserving coastal waters

2.1 States' 'sovereignty and jurisdiction' over territorial waters

The UNCLOS was the first wide scale treaty which provided the detailed scheme of the maritime zones with specific characteristics and juridical scopes. It was really important novel, because for centuries, customary law and not treaties governed the maritime zones and the law of the sea at whole. As was mentioned by Schiffman early state practice on the breadth of the territorial sea was quite inconsistent and often employed vague criteria⁶. Over and above Churchill expresses the existing fisheries law was unsatisfactory to developing states concerned about access to fishery resources near their own shorelines, where the distant water fishing vessels of developed states were permitted to catch fish on the high seas close to their coast⁷. Hence the international cooperation for resolving such conflicts was one of the important recipes among other complexities. From the point of view of Tommy T.B. Koh, the president of UNCLOS III, the Law of the Sea Convention is 'a constitution for the oceans'⁸. One of the best achievements of the UNCLOS is the establishment of the territorial sea breadth and definition.

'Territorial sea' is defined in the UNCLOS 1982 as an adjacent sea belt beyond coastal states' land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, where the sovereignty of a coastal State extends⁹. The breadth of the territorial sea should not exceed 12¹⁰ nautical miles, measured from baselines¹¹.

'The sovereignty' under the legal doctrine is a supreme dominion or authority, the total and supreme power of an independent state on the concrete territory¹², or in case of territorial waters: the air space over it as well as to its bed and subsoil¹³. An authority could be exercised within the limits or territory of national jurisdiction¹⁴, where restrictions upon

⁶ Howard S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservations and Vetoes*, Martinus Nijhoff Publishers, Leiden/London, 2008, p. 11.

⁷ Churchill and Lowe, *The Law of the Sea*, 3rd ed. Manchester: Juris, 1999, p. 287-288.

⁸ Remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, reprinted in, United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea, U.N. Sales No. E.83.V.5(1983) (remarks delivered on Dec. 6 and 11, 1982 at the final session of the Conference at Montego Bay, Jamaica).

⁹ UNCLOS, Article 2(1).

¹⁰ UNCLOS, Article 3.

¹¹ Ibid. Article 5, 7.

¹² "Sovereignty – Definition from the Webster's New World Law Dictionary", URL: <<http://law.yourdictionary.com/sovereignty/>> (accessed: 01.06.2011).

¹³ UNCLOS, Article 2(2).

¹⁴ "Jurisdiction – Definition from the Merriam-Webster Online Dictionary", URL: <<http://www.merriam-webster.com/dictionary/jurisdiction>> (accessed: 01.06.2011).

the independence of states cannot be presumed¹⁵. The jurisdiction is a more narrow term than sovereignty¹⁶, refers to judicial, legislative and administrative competence¹⁷ and to the prescriptive and enforcement power that a state may exercise¹⁸. Coastal states establish their own domestic fishery legislation, adopting regulations to prevent foreign vessels from any activity in that area in compliance with UNCLOS¹⁹. Sovereignty of a coastal state over territorial waters is exercised subject to UNCLOS and to other rules of international law, including any fishing conservatory treaties to which a state is party²⁰.

There is no doubt that the sovereignty of the state on the marine bio-resources should also be commensurate with the will of society. The role of public society in fishery is underlined by professor G.Hubold in his article, where he convinced that public responsibility (not state) could be focused on the definition of the socio-economic parameters for the fishery, which includes relation between fleet sectors, limited ownership and etc., the setting of ecological quality targets and management objectives for the ecosystems (as minimum stock sizes of commercial and other species to maintain ecosystem balance), the prevention of ecological risks by scientific monitoring and analysis of the respective ecosystems under the privatized fishery regime, immediate action on the fishery, when environmental targets are endangered, mediation between user groups of conflicting interest²¹.

2.1.1 'Conservation' definition and basic reasons for it

When states had realized that unregulated fishing will result in depletion of certain stocks in fishing zones the decision for conservatory measures was taken into account. One of the global and substantial conferences for conservation was the 1955 Rome Convention, where the main purpose of conservation was announced:

“The immediate aim of conservation of living marine resources is to conduct fishing activities so as to increase, or at least to maintain, the average sustainable yield of products in desirable form...The principle objective of conservation of the living

¹⁵ PCIJ, Ser. A, No 10, p 18 (1927).

¹⁶ Molenaar, 'Coastal State Jurisdiction over Vessel-Source Pollution' (1998), p. 75.

¹⁷ Brownlie, 'Principles of Public International Law' (2008), p. 299.

¹⁸ Malanczuk, Akerhurst's, 'Modern Introduction to International Law' (1997), p. 109.

¹⁹ Ibid. Article 19(2)(i).

²⁰ Ibid. Article 21(1)(e), 42(1)(c).

²¹ G.Hubold, 'Fishery and Sustainability', Marine Issues: From a Scientific, Political and Legal Perspective, p.192.

resources of the sea is to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products...”²²

‘Conservation’, from the point of view of Patricia Birnie²³, who in turn refers to the Legal Experts Group of WCED²⁴, should be identified as:

“...the management of human use of natural resource or the environment in such a manner that it may yield the greatest sustainable benefit to present generations while maintaining it’s potential to meet the needs and aspirations of future generations. It embraces the preservation, maintenance, sustainable utilization, restoration, and enhancement of a natural resource or the environment.”²⁵

Conservation measures were enumerated in the Rome Conference as follows: 1) fixing a maximum annual catch; 2) limitation of fishing gear and ancillary equipment; 3) fish size specification; 4) fishing prohibition in a special areas, where small fish predominate; 5) ensure adequate spawning stock; 6) differential harvesting; 7) fishing prohibition in spawning areas or during spawning seasons; 8) different harvesting of sexes to achieve a desirable ratio in the population; 9) artificial propagation; 10) transplantation of organisms from one biogeographical area to another, with due precaution against adverse effects; 11) transplantation of young to better environmental conditions²⁶.

The authority of a coastal state to marine conservation inside its territorial waters is absolute today, since this part is under state’s sovereignty. But the tendency for a new conception of limited territorial sovereignty, concerning cooperation in conservation, followed inter alia by those of good neighborliness and good faith, presented by some scholars, is seen quite clearly²⁷.

2.1.2 General types of fish species for coastal conservation

²² Rome Conference Report, p.2. A similar concept was adopted also at the Ciudad Trujillo Conference held in 1956 by the Organization of American States. Pan American Union, Inter-American Specialized Conference on “Conservation of Natural Resources: The Continental Shelf and Marine Waters”, Ciudad Trujillo, March 15-28, 1956, Final Act, p.13.

²³ Birnie et al., *‘International Law and the Environment’* (2009) p. 593.

²⁴ World Commission on Environment and Development Experts Group on Environmental Law. URL: <http://www.onlyoneplanet.com/Env_principles_WCED1996.htm> (accessed: 05.06.2011).

²⁵ Legal Experts Group report in Munro and Lammers, *Environmental protection and Sustainable Development* (Dordrecht, 1986) 9n.

²⁶ Rome Conference Report, p.3, para. 23.

²⁷ L.Wildhaber, *‘Rechtsfragen des Internationalen Umweltschutzes’*, in: H.Meihlsler *Gedachtnisvorlesungen an der Universitat Salzburg*, 1/1987, 16, 17.

As it was mentioned above a national jurisdiction of a coastal state's territorial sea falls into line with its sovereignty and could be limited only by wish of a coastal state²⁸ and by submitting any regional or international agreement²⁹, providing special conservatory measures for any species such as, for instance, anadromous³⁰ or catadromous³¹. The importance of providing review on such species is explained by their habitat (inside coastal waters). The master thesis is not cover unnecessary highly-migratory and transboundary species, which habitat is in the high seas and the EEZ.

2.1.2.1 'Anadromous species'

The general harvesting species of coastal waters are anadromous and catadromous. 'Anadromous species' (such as salmon³² or shad, steelhead trout, striped bass, herring³³) spawn in freshwater rivers, but spend the major part of their lives at sea, passing through territorial sea and EEZ to the high seas before returning to die in the rivers in which they originated³⁴. The legal regime of anadromous fishery is based on the primary interest of coastal states, their responsibility for these stocks and conservation, including cooperation among adjacent states.³⁵ It is also important to mention that any conservatory measures adopted by states of origin are useless if the species are over-exploited in the EEZ or on the high seas, therefore they can only be caught on the high seas in exceptional cases with multilateral consultations³⁶. According to the opinion of scholar Hey there is the issue of exercising jurisdiction over stocks not originating in the territory of coastal state³⁷. Every coastal state can establish total allowable catch standards (TACs³⁸) only after negotiations with adjacent states³⁹.

2.1.2.2 'Catadromous species' and 'coastal species'

²⁸ Ibid. p. 518.

²⁹ The exemption from this part should be made for archipelagic waters, where a state should "recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighboring States in certain areas falling within archipelagic waters", UNCLOS, Article 51.

³⁰ Ibid, Article 66(1).

³¹ Ibid. Article 67(1).

³² 'Salmon' - a marine and freshwater food fish, *Salmo salar*, of the family Salmonidae, having pink flesh, inhabiting waters off the North Atlantic coasts of Europe and North America near the mouths of large rivers, which it enters to spawn. URL: <<http://dictionary.reference.com/browse/salmon>> (accessed: <05.06.2011>).

³³ W.T.Burke, 'The New International Law of Fisheries' (1994), p. 151.

³⁴ Birnie et al., 'International Law and the Environment' (2009) p. 727.

³⁵ UNCLOS, Article 66(4).

³⁶ Ibid. Article 66(3)(a).

³⁷ Hey, 'The Regime for the Exploitation of Transboundary Marine Fishery Resources', p. 64.

³⁸ 'The total allowable catch (TAC)' - is a catch limit set for a particular fishery, generally for a year or a fishing season. TACs are usually expressed in tonnes of live-weight equivalent, but are sometimes set in terms of numbers of fish. Review of Fisheries in OECD Countries: Glossary, February 1998.

³⁹ UNCLOS, Article 66(2).

‘Catadromous species’ (such as eels⁴⁰) are spawned at sea and spend the major part of their lives in rivers and lakes⁴¹. The relevant article of UNCLOS provides responsibility of coastal states for their conservation and management⁴². The appropriate exploitation is allowed to landward of the outer limit of the EEZ⁴³ and in cases where catadromous fish migrate through the exclusive economic zone of another state, whether as juvenile or maturing fish, the management, including harvesting, of such fish shall be regulated by agreement between states⁴⁴. Inasmuch as no any concrete form of cooperation is set a coastal state can act bilaterally or multilaterally.

‘Coastal species’ are separate group in the ternary. The most popular coastal variants for fishery are cod and haddock. Cod is divided in two groups⁴⁵: highly migratory (oceanic) and as it is called ‘sedentary’ or ‘coastal’.

2.2 States’ obligations to protect the environment in territorial waters

The crucial point between state sovereignty on fishery in coastal waters and the obligation to “protect and preserve the marine environment”⁴⁶ consists in “the sovereign right of states to exploit their natural resources”⁴⁷. The legal literature reveals to us several general principles of international environmental law. Customary law principles are duty to cooperate, duty to avoid harm, duty to compensate for harm and etc⁴⁸. General principles of environmental law are: 1) liability for environmental damage⁴⁹; 2) intergenerational equity⁵⁰; 3) human rights (to healthy environment)⁵¹; 4) development of environmental considerations⁵²; 5) common, but differentiated responsibilities⁵³; 6) precaution⁵⁴; 7) procedural principles: effective legislation, monitoring compliance, environmental impact assessment, access to information, public participation, access to

⁴⁰ ‘Eel’ – is one of numerous elongated, snakelike marine or freshwater fishes of the order Apodes, having no ventral fins. URL: <<http://dictionary.reference.com/browse/eel>> (accessed: 19.06.2011).

⁴¹ Birnie et al., *‘International Law and the Environment’* (2009), p. 728.

⁴² UNCLOS, Article 67(1).

⁴³ Ibid. Article 67(2).

⁴⁴ Ibid. Article 67(3).

⁴⁵ Universitetet i Oslo website. Dynamics and genetics of oceanic - coastal cod population complexes. URL: <<http://folk.uio.no/sigurdnes/utgivelser/CODPLEX.pdf>> (accessed: 22.06.2011).

⁴⁶ UNCLOS. Article 192.

⁴⁷ Ibid. Article 193.

⁴⁸ Winfried Lang, *‘UN-Principles and International Environmental law’*, Vol. 3 (1999), p.160.

⁴⁹ C.Peck, R.S.Leeds, *‘Increasing the Effectiveness of the International Court of Justice’* (1997), p. 397.; Rio Declaration, Principle 2 and 13; Stockholm Declaration, Principle 21 and 22.

⁵⁰ Rio Declaration, Principle 3; Stockholm Declaration, Principle 2.

⁵¹ Rio Declaration, Principle 1; Stockholm Declaration, Principle 1.

⁵² Stockholm Declaration, Principle 8,11,13.

⁵³ Rio Declaration, Principle 6. ‘Differentiation’ means ‘positive discrimination’ in favor of developing countries.

⁵⁴ Rio Declaration, Principle 15.

judicial proceedings⁵⁵. Such principles totally cover states obligation for marine environment preservation.

‘The environment’ includes ‘rare and fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other forms of marine life’⁵⁶ and it is clear that Part XII of UNCLOS at whole does not cover only vessel or any source pollution⁵⁷, but compose protection of ecosystems, conservation of depleted or endangered species of marine life, and control of alien species⁵⁸. Part XII at all may be read as an indicator of the economic and territorial focus associated with protecting sovereign rights over fish stocks as opposed to an environmentally centered approach.

2.2.1 UNCLOS 1982, Part XII: interpretation marks

Conservation is usually based on precautionary approach (principle), which could not be found in the UNCLOS. The additional to UNCLOS UNFSA 1995 refers to such principle for the conservation; management and exploitation of straddling and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment⁵⁹, but do not give the legal definition.

2.2.2 Convention on Biological Diversity 1992 and ‘precautionary approach’

The relevance of the CBD for marine preservation can’t be overstated. At present time this international treaty is the most complete and not vague instrument for biodiversity protection. But, unfortunately, the CBD does not provide any legal definition of ‘precautionary approach’. Only doctrinal or technical assessment could help to define how this principle looks like:

“... ‘Precautionary approach’ is a set of agreed cost-effective measures and actions, including future courses of action, which ensures prudent foresight, reduces or avoids risk to the resources, the environment, and the people, to the extent possible, taking explicitly into account existing uncertainties and the potential consequences of being wrong”⁶⁰

⁵⁵ Rio Declaration, Principles 11, 17, 10; CSD Principles 13, 14, 15, 17, 18, 19.

⁵⁶ Ibid. Article 194(5).

⁵⁷ Birnie et al., ‘*International Law and the Environment*’ (2009), p. 745.

⁵⁸ Eugene H. Buck, ‘*U.N. Convention on the Law of the Sea: Living Resources Provisions*’, URL: <<http://www.fas.org/sgp/crs/row/RL32185.pdf>> (accessed: 23.08.2011).

⁵⁹ UNFSA, Article 6.

⁶⁰ FAO, Technical Guidelines for Responsible Fisheries (1997), p. 4.

It is interesting that under the CBD the jurisdictional scope covers as areas within the limits of national jurisdiction and also beyond these limits⁶¹, but in question of cooperation “each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties... in respect of areas beyond national jurisdiction and on other matters of mutual interest”⁶². The authority of the State’s sovereignty within the territorial sea is undeniable. The only way to weak the influence of a state power for the benefit of people and biodiversity is the provisions of the Article 10, where parties should “(c) protect and encourage customary use of biological resources”, “(d) support local populations”, “(e) encourage cooperation with private sector”.

The additional protocol to the CBD enlarges responsibilities of states, concerning access to genetic resources (including marine living resources), providing special rules on traditional knowledge, associated with genetic resources⁶³. In process of sharing fish resources in a territorial sea states must be guided by indigenous peoples’ interests:

“In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources”⁶⁴

2.2.3 Interaction between UNCLOS and CBD norms, CBD novels und updates

First of all it should be mentioned, that the provisions of the CBD do not affect any the rights and obligations of any states from any existing international agreement, excepting cases, where “the exercise of those rights and obligations would cause a serious damage or threat to biological diversity”⁶⁵. The CBD imposes higher requirements and standards on environmental protection than the UNCLOS.

Both conventions provide management and protection of marine biological resources regime. The UNCLOS establishes the regulations which are to a large extent depend upon the maritime zone, opposite the CBD applies to all terrestrial and marine biodiversity. As was mentioned by Nele Matz under the Article 4 “the CBD applies to components of biological diversity, whereas beyond all zones of sovereignty states parties have to cooperate either

⁶¹ The CBD, *ibid.*, Article 4 (a), (b).

⁶² *Ibid.*, Article 5.

⁶³ Nagoya Protocol to the CBD, Article 6-7.

⁶⁴ *Ibid.*, Article 12.

⁶⁵ The CBD, *ibid.*, Article 22 (1).

directly or through competent international organizations to promote the conservation of components of biological diversity”⁶⁶. The limits outside national jurisdiction covered by CBD only in regard to activities under states’ control and to “components of biological diversity”, where all distinction between these 2 categories would be considered arbitrary⁶⁷.

The second difference between the UNCLOS and the CBD is in the approach, where the CBD prescribes ecosystem approach and the UNCLOS is in the restoration and maintenance of the maximum sustainable yield. The CBD protects rather the ecosystems than certain types of species⁶⁸. The marine ecosystems could be significantly changed, even if a state policy complies with the provisions of the UN Convention on the Law of the Sea on independence of species⁶⁹. The precautionary principle received global recognition in the 1985 Vienna Convention for the Protection of the Ozone Layer; it was the endorsed in the 1992 Rio Declaration, and was subsequently applied in a number of the other contexts, including the management of marine resources⁷⁰. The UNCLOS doesn’t provide a precautionary approach as the element for conservation and fishery in coastal waters of a state⁷¹; this is only the question of treaty interpretation. A coastal state has a sovereign right for establishing its own domestic precautionary standards⁷² in event of the absence of membership in regional or global agreement on different types of species (UNFSA, for instance).

The fundamental provisions of the Convention on Biodiversity are now being used in support of marine biodiversity, through The Jakarta Mandate on Marine and Coastal Biological Diversity (2001). A program has been developed with five key elements: integrated marine and coastal area management; marine and coastal living resources; marine and coastal protected areas; marine culture; and alien species and genotypes. Work under this program is to use and draw upon scientific, technical and technological knowledge of local and indigenous communities in keeping with the contents of Article 8 (j) of the Convention as well as community and user-based approaches. In the execution of the program of work, the

⁶⁶ Nele Matz, ‘*The Interaction between the Convention on Biological Diversity and the UN Convention on the Law of the Sea*’, Marine Issues: From a Scientific, Political and Legal Perspective, p.207.

⁶⁷ L.Glowka/F.Burhenne-Guilmin/H.Synge in collaboration with J.A.McNeely/L.Gundling, ‘*A Guide to the Convention on Biological Diversity*’ (1994), p.27

⁶⁸ The CBD, Article 8(d), (f).

⁶⁹ A. Rengifo, ‘*Protection of Marine Biodiversity: A New Generation of Fisheries Agreements*’, in: RECIEL 6 (1997), 313 et seq.

⁷⁰ Olav Schram Stokke, ‘*Managing Straddling Stocks: The Interplay of Global and Regional Regimes*’, *Ocean and Coastal Management* 43 (2000): 205-34.

⁷¹ Stuart M. Kaye, ‘*International Fisheries Management*’ (2001), pp. 90-91.

⁷² W.T.Burke, ‘*The New International Law of Fisheries*’ (1994), p. 30.

involvement of relevant stakeholders including indigenous and local people is to be promoted⁷³.

The third elaboration is in the implementation of the obligation to provide protected areas in the territorial sea (under the CBD) and a coastal state's obligation to allow innocent passage. The exclusion of the territorial sea from shipping could be considered unjustifiable under the principle of freedom of navigation (under the UNCLOS). Moreover, the CBD doesn't define the term "protected areas"⁷⁴.

The fourth delicacy is in the genetic resources access and marine genetic research, where under the UNCLOS there is no obligation to facilitate access to genetic resources in the territorial waters, but the Article 15(2) if the CBD provides the facilitation of access.

The main conclusion which should be presented is the UNCLOS aims at short-term efforts to secure fish stocks valuable for consumption, but the CBD includes also the potential needs of future generation and the recognition of an intrinsic value of biodiversity⁷⁵.

2.3 Opportunities and offers vis-à-vis fishery and neighboring states

2.3.1 'MPA' instrument

The International Union for the Conservation of Nature (IUCN) define Marine Protected Areas (MPA) as an area

“...which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher protection than its surroundings”⁷⁶

MPAs are now widely promoted as a useful and even essential tool for managing the marine environment, whatever the primary objective: 1) ecosystem and habitat protection; 2) protection of specific species; 3) maintenance, restoration or enhancement of fisheries stocks; 4) maintenance of fisheries genetic diversity; 5) provision of control areas for scientific research and as benchmarks against which to measure the impact of fisheries and biodiversity conservation measures⁷⁷.

⁷³ Report COP2, Annex II, Decision II/10, Doc.UNEP/CBD/2/19.

⁷⁴ Nele Matz, *ibid*, p.215.

⁷⁵ *ibid*, p.214.

⁷⁶ Secretariat of the Convention on Biological Diversity (2004), “Technical advice on the establishment and management of a national system of marine and coastal protected areas”, CBD Technical Series no. 13, p. 7.

⁷⁷ Protected Areas and Development in the Lower Mekong River Region, p.116, URL: <<http://www.mekong-protected-areas.org/mekong/docs/tlp-08.pdf>> (accessed: 17.07.2011).

Ecologically sustainable coastal aquaculture could be built on the next research activities, which define the role of habitats in maintaining healthy fishery production, integrity of ecosystems and biodiversity, major habitats in the coastal and exclusive economic zone, the underlying natural dynamics and environmental variability in major fisheries. Also the role is in the developing of suitable indicators and monitors of ecosystems health and dynamics, the impacts of human activities, such as coastal development, fishery, and aquaculture on fisheries ecosystems, and mitigation, rehabilitation and management strategies to achieve ecologically sustainable development of coastal and marine resources⁷⁸.

Activities of other states in the MPA are consequently subject to the sovereignty of the coastal State. Exemptions may, however, follow from treaties or from rights provided in the UNCLOS ('innocent passage'⁷⁹) or from customary law. For instance a prohibition of fishery within its zone could conflict with other states' right by another treaty and would not be applicable in this case⁸⁰.

The importance of MPA establishing is confirmed by present situation with marine environment changing, which is characterized by declining resources and diminishing biodiversity. The biggest threats are⁸¹: over-fishing, degradation and infilling of coastal swamp ecosystems, which are critical habitat for some marine species and sources of nutrients for marine ecosystems, weakening of marine ecosystems, resource depletion and habitat disturbance, eutrophication of coastal waters by sewage and agricultural chemicals, sediment burden from deforestation and other land disturbances, pollution by an increasing range of chemicals, changes arising from global warming, some sudden (such as coral bleaching) and others more gradual, and extensive physical changes to shorelines and the coastal ecosystems which link land and sea.

Fisheries agencies are more interested in the value of MPAs. In the case of tropical waters, MPAs are seen to provide a measure of fisheries resource management in a multi-species and multi-gear situation that has not been appropriate to the stock-specific management approaches developed in temperate areas. With growing ecological understanding of the complex interactions between coral reefs, lagoons and oceans, new insights for the management of fisheries and biodiversity are gained. MPAs have often contributed to increased abundance, size and density of species. Other benefits include the

⁷⁸ Australian Institute of Marine Science (AIMS). URL: <<http://www.mekong-protected-areas.org/mekong/docs/tlp-08.pdf>> (accessed: 17.07.2011).

⁷⁹ UNCLOS, *ibid.*, Article 17.

⁸⁰ Jakobsen I.U. *Marine Protected Areas in International Law: A Norwegian perspective* (2009), p.32.

⁸¹ Australian Institute of Marine Science, *ibid.*, p.117.

following: increased fecundity and reproductive capacity, increased species richness and genetic diversity, increased fishery yield in the surrounding area, economic benefits⁸².

The environmental conditions needed for sustainable pond aquaculture are as follows: a pond substrate of suitable chemical and physical qualities, a reliable supply of clean water of the appropriate salinity, natural systems (such as mangrove areas) that can assimilate pond wastes to avoid the pollution of coastal waters, and protection from storm seas. For cage, raft and stake (stick) forms of aquaculture the requirements are as follows: good quality seawater; current, wave and substrate conditions suited to the target species; adequate tidal exchange to disperse wastes; and supplies of timber for the structures and fuel needed for drying and processing.

2.4 An illustration on how Russia has interpreted the international obligations on sustainable development

As it has been shown previously an every state has the responsibility to protect marine environment, trying to use a precautionary approach, basing on best scientific evidence. Conservation and cooperation among states should be lead by the aim to preserve the ecosystem and biodiversity. In connection with the recent 20 years changes of Russian political and legal situation this state was chosen for detailed analysis. Russian fishery legislation changes every year, new political will and presidential initiative affected such legal framework. It has passed only 14 years from the date when Russia had ratified the UNCLOS in 1997 and 16 years from the CBD ratification. But does Russia comply with the international obligations emanating from these treaties and where are there legal gaps inside Russian domestic legislation? These matters will be disclosed below.

2.4.1 Environmental protection of territorial waters

Russia as the democratic state respects generally recognized principles (as “*opinio juris*”⁸³) and norms of the international law and the international agreements as a component part of its legal system, and if the federal law goes in contradiction with the international treaty the rules such agreement shall be applied⁸⁴. After 2003 The Plenum of Supreme Court of Russia established the Resolution of 10.10.2003 №5 “On the application of the courts of general

⁸² Keith Sainsbury, Ussif Rashid Sumalia, *Incorporating Ecosystem Objectives into Fisheries Management, including: 'best practice' reference points and use of Marine Protected Areas*, URL: <ftp://ftp.fao.org/fi/document/reykjavik/ppt/20sainsbury.ppt> (accessed: 25.08.2011)

⁸³ Bederman, David J., *International Law Frameworks* (New York, New York: Foundation Press, 2001) at 15-16.

⁸⁴ The Russian Constitution, Article 15(4).

jurisdiction generally recognized principles and norms of international law and international treaties of the Russian Federation”, which provided that “principle and norms” are “jus cogens”.

The FL “On the internal waters, territorial sea and contiguous zone” in the Article 32.1 announced the ecological defense of the biodiversity as the basic principles. Hence the Article 35 establishes the state ecological and sanitarian control in these zones.

2.4.2 Protection and management of fish resources

The Russian fishery legislation is fairly new one. The primary source is the Federal Law of 20.12.2004 N 166-FZ “On Fishery and Conservation of Aquatic Biological Resources”. The Russian fishery legislation doesn’t provide the term ‘precautionary approach’, but establishes the principle of priority of safety of aquatic bio-resources and sustainable management⁸⁵.

Even more interesting is the existence a special presidential decree of April 1, 1996 N 440 “On the Concept of Transition of the Russian Federation to sustainable development asserted the rule that “following the recommendations and principles set forth in the documents of the UN Conference on Environment and Development (Rio de Janeiro, 1992), guided by them, it seems necessary and feasible to implement in the Russian Federation, a gradual transition to sustainable development, providing a balanced solution of socio-economic problems and the problems of preserving the environment and natural resources potential to meet the needs of present and future generations”⁸⁶. This presidential decree beyond all doubt has the influence on all federal acts in system of subordination. But remains the question, on what reason the precautionary principle was not included inside the text of the FL “On Fishery...”

The term ‘coastal fishery’ is novel in the federal fishery legislation. The substantive reason is founded on the social-economical character for the stimulation and development of a coastal infrastructure. The bill of the federal law contained the original definition of a ‘coastal fishery’ which differed from the present existing term. Primarily, a ‘coastal fishery’ was defined as ‘industrial (commercial) fishery’ inside the internal waters and territorial sea of the Russian Federation providing mandatory supply of all final fish products on the territory of Russia. In the adopted edition of the federal law a lawmaker refused from the territorial criterion. And paradoxically now a ‘coastal fishery’ includes also EEZ, High Seas,

⁸⁵ The FL “On Fishery...”, Article 2(2).

⁸⁶ Presidential Decree “On sustainable development...”, preamble.

and foreign EEZ if the main aim of fishery is a supply of fresh and cold fish catches for the conversion and realization on the land territory of Russia⁸⁷.

But the most serious problem is the system of “actual” and “formal” composition of the criminal in compliance with the 1996 Criminal Code of Russia⁸⁸. “Formal” composition means that a legal responsibility for a crime is incurred by the fact of concrete offence without considering the consequences, only a fact of a crime plays role. “Actual” composition means that the only consequences compose the crime. All ecological crimes have “actual” composition⁸⁹ and this is the straight collision to the constitutional right for everyone on “favorable environment”⁹⁰. For example, the right for fresh water in fact is not protected:

“Pollution, contamination, depletion of surface or groundwater sources of drinking water or otherwise modifies their natural properties, if these acts involved the infliction of substantial harm to an animal or plant life, fish stocks...”⁹¹

Must pay tribute to the absence of such composition in the Article 252 “Marine pollution”, where only the fact of marine pollution from land-based sources or due to violation of the rules of burial or dumping of vehicles is punished.

The internal and territorial waters are the subject of the rights of indigenous people, and such legislative provisions open the gate for corrupt practices among officials and owners of energy, mining and fishery companies. Non-legally binding norms of the UN Declaration on the Rights of Indigenous Peoples insure aboriginal communities using methods of obligatory consultations and negotiations without discrimination, concerning property and rent questions⁹². To the great regret after 4 years of declaration adoption Russia still doesn't sign this document.

The Russian fishery management based on the quota allocation system. The catch quotas for fishery from the Russian government are divided into 9 groups⁹³: 1) industrial (commercial) fishery; 2) coastal fishery; 3) fishery for the scientific research and monitoring purposes; 4) fishery for the educational, cultural and educational purposes; 5) fishery for the fish breeding, reproduction and acclimatization of aquatic biological resources; 6) for the

⁸⁷ Ilyasov S.V., Guculyak V.N., Pavlov P.N. *‘Nauchno-prakticheskij kommentarij k Federal’nomu zakonu ‘O rybolovstve i sohranении vodnyh biologicheskikh resursov’* (2005), p. 19.

⁸⁸ Dyakonov V.V., *‘The Criminal Law of Russia (General part)’* (2003), URL: <<http://www.allpravo.ru/library/doc101p0/instrum104/item350.html>> (accessed: 05.07.2011).

⁸⁹ The Criminal Code of Russia, Chapter 26 “Ecological crimes”.

⁹⁰ The Russian Constitution, Article 42.

⁹¹ The Criminal Code of Russia, Article 250(1).

⁹² UNDRIP, Article 30(2).

⁹³ *Ibid.* Article 30.

organization of amateur and sport fishery; 7) fishery in order to conduct their traditional lifestyle and traditional economic activities of indigenous numerically small peoples of North, Siberia and the Russian Far East; 8) in the areas of international treaties of the Russian Federation in the field of fisheries and conservation of living aquatic resources; 9) in the exclusive economic zone of the Russian Federation for foreign states that are installed in accordance with international treaties of the Russian Federation in the field of fisheries and conservation of living aquatic resources.

A flexible fish quota system is a positive model of Russian legislation. Unfortunately, the federal state bodies sometimes is guided by statistical and political interests, using scientific evidence as the lever for lobbying some financial projects, without taking into account the opinion of indigenous peoples with their right to fishery. The specific problem will be reflected in the next chapter.

Chapter 3. Indigenous peoples' rights to fishery

In the last 10 years, indigenous matters have become more prominent in documents of UN monitoring mechanisms, represented by the special body - Committee on the Elimination of Racial Discrimination, primarily through its 1997 General Recommendation 23⁹⁴.

Importantly, it has 'intimated that a "hands-off", or "neutral" or "laissez-faire" policy is not enough'⁹⁵. But, the challenge is that the land and resources issues represent a grey area in international law, as the right to property has not acquired as strong protection as have other rights. The interests of indigenous groups conflicted with the state's policy on exploration and exploitation of resources. The UN Declaration on the Rights of Indigenous Peoples has changed the situation, recognizing not only the right to use natural resources (ILO 169), but the right to own and possess. Many years an ownership and use of natural resources has always been the monopoly of states. The situation is changed.

3.1 Human and collective rights and a state's sovereignty: contradiction or consent?

Where is the strict line between state sovereignty and jurisdiction on marine bio-resources in coastal waters and the indigenous peoples' traditional rights on fishery? Can human rights in general and collective rights *inter alia* prevail against state power? The modern juridical practice and doctrine as sources⁹⁶ of international law affirm the possibility of this human rights' tendency. First of all, the great effect has the statement of the Permanent Court of International Justice:

"the jurisdiction of a State is exclusive within the limits fixed by international law"⁹⁷

The international law should be understood as combined customary and treaty law. And a state's sovereignty is not an absolute power to execute all that is not expressly forbidden by international law⁹⁸. State's sovereignty is only one of criterion of a state for "possessing the totality of international rights and duties recognized by international law"⁹⁹. The UN Charter provides prohibition of the influence into "internal affairs" of the independent state¹⁰⁰. But

⁹⁴ Xanthaki Alexandra, 'Indigenous rights in international law over the last 10 years and future developments', 2009) 10(1) Melbourne Journal of International Law 27, p. 1.

⁹⁵ Patrick Thornberry, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5 Human Rights Law Review 239, 260.

⁹⁶ Statute of the International Court of Justice, Article 38(1).

⁹⁷ PCIJ, Advisory Opinion, Nationality Decrees Issued in Tunis and Morocco, Series B, N° 4, p. 24., 07.02.1923.

⁹⁸ PCIJ, Judgment, Lotus case, Series A, N° 10, p. 18., 07.09.1927.

⁹⁹ ICJ, Advisory Opinion, Reparation for Injuries Suffered in the Service of the United Nations, ICJ Rep. 1949, p. 180.

¹⁰⁰ UN Charter, Article 2(7).

human rights are no longer “internal” aspect of a state, what was confirmed in the international agreements after the Second World War and ICJ commentary reports¹⁰¹. By scholar Helen Stacy from the Center on Democracy, Development, and the Rule of Law of the Institute for International Studies:

“human rights claims no longer depend on geographic limitations, and may be as appropriately addressed to the broader international community as they are to a nation state's sovereign”¹⁰²

Thus so persistently from year to year the international human rights’ bodies are working on special recommendations for states and programs against any kind of discrimination.

3.2 International legal framework on indigenous peoples’ fishery rights

3.2.1 Substantial fish rights: ICCPR, CERD Rec.26, ECHR, ILO 169

Indigenous peoples are collective¹⁰³ subject of the international law. Despite a small number of states ratified the ILO Indigenous and Tribal Peoples Convention, one of the best legal definitions of such phenomenon as ‘indigenous people’ could be found in this document:

“a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”¹⁰⁴

Indigenous fishery rights are enshrined in the Article 14, where “the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy” and their right to continue to use resources on lands which they may not occupy, but traditionally use “for their subsistence and traditional activities”. Article 23 affirms fishing and other

¹⁰¹ Advisory Opinion, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Rep. 1951, p. 23.

¹⁰² Helen Stacy, ‘*Relational Sovereignty*’, Stanford Law Review, Vol. 55, No. 5 (May, 2003), p. 2049.

¹⁰³ UNDRIP, Article 1.

¹⁰⁴ ILO 169, Article 1(1)(a)(b).

traditional activities as “...important factors in the maintenance of their cultures and in their economic self-reliance and development”.

Unfortunately, only 22 states have ratified this convention¹⁰⁵. It means that there is only one generally accepted and legally-binding document on the rights of natural resources (fishery) of indigenous people – The International Covenant on Civil and Political Rights, which prescribed to protect the right for culture¹⁰⁶ of ethnic, religious or linguistic minorities. Culture should be understood as the customary beliefs, social forms, and material traits of a racial, religious, or social group or the set of values, conventions, or social practices associated with a particular field, activity, or societal characteristic¹⁰⁷; fishery in this context is an exact cultural display:

“With regard to the exercise of the cultural rights protected under article 27... culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing... The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them”¹⁰⁸

As an example of indigenous cultural rights on fishery the case of New Zealand’s tribe Maori can be displayed. Prior colonization, Maori cosmology, the Maori world view (*Te Ao Maori*) and Maori custom (*tikanga Maori*) inextricably linked Maori to their fishery. In 1840, the Treaty of Waitangi recognized these rights¹⁰⁹.

International legal practice precisely shows that fishery could be identified as a traditional economical activity, which as such, is covered by the ICCPR. In particular the Sámi tribes exercise their rights for fjord fishery not only with their nutritional needs, but also in accordance with cultural identity¹¹⁰. Furthermore, Sámi fish food consists of steelhead,

¹⁰⁵ Convention No. C169 member states. URL: <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>> (accessed: 03.07.2011).

¹⁰⁶ ICCPR, Article 27.

¹⁰⁷ “Culture – Definition from the Merriam-Webster Online Dictionary”, URL: <<http://www.merriam-webster.com/dictionary/culture>> (accessed: 25.06.2011).

¹⁰⁸ CCPR/C/21/Rev.1/Add.5, General Comment No.23, item 7.

¹⁰⁹ Valmaine Toki, ‘Indigenous Peoples’ Fisheries Rights – A comparative perspective between Maori and the Sami’, Arctic Review of Law and Science 2010, No 1, p. 57.

¹¹⁰ The Sámi Rights Commission II, NOU 2007: 13, The New Sami Right, The Sami Rights Commission’s Evaluation of International Law, Article 27 of the ICCPR; Is Coast- and Fjord Fishery in Sea – Sami Areas Protected by this Provision?, p.14-15

trout, brown trout and salmon¹¹¹. From the point of professor Burke “salmon species are intimately related to land areas, beginning and ending life in fresh water, they are sometimes closely associated with the aspirations and beliefs of the people who surround them”¹¹².

There is the decision of Agenda 21, where states-parties of this document “recognize and strengthens the role of indigenous people and their communities”¹¹³. Take at least a job of The Committee on the Elimination of Racial Discrimination which provided in 1997 the general comment on the Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, where stated that state parties should “provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics”¹¹⁴ and “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources” with the right on “just, fair and prompt compensation”¹¹⁵ for indigenous communities. Likewise item 6 prescribe states to include in their periodic reports all relevant data on indigenous peoples.

Somehow or other, the international perspective moves towards the recognition of indigenous cultural rights for fishery.

3.2.2 Procedural rights of relevance for indigenous peoples

This section is dedicated to the question of procedural indigenous rights, arising from the status of ‘property’.

The CBD Convention states:

“Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices”¹¹⁶

¹¹¹ Sápmi – Sámi Land website. URL: <http://www.eng.samer.se/servlet/GetDoc?meta_id=1203> (accessed: 28.06.2011).

¹¹² W.T.Burke, ‘*The New International Law of Fisheries*’ (1994), p. 151.

¹¹³ UN Agenda 21, Chapter 26, Section 3.

¹¹⁴ CERD, General Comment №23, item 4(c), A/52/18, Annex V, p. 122-123.

¹¹⁵ Ibid. item 5.

¹¹⁶ CBD, Article 8(j).

Also the traditional knowledge of indigenous peoples is related to their customary practices, specifically recognized in Article 10(c) of the Convention on Biological Diversity which stipulates that Parties shall, as far as possible and as appropriate:

“Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”¹¹⁷

There could be many variants of interpretation of this article, but one of the point of view is based on ‘main players’, such as local indigenous communities, should be recognized by state-parties, and given back their sovereignty over the biodiversity of their territories, so that they can continue protecting it¹¹⁸. The convention gives only legal framework for step by step preparations for realization such conception in domestic legislation. From the point of view of Stanley Worgu such unclearness of norms application in real case scenario can provoke “a risk the traditional knowledge of the indigenous people, since this knowledge has become vulnerable to piracy and unauthorized copying by large multi-national companies”¹¹⁹. For the purpose of suppressing such non-legal actions, producing mechanisms to ensure the effective participation of indigenous and local communities in decision-making and policy planning the CBD has established a Working Group on Article 8(j) and Related Provisions (WG8J). The mandate of this Working Group includes: 1) providing advice on the application and development of legal and other appropriate forms of protection for traditional knowledge; 2) providing advice on the development and implementation of a program of work at national and international levels; 3) identifying those work plan objectives and activities which should be referred to other international bodies and processes and identifying opportunities for collaboration and coordination (decision IV/9)¹²⁰.

The Article 1 of the 1st Protocol of the European Convention on Human Rights proclaims:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to

¹¹⁷ Ibid. Article 10(c).

¹¹⁸ Bernard Roussel, *The CBD: Local knowledge systems at the heart of international debates*, Synthèses N°03/2003. Iddri, 2003. 4 p.

¹¹⁹ Stanley Worgu, *An analysis of the role of indigenous people and their technology within the framework of the convention on biological diversity*, URL: <http://nordicafrican.org/img/Indigenous_People.pdf> (accessed: 12.08.2011).

¹²⁰ United Nations University, Institute of Advanced Studies, Traditional Knowledge Initiative, <http://www.unutki.org/default.php?doc_id=49> (accessed: 12.08.2011).

the conditions provided for by law and by the general principles of international law...”¹²¹

The only one exclusion can be made in case of states’ “general interest or to secure the payment of taxes...and penalties” (Article 1, second paragraph). But indigenous groups, nevertheless, as traditional owners of the land should be released from tax burden. In this case it is pertinent to mention about the legal procedure ‘*Johtti Sappmelaccat Ry. and others against Finland*’, where the Sámi people have been severely oppressed by the Finnish Fishing Act, which was enacted on 19 December 1997 and which entered into force on 1 January 1998. According to the Act, from the words of scholar Timo Koivurova public fishing rights were extended to apply also in the municipalities of Enontekiö, Inari and Utsjoki – all municipalities belonging to the Sámi homeland area. The amendment guaranteed that the people living permanently in the municipality were entitled to enjoy public fishing rights within the state owned water areas¹²²:

“The applicants complained under Article 1 of Protocol No. 1 to the Convention that the 1997 amendment of the Fishing Act violated their right to the peaceful enjoyment of their possessions as the property rights of Sámi people who were not landowners were not taken into account in the relevant legislation even though their right to fish had earlier been clearly established by the Committee for Constitutional Law. Moreover, the Fishing Act extended the fishing rights of the local people, weakening the legal position of the landless Sámi people with the result that their fishing rights no longer enjoyed the constitutional protection of property. Also fees charged for a fishing license in the area had changed from being on a household basis to a personal basis, adding to the applicants’ fishing expenses”¹²³

The decision of the court was based on the opinion that the 1997 amendment did not introduce any change to earlier regulations. The Sámi people argued that the relevant fishing rights were in fact established back in 1982 via an illegal decree implementing the 1951 Fishing Act. The European Court on Human Rights failed to see how this could have been a weakening of the applicants’ legal status, because it only broadened others’ fishing rights in the region. The Court decided that there was no interference with the applicants’ property

¹²¹ 1st Protocol to the European Convention on Human Rights:

<<http://www.hri.org/docs/ECHR50.html#P1.Art1>> (accessed: 21.08.2011)

¹²² Timo Koivurova, ‘*Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects*’, *International Journal on Minority and Group Rights* 18 (2011), p. 15.

¹²³ Application no. 42969/98 by *Johtti Sappmelaccat ry and Others against Finland*, *supra* note 20, complaints, 1.

rights. The collision arises between indigenous peoples and simple citizens, which rights to fishing should also be met.

3.2.3 Non-legally binding instruments: UNDRIP, FAO Code, Draft Nordic Sámi Convention

Non-legal binding instruments such as The Declaration on the Rights of Indigenous Peoples also consider the interests of indigenous culture¹²⁴. The indigenous fishery is protected by Article 25:

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard”¹²⁵

Declarative norms tell about states’ responsibility to legal recognition and protection to indigenous lands, territories and resources with respect to the customs, traditions and land tenure systems of the indigenous peoples¹²⁶. Fair restitution and equitable compensation for the lands, territories and resources which indigenous peoples have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent is also prescribed¹²⁷.

The most famous scholar on indigenous peoples and UN Special Rapporteur S. James Anaya expound the UNDRIP provisions do not attempt “to bestow” indigenous peoples a set of rights, but contextualize elaboration of general human rights principles and rights, where “the standards of the Declaration connect to existing State obligations under other human rights instruments”¹²⁸. The fishery is one of the basic nutritional aspects for indigenous peoples’ survival. In general, there is no a contradiction among the promotion of sustainable development, food security and poverty alleviation, while recognizing that effective resource management is an implication for sustainable development¹²⁹. The UN Special Rapporteur –

¹²⁴ UNDRIP, Article 11.

¹²⁵ Ibid, Article 25.

¹²⁶ Ibid, Article 26(3).

¹²⁷ Ibid, Article 28(1).

¹²⁸ UN Docs. Robert Charles G. Capistrano, *Indigenous peoples, their livelihoods and fishery rights in Canada and the Philippines: paradoxes, perspectives and lessons learned*.

<http://www.un.org/Depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/capistrano_0910_philippines_PPT.pdf> (accessed: 27.06.2011).

¹²⁹ Douman, D. in Neiland, A.E. and Bene, C. (eds.). 2004. *Poverty and small-scale fisheries in West Africa*, p. 220.

Professor Rodolfo Stavenhagen after his mission to the Philippines in 2002 reported that indigenous peoples' human development indicators are lower and poverty indicators are higher than those of the rest of society¹³⁰. The same situation are traced on the Russian Far East, where indigenous tribes of itelmen, koryak and even couldn't have the possibility from this year to exercise their rights on fishery of salmon¹³¹.

FAO Code on Indigenous Fishery shows the element of this activity:

“targeted on supplying fish and fishery products to local ...markets, and for subsistence consumption” ... and “[o]ther ancillary activities such as net making [and] boat building ... can provide ... fishery-related employment and income opportunities in marine and inland fishing communities”¹³²

The traditional indigenous fishery is small-scale and artisanal. While there is no common definition, it has been considered useful to have a common understanding on some general characteristics applying to such category. Thus, based on elements that have been advanced by these international organizations such as common characteristics for developing an understanding of small-scale, artisanal fisheries may be based on a recognition of the following¹³³: 1) artisanal fisheries are traditional fisheries involving fishing households or small groups of fish workers; 2) the fishing vessel could vary from gleaning or a one-man canoe to up to 20 m, including trawlers, seines or long-liners; 3) using relatively small fishing vessels, which may be non-motorized or use small out board engines; 4) the fishing is confined close to the shoreline; 5) using of fishing gear such as beach seine and gill nets, hook and line, and traps; 6) using of labor-intensive technologies¹³⁴.

The considerable element for indigenous fishery is the precautionary approach. The Technical Guidelines No. 2 (FAO) emphasize that the precautionary approach should not be taken to imply that “no fishing can take place until all potential impacts have been assessed

¹³⁰ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples Rodolfo Stavenhagen 21 January 2003 E/CN.4/2003/90.

¹³¹ Abroskina A., Moshnyagun V. The Northern indigenous peoples of Kamchatka are prohibited from engaging in fishery. “TVC” TV-report. RAIPON official website. URL:

<<http://www.raipon.info/component/content/article/1-novosti/2058-predstaviteljam-korennyh-severnyh-narodov-kamchatki-zapreshajut-zanimatsja-rybnym-promyslom.html>> (accessed: 15.07.2011).

¹³² The Code of Conduct for Responsible Fisheries and Indigenous Peoples: an Operational Guide, p.3. URL: <<ftp://ftp.fao.org/docrep/fao/011/i0840e/i0840e.pdf>> (accessed: 17.07.2011).

¹³³ FAO Guide, *ibid.* p. 4.

¹³⁴ The elements of a definition for small scale, artisanal, traditional fisheries, have been discussed at the WTO in September 2005. A note by the WTO's Secretariat puts together a number of such definitions, as well as those that can be inferred from the laws & regulations of some WTO Members. See TN/RL/W/197, note by the WTO Secretariat.

and found to be negligible.”¹³⁵ The Code of Conduct call up states to “facilitate consultation and the effective participation of industry, fish workers, environmental and other interested organizations in decision–making with respect to the development of laws and policies related to fisheries management, development, international lending and aid”¹³⁶ and to “promote the creation of public awareness of the need for the protection and management of coastal resources and the participation in the management process by those affected”¹³⁷.

The Code does not only encourage mobilization of fishing communities to participate actively in fisheries management, but also to adopt measures that are based on traditional resource knowledge and customary resource-use practices¹³⁸. The use of this knowledge and these practices facilitates decision making and consensus building among stakeholders, serves to minimize adverse effects on the environment, leads to new alliances and modes of cooperation in fishing communities, in particular in indigenous fishing communities, and ultimately has a positive bearing on the manner in which fisheries are utilized.¹³⁹

Draft Nordic Sámi Convention is one of the progressive regional acts, protecting the rights of Sámi indigenous group. Chapter IV of such document almost sets rules on traditional use of land and marine resources of ‘Sápmi land’:

“Protracted traditional use of land or water areas constitutes the basis for individual or collective ownership rights...If the Sámi, without being deemed to be the owners, occupy and have traditionally used certain land or water areas for reindeer husbandry, hunting, fishing or in other ways, they shall have the right to continue to occupy and use these areas to the same extent as before...”¹⁴⁰

It is interesting that the Article 34 on land rights, providing for both individual and group rights, looks like falling below the standard set in article 14 of ILO Convention No. 169 that extends land rights to the groups only so as to prevent the splitting up of indigenous lands which in turn would harm their pursuit of identity and culture¹⁴¹.

The obligation to the states is “to identify the land and water areas that the Sámi traditionally use”¹⁴². Article 38 Fjords and coastal seas covers fishery issue:

¹³⁵ FAO Guide, *ibid.* p. 13.

¹³⁶ The Code of Conduct (FAO), Article 6.13.

¹³⁷ *Ibid.* Article 10.2.1.

¹³⁸ *Ibid.* Article 6.4, Article 12.12.

¹³⁹ FAO Guide, *ibid.* p. 16.

¹⁴⁰ DNSC, Article 34.

¹⁴¹ Gudmundur Alfredsson, ‘*Human Rights Challenges in the Arctic*’, the Fourth Northern Research Forum in Oulu 2007, p. 5.

¹⁴² *Ibid.*, Article 35.

“...In connection with the allocation of catch quotas for fish and other marine resources, as well as when there is otherwise regulation of such resources, due regard shall be paid to Sámi use of these resources and its importance to local Sámi communities. This shall apply even though this use has been reduced or has ceased due to the fact that catch quotas have not been granted or owing to other regulations of the fisheries or other exploitation of resources in these areas. The same shall apply if the use is reduced or has ceased owing to a reduction of marine resources in these areas”

The Draft Nordic Sámi Convention in Article 40 commits states to cooperate with Sámi parliaments in environmental protection and environmental management in order to ensure sustainable development of the Sámi land and water areas referred to in Articles 34 and 38.

3.2.4 Russian acts on indigenous peoples rights: specificity and legal gaps

The Russian Modern Law on indigenous peoples was born in 1993 when the Russian democratic Constitution was adopted. The legislators trying to insure themselves from the unknown international standards and democratic institutions, preserving the political unity of the young liberal Russian state, invented their own legal view on the problems of indigenous peoples, guaranteed the rights of numerically small groups of the aboriginal communities (not more than 50.000 in number)¹⁴³ disregarding the rest of them (such as Karels (93.344 according to 2002 census), Udmurts (236.906 according to 2002 census), Komi (293.406 according to 2002 census) and Maris (604,298 according to 2002 census), etc¹⁴⁴). Moreover, the Constitution established vague formula of “protection of a native habitat and traditional lifestyle of numerically small ethnic communities”¹⁴⁵, without providing the legal definition of them.

The legal conflict is exacerbated by the fact that some local normative acts provide the term “indigenous people”, as it was made for Sámi people in Murmansk Region¹⁴⁶ in contradiction with the federal law. Since the Russian Federation is not a state-member of ILO №169 and UN Declaration on the Rights of Indigenous Peoples 2007 such lack of specificity and legal gaps create the field for corruption and human rights violations.

¹⁴³ The Russian Constitution, Article 69.

¹⁴⁴ Federal Census 2002. URL: < <http://www.gks.ru/wps/wcm/connect/rosstat/rosstatsite/main/>> (accessed: 13.07.2011).

¹⁴⁵ The Russian Constitution, Article 72(1)(m).

¹⁴⁶ The Charter of Murmansk Region, Article 21.

The Federal Law “On Guarantees of the Rights of Indigenous Numerically Small Peoples of the Russian Federation” in the article 1(1) establishes the official definition:

“the peoples living in areas of traditional settlement of their ancestors, preserving the traditional way of life, economy and crafts, numbering in the Russian Federation at least 50 thousand people and identify themselves as separate ethnic communities”.

The federal fishery legislation provides a concrete type of fishery for indigenous numerically small peoples:

“...fishing in order to conduct their traditional lifestyle and traditional economic activities of indigenous numerically small peoples of North, Siberia and the Russian Far East...”¹⁴⁷

The article 30(7) of above mentioned federal law provides fish quotas (catch) of aquatic biological resources in order to ensure their traditional lifestyle and traditional economic activities. Indigenous communities are often not free to choose how much fish they really need for nutrition; all quotas are lead by the government and the Federal agency on fishery.

One of the important international body which works on the problem of sustainable management in fishery is Sakhalin Salmon Initiative Center (Russia). This center is the link in the chain of other bodies united in the Wild Salmon Center (Portland, USA)¹⁴⁸. This center covers the whole area across the North Pacific for salmon fishery and long-term development program in sustainable management. Indigenous peoples can apply their traditional knowledge for the sustainable use of salmon and this idea reflected in 2006 Sakhalin Salmon Initiative International Conference Resolution, where the task was to facilitate conservation of rivers that are historically significant for Sakhalin’s indigenous peoples by creation of Territories of Traditional Use (TTP) and the granting long-term leases of rivers to clans¹⁴⁹.

The several federal acts contemplate the incorporation of traditional knowledge of the indigenous peoples into the economic and social activity. The Land Code of Russia contains the norm about “the special legal regime, in accordance with the federal, regional and municipal acts”¹⁵⁰ for the traditional methods of land exploitation. He was echoed by the

¹⁴⁷ FL “On fishery”, Article 16 (7).

¹⁴⁸ The Wild Salmon Center, URL: <<http://www.wildsalmoncenter.org/about/index.php>> (accessed: 05.07.2011).

¹⁴⁹ Sakhalin Salmon Initiative International Conference Resolution, p. 7. URL: <http://www.wildsalmoncenter.org/pdf/official_ssi_resolution.pdf> (accessed: 05.07.2011).

¹⁵⁰ The Land Code of Russia, Article 7(3).

federal law “On the protection of environment” with “the special guard on the indigenous habitat and traditional methods of activity”¹⁵¹. The FL “On the territory of traditional nature activity of the of Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation” established the term “custom” as traditionally established and widely used by indigenous numerically peoples of the North, Siberia and the Far East of Russian Federation the rules of traditional native activity and the traditional way of life”¹⁵². The same provision could be found in the Federal law “On the specially protected natural territories”, where the indigenous numerically small peoples and ethnic communities are allowed to conduct extensive environmental, natural resource using in ways that protect native habitats and preserving traditional ways of life, including the fishery methods¹⁵³. The Federal Law “On the continental shelf of the Russian Federation” gives indigenous communities preemptive rights for marine bio-resources exploitation in the continental shelf water area¹⁵⁴. And, of course, the provisions of the Federal Law “On the internal waters, territorial sea and contiguous zone of the Russian Federation”:

“in neighborhoods and traditional economic activities of the indigenous numerically small peoples, ethnic communities and other inhabitants of the North and the Russian Far East, lifestyle, livelihood and economy have traditionally been based on commercial exploitation of living resources, procedures and methods of use of natural resources of the internal waters and territorial sea, ensure the preservation and maintenance of the necessary conditions for life are determined and assessed in accordance with the Russian legislation”¹⁵⁵

Unfortunately, in many cases these provisions are perceived as declarative, but not the imperative norms.

3.3 Indigenous ‘traditional knowledge’ and ‘sustainable development’: theory and international practice (cases)

With a growing emphasis to the problem of sustainable development and indigenous issues, states and international organizations pay attention to indigenous peoples ‘traditional knowledge’ or ‘traditional environmental knowledge’ is ‘a particular form of knowledge of the diversity and interactions among plants and animals, landforms, watercourses, and other

¹⁵¹ The FL “On the protection of environment”, Article 4.

¹⁵² The FL “On the territory of traditional nature activity...”, Article 1.

¹⁵³ The FL “On the specially protected natural territories”, Article 9(4), Article 15(3), Article 24(4).

¹⁵⁴ The FL “On the continental shelf of the Russian Federation”, Article 11.

¹⁵⁵ The FL “On the internal waters, territorial sea and contiguous zone of the Russian Federation”, Article 21(3).

traits of the biophysical environment in a given place. Sometimes called Traditional Ecological Knowledge, it is typically associated with aboriginal peoples'¹⁵⁶. The purpose of this section is to show in practice how states apply this indigenous knowledge to protect environment.

The UNESCO/ICSU World Conference on Science for the Twenty-first Century: A New Commitment, 1999 considered that:

“Traditional and local knowledge systems, as dynamic expressions of perceiving and understanding the world, can make, and historically have made, a valuable contribution to science and technology, and that there is a need to preserve, protect, research and promote this cultural heritage and empirical knowledge”.

Referring specifically to the fisheries sector in general and fisheries research and management particularly, the Code of Conduct for Responsible Fisheries (FAO, 1995) recommends:

“States should investigate and document traditional fisheries knowledge and technologies, in particular those applied to small-scale fisheries, in order to assess their application to sustainable fisheries conservation, management and development”¹⁵⁷.

In Newfoundland and Labrador, most of the remaining cod live in the coastal bays. In both Newfoundland and Norway, fishers' knowledge has been used to help identify actual and potential local stocks of cod in fjords and bays¹⁵⁸. In the Gulf of Maine, it has been used to identify coastal spawning areas for cod and haddock¹⁵⁹. Indigenous peoples of Raviana Lagoon (Solomon Islands) have exact knowledge about topa¹⁶⁰ fish useful for scientists and commercial and state fishery entities. The indigenous knowledge on the behaviour and ecology of topa is one such example. It includes knowledge on; diet, feeding times, schooling behaviour, juvenile nursery areas, spawning, the influence of the lunar stage on nocturnal

¹⁵⁶ Devon G. Peña, 'Glossary', *Mexican Americans and the Environment*. Tucson: The University of Arizona Press, 2005, p. 198.

¹⁵⁷ CCRF Article 12 Fisheries Research, para.12.12.

¹⁵⁸ Maurstad, A.; Sundet, J. 1998. *The invisible cod: Fishermen's and scientist's knowledge*. In: S. Jentoft (ed.), *Commons in a cold climate: Reindeer pastoralism and coastal fisheries*. Paris, Casterton Hall, Parthenon Publishing, pp. 167–85.

¹⁵⁹ Ames, E.P. 2004. Atlantic cod stock structure in the Gulf of Maine. *Fisheries*, Vol. 29, No. 1, pp. 10–28.

¹⁶⁰ The topa, *Bolbometopon muricatum*, is the largest of all parrotfish, reaching over 50 kilograms and living to an age of at least 40. Richard J. Hamilton, “The role of indigenous knowledge in depleting a limited resource – a case study of the bumphead parrotfish (*bolbometopon muricatum*) artisanal fishery in Roviana Lagoon, Western Province, Solomon Islands”, p. 70.

behaviour, predation by sharks, nocturnal aggregations, individual color changes at night, spatial and temporal distributions, population changes over time and fleeing behaviour.¹⁶¹

The interesting example is provided by Tanuja Barker and Anne Ross from the department of Geographical Sciences and Planning of the University of Queensland (Brisbane, Australia) in their research on indigenous sea mullet management in Moreton Bay¹⁶². This method of fishing could be titled as “dolphin catch fishery”. According to indigenous Quandamooka tradition, in the ancient times, mullet elders guided the spawning migration of sea mullet northwards, up the east coast of North Stradbroke Island and into the Bay through the passages between the tip of North Stradbroke Island and Moreton Island, and at Cape Moreton on Moreton Island. By allowing the mullet to follow this route into the Bay, rather than continuing on to the open sea, the fish could be easily herded toward the shore with the help of dolphins¹⁶³. It remains common practice amongst Quandamooka fishers to avoid catching the elder mullet until the elders have led the younger fish on the correct migration path into the Bay and thereby passed on the knowledge of the migration route¹⁶⁴. The Quandamooka people use a number of different signs to indicate when the spawning migration has begun and where the fish are on their route. These signs are mostly land based indicators, although the most important signal came from the dolphins. In pre-contact times, Quandamooka elders would call the dolphins by hitting their spears on the surf, thereby requesting their assistance in summoning fish towards the foreshore. Dolphins would guide the fish into the net, however, tradition stipulated that the best fish were to be given to the dolphins in order to ensure they would grant approval for future catches. Objectively, this approach to sea mullet management is more holistic than that used by the official Queensland Fisheries Act. The Quandamooka people do not restrict their management of this resource entirely to the sea. The land resources play a part in signaling the harvesting sequence. Furthermore, the Quandamooka approach is one that incorporates both input controls over the resource (there are rules for when and where fish can be taken and by whom) and output controls (based on the numbers of fish and which fish can be taken at what stage during the migration path). It is different from the QFS management approach.

¹⁶¹ Richard J. Hamilton, *ibid*, p. 69.

¹⁶² Tanuja Barker and Anne Ross, ‘*Exploring Cultural Constructs: The Case of the Sea Mullet Management in Moreton Bay, South East Queensland, Australia*’, pp. 298-299.

¹⁶³ Hall, J. (1984). Fishing with dolphins? Affirming a traditional Aboriginal fishing story in Moreton Bay, SE Queensland. In Coleman, R.J., Covacevich, J., and Davie, P. (eds), *Focus on Stradbroke: New Information on North Stradbroke Island and Surrounding Areas 1974-1984*. Boolarong Press, Brisbane, pp. 16-22.

¹⁶⁴ Ross, A. and Quandamooka Land Council (1996). Aboriginal approaches to cultural heritage management: A Quandamooka case study. *Tempus* 6: 107-112.

In Samoa, community-based co-managed Village Fish Reserves (VFAs) have been established in 38 villages in recent years. These are small, dispersed and numerous, and do not neatly fit concepts of ecosystem boundaries, larval dispersal or local fish migration routes, factors that would have been crucial in determining boundaries for a scientifically based MPA. VFA boundaries were determined by communities on the basis of traditional use, coupled with contemporary fishing needs¹⁶⁵. For non-migratory species, the combined larval production from many small protected areas could be greater than that from a smaller number of large areas. It is also possible that a chain of small protected areas, separated by only a short distance, improves the chances of linking larval sources and suitable settlement areas. The interconnections between small areas make it possible to protect a greater variety of habitats for a given area; this can result in a wider range of species being protected. Moreover, such a network has in a large perimeter, and it is at the perimeters of protected zones that fishermen can haul in the largest catches. In effect it establishes a network of fish refuges throughout the entire country.

Such model could be applicable to other states where small fishing groups have some degree of control over the use of bio-resources in adjacent waters, or where innovative governments are prepared to cede a measure of local attention. The results have confirmed that, regardless of legislation or enforcement, effective management of marine resources can be achieved only when fishing communities themselves see it as their responsibility, and are supported in their efforts¹⁶⁶.

¹⁶⁵ King, M.G. and Faasili, U. 1998. 'A network of small, community-owned Village Fisheries Reserves in Samoa' *Parks* 8 (2).

¹⁶⁶ Protected Areas and Development in the Lower Mekong River Region, p.124, URL: <<http://www.mekong-protected-areas.org/mekong/docs/tlp-08.pdf>> (accessed: 12.08.2011).

Chapter 4. Conclusion

4.1 Summary of the major findings with respect to the issues

The conclusion should be made on several blocks of research questions from the text above. The question about 'a state's sovereignty' is debatable to this day, where face in terms of different scholars on the nature of sovereignty and the collaboration with 'the human rights theory'. But the aspiration of the international society to establishing of the basic international principles and norms on human rights, basing for the future generations and the whole mankind, is reflected in many multinational treaties and declarative norms already. The international practice and the progressive vision of leading legal scientists and lawyers can form the future tendency of understanding the state's sovereignty which must be qualified as a state's power for protection its own people, collective and individual rights.

In this connection the issue on conservation and environmental protection over marine biological resources is one of the crucial points for international society. States should be obliged for limitation of their own sovereignty on getting a maximum sustainable yield in a purpose of environmental protection and defense of an aquatic ecosystem. The basic reason for the conservation policy is the environmental destruction, which can cause serious harm to the ecosystem of neighboring states. This is the basic responsibility of a state.

Conservation in a territorial sea is aimed at specific types of fish resources: 'anadromous', 'catadromous' and special 'coastal', which should be objects for environmental protection. These species habitat within the limits of coastal waters, and do not cross an EEZ and High Seas, as transboundary and highly migratory species. Salmon, cod, haddock and other types are also the sources for indigenous peoples' nutrition. Hence this fish should be the object of negotiation between states and indigenous groups for best sharing and conservatory measures.

States' right to explore marine bio resources within the limits of national jurisdiction is limited by states' obligation to protect marine environment. It's clear and follows from the part XII of the UNCLOS, which covers not only the pollution issue, but also fishery and conservatory measures.

The interaction between the CBD and the UNCLOS gives the possibility to find the way for mutual application of these legal instruments. The main difference between the CBD and the UNCLOS is in the object for protection. The CBD protects the whole ecosystem rather than the certain types of species. The CBD standards are stricter than the UNCLOS rules, and it leads for the great responsibility of states. The main conclusion which should be presented is the UNCLOS aims at short-term efforts to secure fish stocks valuable for

consumption, but the CBD includes also the potential needs of future generation and the recognition of an intrinsic value of biodiversity. Nor the CBD nor the UNCLOS doesn't have definition of 'precautionary approach' (principle), this is a significant drawback of both documents.

States can organize an MPA zones, which are now widely promoted as a useful and even essential tool for managing the marine environment, whatever the primary objective: 1) ecosystem and habitat protection; 2) protection of specific species; 3) maintenance, restoration or enhancement of fisheries stocks; 4) maintenance of fisheries genetic diversity; 5) provision of control areas for scientific research and as benchmarks against which to measure the impact of fisheries and biodiversity conservation measures. Activities of other states in the MPA are consequently subject to the sovereignty of the coastal State. Exemptions may, however, follow from treaties or from rights provided in the UNCLOS ('innocent passage') or from customary law. For instance a prohibition of fishery within its zone could conflict with other states' right by another treaty and would not be applicable in this case.

The Russian Federation was chosen as an example of developing fishing state with reforming legal system. The Russian Federal Law "On the internal waters, territorial sea and contiguous zone" in the Article 32.1 announced the ecological defense of the biodiversity as the basic principles. Hence the Article 35 establishes the state ecological and sanitarian control in these zones. There are several issues in Russian fishery and environmental legislation: 1) coastal fishery includes also EEZ, High Seas, and foreign EEZ if the main aim of fishery is a supply of fresh and cold fish catches for the conversion and realization on the land territory of Russia; 2) system of 'formal' and 'actual' composition of crime in the Criminal Code, where all ecological crimes have "actual" composition, meaning that the only consequences compose the crime, and this is the straight collision to the constitutional right for everyone on "favorable environment"; 3) flexible, but 'confused' fishing quota system, where often the federal state bodies sometimes is guided by statistical and political interests, using scientific evidence as the lever for lobbying some financial projects, without taking into account the opinion of indigenous peoples with their right to fishery.

The conflict between the interest of indigenous peoples rights to land and resources and states' sovereignty expressed in resistance among different view of scholars, international organizations and states. The Permanent Court of International Justice established that "the jurisdiction of a State is exclusive within the limits fixed by international law" and state's sovereignty is only one of criterion of a state for "possessing the totality of international

rights and duties recognized by international law”. Human rights are no longer “internal” aspect of a state, what was confirmed in the international agreements after the Second World War and ICJ commentary reports. Indigenous peoples as tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations, have inalienable rights for cultural identity. Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing. International legal practice precisely shows that fishery could be identified as a traditional economical activity, which as such, is covered by the ICCPR. The CBD requires the states to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. FAO Code on Indigenous Fishery shows the element of indigenous fishery activity in supplying fish and fishery products to local markets, and for subsistence consumption and other ancillary activities such as net making and boat building can provide fishery-related employment and income opportunities in marine and inland fishing communities. Small-scale and artisanal fishery has its own system of fishing: 1) artisanal fisheries are traditional fisheries involving fishing households or small groups of fish workers; 2) the fishing vessel could vary from gleaning or a one-man canoe to up to 20 m, including trawlers, seines or long-liners; 3) using relatively small fishing vessels, which may be non-motorized or use small out board engines; 4) the fishing is confined close to the shoreline; 5) using of fishing gear such as beach seine and gill nets, hook and line, and traps; 6) using of labor-intensive technologies.

The Russian legislation on indigenous peoples has different types of terminology, where there is no legal definition of ‘indigenous peoples’, but there is ‘indigenous numerically small peoples’, where only tribes not exceeding 50 thousand of members could be protected by the state. The majority of legal acts protect the right for fishery and landowning for indigenous peoples. But there is an issue on how it is realized in practice.

Indigenous traditional knowledge is a dynamic expressions of perceiving and understanding the world, can make, and historically have made, a valuable contribution to science and technology, and that there is a need to preserve, protect, research and promote this cultural heritage and empirical knowledge. FAO recommend states to investigate and document traditional fisheries knowledge and technologies, in particular those applied to

small-scale fisheries, in order to assess their application to sustainable fisheries conservation, management and development.

References

Literature:

Ames, 'Atlantic cod stock structure in the Gulf of Maine' (2004)

Alfredsson, 'Human Rights Challenges in the Arctic' (2007)

Barker, Ross, 'Exploring Cultural Constructs: The Case of the Sea Mullet Management in Moreton Bay, South East Queensland, Australia' (2003)

Bederman, 'International Law Frameworks' (2001)

Birnie, 'International Law and the Environment' (2009)

Brownlie, 'Principles of Public International Law' (2008)

Buck, 'U.N. Convention on the Law of the Sea: Living Resources Provisions', URL: <<http://www.fas.org/sgp/crs/row/RL32185.pdf>> (accessed: 23.08.2011).

Burke, 'The New International Law of Fisheries' (1994)

Churchill, Lowe, 'The Law of the Sea' (1999)

Dyakonov, 'The Criminal Law of Russia (General part)' (2003), URL: <<http://www.allpravo.ru/library/doc101p0/instrum104/item350.html>> (accessed: 05.07.2011).

Doulman, 'Poverty and small-scale fisheries in West Africa' (2004)

Glowka, Burhenne-Guilmin, Synge in collaboration with McNeely, Gundling, 'A Guide to the Convention on Biological Diversity' (1994)

Grotius, 'The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the Eastern Indian Trade (translated by Magoffin, 1916), Carnegie Endowment for International Peace'.

Hall, 'Fishing with dolphins? Affirming a traditional Aboriginal fishing story in Moreton Bay, SE Queensland' (1984)

Hamilton, 'The role of indigenous knowledge in depleting a limited resource – a case study of the bumphead parrotfish (*bolbometopon muricatum*) artisanal fishery in Roviana Lagoon, Western Province, Solomon Islands'.

Hey, 'The Regime for the Exploitation of Transboundary Marine Fishery Resources' (1999)

Hubold, 'Fishery and Sustainability' (2002)

Ilyasov, Guculyak, Pavlov, 'Nauchno-prakticheskij kommentarij k Federal'nomu zakonu "O rybolovstve i sohranenii vodnyh biologicheskikh resursov" (2005)

Jakobsen, 'Marine Protected Areas in International Law: A Norwegian perspective' (2009)

- Kaye, '*International Fisheries Management*' (2001)
- King, Faasili, '*A network of small, community-owned Village Fisheries Reserves in Samoa*' (1998)
- Koivurova, '*Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects*' (2011)
- Lang, '*UN-Principles and International Environmental law*' (1999)
- Malanczuk, Akerhurst's, '*Modern Introduction to International Law*' (1997)
- Maurstad, Sundet, '*The invisible cod: Fishermen's and scientist's knowledge*' (1998)
- Matz, '*The Interaction between the Convention on Biological Diversity and the UN Convention on the Law of the Sea*' (2002)
- Molenaar, '*Coastal State Jurisdiction over Vessel-Source Pollution*' (1998)
- Oda, '*International Law of the Resources of the Sea*' (1979)
- Peck, Leeds, '*Increasing the Effectiveness of the International Court of Justice*' (1997)
- Peña, '*Mexican Americans and the Environment*' (2005)
- Protected Areas and Development in the Lower Mekong River Region, p.124, URL: <<http://www.mekong-protected-areas.org/mekong/docs/tlp-08.pdf>> (accessed: 12.08.2011).
- Rengifo, '*Protection of Marine Biodiversity: A New Generation of Fisheries Agreements*' (1997)
- Roussel, '*The CBD: Local knowledge systems at the heart of international debates*' (2003)
- Ross, '*Quandamooka Land Council*' (1996)
- Sainsbury, Sumalia, '*Incorporating Ecosystem Objectives into Fisheries Management, including: 'best practice' reference points and use of Marine Protected Areas*', URL: <<ftp://ftp.fao.org/fi/document/reykjavik/ppt/20sainsbury.ppt>> (accessed: 25.08.2011)
- Schiffman, '*Marine Conservation Agreements: The Law and Policy of Reservations and Vetoes*' (2008)
- Selden, '*The Right and Dominion of the Sea*' (translated by James Howell, 1668)
- Stokke, '*Managing Straddling Stocks: The Interplay of Global and Regional Regimes*' (2000)
- Stacy, '*Relational Sovereignty*' (2003)
- Toki, '*Indigenous Peoples' Fisheries Rights – A comparative perspective between Maori and the Sami*' (2010)

Thornberry, '*Confronting Racial Discrimination: A CERD Perspective*' (2005)

Xanthaki, '*Indigenous rights in international law over the last 10 years and future developments*' (2009)

Wildhaber, '*Rechtsfragen des Internationalen Umweltschutzes*' (1987)

Worgu, '*An analysis of the role of indigenous people and their technology within the framework of the convention on biological diversity*', URL:
<http://nordicafrican.org/img/Indigenous_People.pdf> (accessed: 12.08.2011).

Court practice:

Application no. 42969/98 by *Johtti Sappmelaccat ry and Others against Finland*, *supra* note 20, complaints, 1.

Advisory Opinion, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Rep. 1951, p. 23.

PCIJ, Ser. A, No 10, p 18 (1927).

PCIJ, Advisory Opinion, Nationality Decrees Issued in Tunis and Morocco, Series B, N° 4, p. 24., 07.02.1923.

PCIJ, Judgment, Lotus case, Series A, N° 10, p. 18., 07.09.1927.

ICJ, Advisory Opinion, Reparation for Injuries Suffered in the Service of the United Nations, ICJ Rep. 1949, p. 180.

Reports:

Rome Conference Report, p.2. A similar concept was adopted also at the Ciudad Trujillo Conference held in 1956 by the Organization of American States. Pan American Union, Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters", Ciudad Trujillo, March 15-28, 1956, Final Act, p.13.
Rome Conference Report, p.3, para. 23.

Report COP2, Annex II, Decision II/10, Doc.UNEP/CBD/2/19.

Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples Rodolfo Stavenhagen 21 January 2003 E/CN.4/2003/90.

Secretariat of the Convention on Biological Diversity (2004), "Technical advice on the establishment and management of a national system of marine and coastal protected areas", CBD Technical Series no. 13, p. 7.

UN Docs. Robert Charles G. Capistrano, Indigenous peoples, their livelihoods and fishery rights in Canada and the Philippines: paradoxes, perspectives and lessons learned.

<http://www.un.org/Depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/capistrano_0910_philippines_PPT.pdf> (accessed: 27.06.2011).

Legal and non-legally binding instruments:

CERD, General Comment №23, item 4(c), A/52/18, Annex V, p. 122-123.

CCPR/C/21/Rev.1/Add.5, General Comment No.23, item 7.

Federal Census 2002. URL: <<http://www.gks.ru/wps/wcm/connect/rosstat/rosstatsite/main/>> (accessed: 13.07.2011).

The Code of Conduct for Responsible Fisheries and Indigenous Peoples: an Operational Guide, p.3. URL: <<ftp://ftp.fao.org/docrep/fao/011/i0840e/i0840e.pdf>> (accessed: 17.07.2011).

Statute of the International Court of Justice, URL: <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>> (accessed: 20.08.2011)

UN Agenda 21, Chapter 26, Section 3.

TV-Reports:

Abroskina A., Moshnyagin V. The Northern indigenous peoples of Kamchatka are prohibited from engaging in fishery. "TVC" TV-report. RAIPON official website. URL: <<http://www.raipon.info/component/content/article/1-novosti/2058-predstaviteljam-korennyh-severnyh-narodov-kamchatki-zapreshajut-zanimatsja-rybnym-promyslom.html>> (accessed: 15.07.2011).