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Interpreting the dispute settlement limitation on fisheries after the *Chagos Marine Protected Area Arbitration*

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The present chapter places its focus on the jurisdictional aspects of the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* Award of 18th March 2015, by examining the interpretation of the fishery limitation under article 297(3)(a) of the 1982 UN Convention on the Law of the Sea, in the context of the fourth submission made by Mauritius, and the manner in which the UK subsequently objected thereto. The chapter views that in relation to the 1995 UN Fish Stocks Agreement article 32, incorporating by reference the fishery limitation, the pronouncements of the Tribunal's majority on this matter have provided a rather dubious legal authority that may only be seen as an inconsistent *obiter dictum* for future reference.

1 Introduction

The disagreement between the Republic of Mauritius (Mauritius) and the United Kingdom of Great Britain and Northern Ireland (UK) over the declaration, by the latter within the context of its administration over the British Indian Ocean Territory (BIOT), of a Marine Protected Area (MPA) around the Chagos Archipelago on 1 April 2010 put under scrutiny the United

Nations Convention on the Law of the Sea [1] with respect to several provisions of both substantive and procedural nature, as well as *lex specialis* law between the Parties.[2]

Mauritius contended that the unilateral declaration of the MPA took place in violation of the Convention, and other rules of international law not incompatible with it, in seeking to obtain an authoritative and binding declaration regarding its legality. In particular, Mauritius submitted four claims, in which requested the Tribunal to adjudge and declare that: first, the UK was not entitled to declare an MPA or other maritime zones because it was not the 'coastal State' within the meaning of *inter alia* arts 2, 55, 56 and 76 of the Convention; and/or, second, having regard to the commitments that it has made in relation to the Chagos Archipelago, UK was not entitled unilaterally to declare an MPA or other maritime zones because Mauritius has rights as a coastal State within the meaning of *inter alia* arts 56(1)(b-iii) and 76(8) LOSC; and/or, third, that UK should take no steps that may prevent the Commission on the Limits of the Continental Shelf (CCLS) from making recommendations to Mauritius in respect of any full submission that Mauritius may make thereto regarding the Chagos Archipelago under art. 76 LOSC. UK, in response, counter-claimed that the Tribunal should declare itself without jurisdiction over each of the above claims, or in the alternative to dismiss them.

The Tribunal found by a majority of three votes to two, that it lacked jurisdiction to consider Mauritius' first two claims in holding that the dispute between the Parties had been expressed through these claims in fact concerned the question of sovereignty over the Chagos Archipelago; a matter that insofar as did not concern the interpretation or application of the

[1] Signed in Montego Bay on 10 December 1982 and entered into force on 16 November 1994 [1833UNTS3] (hereinafter the 'Convention' or LOSC).

[2] As such, they have been considered the undertakings made by the UK at the time of the detachment of the Chagos Archipelago and repeatedly reaffirmed thereafter; *qv.*, 'Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September 1965'[Mauritius Defence Matters, CO 1036/1253] (hereinafter the '*Lancaster House Undertakings*').

Convention divested the Tribunal of its jurisdiction to decide thereon. Concerning the third claim, the Tribunal, however, unanimously held that there was no dispute between the Parties concerning submissions to the CCLS and that it was therefore unnecessary to exercise jurisdiction in this respect on the issue.[3]

The dispute, as such, featured not only important questions characterising the evolving rights and obligations of States regarding the protection and preservation of the marine environment, but moreover as these were put forward against the fundamental background of sovereignty, being one of the most iconic themes that run through general public international law, their legal nature transcended the jurisdictional limits of the Convention. In that sense, as it would have been inappropriate not to acknowledge the main intentions prompting Mauritius' claims, it would be respectively futile – in view of the organic development of the Convention's reach within a constitutional discourse [4] – to admonish such claims as 'artificial and baseless'.[5] Despite the lack of a substantive decision in view of the jurisdictional grounds on the two first claims, the disagreement being canvassed against claims of sovereignty it may have uttered the law of the sea in a post-modern era, when States will need to revisit crucial issues that were intentionally dealt with

[3] *Chagos Marine Protected Area Arbitration* (Mauritius *v*. United Kingdom), Award of 18th March 2015, Arbitration under Annex VII of the United Nations Convention on the Law of the Sea / Permanent Court of Arbitration as the administering institution – case number 2011/03 (hereinafter 'Award' or '*Chagos award*'), pg. 215 §547(A) *dispositif*. The decision has not been included yet in the Reports of International Arbitral Awards (RIAA), but it can be accessed directly, along all the materials cited, at <pcacases.com/web/view/11>.

[4] Among others, see P. Allott, "Mare Nostrum: A New International Law of the Sea", *American Journal of International Law* 86 (1992): 764 and B.H. Oxman, "The Rule of Law and the United Nations Convention on the Law of the Sea", *European Journal of International Law* 7 (1996): 353.

[5] *Counter-Memorial submitted by the United Kingdom* (15 July 2013), pg 3. ¶1.10.

vague and ambiguous drafting due to unresolved political differences [6] at the time in the context of package deal negotiations [7] and put its application in perspective in the light of other processes, such as the request for an advisory opinion by the International Court of Justice under the circumstances. [8]

In its last submission, Mauritius requested the Tribunal to adjudge and declare the MPA incompatible with the substantive and procedural obligations of the UK under the Convention, including *inter alia* arts 2, 55, 56, 63, 64, 194 and 300, as well as art. 7 of the United Nations 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 ('*fourth submission*').[9] Following the objections made by the UK, the Tribunal declared itself without jurisdiction based on art. 297(3)(a) LOSC ('fishery limitation') to pronounce on arts 63 and 64 LOSC, and art. 7 UNFSA, but it found unanimously that its jurisdiction remained unaffected by the other limitation provided in art. 297(1) LOSC, and considered the *fourth submission* in relation to the remaining articles of the Convention. On the merits it found, also unanimously, that Mauritius holds: legally binding rights to fish in the waters surrounding the Chagos Archipelago; to the eventual return of the Chagos Archipelago when no longer needed by the UK for defence purposes; and to the preservation of the benefit of any minerals or oil discovered in or near the Chagos Archipelago pending its eventual return.

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[6] B. Buzan, "Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea", *American Journal of International Law*, 75 (1981): 324.

[7] H. Caminos and M.R. Molito, "Progressive Development of International Law and the Package Deal", *American Journal of International Law*, 79 (1985): 871.

[8] At the time of writing the present chapter, the United Nations General Assembly requested by means of Resolution 71/292 (22 June 2017) the Court to render an advisory opinion on the 'Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965'.

[9] Signed in New York on 4 August 1995 and entered into force on 11 December 2001 [2167UNTS3] (hereinafter 'the Agreement' or UNFSA).

In finding so, the Tribunal held that UK failed to give due regard to these rights and breached its obligations under the Convention in declaring the MPA.[10]

The present chapter places its focus accordingly on the jurisdictional aspects by examining the interpretation of the fishery limitation in the context of the *fourth submission*, and the interplay between the Convention and the Agreement, in arguing that in the context of the latter the pronouncements of the Tribunal have provided a rather dubious authority for future reference. The voluminous written submissions and lengthy hearings transcript reveal the considerable formative effect exerted by the pleadings at hearing on shaping the concluding arguments of the Parties. With regard to the fishery limitation in particular, Mauritius seemed to be throughout the proceedings locked in a sterile argument on sovereignty that deflected attention from, or obscured, promising yet in parts incoherently developed arguments that failed to make clear connections with the black letter provisions of the Convention, and even more so to establish a meaningful connection with those provided in the Agreement. On the contrary, the UK brought a robust objection strategy based on a conservative approach and ingrained in a thorough textbook analysis that sought to shine up to the Tribunal's textual favouritism and downplay the latently underlying constructive ambiguities and unresolved issues in the provisions of the Convention. Overall, the dynamic of the arguments with regard to the fishery limitation, resembled to a situation of 'bringing a knife to a gunfight' with its interpretation resulting into an overly broad and unconvincing in all its brevity pronouncement by the Tribunal, while the minority tried to keep the provision intact by considering it inapplicable on the facts. Due to space restriction in the chapter, it is assumed that the reader has some prior knowledge of the Award, and of the facts surrounding the arbitration, along with the arguments advanced by the Parties in the course of the proceedings.

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[10] Award, pg. 215 §547(B) *dispositif*.

2 The Tribunal's pronouncements on the fishery limitation

Mauritius in the context of its *fourth submission* contended that the MPA was incompatible with the substantive and procedural obligations of the UK under the Convention, including *inter alia* arts 63, 64, as well as art. 7 UNFSA. On this point, the UK objected to the jurisdiction of the Tribunal on the ground of the MPA constituting 'a fisheries measure',[11] which the Convention subsequently excludes from its third-party settlement procedures entailing binding decisions due to the operation of the automatic limitations in art. 297(3)(a) LOSC.[12] The Tribunal in approaching the question of its jurisdiction rightly observed that the point dividing the Parties was the interpretation and application of art. 297 LOSC, which in turn essentially required the characterization proper of the dispute in this context. [13] In doing so, it did not accept that the MPA under the expansive terms proclaimed by the UK was solely a measure relating to fisheries.[14] Siding for the rest of the argument on this point with the UK, the Tribunal's *ratio* specific to the application of art. 297(3)(a) LOSC is to be found essentially in paragraphs 297, 299 and 300, along with an *obiter dictum* following up in paragraph 301, of the Award.

The line of reasoning begins with the finding that part of the UK's *Lancaster House Undertakings* addressed fishing rights, clearly related to living resources, yet insofar as these apply to the exclusive economic zone (EEZ), wherein the MPA was declared, they fall under the exclusion from jurisdiction as set out in art. 297(3)(a) LOSC. This is premised on the

[11] 'Hearing on jurisdiction and the merits, in the matter of arbitration between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland' (22 April – 9 May 2014), Permanent Court of Arbitration – Arbitration under Annex VII of the United Nations Convention on the Law of the Sea (hereinafter 'Final Transcript'), pg. 1274:22-3.

[12] Final Transcript, pg. 804:2-8.

[13] Award, pg. 111 §283.

[14] ibid., pgs 111–2 §286.

rejection of the argument posited by Mauritius that ‘a distinction can be made between disputes regarding the sovereign rights of the coastal State with respect to living resources, and disputes regarding the rights of other States in the [EEZ]’,[15] which it would have seen only the former to be excluded from compulsory settlement.[16] The Tribunal held that ‘the two are intertwined, and a dispute regarding Mauritius’ claimed fishing rights in the EEZ cannot be separated from the exercise of the United Kingdom’s sovereign rights with respect to living resources’, while in extrapolating even further it took the view that ‘in nearly any imaginable situation, a dispute will exist precisely because the coastal State’s conception of its sovereign rights conflicts with the other party’s understanding of its own rights’.[17]

The reasoning was then directed to consider the procedural rights to consultation and coordination claimed by Mauritius pursuant to arts 63, 64 LOSC, and art. 7 UNFSA, which similarly to their substantive obligations, the Tribunal noted to arise directly from the Convention and apply wherever the nationals of another State fish for straddling or highly migratory fish stocks, without being depended on the *Lancaster House Undertakings*. The Tribunal accepted that arts 63 and 64 LOSC, as well as art. 7 of the UNFSA, are on their face fishery measures and consequently in their application within the EEZ are subject to art. 297(3)(a) LOSC. In doing so, the Tribunal fitted in the line of reasoning the precedent of the *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*,[18] which contrary to Mauritius assertion, found to afford no basis for the proposition that procedural obligations are not caught by the fishery limitation, reiterating thus its holding that a

[15] Final Transcript, pg. 477:16-9.

[16] ibid., pgs 1119 –122.

[17] Award, pg. 116 §297.

[18] Award of 11th April 2006, Arbitration under Annex VII of the United Nations Convention on the Law of the Sea / Permanent Court of Arbitration as the administering institution – case number 2004/02, (2008) RIAA XXVII, pgs 147–251 (hereinafter ‘*Barbados/Trinidad and Tobago award*’).

distinction between disputes in the EEZ of the coastal State over sovereign rights and those over the rights of another State cannot be maintained in either substantive or procedural terms. Likewise, it found no support in the award of the *Southern Bluefin Tuna case*, including the Separate Opinion by Sir Kenneth Keith,[19] as argued by Mauritius.

3 The fishery limitation under the Convention

It has been rightly observed that Part XV, section 3, of the Convention, which provides for limitations and exceptions to the applicability of compulsory procedures, is fraught with ambiguity.[20]In contemplating the disruptive effect of the politically inspired limitations to the compulsory procedures it can be said that 'the treaty is not a neat legal document, capable of withstanding, in all respects, the onslaught of detached legal criticism.'[21] In this respect, the limitation that applies to fishery disputes may be considered unfortunately as a provision that exemplifies the drafting technique of a deliberately created uncertainty. A careful reading of the relevant provision exonerates indeed those sternly criticising the dispute settlement provisions under the Convention in this respect.[22] The operating limitation is contained in art.

[19] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan*, Award on jurisdiction and admissibility, Decision of 4 August 2000, Arbitration under Annex VII of the United Nations Convention on the Law of the Sea / International Centre for Settlement of Investment Disputes acting as *ad hoc* registrar, (2006) RIAA XXIII, pgs 1–57 (hereinafter '*Southern Bluefin Tuna case*').

[20] A.L.C de Mestral, "Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective", in T. Buergenthal, eds., *Contemporary Issues in International Law, Essays in Honor of Louis B. Sohn* (Kehl: N.P. Engel, 1984), 182.

[21] A.O. Adede, "Prolegomena to the Disputes Settlement Part of the Law of the Sea Convention", *NY University Journal of International Law & Politics*, 10 (1977-1978): 386.

[22] See among others, M.P. Gaertner, "The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea", *San Diego Law Review*, 19 (1982): 592 *et seq*.

297(3)(a) LOSC, which consists of three clauses – separated below for the convenience of the reader with vertical lines – and reads as follows:

> '| Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, | except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, | including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations |.'

The categorical statement in the opening clause enunciates as a matter of principle, that a fishery dispute regarding the interpretation or application of the provisions of the Convention is subject to the compulsory settlement procedures of Part XV, section 2.[23] This is also supported by the legislative history of the provision revealing that fishery disputes are in principle susceptible to compulsory procedures. More specifically, the dispute settlement procedures were the subject of extensive negotiations in the context of the informal working group on the settlement of disputes until 1975, at what time the issue opened for discussion in the plenary. During the 1974 Caracas session, the group produced a working paper containing a draft on dispute settlement, which was later officially circulated as a co-sponsored national proposal.[24] Thereunder, a draft article being formulated in three alternative versions, made provision for compulsory procedures leading to binding decisions with respect to disputes presenting elements of a gross, or persistent, violation of the Convention or an alleged abuse

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[23] See, G. Singh, *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (Delhi: Academic Publications, 1985), 137.

[24] A/Conf.62/L.7.

of the normal exercise of regulatory or enforcement jurisdiction of the coastal State. This principle was upheld also in the refined document that was developed during the 1975 Geneva session.[25]On this premise, the President of the Conference prepared an informal text dealing exclusively with the settlement of disputes [26] to supplement the 'Single Negotiating Texts' prepared by the chairmen of the three committees. In relation to the applicable limitations, the President's text, however, suggested a negative wording effectively overturning the principle of compulsory settlement regarding fishery disputes except from certain occasions. In particular, it was provided that: 'Nothing contained in the present Convention shall require any Contracting Party to submit to the dispute settlement procedures…any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under the present Convention, except when…'. [27]

During the 1976 session, the President was called to review its text on dispute settlement in order to keep up with the Conference's revision of the Single Negotiating Text (RSNT).[28] In this respect the plenary debates of the 1976 New York session regarding the dispute settlement system in the RSNT revolved predominantly around 'the most knotty problem' in that context, which was 'the scope of permissible limits of exceptions…and the type of disputes in which the parties might be free to exclude a system of binding settlement' in viewing that 'if exceptions were…too broadly defined, the value of the system would be nullified.'[29] In his new document, the limitations continued to reflect the substance of the previous formulation but notably the wording of the draft article had departed from the

[25] A/Conf.62/BackgroundPaper1.

[26] A/Conf.62/WP.9/Add.1.

[27] A/Conf.62/WP.8/PartsI-III.

[28] A/Conf.62/WP.8/Rev.1.

[29] J.N. Saxena, "Limits of Compulsory Jurisdiction in Respect of the Law of the Sea Disputes", in R.P. Anand, ed., *Law of the Sea: Caracas and Beyond* (The Hague: Martinus Nijhoff Publishers, 1980): 335.

negative formulation suppressing the principle of compulsory settlement. The conflict between the views, on the one hand, on the forthcoming economic zone having a *sui generis* nature distinct from the high seas, with those, on the other hand, considering the zone part of the high seas being subject to certain coastal State rights and jurisdiction, set the tone for an extensive discussion about the quality and quantity of the respective legal rights therein. Against this background, the provision on limitations regressed to an explicitly negative formulation in order to avow the exclusive fishing rights of coastal States within the zone. In doing so, the Informal Composite Negotiating Text (ICNT) in its corresponding draft article read that: 'No dispute relating to the interpretation or application of the provisions of the present Convention with respect to the living resources of the sea shall be brought before such court or tribunal *unless*…'[30] Nevertheless, regardless of the above formulation being shaped as an exception to an exclusion, the intention of the provision was to retain the compulsory application of the binding procedures.[31]

The rigid utterance to limitations, among other issues, precipitated the resumption of special negotiations in the form of separate working groups. The mandate of Negotiating Group 5, which examined the ICNT with respect to compulsory settlement, was carefully limited to those disputes concerning sovereign rights of coastal States in EEZ.[32] In parallel to the 1978 session, the group managed to agree on a compromise formula, which was included

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[30] A/Conf.62/WP.10 (emphasis added).

[31] See, A.O. Adede, "Law of the Sea – The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole", *American Journal of International Law* 72 (1978):94–5; B.H. Oxman, 'The Third United Nation's Conference on the Law of the Sea: The 1977 New York Session', 72 (1978):67, 78*ff*., and E.D. Brown, "Dispute Settlement and the Law of the Sea: The UN Convention Regime", *Marine Policy* 21 (1997): 22.

[32] See, *Official Records of the Third United Nations Conference on the Law of the Sea*, Volume X, pg. 6 (hereinafter '*UNCLOS III Off. Records*').

X *UNCLOS III Off. Records* 6.

in the Group's Chairman Report.[33]The Plenary revised the ICNT along the proposed formula by circumscribing *inter alia* the purported broadness of limitations with the introduction of a comprehensive positive statement asserting *ab initio* the applicability of compulsory procedures to fishery disputes. More specifically, it was provided that 'unless otherwise agreed or decided by the parties concerned, disputes relating to the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with Section 2 of Part XV of this Convention, *except*…'[34]. Through an amendment of that nature, UNCLOS III could be seen at that stage as moving from the position of compulsory settlement to that of compulsory exclusions.[35] The provision on limitations received its final significant redrafting in the context of the Informal Draft Convention on the Law of the Sea, where it was further restricted by the refinement of the introductory statement on the applicability of compulsory procedures entailing binding decisions, as to clarify that 'disputes relating to the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, *except* …'.[36] Considering the above expression, Oxman has observed that it 'refers to compulsory jurisdiction over all fisheries disputes, and then excludes sovereign rights only with respect to the living resources in the economic zone'.[37]

Thus, although the opening clause can be constructed as stipulating that any fishery dispute (other than those strictly confined within EEZ) can as a matter of principle be

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[33] *q.v.*, A/CONF.62/RCNG/1, and X *UNCLOS III Off. Records* 117 *et seq*.

[34] A/Conf.62/WP.10/Rev.1(emphasis added).

[35] See, *Adede*, 378–9. Considering the major unresolved issues underlying the negotiations at the time on dispute settlement, see A. Yankov, "The Law of the Sea Conference at the Crossroads", *Virginia Journal of International Law* 18 (1977):31–41.

[36] A/Conf.62/WP.10/Rev.3 (emphasis added).

[37] B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981)", *American Journal of International Law* 76 (1982):19.

submitted to its compulsory procedures – what in the proceedings during the *Chagos arbitration* was invariably referred to between the Parties and accepted as an affirmative grant of jurisdiction – immediately after, nonetheless, the second clause conveys the impression of a *quasi* counter-principle that coastal States shall not be obliged to accept the submission to such procedures of any dispute relating to their sovereign rights with respect to the living resources in the EEZ, or disputes related to the exercise of such rights. The impression in textual terms, nevertheless, that there is some scope to exclude disputes from judicial procedures other than those mentioned by name may be amplified by the grammatical inflection of the verb 'include' in gerund form – *i.e.,* as a non-finite verb – serving practically as a clausal conjunction with the final clause that emphasises three limitations.[38]

These, automatic exceptions, concern the discretionary powers of coastal States to determine the allowable catch in the EEZ, their harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its conservation and management laws and regulations. Disputes falling into the aforementioned categories are to be submitted to non-binding conciliation under Annex V, section 2, of the Convention, when there is any allegation against the coastal State about a manifested failure to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in EEZ is not seriously endangered; an arbitrary refusal to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or an

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[38] The inflections of '*y compris*' and '*incluidas*' to be found in the French and Spanish text respectively carry out the same grammatical function as in the English text. The former, yet, deriving from the verb '*comprendre*' can be susceptible to more restrictive interpretations as to be read as having the cumulative meaning of '*comprising*'.

arbitrary refusal to allocate to any State, under the pertinent LOSC provisions, the whole or part of the surplus that it has declared to exist.[39]

It is interesting to note, however, that the sweeping generality of the second clause in an ordinary and plain reading renders superfluous the specific stipulations that are mentioned by name in the third clause, since by definition, the EEZ is a zone wherein 'the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living,…'[40] Such superfluity can be effectively disposed only through a narrow interpretation of the purported counter-principle, as for example per the interpretation given to the scope of art. 56 LOSC in the *Affaire Concernant le Filetage à l'Intérieur du Golfe du Saint-Laurent entre le Canada et la France*.[41]

It will be recalled that in the context of the Chagos proceedings, UK maintained an argument putting forward an overly general approach to the fishery limitation in holding that art. 297(3)(a) LOSC 'is unambiguous and there is no basis for looking beyond its clear terms'.[42] It considered, furthermore, that in practice the provision effectively grants jurisdiction over fishery disputes in general and then excludes jurisdiction over fisheries disputes in the EEZ,[43] without distinguishing in terms of jurisdiction between the exercise of sovereign rights on account of affecting or not other States,[44] and with such rights to include a decision on granting or denying of fishing licences in the EEZ for the purpose of

[39] LOSC, art. 297(3)(b).

[40] ibid., art. 56(1)(a).

[41] ('*La Bretagne Award*') Sentence du 17 Juillet 1986, (2006) XIX RIAA pgs 225–96, at pgs 255–6 §50; see further W.T. Burke, "Coastal State Fishery Regulation under International Law: A Comment on the *La Bretagne Award* of July 17, 1986 (The Arbitration between Canada and France)", *San Diego Law Review* 25 (1988): 495.

[42] Final Transcript, pg. 806:15-6.

[43] *Counter-Memorial submitted by the United Kingdom* (15 July 2013), pgs 163-4 ¶¶6.32-5.

[44] Final Transcript, pg. 1278:14-16.

conservation and management.[45] As a result, it contended that 'high seas fisheries disputes are within compulsory jurisdiction, EEZ living resources, quite deliberately, are not'.[46] In support, it viewed that this reading is entirely consistent also with the UNCLOS III negotiating record,[47] and in particular with the views expressed then by the delegation of Mauritius.[48] On this specific aspect, a question posed by judge Wolfrum to the UK counsel sought to clarify as to whether the latter part of the fishery limitation, referred to above as the third clause, was to be read according to UK's views to refer to everything done in the EEZ – concerning the conservation and management of living resources – or it did only apply to activities of the coastal State under arts 61 and 62 LOSC. In reply, it was further viewed that the general approach as put by the UK forward correlates in this context arts 56(1)(a) and 297(3)(a), which echoed the anxiety of the coastal States during UNCLOS III to get hold of extensive powers to manage, conserve and exploit fish stocks and living resources in the EEZ, and embodies the outcome to their satisfaction to keep coastal State fisheries disputes out of court as far as possible.[49]

Finally, on this point, a valuable insight into the Tribunal's making of the Award as far as the *fourth submission* is concerned can be deduced from the joint Dissenting and Concurring Opinion issued by two of its members. While concurring that jurisdiction over Mauritius's claims were depended upon the characterization of the Parties' dispute, which consequently had a bearing on the interpretation and application of the automatic exclusions provided in art. 297(3) LOSC, it considered that since the decision on the case was one

[45] ibid., pg. 1278:9-12.

[46] ibid., pg. 804:24-5.

[47] ibid, pgs 810:23 to 811:1, and 815:22-4.

[48] ibid, pgs 806:21-3, and 807:1-14.

[49] Final Transcript, pgs 813-6.

considering a MPA, rather than a decision on fishing, the fishery limitation did not apply.[50] The Opinion further viewed that if that limitation was to be considered applicable then it would need to be narrowly construed. More specifically, if the first part of the clause, whereby jurisdiction is confirmed, is to retain some meaning, not all disputes on fisheries can be interpreted as 'any dispute relating to its sovereign rights with respect to living resources', and therefore, the exclusions envisaged in the remaining of the provision must be narrower in scope.[51]

4 The *Chagos award* in a state of limbo

Having regard to the foregoing discussion, *the Chagos award* found a leeway to steer away the interpretation on the fishery limitation under art. 297(3)(a) LOSC from the principle of compulsory dispute settlement regarding straddling and highly migratory stocks by broadening the scope of limitations in the second and third clause. Indeed, as Boyle (who acted as one of the counsels for the UK in the *Chagos arbitration*) observed in his academic writings in the late 1990s, the negotiations in UNCLOS III and the text of the Convention itself, have left unanswered the difficult question whether disputes of this kind are within or outside the exclusion from compulsory binding settlement.[52]More emphatically, de Mestral had presaged, in early 1980s, that in fact the limitations provided for in art. 297 LOSC across

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[50] *Dissenting and Concurring Opinion of Judges Kateka and Wolfrum*, pgs 13 §50 and 15 §57.

[51] ibid., pg. 15§58.

[52] A.E. Boyle, "Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks", *The International Journal of Marine and Coastal Law* 25 (1999):11. I have not quoted Boyle's views expressed in *A.E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", International and Comparative Law Quarterly 46 (1997)*, as himself stated (see Final Transcript, pg. 812:9-12) that his views therein were consistent with the argument pleaded on behalf of the UK, despite being invoked differently in the *Reply of the Republic of Mauritius* (18 November 2013), Volume III.

the three paragraphs can be interpreted either broadly or narrowly (restrictively), as there is nothing in the Convention to imply a broad exclusion of the application of compulsory settlement procedures to disputes arising in the EEZ *per se*.[53] Assuming a strict adherence of international courts and tribunals to the doctrine of *jurisprudence constante*, the *Chagos award* may have bequeathed to case-law thus a rather doubtful authority in terms of its subsequent application concerning the fish stocks in question under the ambit of the Agreement's provisions. Consequently, the question is whether any ground exists to distinguish the Award in the context of the Agreement. To this end, three points may open the prospect for such discussion.

First, by looking in more detail at Mauritius' strategy to circumvent the application of art. 297(3) LOSC 'taken as a whole',[54] it will be recalled that it had primarily argued for a correlation between arts 56 and 297 LOSC with a view to drawing a distinction between the effect of the provisions on the coastal sovereign rights and the rights of third States in the EEZ. In doing so, it advanced that since in relation to the latter it would involve only the jurisdiction of the coastal State, disputes of that kind would not be caught by the fishery limitation.[55] The backup argument was that even if the dispute were to be characterized as one related to fishing, it would not fall within the exceptions provided in art. 297(3)(a) LOSC. The substantiation for this, however, was rather thin and did not withstand the pressure mounted by UK's objections. As it was put in its written submissions, and emphasized further in the oral pleadings, Mauritius contended 'UK's failure to respect Mauritian fishing rights in the EEZ',[56] in averring more specifically that:

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[53] *de Mestral*, 183.

[54] Award, pg. 99 §249, and in the Final Transcript, pg. 477:16-8.

[55] Final Transcript, pgs 1119–22.

[56] ibid., pg. 322:3.

> 'the dispute is not based on the purported sovereign rights of the UK as a coastal State in relation to the living resources in the EEZ. That is not how the dispute should be characterized..., the dispute concerns the rights of Mauritius. This includes its right to fish in the EEZ of the Chagos Archipelago; its right to be consulted about matters that can affect its interests; its right to have fulfilled the [UK's undertaking]... it is these rights – the rights of Mauritius – that are at issue.'[57]

Therefore, the essential claim of Mauritius did not arise under arts 63(2) and 64(1) LOSC, neither from art. 7 UNFSA, as it will be discussed in more detail below. These articles do not address sovereign, or otherwise afford a legal basis for, access to fisheries within the EEZ of a coastal State; and in a sense, this was a claim linked to sovereignty under the guise of conservation and management for fisheries within the MPA. Even, when Mauritius sought to deploy the secondary line of arguments in encompassing procedural obligations of consultation and cooperation owned to it under these provisions, as a fishing State for stocks in an area adjacent to the Chagos Archipelago,[58] there was no material dispute crystallised at the time of initiating the proceedings with a bearing on the conservation and management measures. For instance, in citing selectively art. 7(3) UNFSA considering the obligation incumbent upon States to make 'every effort to agree on compatible conservation and management measures within a reasonable period of time',[59] Mauritius notably failed to acknowledge that this obligation is provided in reference to a dispute over compatible measures as contemplated in paragraph 2 of that article. The disagreement underpinning Mauritius' *fourth submission* with regard to straddling and highly migratory stocks did not raise, at least as it was presented in the Parties' written submissions and oral pleadings, issues

[57] ibid., pg. 477:19-25.

[58] ibid., pgs 321: 16-20, 335:17-20, and 336.

[59] ibid., pg. 335:7-9.

pertaining to a substantive dispute at the time when the settlement procedures were invoked. That would require Mauritius to argue consistently, or at least raise, issues arising from the proclaimed MPA pertaining to a negative impact on fish stocks within or adjacent and beyond the MPA. Yet, as rightly counter argued by the UK, in the face of the MPA establishing a ban on commercial fishing, any resultant dispute would have arisen in relation to Mauritius' ongoing fishing beyond the MPA on account of possibly undermining the effectiveness of these measures throughout the stocks' spread , and not *vice-versa*.[60]

Secondly, the Tribunal in its reasoning invoked the authority of the *Barbados/Trinidad and Tobago award*, which was also debated between the Parties regarding its bearing on the procedural obligations under consideration. The fishery claim in that case had been brought up by Barbados in the form of an *infra petita* remedy during the oral pleadings, whereon the tribunal found itself lacking the jurisdiction to render a substantive decision on the fisheries access regime in the EEZ, but nevertheless pronounced on the duty upon the Parties 'to agree upon the measures necessary to coordinate and ensure the conservation and development' of the stock in question.[61] The *Chagos award* accepted that 'articles 63 and 64 [LOSC] (as well as the [UNFSA]) are, on their face, measures in respect of fisheries and in their application in the [EEZ] subject to the exclusion in article 297(3)(a) [LOSC]',[62] but is not clear under what terms it invoked the authority above. It will be proposed here that the authority has been partially misapplied in the context of the *Chagos Award* for the reason that it was decided concerning the flying fish stocks in reference to art. 63(1) LOSC, [63] addressing the so-called 'shared' stocks, and as such does not therefore relate to either straddling or highly migratory stocks, which constitute the focus of the Agreement.

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[60] ibid., pgs 894–5.

[61] *Barbados/Trinidad and Tobago award*, pg. 226 §286.

[62] Award, pg. 117 §300.

[63] *Barbados/Trinidad and Tobago award*, pg. 226 §283.

It should be noted that in the course of the pleadings by the Parties, including the references made by the Tribunal in the Award, the employment of the term straddling stocks in the context of art. 63 LOSC subsumed two different – in terms of jurisdictional provisions – types of fish stocks. While some of the claims were phrased by Mauritius in the terms of art. 63(1) LOSC, the blanket application by the Tribunal insofar as arts 63(2) and 64(1) LOSC, as well as art. 7 UNFSA, are concerned is unfounded and especially with regards to highly migratory stocks in view of the *pactum de contrahendo*. Another relevant remark considering the application of the authority to bear in mind, in the light of paragraphs 1 and 2 of art. 63 LOSC having in common a *pactum de negotiando* obligation, is that it was given in the context of the Convention alone, with the Agreement not being in force as between the Parties.[64]

Finally, and in combing the observations above, the interpretation of the fishery limitation as presented in the Tribunal's reasoning was confined within the Convention and not the Agreement. For instance, a fundamental provision of the latter, which it would have been expected to feature in the Parties' respective arguments and reasonably in the Tribunal's reasoning is this of art. 3(1) UNFSA considering its application within areas of national jurisdiction as it will discussed in more detail below. In fact, Mauritius did so, yet, in an inconclusive manner that could be best described as merely 'flagging up' the provision,[65] but utterly abandoning it thereafter. Plausibly this was in keeping with a tactical course that required seeing how it would play out on the arguments within its first and second

[64] Barbados acceded to the Agreement on 22 September 2000, while Trinidad and Tobago only 5 months after the award, on 13 September 2006.

[65] *Memorial of the Republic of Mauritius* (1 August 2012), volume I pg. 144 ¶7.66.

submissions, taking into account also any implications from the declaration filed upon its accession to the Convention and the Agreement.[66]

From a purely procedural point of view, if not out of judicial policy considerations, the Tribunal's distancing from the Agreement can be argued indeed as being the proper way to proceed in the case. The dispute in its entirety was brought within the jurisdiction of the Tribunal on the basis solely of paragraph 1, and not paragraph 2 of art. 288 LOSC. Mauritius initiated arbitral proceedings pursuant to arts 286 and 287(5) LOSC,[67] and only at the stage of filing its Memorial included a rather brief reference in a footnote whereby alluded to jurisdiction also under art. 30(1) UNFSA in respect of art. 7,[68] followed by a more assertive statement mentioning that 'art. 30 of the Agreement provides that the dispute settlement provisions of the 1982 Convention apply to disputes regarding the interpretation or application of the Agreement'.[69] This was not ignored by the UK, which in turn noted in filing its preliminary objections – also by means of a footnote, for obvious reasons – that 'the Tribunal is not a court or tribunal to which a dispute has been submitted under Part VIII of the [A]greement';[70] a position that was reiterated in the same form also in the Counter-Memorial.[71]

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[66] Upon accession to both treaties on 25 March 1997, Mauritius filed a declaration that 'rejects the inclusion of any reference to the so-called British Indian Ocean Territory by the United Kingdom of Great Britain and Northern Ireland as territories on whose behalf it could sign the said Agreement, and reaffirms its sovereignty over these islands, namely the Chagos Archipelago which form an integral part of the national territory of Mauritius and over their surrounding maritime spaces.'; see, [ST/LEG/SER.E/22] *Multilateral Treaties Deposited with the Secretary-General*, XXI 7 'Law of the Sea', p. 309.

[67] Republic of Mauritius, *Notification under Article 287 and Annex VII, Article 1 of UNCLOS* (20 December 2010).

[68] *Memorial of the Republic of Mauritius*, pg. 87 ¶5.6, footnote 378.

[69] ibid., pg. 9 ¶5.35(viii).

[70] *Preliminary Objections to Jurisdiction submitted by the United Kingdom* (31 October 2012), pg. 39 ¶4.2, footnote 113.

While the concept of inducing a Party’s behaviour as to imply consent under the application, of something that imitates, the *forum prorogatum* principle could be appealing, no less by reading such jurisdiction between the footnotes, the question of having the dispute referred under the terms of the Agreement was not touched further upon by the Parties either in the Reply and Rejoinder submissions, or the oral pleadings. As a matter of fact, Mauritius not only abstained from fleshing out any such proposition but owning sensibly to how the dynamic of the arguments were shifted in the course of the pleadings in the context of the discussion over the Convention’s jurisdiction for sovereignty claims, it stated clearly that the ‘claims were not submitted in accordance with the dispute settlement provisions of any other agreement’ but ‘in accordance with the dispute settlement provisions of Part XV of the Convention itself’, invoking the Tribunal’s jurisdiction expressly under art. 288(1), ‘because they arise directly under various substantive articles of the Convention, including art. 2(3), whose interpretation or application is clearly called for’.[72] Moreover, the Tribunal founded unanimously its subject-matter jurisdiction upon art. 288(1) LOSC in relation to the *fourth submission*,[73] and this puts beyond any doubt that jurisdiction-wise the *Chagos award* confined the interpretation on the fishery limitation exclusively within the scope of the Convention, opting out of an inter-textual construction that would require to take account the terms of the Agreement.

[71] *Counter-Memorial submitted by the United Kingdom* (15 July 2013), pg. 132 ¶5.16, footnote 382.

[72] Final Transcript, pg. 484:6-13, as noted also in full quote by the Tribunal in the Award at pg. 107 §269.

[73] Award, pgs 86 §204, and 215 §547(A3) as stated in the *dispositif*.

5 The Relationship between the Agreement and the Convention: consistency as interpretative requisite

The question over the legal relationship between the Convention and the Agreement especially as to the interpretation and application of the respective rights and obligations far exceeds a simple reading of the latter's formal title. The precise construction of the conceptual term 'implementation' bears particularly significant implications for the interpretation of both instruments; depending especially on whether the interpreter may take either a substantive or procedural approach through a constitutional discourse of international law.[74] The legal relationship between the two treaties is being addressed in art. 4 UNFSA, where is stipulated that 'nothing [therein] shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.' The requirement of consistency, therefore, constitutes essentially an interpretative rule for the understanding of its provisions. As it has been emphatically stated by the Chairman of the *Fish Stocks Conference* upon the conclusion of the Agreement,[75] '[i]ts provisions are firmly based on the principles enshrined in the Convention. The Agreement and the Convention are intrinsically linked and are inseparable.'[76]

Nonetheless, Treves had commented *ex cathedra* – in the *Southern Bluefin Tuna case*, of which some pronouncements featured during the proceedings of the *Chagos arbitration* – that although there are remarkable links between the two treaties, the Agreement is

[74] *eg*., see *supra* footnote 4, and accompanying text.

[75] The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 19 April 1993 – 4 August 1995.

[76] A/Conf.164/35.

independent from the Convention.[77] In this respect, it has been very appositely drawn attention to the fact that even though the Agreement intends to implement the specific provisions of the Convention, hence consistency between the two instruments shall be maintained, the latter due to its ambitious scope was not intended to contain detailed provisions on the specific topic of fish stocks and it provides only for 'general obligations relating to the conservation and management of the living resources of coastal States' exclusive zones and of the high seas.'[78] Taking into account, moreover, 'the intention to serve the general interest', in the light of the Convention's rudimentary provisions, there can be no doubt that the intention of the Agreement's drafters was to fill the *lacunae* left by the Convention in respect of the obligation to cooperate in the conservation and management of the straddling and highly migratory stocks.[79] Furthermore, Scovazzi, observes that the so-called 'implementation Agreement' instead of merely implementing the Convention introduces substantial innovations thereto and thus the prudent word "implementation" is used with a broader sense being very close to the meaning of 'change to improve'.[80] In addition, the former ITLOS judge David Anderson also makes a similar remark by

[77] *Southern Bluefin Tuna* (New Zealand *v*. Japan; Australia *v*. Japan) Cases № 3 & 4, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, Separate Opinion of Judge Tulio Treves, at ¶10. For a further explanation of that statement see T. Treves, "The Settlement of Disputes According to the Straddling Stocks Agreement of 1995" in A.E. Boyle and D. Freestone, eds., *International Law and Sustainable Development – Past Achievements and Future Challenges* (Oxford: Oxford University Press, 2001), 253–69.

[78] G. Vigneron, "Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement", *Georgetown Environmental Law Review* 10 (1998): 583.

[79] R. Rayfuse, "The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?", *Australian Year Book of International La*w 20 (1999): 265.

[80] T. Scovazzi, "The Evolution of International Law of the Sea: New Issues, New Challenges", *Recueil des Cours de l'Académie de Droit International de la Haye* 286 (2001): 143.

considering art. 31(3)(a) of the *Vienna Convention on the Law of Treaties* highly relevant with regard to the element of subsequent treaty practice.[81] Notwithstanding that the two instruments are intimately bound together, he argues that ‘in construing the relevant provisions of the Convention…it would probably now be considered appropriate…to take into account the terms of the Agreement, if only because the interpretation and application of a treaty are inextricably bound up with its implementation.’[82]

In this vein, there is arguably scope left by the Convention wherein the provisions of the Agreement can be interpretatively expanded. The question of the relationship between the two instruments, and the fulfilment of the resulting requirement for consistent interpretation, accordingly bears particular significance especially with regard to art. 7 UNFSA in two respects. First, with regard to substantive law, attention shall be paid to the fact that in its opening paragraph it recites arts 63(2) and 64(1) LOSC. Secondly, in terms of procedural law, the Agreement applies under Part VIII *mutatis mutandis* – a legal expression bearing its very own interpretive difficulties and distinctive value – the entire sections 1 and 2 of Part XV LOSC, and art. 32 UNFSA introduces art. 297(3)(a) LOSC by reference, which unless be interpreted inter-textually, that is namely within the context, object and purpose of both the Convention and the Agreement, it is bound to give rise to clausal inconsistencies in view *inter alia* of art. 7(4) UNFSA.

6 The recitation of arts 63(2) and 64(1) LOSC in art. 7 UNFSA

One of the main aims sought to be achieved in the *Fish Stocks Conference* was the clarification of the jurisdictional régime over straddling and highly migratory stocks. The

[81] Signed at Vienna on 23 May 1969 and entered into force on 27 January 1980 [1155UNTS331].

[82] D. Anderson, *Modern Law of the Sea, Selected Essays* (Leiden: Martinus Nijhoff Publishers, 2008), 368.

Convention left that crucial question essentially unresolved, which resulted into great uncertainty as to States' legal rights and obligations over such stocks while these were to be found in areas adjacent to, and beyond, the EEZ.[83] The Agreement in addressing that question adopted a rule whereby envisages that conservation and management measures taken in the respective jurisdictional areas shall be compatible as to fulfil '[t]he objective of ensuring long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.'[84] However, the rule of compatible conservation and management measures is regarded as representing one of the most controversial issues of the Agreement,[85] and therefore is expected to raise complex issues of interpretation.[86] The controversy lies particularly in the legal uncertainty over the measures to be regarded as the basis of the conservation and management scheme. In other words, which measures shall be compatible with what measures?[87] In this respect, the phrasing of the *chapeau* in art. 7(2) UNFSA, vaguely provides that:

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[83] See, among others, F. Orrego-Vicuña, "Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 55 (1995): 521, and W.T. Burke, "The Importance of the 1982 UN Convention on the Law of the Sea and its Future Development", *Ocean Development and International Law* 27 (1996): 2.

[84] UNFSA, art. 2.

[85] D. Nelson, "The Development of the Legal Regime of High Seas Fisheries", in *Boyle* and *Freestone*, *International Law and Sustainable Development – Past Achievements and Future Challenges* (Oxford: Oxford University Press, 2001), 130.

[86] A.G. Oude-Elferink, "The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks", *Max Planck Yearbook of United Nations Law* (2001): 553.

[87] See, D.A. Balton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", *Ocean Development and International Law* 27 (1996): 137.

> 'Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks'.

However, in determining compatible conservation and management measures the Agreement enlists six criteria that need to be considered. In accordance to those criteria, States shall: (i) take into account the conservation and management measures adopted and applied in accordance with art. 61 LOSC in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures; (ii) take into account previously agreed measures established and applied for the high seas in accordance with the Convention in respect of the same stocks by relevant coastal States and States fishing on the high seas; (iii) take into account previously agreed measures established and applied in accordance with the Convention in respect of the same stocks by a subregional or regional fisheries management organization or arrangement; (iv) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction; (v) take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and finally (vi) ensure that such measures do not result in harmful impact on the living marine resources as a whole. [88]

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[88] UNFSA, art. 7(2)(a-f).

Still, the crucial question being involved in the interpretation of the rule of compatibility relates to the specific legal meaning that the word 'compatibility' conveys regarding the imposition of a bidirectional obligation to coastal and high seas fishing States. While is not to be questioned that the rule imposes in principle a common and shared obligation to the respective categories of States, the symmetry of such obligation is being seriously debated. The crux of this question necessitates as a corollary also the clarification of the legal effect that the jurisdictional differentiation between the legal régime of straddling and highly migratory stocks entails for the interpretation and application of the compatibility rule. It has been rightly proposed that in interpreting the rule of compatibility as provided in paragraph 2, due regard shall be paid to paragraph 1 of art. 7. More specifically, as mentioned above, paragraph 1 reintroduces the two separate conservation and management régimes for straddling and highly migratory stocks, respectively. In particular, *lit.*(a) stipulates that, 'with respect to straddling fish stocks…coastal States and the States whose nationals fish for such stocks in the adjacent high seas area, shall seek…to agree upon the measures necessary for the conservation of these stocks *in the adjacent high seas area*'. Respectively, *lit.*(b) provides that 'with respect to highly migratory fish stocks…States and other States whose nationals fish for such stocks in the region shall cooperate…with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks *throughout the region…*' (emphasis added). Thus, paragraph 1 of the compatibility article in this respect tentatively reaffirms the distinction between the two types of stocks contained in the Convention, and renders paragraph 1 an important part of the context for the interpretation of paragraph 2. Essentially, this means that in determining compatible conservation and management measures any interpretation of the rule in order to fulfil the requirement of consistency should be extremely careful as to reiterate the respective jurisdictional balance envisaged in those articles under the Convention, and to avoid in the context of the Agreement tilting the balance

in favour of either of the interests involved.[89] This requirement thus immediately dismisses any favouritism as that proclaimed for instance, in the proceedings of the *Chagos arbitration*, by the UK in mentioning briefly, and in passing, that the obligation for coastal States to take account of the conservation measures applied to the adjacent high seas areas 'is a much weaker' one.[90]

The re-introduction of this jurisdictional division under paragraph 1 poses subsequently a challenge to the concept of compatibility, given that the object and purpose of the rule is to address the difficulties, which originally arose from those provisions in the context of the Convention. Under the compatibility rule, it appears consequently that the Agreement introduces an ecosystem management area of a single biological unity with two jurisdictional systems.[91] However, the text of the Agreement itself remains rather equivocal on this matter when the geographical scope of the compatibility rule is to be taken into account, with art. 3(1) ambiguously stipulating that:

> 'Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention.'

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[89] *Oude-Elferink*, 555-6.

[90] Final Transcript, pg. 894:8-9.

[91] F. Orrego-Vicuña, "The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use", in O.S Stokke, ed., *Governing High Seas Fisheries, The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001), 38–40.

The uncertainty created from the circularity of the above stipulation is obvious. While is provided that the rule of compatibility under the Agreement does ‘apply also to the conservation and management of such stocks within areas under national jurisdiction’, it simultaneously subjects this applicability ‘to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction’ under the Convention.

The last clause of course bears great significance with respect to the application of the compatibility rule to straddling stocks régimes. The oxymoron conclusion that seems to arise from a first reading is that the rule of compatibility applies also to stocks within areas under national jurisdiction subject to art. 63(2) LOSC – as also reproduced in art. 7(1)(a) – which provides that States shall seek to agree upon the measures necessary for the conservation of these stocks “in the adjacent area”. The case of straddling stocks becomes even more controversial in taking into account that, art. 5(a) UNFSA, specifies that ‘coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate…adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization’. On the one hand, the Agreement by setting out this common objective not only overcomes the controversial obligation of *pactum de negotiando* but also unifies in terms of management approach the two conservation régimes since it sets as a general principle that straddling stocks shall be also conserved and managed with the aim of optimum utilization, as highly migratory stocks and the fishery resources within EEZ.[92] On the other hand, however, the general principle of art. 5(a) UNFSA seems to raise a tension with art. 7(1)(a) UNFSA, which does not provide

[92] LOSC art. 62(1), stipulates that ‘the coastal State shall promote the objective of optimum utilization of the living resources in the [EEZ] without prejudice to art. 61 [*i.e.*, to the aim of conservation]’.

for this aim. Unless the latter receives a restrictive interpretation as to conform to the general principle there will be a legal *non sequitur* between the two provisions.[93]

7 The interpretation of the fishery limitation in the Agreement

As shown in the *Chagos award*, compulsory procedures under the Convention may be hindered through the operation of the fishery limitation as it is furnished in art. 297(3)(a) LOSC regarding disputes relating to coastal States' sovereign rights with respect to the living resources in the EEZ. It will be also recalled that the same limitation is introduced *en bloc* into Part III UNFSA through art. 32 thereof, which laconically stipulates that '*Article 297, paragraph 3, of the Convention applies also to this Agreement*'. The intrinsic uncertainty dominating the original text of the limitation under the Convention has thus given rise to two conflicting approaches of interpretation thereon also in the context of art. 32 UNFSA. Namely, the first approach is one that broadly interprets the procedural aspect of the fishery limitation as to bar the principle of compulsory settlement applying on disputes related to these stocks. This approach is associated with the interpretations of compatibility rule in art. 7 UNFSA that favour the extension of coastal States rights seawards in areas beyond the EEZ. On the other hand, there is the approach that interprets restrictively the fishery limitation as to allow compulsory procedures to apply on straddling and highly migratory stocks on the

[93] For this purposive interpretation in reading the general principle in art. 5 *lit.*(a) as not attaching particular importance to the conceptual difference between the two jurisdictional regimes under the Convention, but to the contrary the Agreement's deliberate intention lies in unifying them in terms of management, see. A. Tahindro, "Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks", *Ocean Development and International Law* 28 (1997): 9–10.

premise that such stocks are not susceptible wholly to the exclusive jurisdiction of coastal States.

The broad interpretation of the fishery limitation

A number of academic commentaries have admittedly advanced an approach in favour of interpreting, still with some cautiousness, broadly the fishery limitation. For instance, it has been acknowledged that throughout the *Fish Stocks Conference* there was a 'general recognition of the important biological unity' attached to these stocks. This recognition was manifested in the text of the Agreement through the general principles governing the conservation and management of stocks and more specifically in the adoption of the compatibility rule. However, a broad interpretation on art. 297(3) LOSC, would not lead to the 'uniting of the procedures for the settlement of disputes for the whole geographical distribution of these stocks'[94]. Hence, the compulsory settlement provisions may be seen as operating essentially only in favour of coastal States, which may launch a challenge against any high seas fishing State resulting in compulsory binding procedures with respect to measures undermining the respective conservation and management measures that have been established for the same stock in its EEZ. The same would not apply for high seas States due to the operation of art. 297(3) LOSC. This asymmetrical obligation is viewed to exist because coastal States enjoy sovereign rights regarding fisheries within its EEZ.[95]

The broad scope of such interpretations is derived mainly from academic commentaries analysing the text of the limitation exclusively in the context of the

[94] *Tahindro*, 49.

[95] E. Meltzer, *The Quest for Sustainable International Fisheries, Regional Efforts to Implement the 1995 United Nations Fish Stocks Agreement* (Ottawa: National Research Council of Canada, 2009), 207.

Convention. For instance, a traditional view in this respect is that 'certain disputes relating to fisheries will be completely excluded from the dispute settlement system due to the broad discretionary power of the coastal States with respect to several aspects of coastal fisheries' and furthermore 'the substantive discretion is so broad and plenary that it is no easy to imagine a situation in which third States would have the right to question the exercise of the sovereign rights of the coastal State.'[96] These quotes may read familiar to those who will recall the Tribunal's views in paragraph 297 of the *Chagos Award*. [97]

In sum, the arguments embracing a broad interpretation on the cross-reference of the Convention's fishery limitation in art. 32 UNFSA, consider the latter as continuing an explicit desire by States not to subject national decisions respecting marine living resource use within their EEZ to compulsory third-party adjudication.[98] Discretional fishery measures by coastal States will remain unaffected by the compulsory dispute settlement procedures of the Agreement, either generally or in specific terms; *eg.*, in determining total allowable catches, *etc*.[99] Overall, the part of academic commentary that reaches a conclusion towards the broad interpretation on the limitation varies from firmly supporting in a same manner the view that disputes over such stocks are definitely excluded from compulsory jurisdiction under the Convention, yet remaining silent as to the effect thereon of the procedures through the Agreement, [100] to views that assume more resolutely that the Agreement, like the

[96] *e.g.*, *de Mestral*, 184.

[97] See, *supra* footnote 17, and accompanying text.

[98] L.T. McDorman, "The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention", *Canadian Yearbook of International Law* 35 (1997): 66.

[99] *Orrego-Vicuña*, 36.

[100] M.A. Orellana, "The Law on Highly Migratory Fish Stocks: ITLOS Jurisprudence in Context", *Golden Gate University Law Review* 34 (2004): 460.

Convention, does not address fishery disputes of this kind without the consent of the coastal State.[101]

The restrictive interpretation of the fishery limitation

On the other hand, it has been developed an approach advocating a restrictive interpretation on art. 32 UNFSA, which advances that compatibility disputes are not subject to the fishery limitation. Notwithstanding that the Agreement incorporates the dispute settlement procedures of the latter, their application shall be consonant with the substantive law provided in the former. Arguments affirming the validity of this purposive interpretation point out that 'in the light of [art. 3], the question that arises in interpreting art. 32 UNFSA is whether disputes concerning the interpretation or application of arts 6 and/or 7 UNFSA may be referred unilaterally to adjudication under the settlement procedures provided for in the Convention.'[102] In other words, the interpretation of the fishery limitation in the Convention shall be construed restrictively within the interpretative context of the *lex specialis* principles under the Agreement; such as the principle of precautionary approach and compatibility rule. It shall be here once again be recalled that in respect to these principles the Agreement geographically applies explicitly to the conservation and management of both straddling and highly migratory fish stocks also "within areas under national jurisdiction".[103]

In this respect, academic commentary – Kwiatwoska, for instance – although favouring a broad interpretation of art. 297(3) LOSC, remain uncertain about the interpretation of the same limitation under art. 32 UNFSA. At this point, it may be worth looking in some more

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[101] A. Zumwalt, A. "Straddling Stocks Spawn Fish War on the High Seas", *University of California Davis International Law and Policy* 3 (1997): 56.

[102] *Treves*, 258.

[103] UNFSA, art 3(1).

detail at her views on the *Southern Bluefin Tuna case* having in mind the references made thereto in the *Chagos proceedings*. More specifically, reflecting on the fact that ITLOS' provisional measures Order in the *Southern Bluefin Tuna case* did not consider the applicability of the fishery limitation, she viewed that this presumably applies to the stocks in question, in spite of the high seas fishing States rights being inseparable from the sovereign rights enjoyed by coastal State's within EEZ.[104] Nevertheless, she implied, in the light of the final remarks made by the tribunal in its award regarding the dispute settlement procedures under the Agreement, that the impact of art. 297(3) LOSC, may not affect disputes arising under the principles of precautionary approach and compatibility, which are applicable to both the EEZ and the high seas.[105] Similarly, other commentators also commenting on the Order considered ITLOS to had left open the question of whether its provisional measures were to apply only to the high seas or include the EEZ in order to avoid becoming involved in the controversy over the application of the fishery limitation upon the compulsory settlement procedures of the Part XV of the Convention.[106]

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[104] B. Kwiatkowska, "The Australia and New Zealand *v.* Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal", *International Journal of Marine and Coastal Law* 16 (2001): 276.

[105] B. Kwiatkowska, "International Decisions – Southern Bluefin Tuna", *American Journal of International Law* 95 (2001): 167, and by the same author "The Australia and New Zealand *v.* Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal", *International Journal of Marine and Coastal Law* 16 (2001): 278, wherein is viewed that 'it seems that both the ITLOS and the Arbitral Tribunal have given important guidance and encouragement [to the application of compulsory settlement]'.

[106] *q.v.*, R.R. Churchill, "International Tribunal for the Law of the Sea the Southern Bluefin Tuna Cases (*New Zealand v. Japan; Australia v. Japan*): Order for Provisional Measures of 27 August 1999", *International & Comparative Law Quarterly* 49 (2000): 987–8; for a more comprehensive exposition of his views on the applicability of limitations to compulsory jurisdiction in contentious cases, see R. Churchill, "Some Reflections on the Operation of the Dispute Settlement System of the

Commentaries that would not preclude a restrictive interpretation of the limitation argue, as for example by Oxman in this respect, that 'it is important to bear in mind that art. 297 does not by any means exclude all disputes concerning the exercise of coastal State rights in the areas affected…[and that] these exclusions do not apply to matters such as high seas fisheries beyond the EEZ.'[107] This view is also espoused by Boyle, and in following a similar argument to that propounded by Treves, as discussed above, states in a forthright way that:

> 'The question whether disputes concerning all or part of a straddling stock fall inside or outside compulsory jurisdiction is thus more than a technical question of treaty interpretation. It poses some fundamental questions about the nature of equitable utilisation as a legal principle governing use of common resources. Both in the interests of equitable access to justice, and the effective management and sustainable use of straddling stocks, compulsory jurisdiction should apply to all aspects of such a dispute. The rights of coastal states must of course be maintained, but they should also be accountable for compliance with their obligations insofar as these affect other states or the international community as a whole. The exception for sovereign rights created by article 297(3) of the Convention and incorporated in the 1995 Agreement should thus be construed narrowly, to cover only the exercise of coastal State discretion on matters that are purely of EEZ concern only, *i.e.*, matters which do not affect straddling stocks, whether inside or outside the EEZ.'[108]

UN Convention on the Law of the Sea During its First Decade", in D. Freestone *et al.* , eds., *The Law of the Sea, Progress and Prospects* (Oxford: Oxford University Press, 2006), 407–9.

[107] B.H. Oxman, "The Rule of Law and the United Nations Convention on the Law of the Sea", *European Journal of International Law* 7 (1996): 368.

[108] *Boyle*, 1–2.

Klein, also arrives at the same conclusion by recalling the reliance of the high seas fishing provisions as well as of those governing straddling and highly migratory stocks, on the availability of compulsory settlement procedures to elaborate on the content of obligations with regard to cooperation and conservation in case of disputes. It is further noted that the Agreement, which has been specifically concluded in order to implement these provisions under the Convention, will be able to achieve the sought balance of interests between coastal and high seas fishing States by providing a court or tribunal with compulsory jurisdiction to resolve such disputes and thus safeguard the respective rights. [109] Considering that environmental treaties often lack precision in terms of objective rules of conduct and are deeply ambivalent in terms of their objects and purposes, Stephens puts forward a similar argument in viewing that especially the high seas fisheries provisions in Convention were drafted under a procedural tactic with the expectation that open substantive questions will be later resolved in an international court or diplomatic body.[110] Boyle, once again, makes even a more audacious statement, to the same direction with Klein and Stephen, in perceiving essentially the Agreement as a context of continuous interpretation of the Convention's fishery provisions; given their inherently evolutionary nature insofar as they set standards for the conservation and management measures that States are required to take in the EEZ and on the high seas.[111]

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[109] N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005), 204.

[110] T. Stephens, "The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case", *International Journal of Marine and Coastal Law* 19 (2004): 173, 191–2.

[111] A.E. Boyle, 'Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change', in *Freestone et al.*, 48. I have not quoted Boyle's views expressed in A.E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", *International and Comparative Law Quarterly* 46 (1997), as himself stated (Final Transcript, pg. 812:9-12) that his views therein were consistent with the argument pleaded on behalf of the UK,

8 Conclusions

The *Chagos Award*, while it focused on several provisions of the Convention being common to the Agreement – *ie.*, arts 63(2), 64(1), and 297(3)(a) LOSC, did not interpret any of these within the context of the latter in spite of the Mauritius' submission citing – albeit in a rather fragmented, if not selective – fashion, art. 7 UNFSA as one of the grounds; as discussed earlier nevertheless Mauritius did not follow through its own argument. In fact, the Tribunal as seen, at least in the text of the Award, did not rely its analysis on the Agreement, but rather confined it entirely within the Convention. Nonetheless, it is interesting to note in its *obiter dictum* with regards to the Agreement the views expressed, where it held that:

> 'The Tribunal is aware of the view, advanced in certain academic settings, that article 297(3) should be construed narrowly in its application to arts 63 and 64 [LOSC] and to the 1995 Fish Stocks Agreement on the grounds that the entire purpose of the special regime for these species is to enable populations to be managed as a unified whole, and that this object and purpose is potentially frustrated by providing distinct dispute resolution regimes for such species in the exclusive economic zone and in the high seas. However desirable this purpose may be as a matter of policy, the Tribunal can see no textual basis for such a construction in either the Convention or the 1995 Fish Stocks Agreement. The latter agreement afforded ample opportunity to remedy any ambiguity of drafting

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despite being invoked differently in the *Reply of the Republic of Mauritius* (18 November 2013), Volume III.

in the earlier Convention, but nevertheless expressly provides that 'Article 297, paragraph 3, of the Convention applies also to this Agreement'.[112]

In relation to the above passage, it will be quite pertinent to recall a relevant comment made also in passing, this time by the arbitral tribunal in the *Southern Bluefin Tuna case*, where while resigning itself to the fact that Part XV of the Convention 'falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction',[113] it noted that when the Agreement comes into force 'should for State parties to it, not to go far towards resolving procedural problems', as thereunder 'the articles relating to peaceful settlement of disputes are specified by substantive provisions more detailed and far reaching than the pertinent provisions [of the Convention]'.[114] Whatever may be the worth of *obiters*, one cannot disregard the irony when these two are to be read together.

The restrictive interpretation of art. 32 UNFSA, and by extension of art. 297(3)(a) LOSC, does not contradict the stipulation that the former 'shall be interpreted and applied in the context of and in a manner consistent with the Convention.'[115] The *rationale* of the restrictive approach, in general, views that the indeterminate wording of the limitation shall not be construed as to give any degree of primacy to coastal States, which would thus endorse a false impression emanating itself not from a point of law but rather from the inaccurate perception that only coastal States bear a genuine interest in the conservation and management of such stocks.[116] This kind of belief has been long in decline as evidenced in

[112] Award, pgs 117–8, §301.

[113] *Southern Bluefin Tuna* cases (*Award on Jurisdiction and Admissibility, Decision of 4 August 2000*), pg. 45 ¶62.

[114] ibid., at pg. 48 ¶71.

[115] UNFSA, art. 4.

[116] For instance, it has been argued that '[a] tip of the balance toward coastal state interests is beneficial, since the coastal states are probably more 'invested' in the long-term health of the

numerous collapses of stocks within national jurisdiction, and subsequent treaty developments at many key fishery regions. To the contrary, and on the point of law, it would constitute a *contra legem* interpretation to construe broadly a limitation like this, which was adopted with the view of excluding high seas States fishing *within* the EEZ;[117] in the sense that such broad interpretation will not any more fulfil its purpose to exclude essentially high seas fishing States “in” the EEZ but it inversely expands coastal rights beyond the EEZ onto the high seas.[118] In this respect, the restrictive interpretation on the limitation of compulsory dispute settlement is more harmonious with one of the main purposes underlying the régime of the Agreement, which is to eliminate any scope for creeping jurisdiction.[119]

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straddling stock resource than a distant-water fishing nation, and thus, are more motivated to preserve that resource’, see W. Martin, “Fisheries Conservation and Management of Straddling Stocks and Highly Migratory Stocks under the United Nations Convention on the Law of the Sea”, *Georgetown Environmental Law Review* 7 (1995): 766.

[117] For the latent tendency of coastal rights expansion seawards inhabiting the concept of limitations see G. Erasmus, “Dispute Settlement in the Law of the Sea”, *Acta Juridica*, 1 (1986): 22.

[118] *per* Treves, this is explained easily if considered that the concept of EEZ presents two complementary aspects: on the one hand, an important extension of the rights of the coastal States, and, on the other the prescription of a limit to these new rights, in particular in terms of space; *qv.*, T. Treves, “La Pêcheen Haute Mer et l’Avenir de la Convention des Nations Unies sur le Droit de la Mer”, *Annuaire Français* 38 (1992), 889.

[119] C. Higgenson, “The Law of the Sea Convention and the Protection of Fisheries”, *Georgetown Environmental Law Review* 7 (1995): 771.