

The Contribution of Fisheries Access Agreements to the Emergence of the Exclusive Economic Zone: A Historical Perspective

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Structured Abstract

Article Type: Research Paper

Purpose—While international legal scholarship has devoted significant attention to the factors contributing to the emergence of the customary international law concept of the exclusive economic zone (EEZ), the role of fisheries access agreements (FAAs)—as an important factor contributing to this legal development—is often omitted or understated. This article provides a historical perspective through an in-depth study of the contribution of such FAAs to the emergence of the EEZ.

Design, Methodology, Approach—Overall, the article employs a legal history approach to a question of public international law. In doing so, the article applies a hermeneutic approach to the interpretation of treaty law. It employs an empirical approach to the question of the formation of customary international law in so far as State practice is concerned. Due to the difficulty in accessing representative State practice, the empirical approach is limited to inferences drawn based on available practice and the absence of contrary practice.

Findings—Provisions in FAAs and practice derived from FAAs can be evidence of *opinio iuris*. FAAs have contributed significantly to the formation of the customary international law concept of the EEZ.

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Journal of Territorial and Maritime Studies / Volume 5, Number 2 / Summer/Fall 2018 / pp. 5–23 /
ISSN 2288-6834 (Print) / © 2018 Yonsei University

Originality, Value—This article provides an in-depth study of the contribution of FAAs to the emergence of the customary international law concept of the EEZ. The article provides a case-study of how treaty provisions may generate *opinio iuris*—the findings of which can be generalized and applied in other contexts.

Keywords: customary international law, exclusive economic zone, exclusive fishery zone, fisheries access, law of the sea, preferential fishing rights, treaties

Introduction¹

From the 1970s onwards, coastal States around the world started concluding fisheries access agreements (FAAs) with other States in order to grant these States access to fish stocks located within the exclusive jurisdiction of coastal States—a practice that is still very much alive today, albeit to a more limited extent. It is no coincidence that the advent—and the peak—of FAAs fall within the same period of time during which the concept of the exclusive economic zone (EEZ), as a maritime zone of 200 nautical miles (nm) in which coastal States enjoy sovereign rights over marine living resources, emerged. Indeed, these FAAs were often concluded to soften the impact of EEZ declarations on the existing high seas fisheries of other States in the relevant areas. However, the contribution of the practice deriving from FAAs on the emergence of the concept of the EEZ as well as the rules contained in the EEZ fisheries regime—and *vice versa*—has not been subject to a comprehensive and in-depth study.²

The present article undertakes to fill this gap. In doing so, the article adopts a legal history approach to seek to establish a connection between early FAA practice and the emergence of the EEZ. For lack of space, the article is restricted to the impact of FAAs on the emergence of that concept as such rather than detailed aspects of the EEZ fisheries regime. First, it briefly discusses the status of the EEZ as a rule of customary international law largely identical to its codification in Part V of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).³ Second, the article explains the nature and function of FAAs. Third, the article discusses how treaty provisions may contribute to the emergence of rules of customary international law generally. The article then highlights how FAAs and related State practice have contributed to the emergence of the EEZ as a maritime zone of 200 nm in which coastal States enjoy exclusive fishery rights under customary international law even prior to the adoption of UNCLOS. The analysis shows that the emergence of the EEZ followed a stepwise process that started with the emergence of the concept of the exclusive fishery zone (EFZ) and the concept of preferential fishing rights. Lastly, the article offers some concluding remarks.

The Customary Status of the EEZ Fisheries Regime

In accordance with Part V of UNCLOS, coastal States may claim an EEZ of up to 200 nm measured from the baselines of their territorial sea.⁴ In that zone, coastal States have sovereign rights (as opposed to full sovereignty like in the territorial sea) for the purpose of exploring, exploiting, conserving and managing the marine living resources.⁵ Therefore, other States and their nationals may only fish in the EEZ with the consent of the coastal State.⁶ As the International Tribunal for the Law of the Sea (ITLOS) confirmed in its *Sub-Regional Fisheries Commission 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.⁷

It is generally accepted that the right of coastal States to claim an EEZ of 200 nm forms part of customary international law.⁸ At the very least, the concept of the EEZ, i.e., the allocation of, *inter alia*, sovereign rights and jurisdiction concerning marine resources to the coastal State based on the attribution of a maritime zone of up to 200 nm subject to declaration, constitutes customary international law.⁹ However, in the past some authors have expressed doubts that all provisions of Part V of UNCLOS have acquired customary status and restrict their findings to “the broad rights of coastal and other States enumerated in Articles 56 and 58 of the Convention.”¹⁰ Others argue that, while State practice may not be uniform in all respects, the comprehensive nature of UNCLOS supports not only the customary status of the concept of the EEZ as such but also the accompanying regime of Part V of UNCLOS in some detail.¹¹ In this respect, it has been proposed to consider State practice not in line with UNCLOS as “deviations from customary international rules” rather than conduct aligned with rules of a different content.¹² As the present article is not concerned with the customary status of detailed aspects of the EEZ fisheries regime codified in Part V of UNCLOS but with its customary status generally, these broad findings are sufficient for the present purposes.

Fisheries Access Agreements (FAAs)

In maritime zones in which coastal States enjoy exclusive rights to fisheries, any fishing by other States or their nationals is subject to the consent of the coastal State. Such fisheries access to maritime zones within national jurisdiction is—and has previously been—granted by way of FAAs.¹³ As agreements concluded between sovereign States, FAAs are treaties governed by public international law.¹⁴ For the EEZ, Article 62(2) of UNCLOS states that access is granted “through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in [Article 62(4)].” Irrespective of whether the coastal State grants foreign nationals or vessels access to its fisheries or not, any foreign fishing activities fall under the jurisdiction of the coastal State and must therefore comply with the

applicable domestic fishing laws and regulations.¹⁵ The coastal State has a corresponding right—and primary responsibility—to enforce its fisheries laws and regulations.¹⁶ In some cases, foreign operators obtain so-called “private licenses” directly from the coastal State, in the absence of—or parallel to—an FAA with the flag State.¹⁷ It is submitted that such private licenses may also constitute relevant State practice in the present context. They are, however, not the focus of this article—and of less importance given that they involve private actors which do not (in most cases) represent the official views of their flag States. As is shown in the following section, it is the view and practice of States entering into FAAs with coastal States that is essential in determining whether FAAs have contributed to the emergence of the customary international law concept of the EEZ.

The Relevance of FAAs for the Formation of Customary International Law

As FAAs are treaties, they do not in principle create rights and obligations for States not party to the respective FAA in accordance with the fundamental rule of treaty of *pacta tertiis nec nocent nec prosunt*.¹⁸ For FAAs, this means that they only apply to waters under the jurisdiction of the parties to the relevant FAA. Irrespective of these considerations, a rule of customary international law identical to treaty rules may emerge¹⁹ and treaty provisions may play a role in this process.²⁰ Such a rule of customary international law—in the present case the right of States to claim an EEZ of 200 nm in which they enjoy sovereign rights over marine living resources—is in principle binding on all States.

Under Article 38(1)(b) of the Statute of the International Court of Justice (ICJ-Statute), which is generally considered as the key authority in this regard, customary international law is defined as “evidence of a general practice accepted as law.”²¹ From this definition, two main requirements can be distilled for the formation of a rule of customary international law: State practice (“general practice”) and *opinio iuris* (“accepted as law”).²² If the original “source” of a new customary rule is a treaty rule, there is an additional requirement that the treaty rule in question must be of a “fundamentally norm-creating character.”²³ This is understood as requiring the rule to be both abstract and general.²⁴

However, even if a treaty rule has the same content as an alleged new customary rule, it is not self-evident that State practice in the application of that treaty rule is in fact evidence of *opinio iuris* in that regard. On the contrary, the general presumption will have to be that States bound by such a treaty rule act precisely because they intend to comply with their treaty obligation, not because they are of the view that they are bound by an identical rule of customary international law.²⁵ For this reason, the International Court of Justice (ICJ) stated in the *North Sea Continental Shelf Cases* that from “[the parties’] action no inference could legitimately be drawn as to the existence of a rule of customary international law.”²⁶

Whenever the type of treaty in question is essentially of a contractual (*traités-*

contrats) rather than a law-making (*traités-lois*) character, which is also true of FAAs, particular caution is called for.²⁷ However, it cannot be entirely ruled out that some provisions even of what some would classify as a contractual treaty might be evidence of *opinio iuris*.²⁸ Instead, a treaty provision's ability to generate *opinio iuris* must be determined on a case-by-case basis. Nonetheless, whenever the ability of a treaty rule to contribute to the emergence of a customary international law rule is at issue (such as in the present case), additional requirements must be fulfilled. In particular, the relevance of provisions contained in FAAs for the establishment of *opinio iuris*, and thus for the formation of customary international law, must be ascertained based on whether the provisions in question contain a statement about a rule of general international law external to the treaty. If such a statement is present, the relevant provision can display *opinio iuris* both with respect to rights and obligations. To illustrate this point, a treaty rule containing a right or obligation to do "X" usually lacks an external component. A treaty rule containing a right or obligation to do "X as permitted/required by customary international law," on the other hand, is an express statement about the existence of a relevant customary rule external to the treaty—and thus a reflection of *opinio iuris*.²⁹

As will be discussed below, fisheries treaties have considerable potential in proving assumptions about the nature and extent of coastal State rights and jurisdiction in a maritime zone—based on the explicit or implicit acceptance of such rights and jurisdiction by other States. The act of entering into an FAA with a coastal State signifies acceptance of the coastal State's sovereign rights over the living resources in the area of application of the FAA. It would be difficult to argue that such acceptance is limited to that individual FAA and contains no statement regarding the rights of the coastal State generally. To make such an argument would mean claiming that a flag State entering into such an FAA would intentionally take part in a breach of public international law by the coastal State.³⁰ Therefore, an external component, namely a statement concerning the extent of coastal State rights and jurisdiction, is always inherent in FAAs.³¹

The establishment of *opinio iuris* with respect to obligations in provisions in FAAs is equally not automatic. Obligations laid down in treaty provisions generally arise from the treaty and are not proof of *opinio iuris* concerning the existence of an obligation under customary international law.³² In some cases, however, the relevant treaty provision contains a statement indicating the parties' view that an obligation exists not (only) under the treaty but (also) under customary international law—for example, a rule of reference incorporating general international law into the treaty.³³ A good example that has received considerable attention may be borrowed from international investment law, where many bilateral investment treaties (BITs) contain provisions which oblige States to "accord investments or returns of investors of the other Contracting Party [...] fair and equitable treatment *in accordance with principles of international law*."³⁴ Without entering into the details of the debate concerning the customary status of fair and equitable treatment (FET), it may be pointed out for the sake of comparison that many commentators consider that FET forms part of customary international—and that instead of merely codifying

pre-existing customary rules, “[t]he conventional framework served as the primary source for the customary formation of FET.”³⁵ Where a provision in an FAA possesses a comparable external component, it may be seen as generating *opinio iuris* with respect to an obligation under general international law.

The Emergence of the EEZ and the Role of *opinio iuris* Established by FAAs

As the concept of the EEZ, as a *sui generis* zone under customary international law, evolved prior to its codification in Part V of UNCLOS,³⁶ many of the rules and practices codified in Part V of UNCLOS already existed in some form or another prior to UNCLOS. The following section shows how FAAs contributed to the emergence of the EEZ as a zone of 200 nm in which coastal States enjoy sovereign rights over marine living resources.

The emergence of the EEZ fisheries regime and its predecessors (to be introduced below), namely the concept of the 12 nm EFZ and the concept of “preferential fishing rights,” are excellent examples of how FAAs, despite their contractual nature, have contributed to the establishment of *opinio iuris*. The following section addresses these developments in chronological order. As a starting point, it should be noted that all States enjoy a (qualified) freedom of fishing on the high seas under both customary and treaty law.³⁷ This means, in principle, that no single State may claim exclusive or even preferential access to high seas fisheries at the expense of other States. However, through the gradual extension of coastal State rights and jurisdiction over marine living resources during the 20th century, the area in which this freedom applies has decreased dramatically.

The Emergence of the EFZ

The starting point for the emergence of the EEZ as a new concept under customary international law could be seen in the emergence of a new maritime zone covering the 3–12 nm (and 6–12 nm) belt beyond the territorial sea (which then had a breadth of only 3 nm) in which coastal States would enjoy exclusive fishery rights (the exclusive fishery zone (EFZ)).³⁸ At the first United Nations Conference on the Law of the Sea held in Geneva from 24 February to 27 April 1958 (UNCLOS I), a number of States proposed an extension of the breadth of the territorial sea to 6 nm and the creation of an EFZ of up to 12 nm measured from the baselines from which the territorial sea is measured (i.e., the 6–12 nm belt beyond the territorial sea).³⁹ However, no compromise on either the maximum breadth of the territorial sea or the recognition of an EFZ could be reached at UNCLOS I. Accordingly, the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ)⁴⁰ does not define the maximum breadth of the territorial sea. Article 1(1) of the CTSCZ merely provides that “[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea,” whereas

Article 6 of the CTSCZ states that “[t]he outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea” without indicating the extent of the “breadth of the territorial sea.” However, this also meant that the breadth of the territorial sea remained subject to general international law and that the CTSCZ has to be interpreted accordingly.⁴¹ The concept of the EFZ, on the other hand, was neither considered to constitute part of the territorial sea nor of the contiguous zone, meaning that it was not covered by the existing zones acknowledged by the 1958 Geneva Conventions (see discussion below).

As such, the concept of an EFZ was generally considered incompatible with Article 1 of the 1958 Convention on the High Seas⁴² which states, in its Article 1, that the high seas cover “all parts of the sea that are not included in the territorial sea or in the internal waters of a State” (therefore arguably leaving no room for an additional *sui generis* zone) and, in its Article 2(2), that all States enjoyed freedom of fishing in the high seas.⁴³ Therefore, the question whether the maximum breadth of the territorial sea remained at the generally accepted 3 nm, or at 6 nm plus an EFZ of another 6 nm, or indeed at 12 nm, remained contested.⁴⁴ As a result, the second United Nations Conference on the Law of the Sea (UNCLOS II) in 1960 was convened to, *inter alia*, “[consider] further the questions of the breadth of the territorial sea and fishery limits,” but proposals for an EFZ of up to 12 nm failed (by *one* vote).⁴⁵

Participation in the 1958 Geneva Conventions remained relatively low and, as a result, proved to be less of an obstacle to the extension of coastal State jurisdiction than might have been expected. This lack of support “was particularly reflected in the rapidly developing state practice with respect to claims to fishing zones.”⁴⁶ Indeed, the proposal for an extended territorial sea and EFZ at UNCLOS I and II, which had only failed by one vote, “greatly strengthened the political legitimacy” of the concept of the EFZ.⁴⁷ The new developments were not restricted to unilateral claims⁴⁸ but also involved recognition of the right of coastal States to an EFZ beyond the territorial sea between 3 nm (at the time) and 12 nm by other States in various fisheries agreements.⁴⁹ This practice was relatively widespread amongst major coastal States and fishing States—with such practice particularly concentrated in Europe.⁵⁰

As early as 1960, the United Kingdom and Norway concluded an FAA, the preamble of which expressly took into account “the proposal on the breadth of the territorial sea and fishery limits which was put forward jointly by the Governments of the United States of America and Canada at [UNCLOS II] in 1960 and which obtained 54 votes.”⁵¹ In the preamble, the parties also affirmed “their belief that an Agreement to stabilize fishery relations between the two countries should be based on the aforesaid proposal, and should not contemplate the exclusion of fishing vessels from any area beyond the limits of the fishery zone referred to in that proposal.” Article II of the FAA granted Norway the right to exclude fishing vessels registered in the United Kingdom from “an area contiguous to the territorial sea of Norway extending to a limit of 6 miles from the base line from which that territorial sea is measured.” However, Article III of the FAA granted such vessels the right to continue “to fish in the zone between the limits of 6 and 12 miles from the base line from

which the territorial sea of Norway is measured”—although that right would expire in 1970. Thus, Norway and the United Kingdom endorsed the concept of an EFZ that would at least cover the belt from 3–12 nm.

Equally, in 1961, Iceland concluded two exchanges of notes with the United Kingdom⁵² and Germany⁵³ respectively in order to settle a dispute concerning Iceland's (then) contentious claim to a fishery zone of 12 nm. These agreements recognized the Icelandic claim but also granted the United Kingdom and Germany fisheries access to the outer 6 nm of Iceland's new fishery zone for a transition period of three consecutive years. These exchanges of notes were mixed agreements, but they included a fisheries access component.⁵⁴

In a 1962 FAA,⁵⁵ Norway granted the Union of Soviet Socialist Republics (USSR) access to “a Norwegian fishing zone between the limits of six and twelve miles from the base line from which the territorial waters of the Kingdom of Norway are measured”⁵⁶ in return for access to “Soviet territorial Waters in Varangerfjord between the limits of six and twelve miles from the shore”⁵⁷ with both access arrangements expiring in 1970.

Perhaps the most significant development came with the conclusion of the 1964 London Fisheries Convention (LFC), which was concluded between several European States and provided for reciprocal fisheries access in specifically designated coastal waters.⁵⁸ Article 1(1) of the LFC states that “[e]ach Contracting Party recognizes the right of any other Contracting Party to establish the fishery régime described in Articles 2 to 6 of the present Convention.” This statement is completed by Articles 2 and 3 of the LFC. Article 2 states that “[t]he coastal State has the exclusive right to fish and exclusive jurisdiction in matters of fisheries within the belt of six miles measured from the baseline of its territorial sea.” In addition, Article 3 of the LFC states that “[w]ithin the belt between six and twelve miles measured from the baseline of the territorial sea, the right to fish shall be exercised only by the coastal State.” However, other States had a continued right to fisheries access if their “fishing vessels [...] have habitually fished in that belt between 1st January, 1953 and 31st December 1962.” The LFC entered into force in 1966 and by 1971 it had twelve parties, all of which were European coastal States (Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom).⁵⁹ Reference to the régime established by the LFC was also made in a 1964 FAA between the United Kingdom and Norway which implemented the earlier FAA of 1960.⁶⁰ This bilateral agreement is relevant in so far as Norway never became a party to the LFC.

After the conclusion of the LFC, the practice of claiming an EFZ became more widespread in other regions of the world. In 1965, Japan and South Korea concluded an agreement (not strictly speaking an FAA) in which they “mutually recognize[d] that each High Contracting Party has the right to establish a sea zone (hereinafter ‘fishery zone’), extending not more than 12 nautical miles from its respective coastal base line, over which it will have exclusive jurisdiction with respect to fisheries.”⁶¹ After New Zealand had claimed an EFZ, it concluded an FAA with Japan in 1967 which implicitly recognized New Zealand's EFZ by granting Japan access (until 1970)

to certain fisheries in the 6–12 nm belt of the EFZ.⁶² One year later, Australia concluded a similar FAA with Japan, which in principle excluded Japanese fishing vessels from fishing in the 12 nm EFZ of Australia, as well as the Territory of Papua and the Trust Territory of New Guinea (which are today part of independent Papua New Guinea) except for specific access arrangements.⁶³ As far as North America is concerned, in 1967 the United States and Mexico concluded an FAA which provided for reciprocal access to parts of the 9–12 nm belt of their respective EFZs.⁶⁴ Similarly, in 1968 Mexico concluded an FAA with Japan which granted Japan access to parts of the 9–12 nm belt of the Mexican EFZ.⁶⁵ Finally, the practice of establishing EFZs was also not absent from the African continent, as evidenced by a 1969 FAA between Spain and Morocco, which granted Spain access to parts of Morocco's EFZ of 12 nm.⁶⁶

Overall, the examples given here (which are by no means exhaustive) are evidence of the practice of as many as 22 States from different parts of the world (and including most important fishing nations at that time) recognizing the right of coastal States to establish an EFZ of 12 nm. In light of the freedom of fishing on the high seas enshrined in the HSC, these treaties did not codify a pre-existing rule of customary international law. To the contrary, the *opinio iuris* reflected in the recognition of the concept of the EFZ in FAAs⁶⁷ was constitutive of a new rule of customary international law. In fact, it has been suggested that the striking absence of strong opposition against these EFZ claims was not only due to the near-agreement at UNCLOS II but also due to the fact that almost all coastal States claiming an EFZ continued to grant other States' fisheries access to this zone.⁶⁸ Seen from this perspective, FAAs may have had an additional catalytic effect in generating *opinio iuris*. Thus, the ICJ's finding in its 1974 judgments in the *Fisheries Jurisdiction Cases* that "the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction [...]; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted" and that this concept had "crystallized as customary law in recent years arising out of the general consensus revealed at [UNCLOS II]" appears to be well founded.⁶⁹

During UNCLOS I and II, most States regarded the EFZ as a *sui generis* concept that was different from the territorial sea. This position was confirmed by the State practice presented here. The coastal State's rights in the EFZ were indeed restricted to exclusive rights to fisheries and did not amount to a form of "sovereignty" that could be likened to the coastal State's rights in the territorial sea. It follows that the EFZ must be regarded as the functional predecessor of the EEZ rather than as a step in the gradual extension of the territorial sea towards 12 nm.⁷⁰ Indeed, the ICJ stated in the *Fisheries Jurisdiction Cases* that the EFZ granted coastal States exclusive rights to fisheries "independently of its territorial sea" and was therefore "a *tertium genus* between the territorial sea and the high seas."⁷¹ If this is true, the declaration of recognition of the coastal State's right to an EFZ of up to 12 nm in FAAs may be regarded as a precedent for similar declarations in later FAAs which concerned the existence of a right of coastal States to claim an EEZ of 200 nm in which they enjoyed sovereign rights to marine living resources (discussed in the next section).

The Emergence of the Concept of Preferential Fishing Rights

Soon after the emergence of the concept of the EFZ, a further development concerning fishery rights of coastal States took place. Even when the waters beyond the territorial sea and beyond the EFZ (i.e., the waters beyond 12 nm of the coast) were still part of the high seas for the purposes fisheries, the question of whether the interests of certain States (e.g., coastal States, distant water fishing nations, geographically disadvantaged States) should be somehow reflected in a more nuanced regime of priorities for fisheries access to these areas was present.⁷² To this end, Article 6(1) of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas recognized that “[a] coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.”⁷³ Of course, this was a vague concept and as the remaining paragraphs of Article 6 prove, the coastal State’s special interest mainly concerned unilateral conservation measures and fell short of exclusive jurisdiction.⁷⁴ Parallel to the development of the concept of “special interest,” the concept of “preferential fishing rights” of coastal States in the waters adjacent to their coasts emerged. Unlike the former, the latter concept focused on preferential fisheries access rather than conservation—at least in situations where the coastal State’s population was highly dependent on its coastal fisheries.⁷⁵ However, the concept did not provide for exclusive fisheries jurisdiction either. As one author put it, the difference between the concept of the EFZ and the concept of preferential fishing rights is that the latter “relates to catch and not to jurisdiction” whereas in the former “the exclusiveness relates to jurisdiction and not necessarily to catch.”⁷⁶

To some extent, the interest of coastal States in preferential fishing rights was reflected in both bilateral and multilateral treaties.⁷⁷ However, it appears that this practice was rather scarce. For example, the preamble of the multilateral Arrangement relating to Fisheries in Waters surrounding the Faroe Islands concluded by Belgium, Denmark, France, the Federal Republic of Germany, Norway, Poland and the United Kingdom in 1973 recognized “that the Faroe Islands should enjoy preference in waters surrounding the Faroe Islands” and its Article 4 contains preferential fisheries access for the Faroe Islands by exempting the Faroe Islands from seasonal and spatially restricted closures for trawl fishing established by Article 3(1).⁷⁸ Equally, Article II(1) of the Agreement on the Regulation of the Fishing of North-East Arctic (Arcto-Norwegian) Cod concluded by the United Kingdom, Norway and the USSR in 1973 allocated the biggest share of the envisaged quota to Norway as the coastal State, whereas Article II(2) granted Norway an additional quota for “coastal cod” which was to be considered as a separate stock.⁷⁹

In 1975 the United States and Poland concluded an agreement in which both States agreed to take “into account anticipated legal and jurisdictional changes in the regime of fisheries management based upon the consensus emerging from the Third United Nations Conference on the Law of the Sea.”⁸⁰ The principles governing fisheries access to the waters adjacent to the territorial sea of the United States envisaged by Article 2(1)(c) of that agreement included “preferential harvesting rights for

United States fishermen based on their capacity to harvest the living resources.” As evidenced by Article 2(2) of that agreement, the United States’ preferential harvesting rights were of a nature that could have fully displaced Polish fishing vessels if no surplus was available.

While the examples given here are not exhaustive, it seems that—when compared to the practice supporting the concept of the EFZ—practice in support of the concept of preferential fishing rights was neither widespread nor uniform. Nonetheless, in its *Fisheries Jurisdiction* judgments of 1974, the ICJ took note of, *inter alia*, this treaty practice in determining the legal status of the concept of preferential fishing rights:

State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States [...]. [T]he preferential rights of the coastal State were recognized in various bilateral and multi-lateral international agreements.⁸¹

The ICJ then went on to accept the status as a rule of customary international law of “the concept of preferential rights of fishing in adjacent waters in favor of the coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries.”⁸² Thus, the ICJ expressly made use of statements of acceptance of preferential fishing rights in fisheries treaties in order to establish *opinio iuris* with respect to the customary status of that concept.

Thus, treaties similar to FAAs were seen by the ICJ as contributing to *opinio iuris* concerning the alleged customary international law concept of preferential fishing rights for coastal States (under certain conditions).⁸³ This finding has been subject to considerable criticism and—in the view of the present author—rightly so. There is scarce evidence of relevant State practice and the negotiation history of the agreements discussed above (the first two of which were mentioned by the ICJ) does not imply that flag States had accepted a legal obligation to grant coastal States preferential access.⁸⁴ Indeed, with the possible exception of the preamble of the Faroe Arrangement, it is doubtful that these treaties contained an external component that could be evidence of *opinio iuris*. While the ICJ’s finding is not entirely convincing, it is proof of the willingness of the ICJ to use the recognition of legal concepts in regional fisheries treaties as evidence of *opinio iuris*.

The Emergence of the EEZ

Most of the text of the EEZ fisheries regime of Part V of UNCLOS was agreed upon by 1976—six years before UNCLOS was signed and 18 years before its entry into force.⁸⁵ Nonetheless, as late as 1977, some authors still insisted on the basis of the ICJ’s judgments in the *Fisheries Jurisdiction Cases* that the concept of the EEZ had “no present standing in international law.”⁸⁶ However, on the basis of the evidence available, it seems more likely that, already in the late 1970s, the EEZ’s “acceptance as part of existing or emerging customary international law was anticipated

or reflected by national legislation and measures and by many bilateral fisheries agreements.”⁸⁷ In this regard, it should be noted that while many States did not at first claim “full EEZs” but extended EFZs of up to 200 nm, the latter can be considered as reflecting a part of the former and are thus included in the notion of the EEZ.

Indeed, soon after the ICJ had found in its *Fisheries Jurisdiction* judgments that the concepts of the 12 nm EFZ and preferential fishing rights constituted rules of customary international law, an increasing number of coastal States began to unilaterally claim zones of up to 200 nm in which they asserted sovereign rights over marine living resources and enacted national legislation to make use of these sovereign rights (EFZs/EEZs).⁸⁸ The *opinio iuris* of these States concerning the existence of their right to a 200 nm zone was evidenced by their own claims. Of particular weight, however, is the *opinio iuris* of States other than those States asserting the right in question. In other words, it is important to study the reaction of other (affected) States to the claims of coastal States to extended jurisdiction. While there were at first many objections to the claims to coastal States to an EFZ/EEZ of 200 nm, States also increasingly began to conclude FAAs concerning EFZs/EEZs in the 1970s.⁸⁹ Of these FAAs, most were concluded either between developing coastal States and developed nations with fishing fleet overcapacities (as is still the case today)⁹⁰ or between developed States in order to phase out previous fishing activities in areas which now fell within new EFZs/EEZs.⁹¹

It is submitted that these FAAs are evidence of *opinio iuris*.⁹² In the Asia-Pacific region, for example, New Zealand concluded FAAs with Japan,⁹³ South Korea,⁹⁴ and the USSR⁹⁵ in 1978, all of which contained clauses in their preambles recognizing New Zealand’s claim to sovereign rights over marine living resources within a zone of 200 nm. The United States concluded FAAs containing similar clauses with South Korea⁹⁶ and Japan.⁹⁷ A clause in the preamble of the 1978 FAA between New Zealand and Japan read as follows:

Recognizing that, in accordance with relevant principles of international law, the Government of New Zealand has established a zone of 200 nautical miles within which it exercises sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources[.]

Similar statements can be found in trans-Atlantic FAAs such as the 1975 FAA between Canada and Norway, which contains the following clause in its preamble:

Recognizing that both Governments propose to extend their areas of jurisdiction over such living resources pursuant to and in accordance with relevant principles of international law, and to exercise within these areas sovereign rights for the purpose of exploring and exploiting, conserving and managing these resources[.]⁹⁸

Of this FAA, it has been said that it “was the first [Canadian] agreement signed which recognized Norwegian rights to a share of the surplus in exchange for *de facto* recognition of an eventual [200 nm] Canadian zone.”⁹⁹

The same clause exists, for example, in the preamble of 1976 FAA between

Canada and Portugal¹⁰⁰ and in the preamble of the 1976 FAA between Canada and Spain.¹⁰¹ Equally, the preamble of the 1977 FAA between the United States and the European Economic Community (EEC) acknowledged “the fishery management authority of the United States as set forth in the Fishery Conservation and Management Act of 1976”¹⁰²—legislation unilaterally enacted by the United States in order to establish a 200 nm fishery conservation zone in which the United States claimed exclusive fisheries jurisdiction.¹⁰³ Similar statements can be found, for example, in the preambles of the 1977 FAA between the United States and Cuba¹⁰⁴ (the latter being evidence of at least some Latin American practice) and the 1976 FAA between the United States and Poland.¹⁰⁵ Relevant practice from the 1970s can also be found on the African continent. For example, the preamble of the 1981 FAA between Mauritania and the USSR takes “into account the decision of the Islamic Republic of Mauritania to establish a 200-mile economic zone.”¹⁰⁶ Equally, the preamble of the 1979 FAA between South Africa and Spain contained the following statement:

Recognizing the fact that the Government of the Republic of South Africa has extended its jurisdiction over the living resources of its adjacent waters pursuant to and in accordance with relevant principles of international law, and exercises within a zone of 200 nautical miles sovereign rights for the purpose of exploring and exploiting, conserving and managing these resources[.]¹⁰⁷

It may be concluded that the practice was widespread and involved most major fishing nations. One aspect of the examples provided above, however, could be criticized—namely the fact that all States engaging in the practice of recognizing other States’ EEZ claims were in fact also coastal States themselves and did therefore act with the prospect of gaining sovereign rights over marine living resources in extensive marine areas. On this basis, and given the risk of “creeping jurisdiction” by coastal States through such practice, it could be argued that their *opinio iuris* should not carry the same weight as the *opinio iuris* of landlocked States. While this argument is not entirely without merit, it should be borne in mind that most of the States entering into FAAs (e.g., the United States, the USSR or Japan) are also important flag States which are traditionally opposed to extensions of coastal State jurisdiction despite the fact that they are coastal States themselves. In addition, few landlocked States have a considerable fishing fleet—and those that do have such a fleet do often not pursue a very active fisheries policy that would lead to vocal objections to the practice of coastal States and other flag States. Given these considerations, it seems legitimate to uphold the inferences drawn above with respect to the *opinio iuris* generated by FAAs recognizing coastal States’ rights to an EEZ.

Conclusion

The present article has shown that there was a gradual development from complete freedom of fishing on the high seas adjacent to a coastal State’s territorial sea towards a fisheries regime that provided for exclusive fishing rights of coastal States

in maritime zones of increasing breadth. This development was influenced by State practice arising out of FAAs. First, FAAs and related practice were a major source of *opinio iuris* with respect to the emergence of the EFZ of up to 12 nm as a rule of customary international law. Second, it is doubtful whether the concept of preferential fishing rights ever attained the status of a rule of customary international law as asserted by the ICJ—and FAAs in the strict sense did not contribute significantly to the development of that concept. Third, similar practice to that which contributed to the emergence of the 12 nm EFZ was later adopted with respect to EFZs/EEZs as zones of 200 nm in which coastal States have sovereign rights over living resources. Specifically, the article has shown that the unilateral EEZ claims of coastal States which are often referenced in literature dealing with the emergence of the EEZ were accompanied by FAAs recognizing coastal States' rights to claim an EEZ of 200 nm. These FAAs are clear evidence of the acceptance by other States of coastal States' claims to an EFZ/EEZ. Consequently, they were evidence of *opinio iuris* with regard to the status of the EEZ/EFZ as a rule of customary international law prior to its codification in Part V of UNCLOS. Of course, the development of the EEZ fisheries law regime did not stop with the entry into force of UNCLOS, and neither did the influence of FAAs on that regime. FAAs continue to shape the content of the rules of Part V of UNCLOS because they may constitute subsequent State practice relevant to the interpretation of Part V of UNCLOS.¹⁰⁸ Equally, given the fact that Part V of UNCLOS continues to provide only a general framework for EEZ fisheries regulation, FAAs continue to be used as specific and more detailed regulatory tools in EEZ fisheries management throughout the world.

Notes

1. Earlier versions of this paper were presented at a Junior Scholars' Workshop prior to the 6th Asian Society of International Law Biennial Conference, 24 August 2017, Seoul, South Korea and the 2nd Hamburg Young Scholars' Workshop in International Law, University of Hamburg, 15–16 September 2017, Hamburg, Germany. The author would like to express his gratitude to everyone who provided feedback during these workshops. In addition, the author would like to thank two anonymous reviewers for their constructive feedback and suggestions.

2. Regarding this research gap, see Kenneth J. Keith, "Book Review: The Oxford Handbook of the Law of the Sea," *American Journal of International Law* 110(2) (2016), p. 390, at p. 395. For the purposes of this article, the term "contribution" will be used as a reference to an impact on the emergence, modification or elimination of a rule of public international law via State practice and *opinio iuris*.

3. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3.

4. Article 55 UNCLOS.

5. Article 56(1)(a) UNCLOS.

6. On this concept of "sovereign rights," see Alexander Proelss, "Article 56," in Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS)—A Commentary* (Munich: C.H. Beck/Hart/Nomos, 2017), paras. 8–10.

7. *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* [2015] ITLOS Case No. 21, paras. 104–106, 124. See also Valentin Schatz, "Combating Illegal Fishing in the Exclusive Economic Zone—Flag State Obligations in the Context of the Primary Responsibility of the Coastal State," *Göttingen Journal of International Law* 7(2) (2016), p. 383, at p. 395.

8. *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, ICJ Reports 1985, p. 13,

p. 33; Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the Law of the Sea* (Dordrecht: Brill Nijhoff, 1989), p. 28, with further references. See also Proelss, “Article 55,” in Proelss (ed.), 2017, para. 3; Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (Dordrecht: Brill Nijhoff, 1993), p. 519.

9. Dolliver Nelson, “Exclusive Economic Zone,” in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (Oxford: Oxford University Press, 2008), para. 91.

10. Robin Churchill and Vaughan Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester University Press, 1999), pp. 161–162; Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991), p. 283; Francisco Orrego Vicuña, *The Exclusive Economic Zone* (Cambridge: Cambridge University Press, 1989), p. 252.

11. Proelss, 2017, para. 3: “the concept itself and most parts of the regime codified in Part V.” See also Daniel P. O’Connell, *The International Law of the Sea*, Vol. 1 (Oxford: Clarendon Press, 1982), p. 49.

12. James Harrison, *Making the Law of the Sea* (Cambridge: Cambridge University Press, 2011), p. 56. <https://doi.org/10.1017/CBO9780511974908>.

13. Mohamed Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (Dordrecht/Boston/Lancaster: Martinus Nijhoff, 1987), pp. 77–78.

14. See Article 2(1)(a) of the *Vienna Convention on the Law of Treaties* (VCLT), 23 May 1969, 1155 UNTS 331.

15. For the EEZ, see Article 62(4) UNCLOS.

16. For the EEZ, see Article 73(1) UNCLOS.

17. See, for example, Suzannah F. Walmsley et al., “Comparative Study of the Impact of Fisheries Partnership Agreements,” *Technical Report Prepared for the UK Department for Environment Food and Rural Affairs and the Department for International Development* 3 (2007), p. 63, at p. 68; Robin Churchill and Daniel Owen, *The EC Common Fisheries Policy* (Oxford: EC Law Library, 2010), pp. 351–359. <https://doi.org/10.1093/acprof:oso/9780199275847.001.0001>.

18. Articles 34 and 35 VCLT. See discussion by Valentin J. Schatz, “The Contribution of Fisheries Access Agreements to Flag State Responsibility,” *Marine Policy* 84 (2017), p. 313, at pp. 315–316.

19. Article 38 VCLT. See also Mark E. Villiger, “Article 38,” in Mark E. Villiger (ed.), *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Nijhoff, 2009), para. 4.

20. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, Judgment, ICJ Reports 1969, p. 3, at para. 72; Alexander Proelss, “Article 38,” in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Heidelberg: Springer, 2012), para. 10.

21. *Statute of the International Court of Justice*, 26 June 1945, available at http://www.icj-cij.org/en/statute#CHAPTER_II, accessed February 10, 2018.

22. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, Judgment, ICJ Reports 1969, pp. 42 ff.

23. *Ibid.*, para. 72.

24. Proelss, 2012, para. 9.

25. Villiger, 2009, para. 5; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, Judgment, ICJ Reports 1969, para. 76.

26. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)*, Judgment, ICJ Reports 1969, para. 76.

27. Mark E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, 2nd ed. (The Hague: Kluwer Law International, 1997), p. 189; Schatz, 2017, p. 316.

28. Richard R. Baxter, “Treaties and Customs,” *Collected Courses of the Hague Academy of International Law* 128 (1970), p. 25, at p. 82; Vladimir D. Degan, *Sources of International Law* (The Hague: Martinus Nijhoff, 1997), p. 256.

29. Compare also Arthur M. Weisburd, “Customary International Law: The Problem of Treaties,” *Vanderbilt Journal of Transnational Law* 21 (1988), p. 1, at p. 23.

30. That breach would entail an excessive exercise of jurisdiction by the coastal State over living marine resources in an area that forms part of the high seas. See Article 87(1)(e) UNCLOS.

With respect to claims to sovereignty over parts of the high seas, see also the prohibition in Article 89 UNCLOS.

31. This is not, however, necessarily true of flag State rights laid down in FAAs. For example, the inclusion of provisions on flag State rights to access to coastal State fisheries in FAAs does not in turn generate *opinio iuris* with respect to such a right of flag States generally even absent an FAA. Here, the FAA's provisions on access themselves are the sole source of the flag State's right to access—and they will generally lack an external component. See Tullio Treves, "Customary International Law," in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (Oxford: Oxford University Press, 2012), para. 49.

32. See, for example, the discussion of the relevance of so-called "compliance clauses" in FAAs providing for flag State responsibility for the emergence of a parallel obligation of flag States to ensure that vessels flying their flag do not engage in illegal fishing in the coastal State's EEZ under customary international law by Schatz, 2017, p. 316.

33. Rules of reference concerning fisheries law (arguably also including soft-law standards enunciated in non-binding instruments) can be found, for example, in Articles 61 (3) and 119(1)(a) UNCLOS. See Valentin J. Schatz, "Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ," *Ocean Development and International Law* 47(4) (2016), p. 327, at p. 337.

34. Example taken from Canadian BITs (emphasis added). See discussion by Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008), pp. 25–26.

35. See Tudor, 2008, p. 83, with further references.

36. *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, ICJ Reports 1985, p. 33; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, ICJ Reports 1984, p. 246, at p. 294; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports 1993, p. 38, at p. 59.

37. See, in particular, Article 87(1)(e) UNCLOS.

38. For a discussion of both the original and contemporary concepts of the EFZ, see further Shalva Kvinikhidze, "Contemporary Exclusive Fishery Zones or Why Some States Still Claim an EFZ," *The International Journal of Marine and Coastal Law* 23 (2008), pp. 271–295. <https://doi.org/10.1163/092735208X272238>.

39. See, e.g., UN Doc. A/CONF.13/C.1/L.159-L.168, 15 April 1958, United States of America: Proposal, Official Records of the United Nations Conference on the Law of The Sea, Volume III (First Committee [Territorial Sea and Contiguous Zone]), p. 253. See also discussion by Rainer Lagoni and Alexander Proelß, "Festlandssockel und ausschließliche Wirtschaftszone," in Wolfgang Graf Vitzthum (ed.), *Handbuch des Seerechts* (Munich: C.H. Beck, 2006), pp. 222–224, with further references.

40. *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 515 UNTS 205.

41. See Article 31(3) VCLT.

42. *Convention on the High Seas*, 29 April 1958, 450 UNTS 11.

43. Cf. Lagoni and Proelß, 2006, p. 224–225. But see Carolyn Hudson, "Fishery and Economic Zones as Customary International Law," *San Diego Law Review* 17 (1980), p. 661, at pps. 670–673.

44. See discussion by René J. Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea*, Vol.1 (Dordrecht: Nijhoff, 1991), pp. 262–263.

45. UN Doc. A/RES/1307 (XIII), 10 December 1958, Convening of a Second United Nations Conference on the Law of the Sea. For a general discussion, see Arthur H. Dean, "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas," *American Journal of International Law* 54 (1960), p. 751. <https://doi.org/10.2307/2195140>.

46. Donald R. Rothwell and Tim Stephens, *The International Law of the Sea*, 2nd ed. (Oregon: Hart Publishing, 2016), p. 10.

47. B. Johnson and D. Middlemiss, "Canada's 200-Mile Fishing Zone: The Problem of Compliance," *Ocean Development and International Law* 4 (1977), p. 67, p. 71. <https://doi.org/10.1080/00908327709545582>.

48. An incomplete list of unilateral claims to a 12 nm EFZ is provided by Kvinikhidze, 2008, pp. 290–291.

49. Jean E. Carroz and Michel J. Savini, "The New International Law of Fisheries Emerging from Bilateral Agreements," *Marine Policy* 3 (1979), p. 79, at p. 79; Rothwell and Stephens, 2016, pp. 10–11.

50. Yoshifumi Tanaka, *The International Law of the Sea*, 2nd ed. (Cambridge: Cambridge University Press, 2015), 25: "some twenty coastal States."

51. *Fishery Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway*, 17 November 1960, UK Treaty Series 25 (1961).

52. *Exchange of Notes Settling the Fisheries Dispute between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Iceland*, 11 March 1961, UK Treaty Series No. 17 (1961).

53. *Exchange of Notes Constituting an Agreement concerning the Fishery Zone around Iceland*, 19 July 1961, 409 UNTS 47.

54. These exchanges of notes also contained compromissory clauses which served as the ICJ's basis for jurisdiction in the *Fisheries Jurisdiction Cases* cited above. For the ICJ's findings on jurisdiction, see *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 49, para. 23; *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 3, para. 23.

55. *Agreement on Fishing between the Government of the Union of Soviet Socialist Republics and the Government of the Kingdom of Norway*, 16 April 1962, 437 UNTS 194.

56. Article II.

57. Article III.

58. *Fisheries Convention*, 9 March 1964, 581 UNTS 57. The LFC remains in force and has not lost all of its relevance today. For a discussion of its status and of recent developments concerning fisheries access in the waters of the member States of the European Union in light of Brexit, see Valentin J. Schatz, "Brexit and Fisheries Access: Some Reflections on the UK's Denunciation of the 1964 London Fisheries Convention," *EJIL: Talk!—Blog of the European Journal of International Law*, July 18, 2017, <https://www.ejiltalk.org/brexit-and-fisheries-access-some-reflections-on-the-uks-denunciation-of-the-1964-london-fisheries-convention/>, accessed February 10, 2018.

59. See UK Depositary Status List, Fisheries Convention, signed at London, 9 March–10 April 1964 (with Protocol of Provisional Application and Two Agreements as to Transitional Rights), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/625470/15_Fisheries_Convention_1964_status.pdf, accessed February 10, 2018.

60. See particularly Articles 1 and 2 of the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway for the Continuance of Fishing by Norwegian Vessels within the Fishery Limits of the United Kingdom of Great Britain and Northern Ireland*, 28 September 1964, UK Treaty Series 43 (1965).

61. See Article 1(1) of the *Agreement between Japan and the Republic of Korea concerning Fisheries*, 22 June 1965, *International Legal Materials* 4 (1965), p. 1128.

62. See Articles 1 and 2 of the *Agreement on Fisheries between Japan and New Zealand*, 12 July 1967, 683 UNTS 54.

63. See Article 1 of the *Agreement on Fisheries between the Commonwealth of Australia and Japan*, 27 November 1968, 708 UNTS 202.

64. See Paras. 1–4 of the *Agreement between the United States of America and the United Mexican States on Traditional Fishing in the Exclusive Fishery Zones Contiguous to the Territorial Seas of Both Countries*, 22 June 1965, *International Legal Materials* 7 (1968), p. 312.

65. See Article 1 of the *Agreement between Japan and the United Mexican States on Fishing by Japanese Vessels in the Waters Contiguous to the Mexican Territorial Sea*, 7 March 1968, 682 UNTS 274.

66. The agreement was concluded on 7 February 1969. The author was unable to obtain the original text. However, the content of the agreement is reported, *inter alia*, by María del Mar Holgado Molina and María del Sol Ostos Rey, "Los Acuerdos de Pesca Marítima entre España y Marruecos: Evolución Histórica y Perspectivas," *Estudios Agrosociales y Pesqueros* 194 (2002), p. 189, at pp. 193–194.

67. See also Robin R. Churchill, "The Fisheries Jurisdiction Cases: The Contribution of the

International Court of Justice to the Debate on Coastal States' Fisheries Rights," *International and Comparative Law Quarterly* 24 (1975), p. 82, at p. 88: "There seems to be sufficient evidence, in the form of State claims accepted or acquiesced in, either tacitly or by agreement, by other States, to justify the claim that an exclusive fishing zone up to 12 miles from the coastal State's baselines, is recognized as being a rule of customary international law" (emphasis added).

68. Johnson and Middlemiss, 1977, pp. 71–72.

69. *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 3, para. 52; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 49, para. 44.

70. Rothwell and Stephens, 2016, pp. 86–87.

71. *Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 3, paras. 52 and 54; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Jurisdiction, Judgment, 1973 ICJ Reports 49, paras. 44 and 46.

72. J. C. Phillips, "The Exclusive Economic Zone as a Concept in International Law," *The International and Comparative Law Quarterly* 26(3) (1977), p. 585, at p. 600.

73. *Convention on Fishing and Conservation of the Living Resources of the High Seas* of 29 April 1958, 559 UNTS 285.

74. D H. N. Johnson, "The Special Interest of Coastal States," in Robin R. Churchill, K. R. Simmonds and J. Welch (eds.), *New Directions in the Law of the Sea*, Volume III (New York: Oceana Publications Inc., 1973), pp. 46–51.

75. Kvinikhidze, 2008, pp. 272–273.

76. Churchill, 1975, p. 88.

77. Phillips, 1977, pp. 600–601.

78. *Arrangement Relating to Fisheries in Waters Surrounding the Faroe Islands*, 18 December 1973, UK Treaty Series No. 28 (1975).

79. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on the Regulation of the Fishing of North-East Arctic (Arcto-Norwegian) Cod*, 15 March 1974, UK Treaty Series No. 35 (1974).

80. *Agreement Regarding Fisheries in the Northeastern Pacific Ocean off the Coast of the United States*, 16 December 1975, 1067 UNTS 245.

81. *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Merits, Judgment, ICJ Rep 1974, p. 3, at para. 58; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, ICJ Rep 1974, p. 175, at para. 50. For detailed commentary on these judgments, see Churchill, 1975, at p. 82.

82. *Ibid.*, para. 52.

83. The concept of preferential fishing rights resurfaced in the UNCLOS III negotiations in proposals to include into UNCLOS a provision which would give coastal States preferential access to waters adjacent to their territorial sea even if they should choose not to claim a (full) EEZ—subject to further regulation through bilateral agreements. See Andrés Aguilar, "The Patrimonial Sea or Economic Zone Concept," *San Diego Law Review* 11 (1973–1974), p. 579, at p. 584.

84. Churchill, 1975, pp. 94–97: "the vital element of *opinio juris* seems to be completely missing."

85. Keith, 2016, p. 395.

86. Phillips, 1977, p. 585.

87. Keith, 2016, p. 395.

88. Kwiatkowska, 1989, pp. 27–28, with further references.

89. Annick Van Houtte, "Flag State Responsibility and the Contribution of Recent International Instruments in Preventing, Deterring and Eliminating IUU Fishing," in FAO, *Report of the Expert Consultation on Fishing Vessels Operating under Open Registries and their Impact on Illegal, Unreported and Unregulated Fishing* (2003), FAO Fisheries Report No. 722 (2004), p. 47, at p. 49. See also the list of agreements concluded between 1975 and 1978 provided by Carroz and Savini, 1979, at pp. 79 ff.

90. Van Houtte, 2004, p. 49.

91. Carroz and Savini, 1979, p. 82.

92. This is also briefly hinted at by Churchill, 1975, p. 92.

93. *Agreement on Fisheries between the Government of New Zealand and the Government of Japan*, 1 September 1978, 1167 UNTS 441.
94. *Agreement on Fisheries between the Government of Korea and the Government of New Zealand*, 16 March 1978, 1167 UNTS 415.
95. *Agreement on Fisheries between the Government of the Union of Soviet Socialist Republics and the Government of New Zealand*, 4 April 1978, 1151 UNTS 273.
96. *Agreement concerning Fisheries off the Coasts of the United States*, 4 January 1977, 1067 UNTS 209.
97. *Agreement concerning Fisheries off the Coasts of the USA*, 18 March 1977, 1095 UNTS 201.
98. *Agreement between the Government of Canada and the Government of Norway on Their Mutual Fishery Relations*, 2 December 1975, 1132 UNTS 124.
99. Johnson and Middlemiss, 1977, p. 77.
100. *Agreement between the Government of Canada and the Government of Portugal on Their Mutual Fishery Relations*, 29 July 1976, 1132 UNTS 375.
101. *Agreement between the Government of Canada and the Government of Portugal on Their Mutual Fishery Relations*, 10 June 1976, 1058 UNTS 290.
102. *Agreement between the Government of the United States of America and the European Economic Community concerning Fisheries off the Coasts of the United States*, 15 February 1977, 1087 UNTS 225.
103. Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, Fishery Conservation and Management Act of 1976, <https://www.fws.gov/laws/lawsdigest/fishcon.html>, accessed February 11, 2018.
104. *Agreement concerning Fisheries off the Coasts of the United States*, 27 April 1977, 1087 UNTS 320.
105. *Agreement concerning Fisheries off the Coasts of the United States*, 2 August 1976, 1068 UNTS 4.
106. *Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the Islamic Republic of Mauritania on Cooperation in the Field of Marine Fisheries*, 31 January 1981, 1311 UNTS 162.
107. *Agreement on Mutual Fishery Relations*, 14 August 1979, 1314 UNTS 246.
108. A possible example would be the relevance of “compliance clauses” in FAAs as subsequent practice that can be taken into account in the interpretation of Part V of UNCLOS with regard to flag State responsibility for illegal fishing in other States’ EEZs pursuant to either Article 31(3)(b) VCLT or, more likely, Article 32 VCLT. See Schatz, 2017, pp. 316–317.

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