Fisheries Disputes: Judicial and Arbitral Practice since the Entry into Force of UNCLOS

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I Introduction

Fisheries are a major factor in the evolution of the international law of the sea. The nutritional needs of the growing population of the world have been at the basis of the transition from the time in which coastal States claimed exclusive powers over the narrow band of the territorial sea while the rest of the sea, the vast expanses of the high seas, remained free for the exploitation of its apparently inexhaustible biological resources, to the present time. Today sovereign rights on fisheries exploitation are recognized to coastal States over a 200-mile wide exclusive economic zone (EEZ). On the high seas, while freedom of fishing is still recognized in principle, broadly shared concerns for over-exploitation have opened the way to cooperative efforts to impose responsible fishing practices. The modern law of the sea concerning fisheries is set out in the provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)\(^1\) concerning the EEZ (Part V) and the high seas (Part VII, Section 2) and in a myriad of global, multilateral, regional and bilateral agreements, among which the most important is the 1995 UN Fish Stocks Agreement.\(^2\) Moreover, the Food and Agriculture Organization of the United Nations (FAO) produces a number of conventions and soft-law instruments, or fosters their adoption by States, and Regional Fisheries Management Organizations produce binding and non-binding measures.

The contemporary international law of fisheries is not an isolated set of rules. It is clearly connected with other fields of international law, especially with international environmental law. This has been judicially noticed. In fact,

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1 Montego Bay, Jamaica, 10 December 1982, 1833 UN Treaty Series 397.

the International Tribunal for the Law of the Sea (ITLOS) in its 1999 Order on the Southern Bluefin Tuna cases stated that

the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.3

This explains why in a case such as the Southern Bluefin Tuna one, concerning mostly fisheries, interesting arguments drawn from international environmental law have been developed by the Tribunal. This is also a consequence of the approach combining the protection of living resources and of the marine environment followed by the 1995 UN Fish Stocks Agreement which, while not applicable to the case, the Tribunal did not ignore.4

The above-mentioned connection is based on the circumstance that living resources, such as fish stocks, are part of the natural environment and deserve to be protected. Still, it is undeniable that provisions on these resources, even when aimed at securing their conservation, have as their real purpose ensuring their sustainable exploitation for human and animal nutrition. Provisions like Article 194, para 5, of UNCLOS, stating that the measures taken for the protection of the marine environment from pollution

shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life

are the exception. And it seems significant that Article 294, para 5, is included in Part XII, on the preservation of the marine environment, and not in Part V or VII where fisheries are dealt with.

The contemporary law of the sea is characterized by the significant role played by judicial and arbitral settlement of disputes.5 In the brief observations that follow I will give an overview of the mechanisms available for the settlement of disputes concerning fisheries and of the relevant judicial and arbitral practice since the entry into force of UNCLOS. In most of the cases that will be examined and which were dealt with by the International Tribunal for the Law of the Sea, I had the honour and the pleasure to cooperate as colleague

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4 Separate opinion of Judge Treves, ITLOS Reports 1999, p. 316 at paragraph 11.