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Striking the right balance? Applying the jurisprudence of international tribunals to coastal state innovations in international fisheries governance

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ABSTRACT

While the coastal State has 'sovereign rights' with respect to the exploration, exploitation, conservation and management of the living resources of the exclusive economic zone, including the right to take the necessary enforcement measures, these rights are not as all-encompassing as they first appear. In practice, the geographic and substantive limitations on the coastal State's jurisdiction in the exclusive economic zone provide significant challenges to effective fisheries governance and enforcement. This paper considers the approaches that have been adopted – or could be adopted – by coastal States seeking to improve the reach and effectiveness of their jurisdiction over the living resources of the exclusive economic zone, by reference to the current state of jurisprudence from international courts and tribunals.

1. Introduction

As the International Tribunal for the Law of the Sea (ITLOS) made clear in its 2014 judgment in the *Virginia G* case, the 'sovereign rights' of the coastal State in the exclusive economic zone under the 1982 *United Nations Convention on the Law of the Sea* (LOSC) [1] encompass 'all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures' [2]. In practice, however, the nature and extent of the jurisdiction that may actually be exercised by a coastal State on the basis of these sovereign rights is limited – both spatially and substantively. Given the ambiguous way in which the fisheries provisions of the LOSC are drafted, as well as the varied and constantly developing nature of activities at sea, it is often difficult to determine the extent of the coastal State's jurisdiction over living resources in the exclusive economic zone.

This paper explores five key avenues through which coastal States can adopt innovative interpretations of the LOSC to maximise the extent of their jurisdiction over living resources in the exclusive economic zone, both spatially and substantively:

- first, through the extension of fisheries laws and regulations to fishing-related activities, such as bunkering or transhipment;
- second, through measures relating to access by foreign fishing vessels to the living resources of the exclusive economic zone and in particular the nature of conditions that may be imposed in access agreements;
- third, through measures relating to the transit of foreign fishing vessels through the exclusive economic zone, including requirements of reporting, routeing, monitoring or inspection;
- fourth, through the cooperative exercise of coastal State rights, including collaborating with other coastal States in setting conditions for access to the living resources of the exclusive economic zone and establishing harmonised fisheries laws, the mutual enforcement of such laws, and the cross-vesting of powers to undertake enforcement at sea; and
- fifth, through the use of modern technology not contemplated in the LOSC to increase the effectiveness of fisheries enforcement, such as electronic communications technology, satellite vessel monitoring systems and radar.

In relation to each of these avenues, the paper will suggest the key opportunities and rewards that may exist for innovative coastal State regulation. It will also highlight the potential risks of such regulation, as well as limitations arising from the principles that have emerged in the decisions of international courts and tribunals.

2. Extending the scope of fishing regulation in the exclusive economic zone to fishing-related activities

The scope of the coastal State's powers to regulate foreign fishing in the exclusive economic zone has not always been clearly understood. The journey to judicial clarity on this point has included detours through the 1986 *Filleting in the Gulf of St Lawrence* arbitration, in which

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the Tribunal found that coastal State jurisdiction did not extend to the filleting of fish caught in the exclusive economic zone [3], and the *Saiga* cases of the late 1990s, which involved a lot of equivocation on the point. [4,5] However, following the 2014 *Virginia G* case, it is clear that one way for coastal States to maximise their jurisdiction over foreign fishing in the exclusive economic zone is to expand the *type* of activities that may be regulated in relation to the living resources of the exclusive economic zone.

The starting point is the 'sovereign rights' of the coastal State over living resources under Article 56(1) of the LOSC, and the expansive nature of its discretionary powers of prescription over fishing in Articles 61 and 62. As confirmed in the *Virginia G* case, the coastal State's jurisdiction extends to fishing-related activities 'directly connected' with fishing in the exclusive economic zone [2]. There is a 'direct connection' between fishing and a given activity where that activity enables fishing vessels to continue their activities without interruption at sea, which includes the wide range of support and handling activities commonly included in the definition of 'fishing- related activities' in international instruments and regulated in the national legislation of coastal States. Accordingly, the coastal State can regulate transhipment, processing, packaging, storing, refuelling, repair, and the supply of personnel, provisions and any other materials needed to undertake any of these activities. The practical importance of such regulation is clear; activities like bunkering and transhipment are the ultimate 'facilitator' for illegal fishing, since they enable vessels to 'pursue their activities without interruption at sea with no need to return to the ports of the coastal State to refuel, on the one hand, and to unload their catch in accordance with their fishing licence, on the other' [2]. While it is currently difficult to conceive of a fishing-related activity that would *not* fall within the broad test of 'direct connection' adopted in the *Virginia G* case, changes in fish stocks and fishing methods, and developments in science and technology may, in time, give rise to new innovations that test the scope of the coastal State's regulatory authority.

However, such assertions of coastal State authority must be founded in the relevant source of jurisdiction. For example, in the *Saiga (No 2)* case [5], the bunkering of a fishing vessel could legitimately have been regulated by the coastal State in the exercise of its sovereign rights over living resources in the exclusive economic zone. Instead, the coastal State specifically sought to rely on other bases of jurisdiction, including the customs power and an asserted right of 'public interest' or 'self-protection' relating to commercial activities affecting its economic interests, which ITLOS found were *not* consistent with the LOSC. Accordingly, while the coastal State's regulation of a particular activity by foreign vessels in the exclusive economic zone may happen to serve an additional purpose – such as prevention of drug smuggling or people trafficking, or protection of the marine environment – the coastal State should take care to maintain its focus on the 'direct connection' with fishing. Of course, the coastal State's sovereign right to regulate 'fishing' in the exclusive economic zone ends where the flag State's freedom of navigation begins – so the outer limits of coastal State ability to innovate in this regard ultimately stand to be determined through compulsory dispute settlement under Article 297(1)(a) of the LOSC.

3. Use of conditions in the regulation of foreign fishing vessels

In addition to the *types* of activity that may legitimately be regulated by the coastal State on the basis of their connection with fishing, an expansive interpretation can be given to the *conditions* that may be imposed on foreign fishing in the exclusive economic zone under Articles 62(3) and (4).

Article 62(3) establishes a broad range of issues that may be taken into account by the coastal State in giving access to the surplus of the allowable catch in its exclusive economic zone and Article 62(4) sets out a long and non-exhaustive list of potential terms and conditions. The breadth and discretionary nature of these rights is reinforced by their specific exclusion from compulsory dispute settlement under Article 297(3)(a). Accordingly, this is a rich area for innovation by coastal States seeking to find new approaches to the regulation of living marine resources in the exclusive economic zone. The use of innovative conditions on access to living resources in the exclusive economic zone could potentially provide a means for the coastal State to extend its regulatory reach well beyond traditional forms of regulation, which tend to cover issues such as fishing gear restrictions, notification requirements, and landing and transhipment regulations.

For example, it is clear that coastal States may make use of modern technology and require that vessels fishing in their exclusive economic zone (or engaged in fishing-related activities in support of such vessels) carry an operational satellite vessel monitoring system that reports to the coastal State [6]. Coastal States might also use Article 62(4) to extend the spatial application of their prescriptive jurisdiction by imposing conditions that relate to the activities of foreign fishing vessels in areas beyond the exclusive economic zone. This could include, for instance, a requirement that the vessel's satellite monitoring system continue to report to the coastal State even when the vessel is outside the exclusive economic zone, so that the coastal State has a clearer surveillance picture on which to base its fisheries enforcement activities. It could also include a requirement that the vessel (or the flag State, if executed through a bilateral agreement) agree not to fish in certain areas of the high seas, as a condition of being granted access to fisheries in the exclusive economic zone. Such approaches have been adopted, for example, in relation to fishing in the high seas enclave in the Barents Sea [7], in a high seas enclave within the exclusive economic zone of New Zealand [8–10], and in areas of high seas adjacent to the adjoining exclusive economic zones of the Parties to the Nauru Agreement in the western and central Pacific Ocean [11].

Such conditions could also be used innovatively by the coastal State in relation to fishing support vessels. In this regard, ITLOS was at pains to emphasise in the *Virginia G* case that – unless otherwise determined in accordance with the LOSC – the coastal State's regulatory authority only extends to fishing-related activities when they are undertaken *in support of foreign vessels engaged in fishing in the exclusive economic zone* [2]. However, ITLOS did not address the question of to what extent the coastal State may assert jurisdiction over the broader activities of fishing support vessels in the exclusive economic zone. In this regard, the ability to impose conditions under Article 62(4) might also be used as a basis for regulating the conduct of fishing support vessels – not just during their engagement with authorised vessels in the 'fishing-related' activities described above, but in respect of their broader navigation in the exclusive economic zone. This could be implemented through a requirement that authorised fishing vessels use transhipment and bunkering services from *authorised* fishing support vessels, which might in turn be subject to coastal State regulations, such as the carriage of a vessel monitoring system.

Conditions can also be used as a means of ensuring the effective enforcement of fisheries laws and regulations. In this respect, it is worth recalling that if a foreign vessel should violate the laws and regulations governing fishing in the exclusive economic zone, the discretion afforded the coastal State in the exercise of its *enforcement* jurisdiction over that vessel may be much more limited. In particular, ITLOS has taken a strict, textual interpretation to the question of what measures may be 'necessary' to ensure compliance with the laws and regulations adopted by the coastal State under Article 73(1) and what constitutes a 'reasonable' bond for the release of a vessel and its crew under Article 73(2). For example, in the *Virginia G* case, the majority found that the coastal State was not permitted to confiscate a vessel that had engaged in unauthorized bunkering in the exclusive economic zone on the basis that it was not 'necessary' to ensure compliance with the relevant laws and regulations [2]. Similarly, in a number of cases ITLOS has significantly reduced the bond for prompt release of a vessel alleged to have violated fisheries laws in the exclusive economic zone, on the basis that the amount set by the coastal State was not 'reasonable'; the bond was reduced by 60 per cent in the *Camouco* case, by more than 30 per