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The contribution of fisheries access agreements to flag State responsibility

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A B S T R A C T

On 2 April 2015, the International Tribunal for the Law of the Sea (ITLOS) rendered an advisory opinion in which it held that Articles 58(3), 62(4), 94(2), 192 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) laid down a responsibility of flag States for fishing activities undertaken by private actors in the Exclusive Economic Zones (EEZs) of coastal States. In interpreting these provisions of UNCLOS, the ITLOS made reference to specific clauses in fisheries access agreements (FAAs) concluded by coastal States and flag States. This article examines in more detail the contribution of FAAs to the concept of flag State responsibility. It will first offer a brief discussion of the framework for fisheries access under national jurisdiction provided by UNCLOS and will then take a closer look at how certain provisions contained in FAAs have contributed –and could contribute in the future– to the concept of flag State responsibility in international fisheries law. The article concludes that FAAs have contributed significantly to the development of the concept of flag State responsibility for fishing activities in the past and may do so to a more limited extent in the future.

1. Introduction

During the past three decades, international fisheries governance has experienced a considerable paradigm shift away from separate responsibility of individual actors towards shared responsibility. This change was initiated by the continuing depletion of marine living resources, the problem of illegal, unreported and unregulated fishing (IUU fishing), and the resulting necessity to improve the applicable regime and its implementation. The present article will focus on the fisheries regime applicable to waters under national jurisdiction as envisaged by the United Nations Convention on the Law of the Sea (UNCLOS)[1] and customary international law. The maritime zones most relevant in this context are the Territorial Sea (breadth: up to 12 nautical miles from the baselines) and Exclusive Economic Zone (EEZ; breadth up to 200 nautical miles from the baselines) of coastal States, where they enjoy, respectively, sovereignty[2] and sovereign rights over living marine resources.[3] As fisheries governance and enforcement by coastal States has proven to be frequently insufficient, the focus of the international community has increasingly shifted towards parallel, complementary responsibility of other key actors such as flag States, port States, States of nationality and market States [1]. The issue of flag State responsibility in the fisheries context is addressed in a number of multilateral instruments, including both binding treaties[4] and soft-law.[5]

The present article focuses on the contribution of fisheries access agreements (FAAs) to flag State responsibility. It first provides a brief overview of both the international legal framework applicable to FAAs and related practice since the 1970s. The article then discusses treaty clauses contained in FAAs which establish the supervisory responsibility of flag States in fisheries matters (so-called 'compliance clauses'). However, given the overwhelmingly bilateral nature of FAAs and the decline of their object, namely surpluses of fisheries, the relevance of FAAs for the future regulation of flag State responsibility is limited despite significant influence on the development of the concept. Due to these limitations, the article next analyzes the potential influence of

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[1] *United Nations Convention on the Law of the Sea*, Montego Bay; 10 December 1982. In force 16 November 1994, 1833 UNTS 3 [UNCLOS].

[2] Article 2 UNCLOS.

[3] Article 56(1)(a) UNCLOS.

[4] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome; 24 November 1993. In force 24 April 2003, 2221 UNTS 91; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York; 4 December 1995. In force 11 December 2001, 2167 UNTS 3; Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome; 22 November 2009. In force 5 June 2016, available at ⟨http://www.fao.org/fileadmin/user_upload/legal/docs/037 t-e.pdf⟩ (Accessed 05 April 2017).

[5] See FAO, *Code of Conduct for Responsible Fisheries*, 31 October 1995, available at ⟨www.fao.org/docrep/005/v9878e/v9878e00.htm⟩ (accessed 05 April 2017); FAO, *Voluntary Guidelines for Flag State Performance*, 11 June 2014, available at (accessed 05 April 2017) [Voluntary Guidelines].

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compliance clauses in FAAs and related practice on the evolution of relevant customary international law as well as on the interpretation of Articles 58(3), 62(4), 94(2), 192 UNCLOS. Moreover, as the relevant flag State obligations constitute obligations of due diligence, their exact content must be determined, *inter alia* by reference to State practice. FAAs and their implementation may play a role in this context also in the future. Further, the article shows how specific clauses incorporated in FAAs can help in ensuring the responsibility of States for the proper regulation of conduct of natural and juridical persons possessing their nationality involved in fishing activities as operators or as part of an ownership structure of foreign flagged vessels.

2. The legal framework for fisheries access agreements

As the International Tribunal for the Law of the Sea (ITLOS) stated in its *SRFC Advisory Opinion*, the coastal State's sovereign rights over the living resources of the EEZ also entail a primary responsibility of the coastal State to regulate its EEZ fisheries and enforce its fisheries legislation [2]. This primary responsibility includes the determination of the allowable catch[6] and the adoption of proper conservation and management measures in order to ensure that the maintenance of the living resources in the EEZ is not endangered by over-exploitation.[7] At the same time, the coastal State must promote the objective of optimum utilization of the living resources of its EEZ.[8] It follows that if there is a surplus of the allowable catch not harvestable by its nationals, the coastal State has an obligation to grant other States access to any such surplus [3].[9] In granting access, the coastal State has to take into account various factors such as the significance of the living resources of the area to the economy of the coastal State and its other national interests, the requirements of land-locked, geographically disadvantaged and developing States and 'the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks' [4].[10] As stated by Article 62(2) UNCLOS, access is granted 'through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in [Article 62(4)].'

The preferable means of granting access prior and after the adoption of UNCLOS has been FAAs [5]. FAAs are 'treaties' within the meaning of Article 2(1)(a) of the 1969 Vienna Convention on the Law of the Treaties (VCLT)[11] and are governed by public international law. As the concept of the EEZ as a *sui generis* zone evolved prior to its codification in Part V of UNCLOS [6], many of the rules and practices codified in Part V of UNCLOS existed already in pre-UNCLOS times in some form or another. Already during the 1960s, FAAs had been concluded with regard to fisheries zones up to 12 nm in the Northeast Atlantic [7]. FAAs as a widespread practice concerning the EEZ came into being in the 1970s [8]. Early FAAs were often concluded between developing coastal States and developed nations with fishing fleet overcapacities [9]. Other FAAs were concluded primarily between developed States and concerned the orderly phasing out of the respective fishing activities in the newly established EEZs [10]. Today, a number of States, such as the United States, no longer grant access to third States due to the fact that their own fishing industries have the capacity to harvest the full allowable catch within the EEZ.

If no FAA exists, fishing vessels flying the flag of the flag State are not allowed to fish in the EEZ unless they obtain a 'private license' directly from the coastal State. Such private licenses, which are not agreements under public international law, cover a significant share of EEZ fisheries by foreign vessels [11]. Despite the fact that these arrangements are usually kept confidential [12], there is evidence that the practice continues where no FAA has been entered into by the respective States, and sometimes even parallel to FAAs [13]. Both the broad wording of Article 62(2) and State practice suggest that the issuing of private licenses is not contrary to UNCLOS.[12] As it is beyond the scope of this article to analyze the content of private licenses, the following assessment will be restricted to FAAs.

Irrespective of whether the coastal State grants foreign nationals or vessels access to its EEZ fisheries or not, any foreign fishing activities in the EEZ fall under the jurisdiction of the coastal State and must therefore comply with the applicable domestic fishing laws and regulations.[13] The coastal State has a corresponding primary responsibility to enforce its fisheries laws and regulations.[14] However, as the discussion below will demonstrate, practice has evolved in this respect so that other actors are often now also involved in this area of regulation and enforcement.

3. Flag State obligations in 'compliance clauses'

As coastal State regulation and enforcement has in many cases proven insufficient, focus has shifted towards a parallel, complementary responsibility of flag States. The legal concept of 'flag State responsibility' is used to imply the existence of relevant international obligations of flag States to exercise jurisdiction and control over private actors, the breach of which will result in international responsibility.

An examination of early FAAs shows that the concept of flag State responsibility for fishing activities predates both UNCLOS and other multilateral fisheries instruments. From the outset, provisions which oblige the flag State to ensure that its fishing vessels comply with the fisheries laws of the coastal State – so-called 'compliance clauses' – have been a prominent feature in FAAs [14]. Some early compliance clauses obliged the flag State to take the necessary measures to ensure that their vessels comply with the provisions of the FAA [15].[15] In such cases, the true content of the respective compliance clause must be determined by reference to the content of other provisions of the FAA. Usually the flag State is obliged to ensure that its fishing vessels do not fish without license and comply with the fisheries legislation of the coastal State as well as the terms of their licenses [16].[16] Other early compliance clauses were already more detailed, such as the compliance clause appearing in the 1977 FAA between the United States and the EEC:

> 'The Community shall take all necessary measures to assure: 1. that nationals and vessels of the Member States of the Community refrain from fishing for living resources over which the United States exercises fishery management authority except as authorized pursuant to this Agreement; 2. that all such vessels so authorized comply with the provisions of permits issued pursuant to this Agreement and applicable laws of the United States […].'[17]

[6] Article 61(1) UNCLOS.
[7] Article 61(2) UNCLOS.
[8] Article 62(1) UNCLOS.
[9] Article 62(2) UNCLOS.
[10] Article 62(3) UNCLOS.
[11] *Vienna Convention on the Law of Treaties* [VCLT], Vienna; 23 May 1969. In force 27 January 1980, 1155 UNTS 331.
[12] Notably, para. 41 of the Voluntary Guidelines expressly takes into account 'authorizations outside of [FAAs]'.
[13] Article 62(4) UNCLOS.
[14] Article 73(1) UNCLOS.
[15] See, e.g., Agreement between the Government of Canada and the Government of Norway on Their Mutual Fishery Relations, Ottawa; 2 December 1975. In force 11 May 1976, 1132 UNTS 124 (Article V). See also Agreement between the Government of Canada and the Government of Portugal on Their Mutual Fishery Relations, Ottawa; 29 July 1976. In force 18 July 1977, 1132 UNTS 375 (Article V(1)).
[16] This is particularly so where the agreement expressly provides, for example, that '[t]he fishing vessels of each Party shall […] comply with the conservation measures and other rules and conditions established by that Party and the legal requirements and provisions of that Party concerning fisheries.' See *Agreement between Estonia and Denmark (also on behalf of the Faroe Islands) concerning mutual fishery relations*, Copenhagen; 1 May 1992. In force 20 February 1992, 1774 UNTS 254 (Article 4 (1)).
[17] *Agreement between the Government of the United States of America and the European Economic Community concerning fisheries off the coasts of the United States*, Washington; 15