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The Many Facets of EEZ Fisheries Disputes and their Resolution under UNCLOS

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A. Introduction

The core question being posed for this symposium was whether the 'exception swallows the rule' in relation to disputes concerning fishing in the exclusive economic zone (EEZ). This question emerges because of the starting point that disputes relating to the interpretation or application of the UN Convention on the Law of the Sea (UNCLOS)[1] may be subject to compulsory procedures entailing binding decisions – arbitration or adjudication – at the request of a party to the Convention. However, while this 'rule' is the start, it is immediately important to point our that there are exceptions and limitations to this proposition; the grant of compulsory jurisdiction in UNCLOS is limited in significant ways.[2] The 'exception' of concern to this symposium is set out in Article 297(3) of UNCLOS, which excludes fisheries disputes from adjudication or arbitration in the following situation:

> "the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations."[3]

Pursuant to Article 298(1)(b), States also have the option to exclude 'disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal' under Article 297(3).[4] The symposium papers that follow seek to improve our understanding of these exceptions to compulsory jurisdiction; do they swallow the 'rule' of compulsory jurisdiction? This introduction aims to explain the relevance of the exception (Part B), situate the papers that are part of the symposium (Part C) and indicate what has been jurisprudentially achieved despite the exception (Part D).

1 *United Nations Convention on the Law of the Sea*, 16 November 1994, 1833 UNTS 397 [UNCLOS].
2 *Ibid.*, Art 286(1).
3 *Ibid.*, Art 297(3)(a).
4 *Ibid.*, Art 298(1)(b).

B. The Relevance of the Exception

The scope of the exceptions matter when it is recalled that fish production continues to increase every year, with an approximate growth rate of 3 percent per year.[5] The demand on fisheries is tremendous; a recent study from the Food and Agriculture Organisation indicates 'the percentage of stocks fished at biologically unsustainable levels has been increasing since the late 1970s, from 10 percent in 1974 to 35.4 percent in 2019'.[6] Moreover, when considering the EEZ as a proportion of ocean space, we are discussing a maritime area that may extend up to 200 nautical miles from the coast of a State,[7] encompassing significant swathes of ocean space. Access to these resources, especially for States with distant-water fishing fleets, is critical to sustain human demands. Demand for fish contributes to the endemic problem of illegal, unreported and unregulated (IUU) fishing. The total value of IUU fishing is estimated at between $10 bn and $23.5 bn annually, which reflects a quantity of fish ranging between 11 and 26 million tonnes.[8]

The governance of the world's fisheries is complex, given the diverse stakeholders, varying economic incentives, food security concerns, as well as the political posturing that control over fisheries may entail. International law is a fundamental component to this governance structure, as it provides the foundations for the assertion of rights and duties and provides content to the specific rights and duties associated with the conservation and management of marine living resources. The core UNCLOS provisions relating to the allocation of rights and duties in the EEZ, as well as those provisions on conservation, utilization and law enforcement, have been recognised as reflecting customary international law.[9]

Understanding the interpretation and application of these provisions will inevitably prompt differing views and may lead to diplomatic disputes as well as physical and forceful contests at sea. A means for resolving these disputes is

5 'The State of World Fisheries and Aquaculture 2022', Food and Agriculture Organization, available at https://www.fao.org/3/cc0461en/online/sofia/2022/world-fisheries-aquaculture-production.html (last visited 18 July 2023).

6 *Ibid*.

7 UNCLOS, *supra* note 1, Art 57.

8 D. Agnew *et al*., 'Estimating the Worldwide Extent of Illegal Fishing', 4 *PLoS ONE* (2009) 2, e4570.

9 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, Judgment, ICJ Reports 2022, para. 57 [*Alleged Violations of Sovereign Rights*].

therefore critical. However, when a party to UNCLOS turns to the Convention's dispute settlement regime, there is a real possibility that the dispute concerning fishing in the EEZ falls outside the scope of compulsory jurisdiction because of Article 297(3). Other dispute settlement methods may then be needed.

For EEZ fisheries disputes arising under UNCLOS, it is worth bearing in mind that any court or tribunal constituted under UNCLOS is confronted with a core tension from the time UNCLOS was drafted. This tension concerned increased State rights over living marine resources and ongoing interests of flag States with vessels seeking to fish with as few restrictions as possible throughout the oceans. With the recognition of the coastal State's sovereign rights over the EEZ, including for the conservation and management of living marine resources, the Convention also builds in protection of these coastal State rights as well as safeguards for flag States.

The protection of coastal States is demonstrated in the significant insulation of coastal State decision-making from third party review in Article 297(3) (including from any possible conciliation process[10]) and, potentially, Article 298(1)(b).[11] Flag State interests are shielded to some extent through restrictions on law enforcement,[12] and the mechanism for the prompt release of vessels upon payment of a reasonable bond.[13] Balancing these competing perspectives has inevitably coloured judicial decision-making of fisheries disputes under UNCLOS, both in relation to the scope of jurisdiction and in substantive decisions under Part XV of the Convention.

C. Situating the Symposium Papers

What is or is not within the scope of Article 297(3) will, and already has, incited opposing points of view. Each of the papers in this symposium grapple with this issue of scope. Valentin Schatz addresses disputes concerning access to EEZ fisheries. This lens makes good sense given the signal importance of access for other States seeking to fish in a coastal State's EEZ. Schatz carefully explores the meaning and scope of Article 297(3), particularly with regard to the provision as a whole, its place within Part XV of UNCLOS and in relation to the regulation of EEZ resources in UNCLOS. He takes account of the possible

10 UNCLOS, *supra* note 1, Art 297(3)(b) and (c).

11 See N. Klein, *Dispute Settlement in the UN Convention in the Law of the Sea* (2005) 176-188.

12 UNCLOS, *supra* note 1, Art 73.

13 UNCLOS, *supra* note 1, Art 292.

availability of compulsory conciliation for a limited category of EEZ fisheries disputes under Article 297(3)(b) of UNCLOS. Schatz notes that this process has been subjected to very limited academic consideration and explores procedural dimensions as well as possible substantive issues that could emerge, as well as limitations to the process. His examination underscores the marginal utility of compulsory conciliation pursuant to Article 297(3).[14]

Dr Camille Goodman studies the scope of the optional law enforcement exception, observing that there are a range of instances where these disputes have been or could be resolved through compulsory procedures under UNCLOS. Challenges to fisheries law enforcement have been pursued in the context of prompt release procedures under Article 292 of UNCLOS. While this proceeding allows for judicial determinations of what constitutes a 'prompt' release and what is a 'reasonable bond' during law enforcement operations, the judicial intervention in EEZ fisheries enforcement operations is necessarily limited. Goodman highlights that only a small number of parties to UNCLOS have excluded EEZ fisheries law enforcement disputes from compulsory procedures entailing binding decisions and more cases could have been expected as a result. Why it has not happened is open to speculation, as Goodman acknowledges. Even if a State has declared an exception under Article 298(1)(b) of UNCLOS, Goodman considers that some aspects of law enforcement operations may still potentially find their way before international courts or tribunals constituted under UNCLOS. A possible difficulty (or advantage?) in carving out aspects of law enforcement operations that may still fall within compulsory jurisdiction is that many issues are legally assessed on the merits in the course of determining jurisdiction and may potentially answer questions that emerged between the parties even if not strictly within the jurisdictional remit of the court or tribunal.[15]

Each of the papers developed for this symposium is rich in detail and they are extremely thoughtful considerations as to the possible operation of this exception. In considering them together, it seems analyses of Part XV of UNCLOS are either consciously or sub-consciously influenced by the writer's perceptions of the aims and characteristics of international dispute settlement, and more particularly the purposes of international adjudication or arbitration

14 Which may also explain why it has been subjected to limited consideration in the literature.

15 A similar scenario can emerge in assessing whether a dispute concerns historic title or bays or not. See UNCLOS, *supra* note 1, Art 298(1)(a). See further N. Klein & K. Parlett, *Judging the Law of the Sea: Judicial Interpretations of the UN Convention on the Law of the Sea* (2022).

in the context of UNCLOS.[16] There is perhaps a stronger inclination to construe exceptions as narrowly as possible to promote international adjudication or arbitration where this approach supports judicial engagement as inherent to the rule of law in international relations. Maybe some level of respect for State sovereignty and the importance of State consent to different forms of dispute settlement are influential factors in how we understand rules and their exceptions in UNCLOS dispute settlement. Strict adherence to legal rules and legal method may follow from either of these perspectives.

The historic importance of the negotiating process that led to the adoption of UNCLOS and strength in rhetorical labels of 'package deal' and 'constitution of the oceans' may also invoke deference in determining how UNCLOS dispute settlement operates. Contemporary political interests may support tenacious adherence to the compromises accepted in the 1970s, even when we are operating in a geopolitical paradigm that is now fundamentally different. Also at play may be idealised conceptions of what good ocean governance or public order of the oceans may look like, and / or political pragmatism as to the limits of international law and its place in international matters. International law cannot (and, in my view, does not) stand in isolation from these varying, and sometimes competing, perspectives. Giving voice to each or any of them may ultimately enhance the ongoing relevance of international law and its place in the resolution of EEZ fisheries disputes.

D. Jurisprudence on EEZ Fisheries Disputes

As is observed in the symposium papers, I have previously written that EEZ fisheries disputes are (or should be) largely insulated from compulsory procedures entailing binding decisions because of Article 297(3) and also potentially Article 298(1)(b).[17] Instead, much judicial elucidation has been achieved in relation to fisheries disputes in the EEZ in relation to UNCLOS through alternative approaches or issues, or other bases of jurisdiction. This Part briefly discusses the substantive questions that have been judicially considered in relation to fishing disputes in the EEZ, despite the existence of the exceptions.[18]

16 And not suggesting that the present author is any exception in this regard.

17 Klein, *Dispute Settlement*, *supra* note 11, 176–185.

18 This part draws on Klein & Parlett, *supra* note 15, Chapter 8. It excludes consideration of law enforcement, as this issue is addressed in detail in Goodman's paper in the symposium.

Acknowledging the existence of this jurisprudence supports an argument that the exception is not 'swallowing the rule'.

I. Sovereign Rights over Fisheries

With the creation of the EEZ in UNCLOS, coastal States gained sovereign rights to conserve and manage the marine living resources located within this maritime zone under Article 56 of the Convention. Article 58 of UNCLOS then provides for the rights of other States in a coastal State's EEZ. In the *South China Sea* arbitration,[19] the Philippines claimed that China had interfered with its sovereign rights through enacting and enforcing fisheries laws in an area that the Philippines claimed to be its EEZ. The challenged actions included the prevention of fishing by Philippine fishing vessels around Mischief Reef and Second Thomas Shoal.[20] In this case, it was not the coastal State's sovereign rights over fisheries being questioned, but rather another State's actions in relation to those rights.[21]

The *South China Sea* Tribunal found as a factual matter that China had violated the Philippines' sovereign rights over the living resources in its EEZ in respect of a fishing moratorium promulgated in 2012 that threatened punitive measures and 'may have [had] a deterring effect on Filipino fishermen and their activities'.[22] The mere assertion of fisheries jurisdiction in this context was sufficient for a finding of violation of Article 56.[23] The Philippines failed to establish any further violation of Article 56, as it did not include evidence of actual interference with its fishing vessels in the waters around Mischief Reef or Second Thomas Shoal.[24]

Yet the Philippines also argued that China had violated its rights under Article 56 in failing to prevent Chinese nationals and fishing vessels from exploiting marine living resources in the Philippines' EEZ.[25] The Philippines submitted that under Article 56 China had an 'obligation to take the measures necessary to prevent' Chinese nationals from exploiting resources in the

19 *South China Sea Arbitration (Philippines v China)*, Award of the Arbitral Tribunal, 12 July 2016, PCA Case No 2013-19 [*South China Sea*].

20 *Ibid*, para. 686.

21 The avoidance of the application of Article 297(3) in this situation is discussed in Schatz's paper.

22 *South China Sea*, *supra* note 19, para. 712.

23 *Ibid*.

24 *Ibid*., para. 714.

25 *Ibid*., para. 717.

Philippines' EEZ.[26] Further, the Philippines argued that China had to 'deploy adequate means…' to ensure compliance with the Philippines' laws and regulations and prevent unauthorized fishing activity by its nationals.[27] However, the *South China Sea* Tribunal rightly did not read an 'obligation to ensure' into Article 56. Instead, the Tribunal assessed China's conduct against Article 58(3), which mandates States to show due regard for the rights and duties of the coastal State,[28] and found that provision to have been violated.

The scope of Article 56 in relation to EEZ fisheries dispute has also been contested in relation to the question of bunkering (the supply of fuel to fishing vessels). The *Virginia G* case was brought by special agreement to the International Tribunal for the Law of the Sea (ITLOS) and was not subject to either of the exceptions in Articles 297 or 298 of UNCLOS.[29] In the *Virginia G,* Panama argued bunkering fell within the freedom of navigation and was regulated under Article 58 of UNCLOS whereas Guinea-Bissau submitted that it could be regulated by the coastal State as part of its sovereign rights over the exploitation, conservation and management of the resources of the EEZ,[30] or for the purposes of protecting the marine environment.[31] Guinea-Bissau suggested that an 'evolutionary interpretation' of the Convention was required.[32] Although bunkering is not explicitly addressed in UNCLOS, ITLOS considered that Article 56, when read together with Articles 61 to 68 on living resources, provided that the coastal State's sovereign rights extend to fishing-related activities, which included the bunkering of fishing vessels.[33]

II. Conservation and Utilization of Living Resources in the EEZ

Fisheries disputes in the EEZ have emerged where there are contests about conservation and management measures that have been adopted by the coastal State and also where foreign fishing vessels are considered to be in violation of coastal State requirements. In this setting, Articles 61 and 62 are key provisions of UNCLOS articulating coastal State rights and duties, as well as concomitant rights and duties of other States, in respect of fisheries in the EEZ. A greater

26 *Ibid*., para. 725.
27 *Ibid*., paras 726 and 727.
28 *Ibid*., para. 744.
29 *M/V Virginia G (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014.
30 *Ibid*., para. 188.
31 *Ibid*., para. 196.
32 *Ibid*., para. 187.
33 *Ibid*., para. 209.

understanding of the content of the obligations relating to conservation and management may be drawn from the views of ITLOS in its *Advisory Opinion for the Sub-Regional Fisheries Commission* (SRFC).[34] As an advisory opinion, Art 297(3) was not at issue. Whether the Tribunal had jurisdiction to issue an advisory opinion was contested, however.[35] Nonetheless, from this Advisory Opinion we have learned more about the claims and counter-claims that could occur in relation to fishing in the EEZ.

The Tribunal affirmed that a 'primary responsibility' is accorded to the coastal State for taking the necessary measures to prevent, deter and eliminate IUU fishing.[36] However, flag States also have responsibilities in relation to fishing in the EEZ. These obligations are drawn from Articles 58(3) and 62(4), general obligations under Articles 91, 92, 94,[37] as well as two provisions concerning the protection and preservation of the marine environment, Articles 192 and 193.

While the interpretation of Article 62(4) is quite interesting in its own right, what is worth underlining here is that fisheries disputes implicate a variety of UNCLOS provisions. Consequently, it is not only provisions relating to the exercise of sovereign rights in Part V of UNCLOS concerning the EEZ that may be at issue, but also obligations relating to flag State duties and to the protection and preservation of the marine environment. These latter questions are more likely to be within the scope of compulsory jurisdiction.

III. Straddling Stocks and Highly Migratory Species

We have also seen that EEZ fisheries disputes may emerge in relation to straddling stocks and highly migratory species. Under UNCLOS, regard would be had to Articles 63 and 64 in ascertaining legal rights and duties that may be at issue for dispute resolution under Part XV of the Convention. The difficult question has been whether these disputes would be excluded from jurisdiction under Article 297(3) or are within jurisdiction because of the high seas obligations

34 *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Reports 2015, 4 [*SRFC Advisory Opinion*].

35 For discussion, see, e.g., Y. Tanaka, 'Reflections on the Advisory Jurisdiction of ITLOS as a Full Court: The ITLOS Advisory Opinion of 2015', 14 *Law and Practice of International Courts and Tribunals* (2015) 2, 318; T. Ruys & A. Soete, '"Creeping" Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea', 29 *Leiden Journal of International Law* (2016) 1, 155.

36 *SRFC Advisory Opinion*, *supra* note 34, para. 106.

37 *SRFC Advisory Opinion*, *supra* note 34, para. 111.

relating to fisheries, which are subject to compulsory jurisdiction. The *Chagos MPA* arbitration considered that these disputes would be outside compulsory jurisdiction.[38] However, Judge Paik in his separate opinion in the *SRFC Advisory Opinion* seems to suggest otherwise.[39]

What appears to matter with these disputes is the requirement to cooperate. Judge Paik underlined that Articles 63(1) and 64 of UNCLOS entail requirements to seek to agree, rather than requiring agreement, and that these efforts must be bona fide and meaningful.[40] He contemplated that '[t]he obligation to cooperate may include duties to notify, to exchange information, and to consult and negotiate.'[41] It may also be observed that obligations to show due regard are relevant,[42] and, as above, there is a tie in to duties to protect and preserve the marine environment.[43] These obligations may not necessarily fall within the exclusionary scope of Article 297(3)(a).

IV. Traditional Fishing

Finally, an EEZ fishing dispute may concern traditional fishing rights.[44] Under Article 62(3) of UNCLOS, there may be a dispute about access of nationals who have habitually fished in an EEZ. The extent such rights are recognised is dependent on coastal State consent and discretion. Questions have emerged as to the status of traditional fishing rights in another State's EEZ, with some commentators considering that such rights ceased to exist beyond what

38 *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA Case No 2011-03, Award of 18 March 2015, para. 300 [*Chagos MPA*].

39 *SRFC Advisory Opinion*, *supra* note 34, Separate Opinion of Judge Paik, para. 37.

40 Consistent with the view of the ICJ from *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)*, Judgment, ICJ Reports 1969, 3. See *SRFC Advisory Opinion*, *supra* note 34, Separate Opinion of Judge Paik, para. 35.

41 *Ibid*., para. 36.

42 *SRFC Advisory Opinion*, *supra* note 34, para. 216.

43 *Ibid*.

44 As evident most recently in a decision before the International Court of Justice: *Alleged Violations of Sovereign Rights*, *supra* note 9, paras 201–233. In this case, the traditional fishing of Colombian fishers in the Nicaraguan EEZ was not proven as a factual matter.

was indicated in UNCLOS.[45] Nonetheless, States have recognised such rights in their practice.[46]

In the *South China Sea* arbitration, the Tribunal decided that traditional fishing rights were extinguished with the establishment of the EEZ in maritime areas beyond 12 nautical miles from a State's coast apart from the consideration to be afforded to 'habitual' fishing in coastal State decision-making over allocation of any fishing rights in Article 62(3).[47] This decision was drawn from an assessment of UNCLOS negotiations,[48] and the *South China Sea* Tribunal further considered its position as consistent with the *Gulf of Maine* decision at the International Court of Justice.[49] The latter holding was distinguished from *Eritrea / Yemen*, the *Chagos Marine Protected Area* and *Fisheries Jurisdiction* cases.[50]

E. Conclusion

As noted above, it is remarkable that so much judicial elucidation has been achieved in relation to fisheries in the EEZ despite the existence of the exceptions to the rule. Respect for the balance of rights, as further discussed in Goodman's paper, has played a role in judicial interpretations that are relevant to fishing activities in the EEZ. Further judicial elaboration of the respective rights and duties of coastal and flag States will potentially calibrate the range of claims and counter-claims between stakeholders in EEZ fisheries. Ideally, these judicial interventions in EEZ fisheries disputes will form a positive contribution to

45 See, e.g., L. Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation', in H. N. Scheiber & M. S. Kwon (eds), *Securing the Ocean for the Next Generation*, Law of the Sea Institute, UC Berkeley–Korea Institute of Ocean Science and Technology Conference, Seoul, May 2012, 1, 2.

46 Examples of State practice recognising the existence of traditional fishing rights are reviewed in P. Dyspriani, *Traditional Fishing Rights: Analysis of State Practice*, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, UN 2011.

47 *South China Sea*, *supra* note 19, para. 804.

48 *South China Sea*, *supra* note 19, 248–252. See also Bernard*, The Effect of Historic Fishing Rights*, *supra note 45,* 7.

49 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)*, Merits, ICJ Report 1984, 246, para. 235; *South China Sea*, *supra* note 19, paras 256–257.

50 The *Fisheries Jurisdiction* case was distinguished because it predated UNCLOS whereas the *Chagos Marine Protected Area* was viewed as a modification of the rights of the UK and Mauritius pursuant to Article 311 of UNCLOS. *South China Sea*, *supra* note 19, paras 258–260.

ocean governance and enhance the sustainability of the world's fisheries. While international law clearly has a role to play, UNCLOS dispute settlement does not and cannot provide the only means for resolving EEZ fisheries disputes.