



# **Donating to Destruction: Combating Capacity Enhancing Fisheries Subsidies and EEZ Overfishing Within *UNCLOS***

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## Abbreviations

ACP	African, Caribbean, and Pacific Group of States
ASCM	WTO Agreement on Subsidies and Countervailing Measures
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
FAO	Food and Agriculture Organization of the United Nations
FSA	United Nations Fish Stocks Agreement
ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, Unregulated, and Unreported
MPA	Marine Protected Area
MSY	Maximum Sustainable Yield
NM	Nautical Miles
OECD	Organization for Economic and Co-operation and Development
PSSA	Particularly Sensitive Sea Area
RFMO	Regional Fisheries Management Organization
SDGs	Sustainable Development Goals
SRFC	Sub-Regional Fisheries Commission
UK	United Kingdom
UNCCRF	United Nations Code of Conduct for Responsible Fishing
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

## Chapter 1: Introduction

The real cure for our environmental problems is to understand that our job is to salvage Mother Nature. We are facing a formidable enemy in this field. It is the hunters...and to convince them to leave their guns on the wall is going to be very difficult.<sup>1</sup>

- Jacques Cousteau, Oceanographer

The critical relationship between humans and the oceans is a timeless tradition where the reliance on each other is entirely one-sided. Vast amounts of coastal communities depend on the oceans as a primary source of protein for their diets and increasing trends of overfishing have threatened this important food source. The root of overfishing is largely facilitated through vessel overcapacity.<sup>2</sup> Conversely, this overcapacity is a direct result of subsidizing efforts by the State and therefore arguably falls under State authority in this regard.<sup>3</sup> Food-insecure countries, such as those found in West Africa are hit the hardest by heavily subsidized industrial fishing vessels from developed countries. Currently, “West Africa’s fish stocks are being depleted by industrial trawlers which comb the oceans to feed European and Asian markets.”<sup>4</sup>

With subsidies creating an uneven playing field,<sup>5</sup> many artisanal fisheries and developing countries find themselves powerless to massive fishing fleets effectively destroying global marine life at catastrophic levels.<sup>6</sup> Just as fish stocks are being depleted in developing countries, the waters surrounding many industrialized countries have been feeling the effects for some time. A 2002 report published by the United Nations Food and Agriculture Organization (FAO) revealed, “75% of the world’s commercially important marine fish stocks are either fully fished,

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<sup>1</sup> “Jacques Cousteau Quote.” *Salvage Blue*: 2016. Online: [www.salvageblue.org/](http://www.salvageblue.org/) (Accessed July 11, 2018).

<sup>2</sup> R.R. Churchill and A. V. Lowe. *The Law of the Sea*. 3rd Edition. Huntington: Juris Publishing Inc. - Manchester University Press, 1999, p. 321.

<sup>3</sup> The FAO states, “*Fisheries subsidies are government actions.*” Online: [www.fao.org/docrep/005/y4446e/y4446e0k.htm](http://www.fao.org/docrep/005/y4446e/y4446e0k.htm) (Accessed June 13, 2018).

<sup>4</sup> Kieran Guilbert and Umberto Bacchi. *FEATURE-All at sea: foreign fishing fleets drain West African waters*. Reuters: May 8, 2017. Online: [www.reuters.com/article/africa-fish-overfishing-idUSL8N1I43AH](http://www.reuters.com/article/africa-fish-overfishing-idUSL8N1I43AH) (Accessed July 12, 2018).

<sup>5</sup> Anja von Moltke. *Fisheries subsidies at the 11th WTO Ministerial in Buenos Aires*. UN Environment: December 1, 2017. Online: [www.unenvironment.org/news-and-stories/blog-post/fisheries-subsidies-11th-wto-ministerial-buenos-aires](http://www.unenvironment.org/news-and-stories/blog-post/fisheries-subsidies-11th-wto-ministerial-buenos-aires) (Accessed July 12, 2018).

<sup>6</sup> Andrew Jacobs. *China’s Appetite Pushes Fisheries to the Brink*. New York Times: April 30, 2017. Online: [www.nytimes.com/2017/04/30/world/asia/chinas-appetite-pushes-fisheries-to-the-brink.html](http://www.nytimes.com/2017/04/30/world/asia/chinas-appetite-pushes-fisheries-to-the-brink.html) (Accessed June 3, 2018).

overexploited, depleted or slowly recovering from a collapse.”<sup>7</sup> Despite the feeling of helplessness by artisanal fishermen and developing countries that things are only getting worse,<sup>8</sup> the 1982 *United Nations Convention on the Law of the Sea (UNCLOS)*<sup>9</sup> may provide a legal avenue to address issues of harmful capacity enhancing subsidies that can cause overfishing, which inevitably runs contrary to international law. Under *UNCLOS*, coastal State jurisdiction and sovereign rights over resources must be weighed against the obligations afforded under Part XII, pertaining to protection and preservation of the marine environment. Perhaps, in this light, reframing subsidies contributing to overfishing as a Part XII dispute could entail meaningful change through mandatory dispute settlement.

## 1.1 Objective

The objective of the thesis is to answer the question of whether harmful capacity enhancing fisheries subsidies can be addressed and sufficiently curbed under the current *UNCLOS* regime. To tackle this question, several sub-questions must also be sufficiently answered, namely: (1) Is there a causal link between subsidies and overfishing? (2) Does the regulation of fisheries under *UNCLOS* address subsidies? (3) Within a coastal State’s own EEZ, do the sovereign rights to explore and exploit natural resources supersede environmental obligations and duties? (4) What legal options exist under *UNCLOS* for mandatory dispute settlement procedures regarding subsidies contributing to overfishing within the EEZ? (5) Can a fisheries dispute be framed as a Part XII dispute? (6) What is the interaction between *UNCLOS* and World Trade Organization (WTO) dispute settlement mechanisms? In order to answer these questions, *UNCLOS* will need to be adequately scrutinized, while international trade law, through the WTO, will be briefly examined in order to help determine the relationship between the two separate regimes, specifically with regards to dispute settlement.

The aforementioned issues are relevant for a number of reasons, namely that overfishing threatens the primary source of protein for the human race, and the balance to which our ocean

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<sup>7</sup> Wilfram Ken Swartz. "Global Maps of the Growth of Japanese Marine Fisheries and Fish Consumption." Resource Management and Environmental Studies, The University of British Columbia, Vancouver, 2004, p.1.

<sup>8</sup> *Saury prices expected to stay high as neighbors snub Japan-proposed catch quotas*. Japan Times: August 7, 2017. Online: [www.japantimes.co.jp/news/2017/08/07/business/saury-prices-look-stay-high-amid-overfishing-neighbors-snub-japan-proposed-catch-quotas/#.W2bfHNgzbfZ](http://www.japantimes.co.jp/news/2017/08/07/business/saury-prices-look-stay-high-amid-overfishing-neighbors-snub-japan-proposed-catch-quotas/#.W2bfHNgzbfZ) (Accessed July 29, 2018).

<sup>9</sup> *United Nations Convention on the Law of the Sea*, (adopted 10 December 1982, entered into force 16 November 1994). 1834 U.N.T.S. 397.

ecosystems hinge on is extremely delicate. Current negotiations within the WTO, as well as global acknowledgements in favor of the recent UN Development Goals have indicated there is consensus that the present issue must be resolved. However, the current state of our oceans indicates such change cannot come soon enough.

## 1.2 Delimitation of Scope

The scope of the thesis is primarily limited to the international legal regime of fisheries within the exclusive economic zone (EEZ). However, other maritime zones may be briefly touched upon to provide context. Under Article 57 of *UNCLOS*, “The [EEZ] shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”<sup>10</sup> Although subsidies are an issue that occurs in all maritime zones, the basis for the limitation falls under the realization that 90% of all fishing occurs within the EEZ.<sup>11</sup> Furthermore, “[f]ish stocks within EEZs are generally more commercially important than high sea stocks (with one study finding that <0.01 percent of the quantity and value of commercial fish taxa are obtained from catch taken exclusively in the high seas).”<sup>12</sup>

The WTO and international trade law will not be scrutinized in great detail, as it is beyond the scope of this thesis. Although some scholars, such as Young, may hint that the WTO sufficiently addresses subsidies already,<sup>13</sup> the author of this thesis seeks to consider whether some elements of *UNCLOS* have been overlooked, or perhaps framed in a manner, which has insufficiently addressed the issue. Therefore, the main provisions to be analyzed will fall under the relationship between the WTO and *UNCLOS*’ dispute settlement forums.

## 1.3 Methodology

The following thesis will use doctrinal research methodology to include statutes and cases. Primary focus shall be emphasized on Section 3 of the *Vienna Convention on the Law of*

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<sup>10</sup> *Ibid*, art. 57.

<sup>11</sup> Ellen Hey. "The Fisheries Provisions of the LOS Convention." Edited by E. Hey. *Developments in International Fisheries Law* (Kluwer Law International), 1999, p. 27.

<sup>12</sup> Margaret A. Young. *The 'Law of the Sea' Obligations Underpinning Fisheries Subsidies Disciplines*. Geneva: International Centre for Trade and Sustainable Development (ICTSD), 2017, p. 7.

<sup>13</sup> *Ibid*, p. 5.

*Treaties (VCLT)* for the interpretation of treaties. The principle treaty that will be assessed is *UNCLOS*, which will be scrutinized “in accordance with the ordinary meaning [...] in the light of its object and purpose.”<sup>14</sup> Lastly, Article 38 of the *Statute for the International Court of Justice (ICJ)* will be used as it stipulates “international conventions, [...] international custom, [...] general principles, [...] judicial decisions and the teachings of the most highly qualified publicists [shall be applied] as subsidiary means for the determination of rules of law.”<sup>15</sup> This means that treaty interpretation shall come first, with jurisprudence and scholarly text to formulate the subsidiary means of strengthening any arguments.

#### **1.4 Structure of the Thesis**

The structure of the following thesis subsequent to Chapter 1 will follow Chapters 2-8. Chapter 2 will provide a breakdown of the different types of subsidies, as well as an overview of the UN Sustainable Development Goals, which inspired this thesis. Finally, the question of whether there is a causal link between fisheries subsidies and overfishing will be answered.

Chapter 3 will examine the fisheries regime under *UNCLOS* as it specifically applies to the EEZ. This will include an overview of coastal State sovereign rights and obligations. This chapter will lead to Chapter 4, which will scrutinize EEZ environmental obligations and the relationship between exploitation rights and environmental obligations as espoused under Article 192 of *UNCLOS*. After a thorough breakdown of Article 192, the chapter will end with issues of due diligence/due regard.

Chapter 5 will examine dispute settlement for EEZ fisheries within *UNCLOS* as well as whether subsidies breach *UNCLOS*. Details of “responsibility,” surplus rights and judicial jurisdiction will lead to the exclusion clause espoused under Article 297(3)(a). A possible bypass to this exclusion, as well as the inclusion of biodiversity in the exclusion will be addressed.

Chapter 6 will argue the use of EIAs to compel research and information sharing for subsidy activities is necessary and may lead to more States adhering to their environmental obligations. Lastly, Chapter 7 will briefly touch upon the interaction with WTO law, ending with Chapter 8: Conclusion.

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<sup>14</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, art. 31(1).

<sup>15</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946, art. 38(1).



## Chapter 2: Fisheries Subsidies

Estimates place fisheries subsidies as high as \$35 billion worldwide, with the majority of those directly contributing to overcapacity and overfishing.<sup>16</sup> As these subsidies are primarily occurring in the form of State-sponsorship, taxpayers<sup>17</sup> are effectively paying for, “industrial boats to degrade the environment and to destroy the food security and livelihoods of vulnerable coastal communities.”<sup>18</sup> Furthermore, subsidies do not benefit artisanal fisherman and instead benefit the largest vessels, which fosters inequality.<sup>19</sup> Many large fishing vessels now have the capacity to stay at sea for months straight and harvest tremendous amounts of fish at one time. From this, many non-target species are caught accidentally and by the time the by-catch is released, they are already dead.<sup>20</sup>

Although fisheries subsidies primarily lead to capacity-enhancement for fishing fleets, not all subsidies are harmful. Some provide much needed money for monitoring and research, while some tread the line of harmful/beneficial. The following section will first address the three categories<sup>21</sup> of subsidies,<sup>22</sup> which are beneficial, ambiguous and capacity enhancing, respectively. These will be defined in order to explore their contribution/detriment to global fisheries. Secondly, UN Sustainable Development Goal 14.6 will be examined, which outlines current global efforts to address harmful subsidies. From these, it will lead to whether there exists a causal link between subsidies and overfishing.

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<sup>16</sup> *Upcoming UN Ocean Conference expected to trigger a global solution to end harmful fisheries subsidies.* UNCTAD: May 16, 2017. Online: [unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1482](http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1482) (Accessed July 28, 2018).

<sup>17</sup> *Next month's ocean conference eyes cutting \$35 billion in fisheries subsidies – UN trade officials.* UN News: May 10, 2017. Online: [news.un.org/en/story/2017/05/557002-next-months-ocean-conference-eyes-cutting-35-billion-fisheries-subsidies-un#.Wm8gxktG3fY](http://news.un.org/en/story/2017/05/557002-next-months-ocean-conference-eyes-cutting-35-billion-fisheries-subsidies-un#.Wm8gxktG3fY) (Accessed July 28, 2018).

<sup>18</sup> *To make fisheries more sustainable, trade community must end the pointless subsidies.* UNCTAD: September 28, 2016. Online: [unctad.org/en/conferences/Ocean-Conference/Pages/NewsDetails.aspx?OriginalVersionID=1336](http://unctad.org/en/conferences/Ocean-Conference/Pages/NewsDetails.aspx?OriginalVersionID=1336)

<sup>19</sup> *Ibid.*

<sup>20</sup> Gwynn Guilford. *US fishermen throw back 20% of their catch—often after the fish are already injured or dead.* Quartz: March 21, 2014. Online: [qz.com/190379/us-fishermen-throw-back-20-of-their-catch-often-after-the-fish-are-already-injured-or-dead/](http://qz.com/190379/us-fishermen-throw-back-20-of-their-catch-often-after-the-fish-are-already-injured-or-dead/) (Accessed July 29, 2018).

<sup>21</sup> The FAO has a guide outlining 4 types of categories as: Direct financial transfers, Services and indirect financial transfers, Regulations, and Lack of intervention. These can be explored further at: [www.fao.org/tempref/docrep/fao/007/y5424e/y5424e00.pdf](http://www.fao.org/tempref/docrep/fao/007/y5424e/y5424e00.pdf). The choice to use Sumaila's categories was determined by overlap under the FAO Guide, as well as through other organizations. This is explained further by Sumaila (et al.) in “A bottom-up re-estimation of global fisheries subsidies.” *Journal of Bioeconomics* 12: (August, 18, 2010), 201-225, at p. 203.

<sup>22</sup> Chen provides further discussion of the origins of defining subsidies in law in Chapter 1(II)(b) at: [link.springer.com/content/pdf/10.1007%2F978-3-642-15693-9.pdf](http://link.springer.com/content/pdf/10.1007%2F978-3-642-15693-9.pdf), providing further examples through the WTO, FAO and OECD, which he argues divide subsidies into 5, 6, and 5 categories respectively.

## **2.1 Categories of Subsidies**

### **2.1.1 What are Beneficial Subsidies?**

Beneficial subsidies are obviously important, if harmful subsidies are to be curtailed and fish stocks conservation is to be effectively promoted. These subsidies include, “fisheries management programs and services” and “fishery research and development.”<sup>23</sup> Monitoring, surveillance, stock assessments, the establishment of Marine Protected Areas and scientific research are paramount.<sup>24</sup> The European Parliament Directorate-General for Internal Policies, who endorsed the UN classification over the FAO, indicates, “beneficial subsidies enhance the growth of fish stocks through conservation and the monitoring of catch rates through control and surveillance measures to achieve a biological and economic optimal use.”<sup>25</sup>

### **2.1.2 What are Ambiguous Subsidies?**

Ambiguous subsidies may either fall under the category of beneficial subsidies or capacity enhancing subsidies. Sometimes, programs may be intended as beneficial, yet ultimately end up having adverse effects. For example, the vessel buyback program that is intended to alleviate fishing pressure can lead instead to fleet modernization.<sup>26</sup> Other examples include fisher assistance programs as well as rural fishers’ community development programs. Even in developing countries,<sup>27</sup> these too have led to overcapacity instead of sustainable management.

### **2.1.3 What are Capacity Enhancing Subsidies?**

Capacity enhancing subsidies are a massive detriment to the oceans and allow fisheries to fish for ‘cheaper’ and for much longer.<sup>28</sup> Most capacity-enhancing subsidies (90%), which

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<sup>23</sup> Rashid Sumaila, Vicky Lam, Frédéric Le Manach, Wilf Swartz, Daniel Pauly. *Global Fisheries Subsidies*. Note, Policy Department Structural and Cohesion Policies, European Parliament, Directorate-General For Internal Policies, 2013, p. 21-22.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Wilf Swartz. *Ask an Expert: Why is the global fishing industry given \$35 billion in subsidies each year?* Neureus Program, The University of British Columbia: March 14, 2016. Online: [nereusprogram.org/works/ask-an-expert-why-is-the-global-fishing-industry-given-35-billion-in-subsidies-each-year/](http://nereusprogram.org/works/ask-an-expert-why-is-the-global-fishing-industry-given-35-billion-in-subsidies-each-year/) (Accessed July 30, 2018).

exacerbate overfishing, are exclusively provided to large-scale industrialized fisheries.<sup>29</sup> This creates an uneven playing field for developing countries and artisanal fishers who may have to compete for shared or migratory fish stocks.

Capacity enhancing subsidies include tax exemption programs, foreign access agreements, boat constructions renewal and modernization programs, fishing port construction and renovation programs, fishery development projects and support services and fuel subsidies.<sup>30</sup> Of these, fuel subsidies represent the highest subsidized sub-category with 22% of the total.<sup>31</sup> It should be noted that capacity enhancing subsidies play a different role for developing States as opposed to developed States. The crux of the issue lies in overcapacity, which in turn often leads to overexploitation. This practice unevenly benefits wealthier countries, which may require future agreements to consider “giving differential treatment to developing countries.”<sup>32</sup>

## 2.2 UN Sustainable Development Goals

The demand for unification in the sustainable use of the oceans and marine resources, as well as global conservation endeavours have garnered more traction recently with the “precipitous decline in fish stocks.”<sup>33</sup> The United Nations Ocean Conference has, “re-energized [global] efforts,”<sup>34</sup> and with that, many harmful capacity-enhancing fisheries subsidies have been addressed directly. Goal 14 of the Sustainable Development Goals (SDGs) highlights ocean conservation and sustainability with target 14.6 directly addressing harmful fisheries subsidies, which lead to overcapacity and overfishing.<sup>35</sup>

For target 14.6, a four-point plan has been designed with support from member States, international organizations and NGOs. The “roadmap for [the] elimination of harmful fishing

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<sup>29</sup> Anna Schuhbauer, Ratana Chuenpagdee, William W.L. Cheung, Krista Greer, Rashid Sumaila. "How subsidies affect the economic viability of small-scale fisheries." *Marine Policy* 82 (August 2017): 114-121, p. 117.

<sup>30</sup> *Supra*, note 23.

<sup>31</sup> *Ibid.*

<sup>32</sup> *At Ocean Conference, UN agencies commit to cutting harmful fishing subsidies.* UN News: June 6, 2017. Online: [news.un.org/en/story/2017/06/558942-ocean-conference-un-agencies-commit-cutting-harmful-fishing-subsidies#.WTgZMBMrJBw](https://news.un.org/en/story/2017/06/558942-ocean-conference-un-agencies-commit-cutting-harmful-fishing-subsidies#.WTgZMBMrJBw) (Accessed June 15, 2018).

<sup>33</sup> *Press Release: UNCTAD14 sees 90 countries sign up to UN roadmap for elimination of harmful fishing subsidies.* UNCTAD: July 20, 2016. Online: [unctad.org/en/Pages/PressRelease.aspx?OriginalVersionID=316](https://unctad.org/en/Pages/PressRelease.aspx?OriginalVersionID=316) (Accessed July 13, 2018).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Sustainable Development Goal 14.* United Nations: 2017. Online: [sustainabledevelopment.un.org/sdg14](https://sustainabledevelopment.un.org/sdg14). (Accessed June 1, 2018).

subsidies”<sup>36</sup> includes requirements from States to provide information on the subsidies they are providing to their fisheries sector, as well as a prohibition on all subsidies, which contribute to overfishing.<sup>37</sup> The UN plan requires the introduction of new domestic policies which will deter other harmful subsidies, as well as providing special and differential treatment to developing countries, whose economies, as well as the hunger of many of its citizens might be negatively affected by a universal subsidies mechanism, intended to affect overfishing specifically.

Ultimately, the United Nations Development Goals are a ‘soft-law’ mechanism, which relies entirely on domestic implementation, compliance and enforcement. “The voluntary commitments are meant to be taken individually or in partnership by Governments, the UN system, non-governmental organizations, the private sector, and others, to support SDG14.”<sup>38</sup> Large support has already been pledged from many African nations, Caribbean nations, the Pacific Group (ACP), and more.<sup>39</sup> However, time will tell whether/when the industrialized nations with the largest fishing fleets may or may not get on board. David Vivas of the United Nations Conference on Trade and Development (UNCTAD) maintains that, “[Subsidies] create incentives to deplete resources faster than if there weren't the subsidies.”<sup>40</sup> Yet, for many countries, powerful fishing lobbies and growing consumer tastes put tremendous pressure on governments for results. Many of these governments may likely not want to disclose information regarding their subsidies, as well as provide differential treatment for the developing nations of the world. However, it must be understood that different subsidies provide different effects, and not all are harmful. Furthermore, the question of whether or not a causal link exists between fisheries subsidies and overfishing must first be adequately examined before moving forward.

### **2.3 Is There a Casual Link Between Fisheries Subsidies and Overfishing?**

The 1993 FAO study, *Marine Fisheries and the Law of the Sea: A Decade of Change*, was “the first to suggest a causal relation between subsidies and declining [fish] stocks.”<sup>41</sup> However, based on data from 2003-04 Chen maintains, “the FAO have found it difficult to prove

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<sup>36</sup> *Supra*, note 32.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Supra*, note 17.

<sup>40</sup> *Ibid.*

<sup>41</sup> Andrew Rubin, Eric Bilsky, (et al.). *Paths to Fisheries Subsidies Reform: Creating sustainable fisheries through trade and economics*. Washington, DC: Oceana, 2015, p. 134.

the relationship that subsidies cause overcapacity and that overcapacity causes overfishing.”<sup>42</sup> One possible reason for this could be lack of access to State data regarding its EEZ fisheries.

Further evidence can be found through examining State practice. Greenpeace highlights, “From 2012-2014, the number of Chinese DWF vessels grew from 1,830 to 2,460, [over] ten times the size of the US fleet.”<sup>43</sup> Some efforts have been made to promote sustainability and an annual summer moratorium of fishing in the South China Sea has been in place since the 1990s.<sup>44</sup> Yet, as previously stated, growing subsidies and excessive fleet capacity reveal that any hope in China may be misspent. The majority of China’s fleet has to conduct fishing operations in distant waters due to domestic overfishing. This can be alleviated, however “If coastal over-fishing can be resolved then work can be found nearer home for the fishing sector’s excess capacity.”<sup>45</sup> These links represent causation in the factual sense. However, causation in the legal sense may be indicated through trends in legal agreements between States and legal bodies.

Following the release of the 1993 FAO report, the WTO *Agreement on Subsidies and Countervailing Measures (ASCM)* entered into force requiring, “member countries to notify the WTO of their provisions of subsidies to their industries.”<sup>46</sup> Subsequently, the Rome Consensus on World Fisheries and the U.N. Code of Conduct for Responsible Fishing (UNCCRF) was adopted, and the United Nations Commission on Sustainable Development “called upon governments to consider reducing subsidies to the fishing industry and abolish incentives leading to overfishing.”<sup>47</sup> United Nations, FAO and WTO led programs continued to make the link between certain subsidies and overfishing in a legal sense inevitably leading to the 2002 World Summit on Sustainable Development (WSSD). This summit would pave the way for the UN Sustainable Development Goals adopted in 2015. However, these initiatives are ‘soft-law’ and ultimately still only binding on those that sign them, in accordance with the principle of *pacta tertiis*.

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<sup>42</sup> Chen-Ju Chen. *Fisheries Subsidies under International Law*. Vol. 20. Hamburg: International Max Planck Research School (IMPRS) for Maritime Affairs at the University of Hamburg (2010): p. 12.

<sup>43</sup> *Give a Man a Fish—Five Facts on China’s Distant Water Fishing Subsidies*. Briefing, Hong Kong: Greenpeace East Asia, 2016.

<sup>44</sup> *China has fished itself out of its own waters, so Chinese fishermen are now sticking their rods in other nations’ seas*. Quartz: April 4, 2017. Online: [qz.com/948980/china-has-fished-itself-out-of-its-own-waters-so-chinese-fishermen-are-now-sticking-their-rods-in-other-nations-seas/](http://qz.com/948980/china-has-fished-itself-out-of-its-own-waters-so-chinese-fishermen-are-now-sticking-their-rods-in-other-nations-seas/) (Accessed July 18, 2018).

<sup>45</sup> Tang Damin. *Restoring China’s coastal fisheries: An analysis of the policies that have shaped the country’s fishing sector over the last 30 years*. China Dialogue –Ocean: March 5, 2018. Online: [chinadialogue.ocean.net/1826-restoring-chinas-coastal-fisheries/](http://chinadialogue.ocean.net/1826-restoring-chinas-coastal-fisheries/) (Accessed July 18, 2018).

<sup>46</sup> *Supra*, note 41.

<sup>47</sup> *Ibid*, p. 135.

## 2.4 Conclusion

Every case and point in regards to subsidies is unique in its own right. Therefore, one should avoid generalizations in condemning fisheries subsidies as a whole. As previously determined, beneficial subsidies, as well as some ambiguous subsidies can provide much needed assistance to protect the oceans from overfishing. However, in the case of capacity enhancing subsidies, many sources indicate overcapacity leads to overfishing. This notion is supported through data,<sup>48</sup> as well as growing trends and efforts in implementing international voluntary agreements. Sumaila argues, “Because capacity-enhancing subsidies increase profits artificially, they are stimulating this “race to fish” within the industry. This is having disastrous consequences for many fish populations.” Based on UN statements, academic findings, FAO data,<sup>49</sup> State practice (China), and the timeline and content of legal treaties and non-voluntary guidelines, one can conclude there exists a causal link between capacity-enhancing subsidies and overfishing. To support this conclusion, Chen argues, “It should be clear that overfishing could not take place without overcapacity.”<sup>50</sup> While the WTO negotiates new trade rules regarding this issue, attention must be drawn to the law of the sea and the primary instrument for fisheries regulation; *UNCLOS*.

## **Chapter 3: Fisheries in the Law of the Sea**

The international legal regime for fisheries is primarily regulated through legally binding treaties, voluntary instruments, regional fisheries management organizations (RFMOs), domestic legislation, and global environmental treaties. Of these, *UNCLOS* provides the overarching framework, yet leaves the specific details of management to the coastal/flag State. This is especially pertinent to the EEZ where coastal States exercise a large degree of discretion over resource management, yet regulation remains the most in depth, in comparison to others within *UNCLOS*. The following section will seek to ascertain whether the regulation of EEZ fisheries through *UNCLOS* addresses subsidies.

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<sup>48</sup> For more information, please see Sumaila: [onlinelibrary.wiley.com/doi/full/10.1046/j.1467-2979.2002.00081.x](https://onlinelibrary.wiley.com/doi/full/10.1046/j.1467-2979.2002.00081.x).

<sup>49</sup> FAO data primarily indicates global fleet sizes, global capture of fish, etc., however they have stated, “[there is a...] strong correlation between fisheries subsidies and [...] overcapacity and overfishing.” See more at: [www.fao.org/3/a-i8003e.pdf](http://www.fao.org/3/a-i8003e.pdf).

<sup>50</sup> *Supra*, note 42 at p. 12-13.

### 3.1 Fisheries Regime Under *UNCLOS*

*UNCLOS* strives to “promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources and the study, protection and preservation of the marine environment.”<sup>51</sup> Fisheries are regulated through a mix of coastal State and flag State jurisdiction and sovereignty. Within *UNCLOS*, the fisheries regime is a “complex collection of nine sub-regimes.”<sup>52</sup> Of these, three take a “zonal management approach,”<sup>53</sup> with the coastal State maintaining sovereignty and jurisdiction over resources within 200nm, while flag State jurisdiction over fisheries is largely afforded on the high seas, as it constitutes an area beyond national jurisdiction. When fishing inside the EEZ of a coastal State, the jurisdiction over a third State vessel lies with the “State whose flag they fly.”<sup>54</sup> However, non-compliance can result in enforcement by the coastal State who maintains the sovereign rights over the management of the resources, as per *UNCLOS* Article 73.<sup>55</sup>

The remaining 6 sub-regimes are “functional in nature,”<sup>56</sup> and take a “species specific approach.”<sup>57</sup> These include shared and straddling fish stocks, as well as highly migratory species, marine mammals, anadromous stocks and catadromous species. However, as Tanaka points out, “[these measures are] inadequate to conserve living resources in the oceans.”<sup>58</sup> This is in part due to the EEZ exclusion clause within *UNCLOS*, as well as a more detailed regime for fisheries conservation, beyond the current more general provisions. Due to these inadequacies of *UNCLOS* in sufficiently addressing modern day unsustainable fishing practices in the high seas, the *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 (FSA)* was established to address straddling and highly migratory species. The *FSA* primarily utilizes RFMOs to employ and regulate conservation measures over certain stocks in distinct areas. Ultimately, the effectiveness of

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<sup>51</sup> *Supra*, note 9 at preamble.

<sup>52</sup> Donald R. Rothwell and T. Stephens. *The International Law of the Sea*. 2<sup>nd</sup> Edition. Oxford: Hart Publishing, 2016, p. 321.

<sup>53</sup> Yoshifumi Tanaka. "The Changing Approaches to Conservation of Marine Living Resources in International Law." *Heidelberg Journal of International Law* 71, no. 2 (2011): 291-330, p. 292.

<sup>54</sup> *Supra*, note 12 at p. 10.

<sup>55</sup> *Supra*, note 9 at art. 73.

<sup>56</sup> *Supra*, note 52.

<sup>57</sup> *Supra*, note 53.

<sup>58</sup> *Ibid*.

RFMOs depends on the cooperation of States in joining, as its binding powers extend only so far as its members, which is in line with the principle of *pacta tertiis*. However, as Young indicates, “[Non-parties...] may still be subject to the *UNCLOS* obligation to cooperate in the conservation and management of the relevant shared fish stocks.”<sup>59</sup>

### 3.2 The EEZ Regime

The completion of *UNCLOS* drastically altered the oceans, as what were previously high seas areas were subsequently sectioned off into distinct maritime zones affording duties, rights and freedoms to States. Among those included was the right to resources, both living and non-living. An area of major importance was the realization of the EEZ. This was an “essential element”<sup>60</sup> at the negotiating table during the *Geneva Conventions*, which ultimately led to the finalization of *UNCLOS*. Nordquist argues, “This concept is one of the most important pillars of the [*UNCLOS*],”<sup>61</sup> while Young concurs, “[*UNCLOS*]’ greatest impact on fisheries governance has been the recognition [of the EEZ].”<sup>62</sup> The EEZ extends up to 200 nautical miles (nm) from baselines established around the low water points of the shoreline.<sup>63</sup> Such a massive area now represents one third of ocean space and as Young notes, “[i]t was also hoped that [the] enclosure of these areas [...] would allow for better resource management.”<sup>64</sup> Young’s quote directly hints to Hardin’s article, “The Tragedy of the Commons,” which indicated that if there were a shared resource, and everyone acts out of their own self-interest, the resource would eventually become overexploited.<sup>65</sup> Although aspirations may have been high for the EEZ, this massive amount of sea where resources could be exploited unfortunately has led to overexploitation in many cases.

Prior to the introduction of the EEZ, these waters were previously considered high seas with free access to all States. The introduction of the EEZ has led to overexploitation not entirely as a result of coastal State resource management rights, but largely in part due to the advancements in

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<sup>59</sup> *Supra*, note 8 at Executive Summary.

<sup>60</sup> Jean Carroz. “The Exclusive Economic Zone: A Historical Perspective.” *The Law of the Sea – Le Droit et la Mer – El Derecho y el Mar*. FAO, Rome, 1987.

<sup>61</sup> Myron H. Nordquist, Satya Nandan, and Shabtai Rosenne. *UN Convention on the Law of the Sea Commentary 1982*. Center for Oceans Law and Policy, University of Virginia, Leiden: Brill, 2013, p. 508 at V. 31.

<sup>62</sup> Margaret A. Young. “Fragmentation or interaction: the WTO, fisheries subsidies and international law.” *World Trade Review* 8, no. 4 (2009): 477-515, p. 481.

<sup>63</sup> *Supra*, note 9 at art. 57.

<sup>64</sup> *Supra*, note 12.

<sup>65</sup> Garrett Hardin. “The Tragedy of the Commons.” *Science* 162, no. 3859 (Dec 13, 1968): 1243-1248.



technology and the “race to fish” that has been caused by overcapacity of vessels. However, as will be discussed later, poor resource management and overcapacity together, can pose detrimental effects for marine living resources and sustainable fishing practices.

### 3.3 Coastal State Sovereign Rights and Obligations

The EEZ regime is primarily regulated through Part V of *UNCLOS*. Article 56(1)(a) grants the coastal State sovereign rights for the purpose of “exploring and exploiting, conserving and managing its resources.”<sup>66</sup> The content here is effectively jurisdictional in order to promote effective conservation and management within the EEZ. This means that the coastal State has the sovereign right to prescribe laws and enforce them regarding the management of its resources. The coastal State maintains the sovereignty to perform these rights and duties, yet under Article 56(2), “the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.”<sup>67</sup>

The “conservation of living resources” is the basic duty under Article 61 of *UNCLOS* regarding living resources, specifically fisheries within the EEZ.<sup>68</sup> “Conservation,” in accordance with its ordinary meaning is defined as, “Preservation, protection, or restoration of the natural environment and of wildlife.”<sup>69</sup> Beyerlin and Holzer state, “Although conservation is used frequently in international treaties dealing with natural resources, none of them actually defines this concept.”<sup>70</sup> In this light, the concept remains a little vague, however, preservation, protection and sustainability are frequently associated with the term through treaties.<sup>71</sup> These terms lead to the object and purpose, which aim to preserve and protect, as opposed to exploit and damage. Furthermore, the object and purpose is directly in accordance with *UNCLOS* Part XII.

Within *UNCLOS*, conservation and utilization are two of the main features detailed under Articles 61 and 62 of Part V. This includes the determination capacity of the coastal State with respect to the total allowable catch (TAC) as well as the maximum sustainable yield (MSY),

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<sup>66</sup> *Supra*, note 9 at art. 56(1)(a).

<sup>67</sup> *Ibid*, art. 56(2).

<sup>68</sup> *Ibid*, art. 61.

<sup>69</sup> “Conservation [Def. 1.1]” *Oxford Dictionary Online*. (n.d.) Online: [en.oxforddictionaries.com/definition/conservation](http://en.oxforddictionaries.com/definition/conservation) (Accessed August 8, 2018).

<sup>70</sup> Ulrich Beyerlin, Vanessa Holzer. "Conservation of Natural Resources." *Oxford Public International Law*. Max Planck Encyclopedia of Public International Law (MPEPIL). October 2013. Online: [opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1569](http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1569) (Accessed July 28, 2018), para. 10.

<sup>71</sup> See: *Convention on Biological Diversity*, art. 1, *Rio Declaration*, prin. 4, *Stockholm Declaration*, prin. 21.

while ensuring through the best scientific data available that such stocks will not fall to levels of endangerment through overexploitation.<sup>72</sup> To this end, cooperation with competent international organizations shall be endeavoured under Article 61. Young points out, “additional agreements, including the [FSA] and some regional treaties, require the coastal State to adopt the precautionary approach to conservation and management measures where scientific evidence is insufficient.”<sup>73</sup> According to Article 6(2) of the FSA, the precautionary approach indicates, “States shall be more cautious when information is uncertain, unreliable or inadequate.”<sup>74</sup>

Under Article 62(1) the objective is optimum utilization of resources.<sup>75</sup> According to Article 62(2), the coastal State shall, “ensure through proper conservation and management measures that the maintenance of the living resources in the [EEZ] is not endangered by over-exploitation.”<sup>76</sup> Articles 61 to 73 effectively outline that fisheries populations should produce the maximum sustainable yield,<sup>77</sup> while cooperation<sup>78</sup>, the best scientific evidence available<sup>79</sup>, the relevant environmental and economic factors as well as the needs of coastal fishing communities shall be considered.<sup>80</sup> Furthermore, if a coastal State is unable to harvest the entire allowable catch, access to the surplus shall be provided to third-States.<sup>81</sup> Here it is revealed, “the natural resource does not belong to the coastal State, which instead has exclusive competence to manage these fisheries subject to internationally agreed rules and policies.”<sup>82</sup> However, State practice has shown surplus’ have provided heavily subsidized massive fishing fleets such as those in the EU and China an opportunity to overexploit resources outside of their own overfished maritime zones and closer to shore than the high seas.

Whether a State exploits its resources, or allocates its surplus, exploitation rights *must* be balanced not only with the conservation measures of *UNCLOS* Part V, but with Articles 192 and 193 as well. However, within the EEZ there exists no explicit mention of fisheries subsidies.

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<sup>72</sup> *Supra*, note 9 at art. 61.

<sup>73</sup> *Supra*, note 12 at p. 13.

<sup>74</sup> *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*, (Dec. 4, 1995), 2167 UNTS 88. Entry into force: Dec. 11, 2001, art. 6(2).

<sup>75</sup> *Supra*, note 9 at art. 62(1).

<sup>76</sup> *Ibid*, art. 62(2).

<sup>77</sup> *Ibid*, art. 61(3).

<sup>78</sup> *Ibid*, arts. 61, 64-66, 69.

<sup>79</sup> *Ibid*, art. 61(2).

<sup>80</sup> *Ibid*, arts. 61(3), 62(3), 69(3).

<sup>81</sup> *Ibid*, art. 62(2).

<sup>82</sup> Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, Tim Stephens (Eds). *The Oxford Handbook of the Law of the Sea*. Oxford: Oxford University Press, 2015, p. 803.

Here they must be read in through a highly probable causal relationship between subsidies and overfishing. Beyond question, capacity enhancing subsidies lead to overcapacity, however, nowhere in *UNCLOS* is it mentioned that overcapacity is prohibited. Scientific data, research and cooperation, as previously mentioned, are fundamental aspects of EEZ marine living resource management. Therefore, if the coastal State's data and research were to reveal paltry fish stocks, continued efforts to increase fishing efforts despite the data would appear to be in direct contradiction of conservation and management objectives of Part V and Part XII. This blatant disregard for current stock levels has left some oversized fishing fleets with too few domestic fish left to catch, which has instead shifted their interests to other EEZs.

### 3.4 Access to Surpluses

Within the EEZ, if the coastal State does not “have the capacity to harvest the entire allowable catch, [...they shall] give other States access to the surplus [...]”<sup>83</sup> Developing States that lack the capacity to reach the objective of optimum utilization enable this procedure most commonly<sup>84</sup> and as Lowe reveals, “the coastal State can charge other States for access to the surplus.”<sup>85</sup> As an example, “In 2004, the EU paid €86 million to Mauritania for access to its EEZ.”<sup>86</sup> These types of investments are critically important to the impoverished economies of many countries, such as those found in West Africa that often sell access rights to the massive fleets of China and the EU, for example. However, State practice has revealed that not only has the money charged, not sufficiently equated to the value of resources taken out,<sup>87</sup> but lack of enforcement powers has also resulted in considerable amounts of third-State overfishing to occur.<sup>88</sup> In the case of Mauritania, “Mauritania reports that fisheries agreement catch data are

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<sup>83</sup> *Supra*, note 9 at art. 62(2).

<sup>84</sup> Kiet Tuan Nguyen. “What are the consequences of overfishing in West-Africa, and how can sustainable and flourishing fisheries be promoted?” *Masters Thesis* (Faculty of Economics and Social Sciences: University of Agder), 2012, summary.

<sup>85</sup> Vaughan Lowe. “The Global Environment.” *International Law*, September 2007: 234-264, p. 245.

<sup>86</sup> *Ibid.*

<sup>87</sup> Boats from China and Europe caught fish valued at \$8.3 billion over 10 years (from 2000 – 2010) from the [West African] region. Only \$0.5 billion went back into local economies. See more at: [www.un.org/africarenewal/magazine/may-july-2017/overfishing-destroying-livelihoods](http://www.un.org/africarenewal/magazine/may-july-2017/overfishing-destroying-livelihoods).

<sup>88</sup> *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries*. Final Report, UK's Department for International Development (DFID), with support from the Norwegian Agency for Development Cooperation (NORAD), Marine Resources Assessment Group Ltd, London: UK Government, July 2005, Section 4.1.1.2, p. 39.

often reported very late and there is no provision for scrutiny of landing of catches outside Mauritania by Mauritanian officials.”<sup>89</sup> This exemplifies the obligations of flag States regarding jurisdiction and the importance of duty-compliance standards. Otherwise, third-party access can effectively create a loophole where developing States are financially pressured to sell access rights yet, they cannot enforce their own EEZ and effectively comply with *UNCLOS* obligations, while flag States seemingly do too little to prevent overfishing in many cases.

The aforementioned example illustrates a scenario, which could effectively lead to a dispute between the coastal State and the flag State. However, could there also be a dispute whereby a third State seeks to initiate proceedings against a coastal State for failure to comply with Part V obligations in regards to fisheries, such as setting a TAC or preventing fish stocks from reaching a level of endangerment through overexploitation?

### 3.5 Other Maritime Zones

Enshrined within *UNCLOS*, the territorial sea extends 12 nautical miles from the territorial baseline.<sup>90</sup> Section 1, Part 2 of *UNCLOS* affords sovereignty over the water column, seabed and airspace, effectively giving the coastal State sovereignty over the natural resources. Importantly, “the duties relating to conservation and management established by *UNCLOS* apply to the territorial sea.”<sup>91</sup> Yet, no mention of subsidies exists in the regime of the territorial sea/contiguous zone.

Under the high seas regime the freedom of fishing exists, yet this freedom must be exercised in accordance with “due regard” of other States.<sup>92</sup> Within Article 116, “all States have the right for their nationals to engage in fishing on the high seas subject to [...] their treaty obligations [...] as well as [...] the interests of the coastal State.”<sup>93</sup> Section 2 of the high seas regime calls for States to cooperate in the conservation and management of living resources, particularly through RFMOs. States are obliged to use the best scientific data available as well as generally recommended international minimum standards for conservation measures.<sup>94</sup> As an

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<sup>89</sup> *Ibid.*

<sup>90</sup> *Supra*, note 9 at art. 3.

<sup>91</sup> *Supra*, note 12.

<sup>92</sup> *Supra*, note 9 at art. 87.

<sup>93</sup> *Ibid.*, art. 116.

<sup>94</sup> *Ibid.*, art. 119.

*UNCLOS* implementing agreement, the *FSA* provides greater detail of these measures. Within the preamble of the *FSA*, “excessive fleet size”<sup>95</sup> is listed as a problem the *FSA* seeks to resolve. Furthermore, Article 5(h) of the *FSA* indicates that States shall, “take measures to prevent or eliminate overfishing and excess fishing capacity.”<sup>96</sup> Herein lies a direct link to subsidies, however this link is made through the *FSA*, with application specific to highly migratory and trans-boundary fish stocks on the high seas.

### **3.6 Conclusion**

Excessive fleet size is a direct result of capacity enhancing subsidies and an important link for subsidies in the realm of the law of the sea. However, the *FSA* is limited in its scope of application, specifically in regards to the EEZ. *UNCLOS* provides a framework for fisheries regulation, but it contains no explicit reference to fisheries subsidies. The most in depth fisheries provisions within *UNCLOS* are found in the EEZ regime, however the coastal State retains the sovereign rights over resource management. As previously indicated, Tanaka argues that current measures are insufficient. However, if these provisions are to be reinterpreted and weighed against environmental obligations, alternatives may be provided.

## **Chapter 4: *UNCLOS* Environmental Obligations for Coastal States**

The sovereign rights and duties within the EEZ are afforded to coastal and third States through Part V of *UNCLOS*. These rights however, must be balanced with environmental obligations, which are primarily regulated through Part XII of *UNCLOS*. The following section will address protection and preservation of the marine environment within the EEZ before addressing Part XII obligations and how the regime corresponds with Part V. This relationship poses an important question: within a coastal State’s own EEZ, do the sovereign rights to explore and exploit natural resources supersede environment obligations and duties? Furthermore, what is the limit of applicability for Article 192? These questions are important to essentially determine if the right to exploit living resources outweighs the wrongdoings of over-exploitation.

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<sup>95</sup> *Supra*, note 74 at preamble.

<sup>96</sup> *Ibid*, art. 5(h).

#### 4.1 Protection and Preservation of the Marine Environment – Part V

Regarding the protection and preservation of the marine environment within the EEZ, Article 56(1)(b)(iii) affords the coastal State ‘jurisdiction’ over such matters,<sup>97</sup> while creating rights and duties for other States. The distinctly different verbiage seen here, using ‘jurisdiction’ as opposed to ‘rights’ over marine resources provided for under Article 56(1)(a) implies authority versus access. The ‘weight’ afforded under *UNCLOS* Article 56(1)(b)(iii) is of considerable importance with respect to State jurisdiction to protect and preserve the marine environment. This provision however, must be read in accordance with Article 193<sup>98</sup> in its applicability regarding the relationship between ‘conservation’ and ‘protection’. It would appear that *UNCLOS* indicates a linkage of exploitation and management rights with the duties of the coastal State to protect the marine environment through the conservation of living resources. Czybulka notes, “[EEZ exploitation] rights are not given unconditionally.”<sup>99</sup> Furthermore, he suggests,

Coastal States have functional gathered competences and rights to exploit resources as well as competences and jurisdiction or other legal powers to pursue the integration of environmental policies in their national laws regarding human activities in the EEZ [...] in order to fulfil their specific duty as a coastal State to protect and preserve the marine environment.<sup>100</sup>

Article 58 of *UNCLOS* imposes specific obligations on the flag State within the EEZ of the coastal State.<sup>101</sup> Rights for the flag State include navigation, for example, while duties specifically pertain to due regard and compliance with the coastal States’ laws and regulations.<sup>102</sup> The basic obligation for the conservation and management of marine living resources within the EEZ is outlined under *UNCLOS* Article 61. In order to achieve this, the coastal State is obliged to set the total allowable catch within the EEZ. When achieving this, Article 61(4) of *UNCLOS* requires, “the effects on species associated with or depend upon harvested species”<sup>103</sup> to be taken into consideration. Harrison argues that “species” could include “any other flora or fauna living

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<sup>97</sup> *Supra*, note 9 at art. 56(1)(b)(iii).

<sup>98</sup> *UNCLOS* Art. 193: States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

<sup>99</sup> Detlef Czybulka. "Article 192-196." In *United Nations Convention on the Law of the Sea: A Commentary*, by Alexander Proelss (Ed.). Munich: C. H. Beck, 2017, p. 1292, para. 11.

<sup>100</sup> *Ibid*, pp. 1292-93, para. 12.

<sup>101</sup> *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, para. 111.

<sup>102</sup> *Supra*, note 9 at art. 58(3).

<sup>103</sup> *Ibid*, art. 61(4).

in the same marine ecosystem.”<sup>104</sup> This, in turn could be interpreted broadly enough so as to support an “ecosystems approach to fisheries.”<sup>105</sup> In order to substantiate his claims, Harrison cites Article 194(5) of *UNCLOS*, as well as the *South China Sea Arbitration*, which will be explored below. This highlights that exploitation freedoms often hinge first on a determination of the effects on the marine environment prior to implementation and subsequent exploitation.

#### 4.2 Can Exploitation and Environmental Protection Be Read Together?

United Nations Under-Secretary-General for Legal Affairs, Miguel de Serpa Soares, states, “*UNCLOS* embodies the three pillars of sustainable development; social, economic and environmental and sets forth the legal framework for the sustainable development of the oceans and seas.”<sup>106</sup> However, it must be noted that sustainable development can only be implicitly read into *UNCLOS*, as the term is nowhere explicitly mentioned. In support of this notion, Lyons argues, “*UNCLOS* Article 193 is about sustainable development.”<sup>107</sup> Here we can begin to see that exploitation is to be read in accordance with general environmental provisions to achieve sustainability. However, there is an argument to be made that the general obligation found under Article 192 to protect and preserve the marine environment is inapplicable under Part V of *UNCLOS*.<sup>108</sup> The language contained under Article 56 mirrors that of Article 192, specifically ‘protection and preservation of the marine environment.’ Interpreting Article 192 as inapplicable due to the “more specific regulation”<sup>109</sup> contained under Part V however would be incorrect. In this light, Czybulka notes, “Art. 56(1) assigns jurisdiction to coastal States in the EEZ specifically in order to enable them to implement the duties of the environmental part of the Convention.”<sup>110</sup> Additionally, under *UNCLOS* Article 56(1)(b), the words “as provided for in the

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<sup>104</sup> James Harrison. *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment*. Oxford: Oxford University Press, 2017, p. 170.

<sup>105</sup> *Ibid.*

<sup>106</sup> Miguel de Serpa Soares. *Achieving SDG 14: the Role of the United Nations Convention on the Law of the Sea*. UN Chronicle: May 2017. Online: [unchronicle.un.org/article/achieving-sdg-14-role-united-nations-convention-law-sea](http://unchronicle.un.org/article/achieving-sdg-14-role-united-nations-convention-law-sea) (Accessed June 8, 2018).

<sup>107</sup> Youna Lyons. Powerpoint: *UNCLOS as the Cornerstone in the Implementation of SDG 14: A Central Integrative and Framing Role*. Centre for International Law, National University of Singapore. Nadi, Fiji, November 17-18, 2017. Found at: Online: [cil.nus.edu.sg/wp-content/uploads/2017/12/YounaLyons\\_UNCLOS\\_Cornerstone\\_Fiji17Nov2017.pdf](http://cil.nus.edu.sg/wp-content/uploads/2017/12/YounaLyons_UNCLOS_Cornerstone_Fiji17Nov2017.pdf) (Accessed August 7 2018), slide 3.

<sup>108</sup> *Supra*, note 99 at p. 1280, para. 6.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

relevant provisions of this convention,”<sup>111</sup> are in direct reference to Part XII,<sup>112</sup> thus enabling the relationship.

### **4.3 Protection and Preservation of the Marine Environment – Part XII**

‘Protection and preservation of the marine environment’ is a fundamental part of *UNCLOS* (Part XII), which applies to all maritime zones.<sup>113</sup> Part XII is the most far-reaching instrument for which the marine environment is substantially protected. Article 192 establishes duties, while sovereign rights are outlined under Article 193 “regarding the stewardship of the oceans.”<sup>114</sup> Article 192 confers a general obligation on States that must be considered, while succeeding articles outline more specific provisions primarily related to pollution. However, in *Chagos Marine Protected Area*, the Tribunal rejected that Part XII is solely limited to measures regarding pollution.<sup>115</sup> This finding expands the general obligation under *UNCLOS* Article 192, which still remains broad, ultimately extending the limits further. Due to its indefinite limits, the scope of applicability is not pre-defined. In this light, it demands further attention.

### **4.4 The General Obligation of Article 192**

The general obligation under Article 192 reflects the entire scope of the subsequent section. As the article is general in nature, it thereby fails to set the limits of application, or expand on the words within the provision. In order to specify these, one must first interpret the meaning of the individual terms of the provision in accordance with their ordinary meaning and in light of their context and purpose in accordance with the *VCLT*.

#### **4.4.1 The Meaning of ‘Protect’ and ‘Preserve’**

A simplified understanding of the terms, ‘protect’ and ‘preserve’ might suggest that

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<sup>111</sup> *Supra*, note 9 at art. 56(1)(b).

<sup>112</sup> *Supra*, note 99 at p. 1280, para 6.

<sup>113</sup> *South China Sea Arbitration*, Philippines v China, Award, PCA Case No 2013-19, ICGJ 495 (PCA 2016), 12<sup>th</sup> July 2016, Permanent Court of Arbitration [PCA], para. 940.

<sup>114</sup> *Ibid*, p. 1278, para 1.

<sup>115</sup> *Chagos Marine Protected Area Arbitration*, Mauritius v United Kingdom, Final Award, ICGJ 486 (PCA 2015), 18th March 2015, Permanent Court of Arbitration [PCA], para. 320.



‘protect’ entails the prevention of harm from occurring, while ‘preserve’ relates to maintaining the current condition. This interpretation is supported by Czybulka, who stated, the “wide-ranging [Article 192 obligation] requires the prevention of suspected negative changes of the marine environment through its use.”<sup>116</sup> Furthermore, the obligation requires “taking active measures to preserve the ocean as an ecosystem and to minimize pollution.”<sup>117</sup> Although “ecosystem” is only mentioned once in *UNCLOS* under Article 194(5), Czybulka’s interpretation could be read so as to include the ecosystem approach into the reading of Article 192. This is especially pertinent as there is no set definition of the ecosystem approach.<sup>118</sup> Perhaps the most valuable analysis of Article 192 in relation to ‘protect and preserve’ was determined in the *South China Sea Arbitration*:

The “general obligation” extends both to “protection” of the marine environment from future damage and “preservation” in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and [...] entails the negative obligation not to degrade the marine environment.<sup>119</sup>

Not only does the Tribunal’s interpretation shed some light on what ‘protect and preserve’ entails, but also they defined them in light of the positive and negative obligations, which will be expanded on in due course.

#### 4.4.2 The Meaning of ‘Marine Environment’

The ordinary meaning of ‘marine environment’ could be described as a comprehensive area so as to include everything below the water, as well as those areas in the immediate vicinity that share the water, such as beaches or airspace. The *Legality of the Threat or Use of Nuclear Weapons*<sup>120</sup> and *Iron Rhine*<sup>121</sup> made efforts to define environment, but the definitions lacked specificity relating to the marine environment. Malta’s draft articles for the *Convention* provided arguably one of the best definitions; “the marine environment comprises the surface of the sea,

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<sup>116</sup> *Supra*, note 99 at p. 1286, para 23.

<sup>117</sup> *Ibid.*

<sup>118</sup> Elizabeth A. Kirk. "The Ecosystem Approach and the Search for An Objective and Content for the Concept of Holistic Ocean Governance." *Ocean Development & International Law* 46, no. 1 (2015): 33-49, p. 37.

<sup>119</sup> *Supra*, note 113 at para. 941.

<sup>120</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ) 8 July 1996, para. 29.

<sup>121</sup> *Iron Rhine Arbitration*, Belgium v Netherlands, Award, ICGJ 373 (PCA 2005), 24<sup>th</sup> May 2005, Permanent Court of Arbitration [PCA], para. 58.

the air space above, the water column and the seabed [...] including the biosystems therein or dependent upon.”<sup>122</sup> The status as a preparatory work of *UNCLOS* is important, as this definition would qualify as a supplementary means of interpretation under Article 32 of the *VCLT*.<sup>123</sup>

#### 4.5 General Obligation of Article 192

Through interpreting the wording of Article 192, the scope becomes clearer, however the obligations that are imposed require further insight. As the protection and preservation must be considered in all maritime zones, it would naturally follow that the general obligation is universally obligatory. Although this has not received universal endorsement, Harrison notes, the terms ‘protect and preserve,’ as espoused under Article 192, “arguably”<sup>124</sup> creates an *erga omnes* binding obligation on all States within all maritime zones. “The [...] obligation rather requires the prevention of suspected negative changes of the marine environment [...] [including] taking active measures to preserve the ocean and an ecosystem [...].”<sup>125</sup> Such measures endeavour not only to preserve the marine environment in the future, but also to maintain or improve the present condition.<sup>126</sup> This means that coastal States’ sovereign rights over resources are, “broad but not unlimited.”<sup>127</sup> The *South China Sea Arbitration* aptly characterized these differing obligations as positive and negative obligations,<sup>128</sup> and found “this duty informs the scope of the general obligation in Article 192.”<sup>129</sup> In this light, one could make the case that both negative and positive obligations apply to governments subsidizing flag State and coastal State vessels. Nilufer Oral suggests, “this would have tremendous significance for States to bring actions for harm to the marine environment of shared marine spaces regardless of sovereignty or maritime

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<sup>122</sup> “Malta: Draft Articles on the Preservation of the Marine Environment.” *International Legal Materials* (Cambridge University Press) 12, no. 3 (May 1973): 583-590, art. 1.

<sup>123</sup> *Supra*, note 14 at art. 32.

<sup>124</sup> *Supra*, note 104 at p. 24.

<sup>125</sup> *Supra*, note 99 at p. 1286, para 23.

<sup>126</sup> *Ibid*, p. 1286, para 24.

<sup>127</sup> *Land Reclamation by Singapore in and around the Straits of Johor*, Malaysia v Singapore, Provisional measures, ITLOS Case No 12, ICGJ 354 (ITLOS 2003), 8<sup>th</sup> October 2003, International Tribunal for the Law of the Sea [ITLOS], [Joint Declaration of Judges *Ad Hoc* Hossain and Oxman].

<sup>128</sup> *Supra*, note 113.

<sup>129</sup> *Ibid*, para. 941.

entitlements.”<sup>130</sup> However, one must first determine the extent to which this obligation extends and whether it creates an *erga omnes* binding obligation on all States.

#### 4.6 Are UNCLOS Article 192 Obligations *Erga Omnes*?

For any third party to be able to bring a case against a coastal State, the obligation must be *erga omnes*, and, “the obligation described in Article 192 applies to and is owed to all States.”<sup>131</sup> It is unclear in law (still) whether or not Part XII obligations are obligations *erga omnes*, as well as whether they are applicable to a coastal State’s EEZ. Johnstone indicates, “[Little] has been written about third States’ rights to invoke responsibility when a State willfully or negligently contaminates its own EEZ.”<sup>132</sup> However, if the obligation is in fact owed to all States, then it most likely concerns all States. Henriksen who argued, “The obligations to protect and preserve the marine environment probably qualifies as an *erga omnes* obligation,”<sup>133</sup> reached a similar conclusion. Unfortunately, academics have been generally reluctant to actually affirm peremptorily that Part XII obligations are *erga omnes*, as indicated by use of their language such as ‘probably’, ‘arguably’, etc.<sup>134</sup> Fitzmaurice has somewhat expressed his doubts,<sup>135</sup> while tribunals have sidestepped the question altogether, seen most recently in *South China Sea*.

“The doctrine of an obligation *erga omnes* means that a State need not show actual direct harm in order to hold another State responsible for a breach of an international obligation.”<sup>136</sup> Additionally, Mendis notes, “the concept of *jus cogens*<sup>137</sup> also provides a legal ground for the action of states not directly damaged,”<sup>138</sup> yet Malm unconvincingly suggests “*erga omnes* may

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<sup>130</sup> Oral Nilufer. “The South China Sea Arbitral Award: A Triumph for Part XII of UNCLOS and the Protection and Preservation of the Marine Environment.” *Session 5 on Marine Environmental Protection*, Draft, Faculty of Law, Istanbul Bilgi University, 2017, p. 20.

<sup>131</sup> *Supra*, note 104 at p. 24.

<sup>132</sup> Rachael Lorna Johnstone. “Development in the Arctic under International Law: Risk and Responsibility.” *Queen Mary Studies in International Law* (Koninklijke Brill NV) 14 (2015): p. 224.

<sup>133</sup> Tore Henriksen. “The Arctic Ocean, Environmental Stewardship, and the Law of the Sea.” *UC Irvine Law Review* 6:61 (2016): 61-82, p. 71.

<sup>134</sup> Yoshifumi Tanaka. “Protection of Community Interests in International Law: The Case of the Law of the Sea.” Edited by A. von Bogdandy and R. Wolfrum (eds.). *Max Planck Yearbook of United Nations Law* (Koninklijke Brill N.V.), 15: 2011: 329-375, pp. 332-33.

<sup>135</sup> Jean Allain, Siobhan Mullally (eds.). *The Irish Yearbook of International Law* (Hart Publishing), 1: 2006, p. 15.

<sup>136</sup> *Supra*, note 130 at p. 19.

<sup>137</sup> For more of an in-depth analysis of the concept of *jus cogens*, please see Whiteman at: [digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2318&context=gjicl](http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2318&context=gjicl).

<sup>138</sup> Chinthaka Mendis. “Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamudram Ship Channel Project.” United Nations/ Nippon Foundation, 2006, p. 51.

have the nature of *jus cogens* as well.”<sup>139</sup> The threshold for invoking a violation against a coastal State then does not necessarily demand individual harm. “Thus, any State will have standing to sue for breach or non-compliance.”<sup>140</sup> Environmental harm per se can be traced back to the term “wrongful act,” which in turn falls under Article 2: *Elements of an internationally wrongful act of a State*, under the 2001 International Law Commission (ILC) Articles on the *Responsibility of States for Internationally Wrongful Acts*. There is an internationally wrongful act when, “conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”<sup>141</sup> Acts contrary to the provisions of Part XII under *UNCLOS* might satisfy many of the requirements under the ILC Articles.

There is some debate on whether the Draft Articles are binding or not on States, hence at the very least, they are soft law.<sup>142</sup> However, as Beckman and Davenport state, the strength of soft law “should not be underestimated.”<sup>143</sup> “International courts have taken into account soft-law principles in so far as they articulate general principles agreed by consensus.”<sup>144</sup> As representative of *opinion juris*, they are an “authoritative statement of the rules on State responsibility,”<sup>145</sup> and may assist in strengthening the case to bring an *erga omnes* suit against a State for effectively facilitating overfishing through harmful subsidies.

The ILC Draft Articles were referred to in the Seabed Dispute Chamber’s Advisory Opinion: *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, however the scope of application was limited to two maritime zones. Referencing Article 48 of the ILC Draft Articles, ITLOS stated, “Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area.”<sup>146</sup> Interestingly though, in the Draft Articles, the ILC mentioned environment as a collective interest which might

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<sup>139</sup> Gregor Noll, “State Responsibility in relation to Transboundary Environmental Damage.” *Masters Thesis* (Faculty of Law: University of Lund), Spring 2007, p. 21.

<sup>140</sup> *Supra*, note 99 at pp. 1285-86.

<sup>141</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, art. 2.

<sup>142</sup> “Sixth Committee (Legal) – 71<sup>st</sup> session: Responsibility of States for internationally wrongful acts (Agenda item 71). *General Assembly of the United Nations*, 2016, Online: [www.un.org/en/ga/sixth/71/resp\\_of\\_states.shtml](http://www.un.org/en/ga/sixth/71/resp_of_states.shtml) (Accessed July 28, 2018).

<sup>143</sup> Robert Beckman, Tara Davenport. “The EEZ Regime: Reflections after 30 Years.” *LOSI Conference Papers, 2012 – “Securing the Ocean for the Next Generation.”* (LOSI, University of California, Berkeley), May 2012, p. 34.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para. 180.

fall within the scope of *erga omnes*.<sup>147</sup> Meanwhile, Robinson argues, “The evidence in state practice is growing that the duty is at least *erga omnes*,”<sup>148</sup> which means judicial interpretation is the final hurdle to solidify its universal application.

#### 4.7 Due Diligence/Due Regard

To prove the harmlessness of an activity in order to fulfill its Part XII obligations, there is a process that requires the undertaking of due diligence. One case to shed light on this is *Land Reclamation by Singapore in and Around the Straits of Johor [Malaysia v Singapore] [Provisional Measures]*. Judges Hossain and Oxman determined that States must show due regard and take into account the rights of other States, as well as the protection and preservation of the marine environment.<sup>149</sup> Under this rationale, due diligence obligations must be taken to avoid negative changes of the marine environment. However, although closely linked, due diligence and due regard entail different responsibilities, which must be explored further.

##### 4.7.1 General Discussion of Due Diligence/Due Regard

Due diligence obligations are referred to only once under *UNCLOS*, while due regard is referenced frequently albeit with no set definition/explanation. Regarding its origins in *UNCLOS*, Gaunce states, “The obligation of “due regard” is one of the key mechanisms adopted in [*UNCLOS*] to balance the potentially competing interests of coastal states and other uses of the new maritime zone, the [EEZ], recognized by [*UNCLOS*].”<sup>150</sup> This explanation appears to indicate due regard as an abstract mechanism. In *South China Sea*, the Tribunal used the wording, “to exercise due diligence [and...] to exhibit due regard.”<sup>151</sup> From this wording, one could conclude that “exercise” entails a process of physically doing something, while “exhibit” means to demonstrate/prove that something has physically been done.

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<sup>147</sup> *Supra* note 141 at p. 126, para 10.

<sup>148</sup> Nicholas A. Robinson. “Environmental Law: Is an Obligation *Erga Omnes* Emerging?” *Panel Discussion at the United Nations* (New York) June 4, 2018, p. 2.

<sup>149</sup> *Supra* note 127.

<sup>150</sup> Julia Gaunce. “The South China Sea Award and the duty of “due regard” under the United Nations Law of the Sea Convention.” *The blog of the K.G. Jebsen Centre for the Law of the Sea*, September 9, 2016. Online: [site.uit.no/jclos/2016/09/09/the-south-china-sea-award-and-the-duty-of-due-regard-under-the-united-nations-law-of-the-sea-convention/](http://site.uit.no/jclos/2016/09/09/the-south-china-sea-award-and-the-duty-of-due-regard-under-the-united-nations-law-of-the-sea-convention/) (Accessed July 23, 2018).

<sup>151</sup> *Supra* note 113 at para. 757.

#### 4.7.2 The Relationship with *UNCLOS* Articles 192 and 193

When asked to define “due diligence” in *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, the International Tribunal for the Law of the Sea (ITLOS) instead referred back to relevant case law. Referring specifically to *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, due diligence was defined as:

An obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.<sup>152</sup>

*South China Sea* mirrors this initial definition where due diligence refers to the active obligation to adopt and exercise tangible rules and measures (the process), followed by the due regard obligation to exhibit and prove them. From this obligation, “adopting appropriate rules and measures to prohibit a harmful practice is only one component of the due diligence required by States pursuant to the general obligation of Article 192.”<sup>153</sup>

*UNCLOS* Article 193 confirms this notion as it remarks, “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.”<sup>154</sup> Interpreting this based on the aforementioned conclusion would mean that the process of adopting and implementing environmental policy would fall under the scope of due diligence. Meanwhile, due regard falls under the positive obligation to show measures have been taken regarding marine environmental protection and preservation. However, Article 193 must be read in the context of Article 192, which is broad in its obligations. In this light, Schatz argues, “The wording of Art. 192, however, is too general to establish a qualified due diligence obligation on the flag state.”<sup>155</sup> This generality however applies to the flag State in this regard, but coastal States in general, as Article 193 is more precise in its obligations to the coastal State.

Under *UNCLOS* Article 193, the word ‘pursuant’ supports the argument that environmental policy supersedes exploitation rights. Rothwell and Stephens argue, “This duty is

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<sup>152</sup> *Case Concerning Pulp Mills on the River Uruguay*, Argentina v Uruguay, Judgment on the merits, ICGJ 425 (ICJ 2010), 20<sup>th</sup> April 2010, International Court of Justice [ICJ], para. 197.

<sup>153</sup> *Supra* note 113 at para. 964.

<sup>154</sup> *Supra* note 9 at art. 197.

<sup>155</sup> Valentin J. Schatz. “Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ.” *Ocean Development & International Law* 47, no. 4 (2016): 327-345, p. 333.

elevated above the sovereign right of States to exploit their natural resources.”<sup>156</sup> Additional support of this notion are echoed under Principle 2 of the *Rio Declaration on Environment and Development*, Principle 21 of the *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*, as well as Article 3 of the *Convention on Biological Diversity (CBD)*. All of these legal instruments reiterate that the sovereign right to exploit resources is pursuant to their own environmental policy, consistent with Part XII of *UNCLOS*.

Ultimately, *UNCLOS* Article 192 provides a general obligation on States to protect and preserve the marine environment. This creates a positive due diligence obligation to take steps to avoid harm from happening. Article 193 confirms States have the sovereign right to exploit their resources, but only in accordance with the elevated provision of Article 192 over both Article 193, as well as sovereign exploitation rights.

#### **4.8 Limit of Applicability for Article 192**

In order to determine whether or not subsidies could fall within *UNCLOS* Article 192, the limit of said article must first be scrutinized. As previously discussed, subsidies must be read implicitly into *UNCLOS*, and there is nothing prohibiting overcapacity. However, overcapacity often leads to overfishing and if a coastal State continued to entice and increase fishing efforts, despite worsening stock depletion, this could be viewed as contrary to Article 192.

The wording of Article 192 is vague, but it provides a general obligation. As it would be impossible for *UNCLOS* to remain completely relevant with changing ocean trends, the treaty was designed to incorporate rules of reference. Czybulka notes, “Part XII is designed as an environmental framework and specifically leads the way to further embodiments through regional and sub-regional treaties and agreements.”<sup>157</sup> Therefore, Article 192 must be interpreted in the form of other agreements and this informs the limit. The FAO is responsible for numerous soft-law documents related to overfishing and unregulated fishing, such as the *Code of Conduct for Responsible Fisheries*, which indicates States should prevent overfishing and excess fishing capacity.<sup>158</sup> The *FSA* preamble also indicates this issue as a target to prevent. Furthermore, UN voluntary agreements such as the SDGs directly address subsidies and their role in overfishing.

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<sup>156</sup> *Supra* note 52 at p. 370.

<sup>157</sup> *Supra* note 99 at p. 1281.

<sup>158</sup> FAO. *Code of Conduct for Responsible Fisheries*, Rome: 1995. 41 p. art. 6.3.

*UNCLOS* Article 237 enables one to interpret Article 192 more broadly so as to include the compatibility with other (more specific) agreements in the endeavour to protect and preserve the marine environment. This ultimately appears to create a positive obligation on the coastal State. However, the incorporation of other rules and agreements may ultimately fall flat given the rule of *pacta tertiis*, unless the rules are read into to inform the scope of Article 192, such as the way the tribunal in the *South China Sea Arbitration* used the *CBD* to inform the applicability of ecosystem in accordance with Article 237.<sup>159</sup>

#### 4.9 Conclusion

Under *UNCLOS* Article 56(1)(a), it is not entirely clear whether or not exploring and exploiting were meant to be read in accordance with conserving and managing, or not. However, scholars indicate sustainable development is intrinsic to *UNCLOS*, which would suggest a unified reading is to be undertaken. The ‘weight’ of environmental jurisdiction under Article 56(1)(b)(iii) is significant in nature too, as its potential to hamper freedom of navigation, for example, is noteworthy. But, one must take care to note the due regard obligation on visiting third States.

Part XII creates a general obligation on States, yet its *erga omnes* powers are not absolute as the debate continues amongst legal scholars. However, ‘protect and preserve,’ as well as ‘marine environment’ cover a large scope of applicability, which has largely been determined through relevant case law. Within this scope, as per *South China Sea*, there exists both positive and negative obligations. States are under a due regard obligation to show they have exercised due diligence in order to avoid negative effects of their actions on the marine environment. Here one could find an implicit inclusion of preventing subsidies leading to overcapacity and overfishing. Positive/negative obligations are paramount and exhibited through a myriad of treaties, which explicitly mention; exploitation rights must be pursuant to environmental policy. From this, it is shown that Part XII obligations supersede Part V coastal State exploitation rights and freedoms. Furthermore, the marine environment covers a wide array of application, and specifically in line with the ruling of *Southern Bluefin Tuna*, applies to marine living resources. However, the limit of applicability of Article 192 may ultimately depend on the obligations under other conventions as they might inform the limit through more specific rules and standards.

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<sup>159</sup> *Supra* note 113 at para. 945.



## **Chapter 5: Dispute Settlement for EEZ Fisheries**

After determining environmental obligations outweigh exploitation rights within the EEZ, it must now be determined whether harmful subsidies can be deemed in breach of *UNCLOS*. If so, what legal options under *UNCLOS* exist for mandatory dispute settlement procedures for subsidies contributing to overfishing within the EEZ? In this light, the State responsible for the action, as well as the obligation that has been breached must be first determined. The role of coastal State and flag State will be contrasted in this regard. Lastly, a brief overview of ‘flags of convenience’ will be undertaken to illustrate one of the ongoing issues for fisheries management.

As previously concluded in Chapter 2, it can be viably argued there exists a causal relationship between overfishing and capacity enhancing subsidies, although each case should be examined individually. Although there currently exists some options for mandatory dispute settlement within the *UNCLOS* regime pertaining to overexploitation of marine fisheries, such as ITLOS, the ICJ, or an Annex VII arbitral tribunal, these options may only be enforceable against the flag State and subsidies must be implicitly included. In addition, as Schatz points out, “flag States would not be liable even in cases of noncompliance of their vessels provided the flag state undertook “all necessary and appropriate measures” to meet its due diligence obligations.”<sup>160</sup>

Regarding coastal State fisheries discretion within the EEZ, Article 297(3)(a) provides an exclusion clause. However, there may exist a bypass option under Article 298(1)(b). Furthermore, the possible inclusion of biodiversity may lead towards another alternative way to frame the issue of subsidies leading to overfishing under *UNCLOS*.

### **5.1 Do Harmful Fisheries Subsidies Breach *UNCLOS*?**

Many States would argue that fisheries subsidies fall exclusively under WTO law, and that would not be the first time a trade/*UNCLOS* issue has been the subject of deciding in which legal framework to address the issue.<sup>161</sup> As subsidies are nowhere explicitly mentioned in *UNCLOS*, they must first be interpreted indirectly under the general obligation of Article 192, and subsequently balanced with exploitation rights under Article 193 and Part V. Additionally,

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<sup>160</sup> *Supra* note 155 at p. 338.

<sup>161</sup> See *Shrimp-Turtle* or *Chile-EU Swordfish Dispute*.

subsidies should be read through the use of “activities,” espoused through EIAs, as well as a root cause in domestic overfishing practices. These harmful practices ultimately violate both general and specific Part V/Part XII obligations. Ishikawa states, “It should be noted that the [European] Commission might find that the provision of fisheries subsidies contributing to IUU [illegal, unreported and unregulated] fishing *indirectly* constitutes a violation of [UNCLOS], depending on the facts of the case.”<sup>162</sup> In April 2015, the European Commission flagged Thailand for contributing to IUU fishing outside its maritime zones. The basis for its decision was, “declining fish stocks, reduced fishing area (EEZ area closures and loss of access to third country coastal states waters) and an increasing fishing capacity (circa 4 000 commercial vessels in 2011 to 7 000 in 2014).”<sup>163</sup> Although Ishikawa uses IUU fishing and the Commission as an example, harmful capacity-enhancing subsidies leading to overexploitation were directly linked to the root cause and can have a similar result as IUU fishing on the marine environment, and in some cases, such as that of Thailand, can even help perpetuate IUU fishing.

Whenever something is not explicitly mentioned, it must be examined whether or not the scope is wide enough to be read implicitly to find legal relevance. The fundamental issue is the practice of overfishing as it violates environmental provisions spanning numerous treaties, including *UNCLOS* and the *CBD*. Overfishing causes negative reactions to the marine environment and the general ecosystem. Within the scope of *UNCLOS* Part XII, financially facilitating fisheries growth in an environment that cannot sustain it might be interpreted as an activity, thus demanding an EIA be conducted. The coastal State is accountable for overseeing the exploitation of living resources within its maritime zones, and if it neglects them in such a way so as to cause depletion, either proper scientific research has not been adequately conducted, or the enforcement of vessels under its jurisdiction was insufficient. As was the case in Canada, the government subsidized the industry to a degree of unsustainability, which inevitably led to the depletion of its cod fishery. Herein lies but one example of what can ultimately become of this practice, which should give an *UNCLOS* dispute settlement court/tribunal the jurisdiction *ratione materiae*. Although it may be concluded that subsidies play a part in contributing to

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<sup>162</sup> Yoshimichi Ishikawa. “Post-Buenos Aires: Fisheries Subsidies Contributing to IUU Fishing through Unilateral Trade Measures?” *EJIL: Talk! Blog of the European Journal of International Law*, January 12, 2018. Online: [www.ejiltalk.org/post-buenos-aires-tackling-fisheries-subsidies-contributing-to-iuu-fishing-through-unilateral-trade-measures/](http://www.ejiltalk.org/post-buenos-aires-tackling-fisheries-subsidies-contributing-to-iuu-fishing-through-unilateral-trade-measures/) (Accessed August 13, 2018).

<sup>163</sup> “Commission Decision of 21 April 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing.” *Official Journal of the European Union* C 142. (April 29, 2015): 7-17, para. 31.

overfishing, the crux of the issue is overfishing in and of itself, and how it breaches *UNCLOS* obligations under Part V and Part XII. These obligations *should* outweigh those within the realm of the WTO, despite the exclusive mention of subsidies there. Ultimately, *UNCLOS* should provide jurisdiction *ratione materiae* as the more specific treaty regarding the environment.

## 5.2 Responsibility for Overfishing Within the EEZ

“Responsibility”<sup>164</sup> for overexploitation of marine living resources within an EEZ depends on numerous factors. Firstly, one must determine if the coastal State overexploited the resource, or if it was a third-party/separate State. Secondly, it must be specified if there was a breach of coastal State or flag State obligations. As previously determined, Part V allocates exclusive jurisdiction for coastal States to manage marine living resources within 200nm. However, this jurisdiction is subject to the provisions under Part XII, relating to protection and preservation of the marine environment.

Regarding the role of flag States whose vessels operate within the EEZ of other States, Wolfrum says, “[*UNCLOS*] says nothing explicitly on this subject.”<sup>165</sup> Under *UNCLOS* Article 58, “States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State.”<sup>166</sup> From the wording, this indicates a mandatory minimum, meaning, “flag States can therefore adopt, apply, and enforce stricter laws governing activities of fishing vessels flying their flag in the EEZ of other States.”<sup>167</sup> Within Part V, these regulations are more specifically evinced under *UNCLOS* Article 62(4)(a-k). Importantly, this obligation also falls under the realm of Part XII in general scope and

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<sup>164</sup> “Responsibility” is to be interpreted in accordance with ITLOS’ Advisory Opinion for *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, specifically paragraph 66 which states, “‘responsibility’ refers to primary obligations where as the term ‘liability’ refers to the secondary obligation.” This interpretation is substantiated through *UNCLOS*’ layman’s terms application of the word. This clarification is to avoid interpreting “responsibility” in the realm of “State responsibility” following the International Law Commission’s *Draft Articles on the International Responsibility of States*. As aptly determined in para. 47 of *Gabčikovo-Nagymaros*, “[State responsibility has] a [separate] scope that is distinct.”

<sup>165</sup> Rüdiger Wolfrum. "The potential of the International Tribunal for the Law of the Sea in the management and conservation of marine living resources ." *Presentation given by the President of the International Tribunal for the Law of the Sea to the Meeting of the Friends of the Tribunal at the Permanent Mission of Germany to the United Nations in New York*. New York, 21 June 2007, p. 4.

<sup>166</sup> *Supra* note 9 at art. 58(3).

<sup>167</sup> Valentin J. Schatz. "Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State." *Goettingen Journal of International Law* 7 (2016): 383-414, p. 395.

application. Furthermore, Wolfrum states, “It may be argued that there is a mutual obligation to reinforce each other’s efforts to manage and conserve the marine environment.”<sup>168</sup>

In addition to regulatory jurisdiction of the coastal State and flag State, Part V affords the coastal State with enforcement jurisdiction under *UNCLOS* Article 73. This article allows the coastal State to board, inspect, arrest and commence judicial proceedings as may be necessary.<sup>169</sup> Under Article 73(2), “Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.”<sup>170</sup> However, parallel jurisdiction exists consistent with *UNCLOS* Articles 58(2), 91 and 92 which affords the flag State jurisdiction over vessels in the high seas and EEZ, as well as “jurisdiction and control in administrative, technical and social matters,”<sup>171</sup> in accordance with Article 94. One argument made in this light limited Article 94 to navigation and not to fisheries.<sup>172</sup> However, this notion was made clear to include the conservation and management of marine living resources by ITLOS in *their Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*.<sup>173</sup>

One major advantage to coastal State enforcement jurisdiction is in regards to flags of convenience. Flags of convenience pose an additional threat for meaningful flag State governance worldwide. Essentially, “a flag of convenience is a legal identity for a ship [...] registered easily for a fee in a jurisdiction where it is not ultimately owned.”<sup>174</sup> These “open registries” often exercise very limited jurisdiction and enforcement. However, under Article 91(1) of *UNCLOS* there must exist a ‘genuine link’ between the ship and the State.<sup>175</sup> When inside the EEZ of a coastal State, if the visiting vessel acts in a way contrary to the laws of the coastal State, the coastal State has the power to enforce its laws and regulations. Yet, the requirement for enforcement often relies on suitable vessels to board, inspect and ultimately arrest. For developed States such as those in the European Union, or China and Japan, enforcement capabilities are less of an issue. However, for countries such as those off of Western Africa, following the allocation of surpluses, enforcement for overfishing within their EEZ is a difficult issue to mitigate.

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<sup>168</sup> *Supra* note 165 at p. 5.

<sup>169</sup> *Supra* note 9 at art. 73(1).

<sup>170</sup> *Ibid.*, art. 73(2).

<sup>171</sup> *Ibid.*, art. 94(1).

<sup>172</sup> *Supra* note 167 at p. 397.

<sup>173</sup> *Supra* note 101 at paras. 116-119.

<sup>174</sup> Van Fossen, Anthony. “Flags of Convenience and Global Capitalism.” *International Critical Thought* 6, no. 3 (2016): 359-377, p. 360.

<sup>175</sup> *Supra* note 9 at art. 91.

### 5.3 General Obligations

The general obligation of States regarding the settlement of disputes is found under Part XV of *UNCLOS*. Article 279 obliges States to, “settle any dispute between them concerning the interpretation or application of this *Convention* by peaceful means.”<sup>176</sup> Included in Part XV are procedures<sup>177</sup> and obligations<sup>178</sup> regarding peaceful means, conciliation,<sup>179</sup> compulsory procedures entailing binding decisions (Section 2),<sup>180</sup> as well as exceptions and limitations to the applicability of section 2<sup>181</sup> and optional exceptions to the applicability of section 2.<sup>182</sup> “The ICJ has indicated that the existence of a dispute is a matter to be determined objectively [...] and the mere assertion (or denial) of its existence by a State concerned is insufficient.”<sup>183</sup>

*UNCLOS* Article 59 is committed to the resolution of disputes regarding rights and jurisdiction in the EEZ by peaceful means. Conflicts shall be, “resolved on the basis of equity and in light of all the relevant circumstances [...] with the interests involved to the parties as well as to the international community as a whole.”<sup>184</sup> Consensual means should first be endeavoured to resolve a conflict, however, if that fails, “the dispute settlement provisions codified in Part XV ought to be activated.”<sup>185</sup> Under Part XV, disputes may be heard either through ITLOS, the ICJ, or by an ad-hoc arbitral body.<sup>186</sup> Pending the activation of a compulsory procedure entailing a binding decision, such a scenario could ultimately lead to the coastal State enacting Article 297(3)(a) if the dispute in question concerned the sovereign rights over its EEZ fisheries.

### 5.4 Exclusion Clause – Article 297(3)(a)

Despite the prevalence of *UNCLOS* articles obliging conservation and cooperation with

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<sup>176</sup> *Ibid*, art. 279.

<sup>177</sup> *Ibid*, arts. 280-1.

<sup>178</sup> *Ibid*, arts. 282-3.

<sup>179</sup> *Ibid*, art. 284.

<sup>180</sup> *Ibid*, arts. 286-96.

<sup>181</sup> *Ibid*, art. 297.

<sup>182</sup> *Ibid*, art. 298.

<sup>183</sup> Andrew Serdy. "Articles 279-285." In *United Nations Convention on the Law of the Sea: A Commentary*, by Alexander Proelss (Ed.). Munich: C. H. Beck, 2017, p. 1815, para 6.

<sup>184</sup> *Supra* note 9 at art. 59.

<sup>185</sup> Alexander Proelss. "Articles 55-60." In *United Nations Convention on the Law of the Sea: A Commentary*, by Alexander Proelss (Ed.). Munich: C. H. Beck, 2017, p. 459, para. 1.

<sup>186</sup> *Supra* note 9 at art. 287.

respect to domestic fish stocks, a major obstacle for protection and preservation of the marine environment within 200nm is found under Section 3 of Part XV: Settlement of Disputes. Article 297 outlines the Limitations on applicability of section 2. Distinctly, Article 297(3)(a) states,

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 [...].<sup>187</sup>

In examining the aforementioned article, one must first review the wording preceding the earliest comma. It has been noted, “[the] opening clause [...] was a confirmation of jurisdiction, not a limitation of it. If the words were to have meaning, the remainder of the subparagraph, which is where the limitation was to be found, ‘must be narrower in scope than the [...] first part.’”<sup>188</sup> Jurisprudence and various scholarly texts appear steadfast in that Article 297(3)(a) protects the coastal State from mandatory binding dispute settlement procedures regarding its discretion over EEZ fisheries.<sup>189</sup> If subsidies were to be implicitly read into the realm of *UNCLOS*, this exclusion may still apply if the issue was deemed a fisheries related issue. Although capacity enhancing fisheries subsidies often intensify State fisheries, the actual result of what the subsidies lead to may be where a potential dispute is established.

## 5.5 Interpretation of Article 297(3)(a)

Under Article 31(1) of the *VCLT*, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning...and in the light of its object and purpose.”<sup>190</sup> Herein lies a possible problem, as overexploitation *should* be viewed as an ‘abuse of rights’ and inconsistent with notions of ‘good faith’ as outlined under *UNCLOS* Article 300. One can make the argument that the original purpose and intention of *UNCLOS* was not to create a safeguard under Article 297(3)(a) that would effectively protect coastal States to destroy fish stocks.<sup>191</sup> This destruction

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<sup>187</sup> *Ibid*, art. 297(3)(a).

<sup>188</sup> Andrew Serdy. "Articles 297-299." In *United Nations Convention on the Law of the Sea: A Commentary*, by Alexander Proelss (Ed.). Munich: C. H. Beck, 2017, p. 1917, para. 23.

<sup>189</sup> For further discussion, please see Churchill at: [booksandjournals.brillonline.com/content/journals/10.1163/157180807781870336](https://booksandjournals.brillonline.com/content/journals/10.1163/157180807781870336), specifically page 288 onwards.

<sup>190</sup> *Supra* note 14.

<sup>191</sup> This will be discussed further in the section below.

(largely) affects the greater marine ecosystem<sup>192</sup> and is induced partially through fears of losing those stocks to other nations as well as a government-supported overcapacity of fisheries operations to do so.<sup>193</sup> Sumaila describes this endeavour as the “race to fish.”<sup>194</sup> Churchill and Lowe likens this competition to catch available fish as fueled by the over-capacity of the world’s fishing industries which, “puts pressure on fishery managers to increase TACs above the levels recommended by scientists and adopt less stringent conservation measures.”<sup>195</sup> This competition effectively leads to fisherman disregarding conservation measures, which in turn only leads to further degradation of living marine resources.<sup>196</sup>

Article 297(1)(c) outlines that in cases where, “a coastal State has acted in contravention [...of] standards for the protection and preservation of the marine environment,”<sup>197</sup> compulsory procedures entailing binding decisions shall be undertaken. As this binding article precedes the fisheries exception in Section 3, there appears some justification regarding the true intention of the drafters of the article. However, this argument is not devoid of scrutiny as the exception in 297(3)(a) remains explicit in its formulation.

In *Chagos*, the United Kingdom (UK) submitted, “the object of [Article 297(3)]... is to keep coastal State fisheries disputes out of court as far as possible. That’s what coastal States wanted, particularly Developing States, when they asked for creation of the [EEZ].”<sup>198</sup> Although this argument remains subject to discussion, it is clear that at the seventh session of the third conference of *UNCLOS*, Negotiating Group 5 was tasked with determining the settlement of EEZ disputes over fisheries.<sup>199</sup> The group implemented to do so consisted of 36 States, of which 27<sup>200</sup> are *presently* regarded as developing countries.<sup>201</sup> The Chairman of Negotiating Group 5,

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<sup>192</sup> One example to illustrate this point was the depletion of Cod fisheries off the east coast of Canada, which “fundamentally altered the food web and functioning of the ecosystem.” Please see: [www.environmental.science.org/environmental-consequences-fishing-practices](http://www.environmental.science.org/environmental-consequences-fishing-practices).

<sup>193</sup> *Supra* note 42 at p. 5.

<sup>194</sup> Rashid Sumaila. *The race to fish: how fishing subsidies are emptying our oceans*. The Conversation: October 18, 2015. Online: [theconversation.com/the-race-to-fish-how-fishing-subsidies-are-emptying-our-oceans-48227](http://theconversation.com/the-race-to-fish-how-fishing-subsidies-are-emptying-our-oceans-48227) (Accessed June 23, 2018).

<sup>195</sup> *Supra* note 2.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Supra* note 9 at art. 297(1)(c).

<sup>198</sup> *Supra* note 115 at para 246.

<sup>199</sup> James C. F. Wang. *Handbook on Ocean Politics and Law*. Westport: Greenwood, 1992, p. 477.

<sup>200</sup> "Third United Nations Conference on the Law of the Sea, 1973-1982." A/CONF.62/63, Montego Bay, 22 March 1978. Online: [legal.un.org/docs/?path=../diplomaticconferences/1973\\_los/docs/english/vol\\_9/a\\_conf62\\_63.pdf&lang=E](http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_9/a_conf62_63.pdf&lang=E) (Accessed July 1, 2018).

<sup>201</sup> "Country classification." *World Economic Situation and Prospects*. United Nations. 2014. Online: [www.un.org/en/development/desa/policy/wesp/wesp\\_current/2014wesp\\_country\\_classification.pdf](http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf) (Accessed July 1, 2018).

Constantine Stavropoulos, indicated that 34 of the 36 representatives pushed for the exclusion clause of Article 297(3), with conciliation emerging as a compromise.<sup>202</sup> The fear, predominately among developing countries was that, “[they] felt that their sovereign rights and discretions could not be effectively exercised ‘if they were to be harassed by an abuse of [...] applications to dispute settlement procedures.’”<sup>203</sup> The great irony however is that industrialized countries with heavily subsidized fishing fleets have been predominately responsible for overfishing within their own EEZs,<sup>204</sup> as well as others when paying for access rights to their surpluses.<sup>205</sup>

This *should* be examined in light of Article 31(1) of the *VCLT* as Article 297(3) of *UNCLOS* was originally advocated from a developing-State perspective to protect their own resources as many developing nations lacked and continue to lack the capacity<sup>206</sup> to domestically overfish.<sup>207</sup> Therefore, the protection of Article 297(3) appears significantly more ‘useful’ for industrialized countries that have expanded their fishing efforts to such a degree, which almost certainly was unforeseen at the drafting stages of *UNCLOS*. In *Chagos*, the UK argued, “[In] advocating an evolutionary and environmental interpretation of Article 297 Mauritius invites you to overturn a clear policy preference of the negotiating States at [the Conference].”<sup>208</sup> However, such an argument fails to acknowledge that exploitation and conservation can correlate. Given the circumstances of the case, perhaps the argument made by Mauritius was in fact evolutionary, so as to frame a marine protected area (MPA) dispute as concerning the protection of the marine environment, but so is *UNCLOS* in that light too. Alan Boyle stipulates, “[*UNCLOS*] was intended to be capable of further evolution through amendment, the incorporation by reference of other [GAIRAS], and the adoption of additional global and regional agreement and soft law.”<sup>209</sup> Ultimately, the Tribunal ruled against the UK’s prior argument as the UK had additionally focused on the protection of coral in their arguments, which demanded the decision go beyond

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<sup>202</sup> "Statement by the Vice-Chairman of the Delegation of the United States of America in Response to the Statement by the Chairman of the Group of 77 Regarding Deep Sea-Bed Mining Legislation (A/Conf.62/89)." *Ocean Yearbook Online* 2, no. 1 (1980): 466-515, p. 477.

<sup>203</sup> *Ibid.*

<sup>204</sup> See Introduction re: According to UNCTAD: The Mediterranean Sea is about 70 per cent exploited while the Black Sea is 90 per cent exploited. Both Seas are predominately surrounded and fished by Industrialized countries.

<sup>205</sup> *Supra* note 85.

<sup>206</sup> *Supra* note 202.

<sup>207</sup> Rüdiger Wolfrum, Nele Matz. "The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity." Edited by J.A. Frowein and R. Wolfrum (eds.). *Max Planck Yearbook of United Nations Law* (Kluwer Law International), 2000: 445-480, p. 450.

<sup>208</sup> *Supra* note 115 at para 246.

<sup>209</sup> Alan Boyle. "Further Development of the Law of the Sea Convention: Mechanisms for Change." *The International and Comparative Law Quarterly* 54, no. 3 (July 2005): 563-584, pp. 563-64.



strictly a fisheries dispute.<sup>210</sup> In light of these circumstances, an ecosystem approach was fittingly taken as the dispute predominately concerned an MPA.

An additional point to illustrate why EEZ overfishing might run contrary to the original purpose and meaning of Article 297(3) is why else would Part V of *UNCLOS* create obligations under the term *shall*, if they effectively carried no legal ‘weight’? On the one hand, one must take into account that this was a natural result of the ‘package deal’ and compromises reached so that *UNCLOS* could actually be concluded and signed/ratified by all States. On the other hand, why even include it at all if it carries no legal weight? Although the legal obligation remains in full force under international law, the reality is that options are limited for compulsory dispute settlement entailing binding decisions. For example, “Although the second sentence of [*UNCLOS*] Article 62[2] is phrased in mandatory terms, the coastal States’ obligation to open access for other states to the surplus can not be enforced.”<sup>211</sup> In this light, what alternatives are left for third parties against coastal States for detrimental fishing practices in an effort to protect and preserve the marine ecosystem, while fish stocks remain at levels equitable and sustainable for all?

## **5.6 Possible Article 297(3)(a) bypass option: Article 298(1)(b)**

Article 298(1)(b) might provide one avenue on which to address fisheries-related disputes in the EEZ within the mandatory dispute settlement fora. While prescriptive jurisdiction is excluded under Article 297(3)(a) of *UNCLOS*, enforcement jurisdiction under Article 298(1)(b) is not excluded. Prescriptive jurisdiction grants States with the power to regulate persons and things through the passage of laws. Enforcement jurisdiction grants States the power to enforce said laws within their territory. The University of Virginia’s Centre of Ocean Law and Policy’s Commentary on the *LOSC* argues, “Only disputes concerning the enforcement of provisions relating to [...] fisheries, which are not subject to the jurisdiction of a court or tribunal because of the express exceptions in Article 297[3], can be excepted by a declaration under Article 298.”<sup>212</sup> Therefore, under Article 298(1)(b), the law enforcement activities in regards to fisheries may not

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<sup>210</sup> *Supra* note 115 at para. 302.

<sup>211</sup> *Supra* note 207.

<sup>212</sup> Martin Tsamenyi, Ben Murray Milligan, Kwame Mfodwo. "Fisheries Dispute Settlement under the Law of the Sea Convention: Current Practice in the Western and Central Pacific Region." Edited by Q. Hanich and M. Tsamenyi (eds.). *Navigating Pacific Fisheries: Legal and Policy Trends in the Implementation of International Fisheries Instruments in the Western and Central Pacific Region* (Ancors), 2009: 146-162, p. 157.

be excepted. Notwithstanding, such a scenario whereby a State might arrest or enforce against the coastal State for its own fishing practices remains highly unlikely and injudicious.

Consistent with *UNCLOS* Article 298(1), a State may at *any time* declare in writing that it does not accept the category of dispute under Article 298(1)(b).<sup>213</sup> Currently, nineteen States have written declarations excluding such a category, with a few other States excluding a distinct court or tribunal only.<sup>214</sup> “In contrast, disputes concerning enforcement activities in relation to environmental offences [...] would not fall within the scope of this exclusion.”<sup>215</sup> This notion is pertinent given Wolfrum’s earlier statement that, “It may be argued that there is a mutual obligation to reinforce each other’s efforts to manage and conserve the marine environment.”<sup>216</sup>

### 5.7 Does Article 297(3)(a) extend so as to include *biodiversity*?

In *Chagos*, one argument made by the UK specifically warrants some added attention regarding how far reaching the EEZ fisheries exclusion clause goes. In acknowledging ‘sovereign rights’ as written under Article 297(3)(a) with respect to living resources in the EEZ, the UK advocated for a rather broad scope so as to include “the protection of biodiversity [in the exception].”<sup>217</sup> Such a point was subsequently challenged in *Chagos* as the ruling argued, “[the UK’s point is] not sustained by Arts. 61 and 62 of the [*UNCLOS*].”<sup>218</sup> “The protection of the biodiversity does not come under the sovereign rights concerning the protection and management of living resources [under the EEZ regime]. It is a matter of the protection of the environment [under Part XII].”<sup>219</sup> Where part of the arbitrators’ challenge falls short is that although the very notion of ‘sustainable development’ is omitted from original *UNCLOS* text, the notion has largely

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<sup>213</sup> *Supra* note 9 at art. 298(1).

<sup>214</sup> *Settlement of disputes mechanism: Choice of procedure*, UN: June 20, 2017, Online: [www.un.org/depts/los/settlement\\_of\\_disputes/choice\\_procedure.htm#choice%20of%20procedure](http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm#choice%20of%20procedure) (Accessed July 31, 2018).

<sup>215</sup> James Harrison. "Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone—Law and Practice." *Jurisdiction over Ships* (Koninklijke Brill NV) 80 (2015): 217-248, p. 247.

<sup>216</sup> *Supra* note 165 at p. 5.

<sup>217</sup> *Supra* note 115 at para. 289.

<sup>218</sup> “Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland.” *Reports of International Arbitral Awards* (United Nations) XXXI (2018): 359-606, para. 58.

<sup>219</sup> *Ibid*, para. 56.

been adopted through *UNCLOS* and its implementing agreements.<sup>220</sup> Sustainable development is inextricably linked to the EEZ,<sup>221</sup> and biodiversity should be read into *UNCLOS* Arts. 61 and 62, as well as a fundamental aspect of Part XII.

In *Southern Bluefin Tuna (Provisional Measures)*, the Court stated, “The conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.”<sup>222</sup> This view does not entirely lineup with the arbitrators’ argument in *Chagos*, while not entirely following the counter-argument made by the UK either. If biodiversity is to be read into Arts. 61 and 62 of *UNCLOS*, that does not automatically afford it the exclusion as provided under Article 297(3)(a). The Section 3 limitation under Part XV of *UNCLOS* applies merely to fisheries as a harvestable resource, most commonly intended for food.<sup>223</sup> This statement is realized as there is no explicit reference to biodiversity in *UNCLOS*, and no mention of fisheries related terms such as MSY and TAC, found in the *CBD*. Fisheries are dependent on biodiversity and vice versa, and as Macdonald states, “Without biodiversity, there is no future for humanity.”<sup>224</sup> Aspects of this sentiment are realized in the *CBD* and through the ecosystem approach. However, the findings of *Chagos* and *Southern Bluefin Tuna* conflict to some degree and ultimately, must be interpreted accordingly. The implications of such an interpretation can be far-reaching, yet it appears that the ruling in *Southern Bluefin Tuna* with respect to living marine resources has been the more widely accepted of the two (in this context) and the aforementioned quotation can be found extensively cited.<sup>225</sup>

*Chagos* was decided in 2015 and *UNCLOS* was adopted 33 years prior. These dates indicate that UK’s previous point, so as to include biodiversity in Arts. 61 and 62, should be

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<sup>220</sup> *The role of the United Nations Convention on the Law of the Sea and its implementing agreements in sustainable development*. February 18, 2014. [www.un.org/depts/los/convention\\_agreements/UNCLOS\\_sustain\\_dev.htm](http://www.un.org/depts/los/convention_agreements/UNCLOS_sustain_dev.htm) (Accessed August 2, 2018).

<sup>221</sup> J. F. Caddy, R.C. Griffiths. "The International Framework for Sustainable Development and Living Marine Resource Use." *Living marine resources and their sustainable development Some environmental and institutional perspectives* (FAO) No. 353 (1995), Online: [www.fao.org/docrep/003/v5321e/V5321E08.htm](http://www.fao.org/docrep/003/v5321e/V5321E08.htm) (Accessed August 4, 2018).

<sup>222</sup> *Southern Bluefin Tuna*, New Zealand v Japan, Provisional Measures, ITLOS Case No 3, (1999) 38 ILM 1624, ICGJ 337 (ITLOS 1999), 27th August 1999, International Tribunal for the Law of the Sea [ITLOS], para. 70.

<sup>223</sup> *Supra* note 207 at p. 464.

<sup>224</sup> Damian Carrington, *What is biodiversity and why does it matter to us?*. The Guardian: March 12, 2018. Online: [www.theguardian.com/news/2018/mar/12/what-is-biodiversity-and-why-does-it-matter-to-us](http://www.theguardian.com/news/2018/mar/12/what-is-biodiversity-and-why-does-it-matter-to-us) (Accessed July 29, 2018).

<sup>225</sup> Eva Romée van der Marel. “The due diligence obligations of the flag state with respect to its fishing vessels and the environment.” *The blog of the K.G. Jebsen Centre for the Law of the Sea*, October 18, 2016. Online: [site.uit.no/jclos/2016/10/18/the-due-diligence-obligations-of-the-flag-state-with-respect-to-its-fishing-vessels-and-the-environment/](http://site.uit.no/jclos/2016/10/18/the-due-diligence-obligations-of-the-flag-state-with-respect-to-its-fishing-vessels-and-the-environment/) (Accessed August 10, 2018).

deemed consistent with modern *UNCLOS* norms, jurisprudence and recent implementation agreements adopted to ‘fill any holes’ left in the original *UNCLOS* text. In that light, not only should the conservation and management of living resources be read alongside the protection of the environment, but also the protection of endangerment by overexploitation should go so far as to reflect biodiversity and marine habitats. This view is supported through *Southern Bluefin Tuna* and *South China Sea*.<sup>226</sup> Furthermore, these notions subsequently reflect the modern ecosystem approach and are therefore supported through *UNCLOS*, the *CBD* and *CITES* (among others), but not under the exclusion clause of *UNCLOS* Article 297(3)(a), which pertains solely to the harvesting of fish. Under this reasoning, Article 297(3)(a) should not include biodiversity.

## 5.8 Conciliation

Indeed, Article 297(3)(a) of *UNCLOS* provides a blanket protection from mandatory dispute settlement resulting in binding decisions regarding coastal State discretion for management over its fisheries. The wording and the intent of the provision should be read as ‘black and white.’ However, “if a state has manifestly failed to avoid overexploitation or is refusing to set TACs, it could be forced into a compulsory conciliation.”<sup>227</sup> Rothwell and Stephens note that the same applies, “where a coastal State has manifestly failed to adopt conservation and management measures to protect EEZ living resources.”<sup>228</sup> Either party to a dispute may unilaterally bring a dispute before compulsory conciliation under Annex V, Section 2, however, as Churchill notes, its “utility is perceived to be very limited as the report [...] is non-binding.”<sup>229</sup> In that light, if more meaningful change in a dispute is to be pursued, a different avenue may need to be taken. Nevertheless, Owen argues, “the possibility of scrutiny by a conciliation commission may be some incentive to a coastal State to, for example, avoid an allegation of manifest failure to adopt appropriate conservation and management measures.”<sup>230</sup>

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<sup>226</sup> *Supra* note 222 at para. 71, *Supra* note 113 at para. 1181(b).

<sup>227</sup> Solène Guggisberg, *The Use of CITES for Commercially-exploited Fish Species: A Solution to Overexploitation and Illegal, Unreported and Unregulated Fishing?* Hamburg Studies on Maritime Affairs (Springer), 2015, p. 33.

<sup>228</sup> *Supra* note 52 at p. 327.

<sup>229</sup> Robin Churchill, “‘Compulsory’ Dispute Settlement under the United Nations Convention on the Law of the Sea – How has it operated? Pt. 1 ” *Uio PluriCourts Blog*, June 9, 2016. Online: [www.jus.uio.no/pluricourts/english/blog/guests/2016-06-09-churchill-unclos-pt-1.html](http://www.jus.uio.no/pluricourts/english/blog/guests/2016-06-09-churchill-unclos-pt-1.html) (Accessed August 4, 2018).

<sup>230</sup> Daniel Owen, *In the Matter of the Rights and Obligations of Coastal States Under UNCLOS Regarding Fisheries Conservation and Management*, August, 26, 2016, Online: [www.sff.co.uk/wp-content/uploads/2017/03/Advice-26-Aug-2016.pdf](http://www.sff.co.uk/wp-content/uploads/2017/03/Advice-26-Aug-2016.pdf) (Accessed July 22, 2018), para. 130.

## 5.9 Conclusion

For a State to knowingly subsidize its fisheries to the point of overexploitation either within its own EEZ, or in the EEZ of another State, the effect is arguably a legal breach of its obligations under *UNCLOS*. Overexploitation *should* be read so as to violate both positive and negative environmental obligations under *UNCLOS*, as well as numerous other treaties, such as the *CBD*. However, the enforcement options depend on the maritime zone. If the overexploitation has occurred by the flag State in another EEZ, the coastal State maintains enforcement options under Part V, as well as Part XV options if the offence concerns the interpretation or application of *UNCLOS*. However, no State may enact a mandatory dispute settlement entailing a binding decision regarding the coastal State's management over its own fisheries. This exception, although initially written in favour of developing States, today predominately protects developed States who have the capacity to harvest their own TAC and more, largely through subsidies. This could very well run contrary to the ordinary meaning of the exclusion, but such would be objectionable at best. There does exist a bypass option through "enforcement" under Article 298(1)(b), but it appears as though a coastal State could initiate a written declaration immediately to nullify the option. Jensen and Bankes argue, "Articles 297 and 298 involve issues of important national interest."<sup>231</sup> This is true, however one could argue their interpretation is wrong as it fails to acknowledge a vested international interest as well as the ecosystem approach to fisheries, which encompasses the entire ecosystem. The inclusion of biodiversity into Article 297(3)(a) through case law unintentionally raises various options, which will be explored in the subsequent chapter. Perhaps in this new light, and through an evolutionary interpretation of *UNCLOS*, there might prevail an option to mitigate the protections of overfishing within the EEZ.

## **Chapter 6: The Use of EIAs and the Ecosystem Approach**

Article 297(1)(c) stipulates that disputes related to the sovereign rights of a coastal State shall be subject to compulsory procedures entailing binding decisions when, "it is alleged that a coastal State has acted in contravention of specified international rules and standards for the

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<sup>231</sup> Øystein Jensen & Nigel Bankes. "Compulsory and Binding Dispute Resolution under the United Nations Convention on the Law of the Sea: Introduction." *Ocean Development & International Law* 48, no. 3-4 (2017): 209-215, p. 213.

protection and preservation of the marine environment [...].”<sup>232</sup> This begs the question of when a dispute relating to fisheries can be drawn under a logical legal conclusion as that primarily rooted in protection and preservation of the marine environment. One might first look to the preamble of *UNCLOS* as it is stipulated: “The problems of ocean space are closely interrelated and need to be considered as a whole.”<sup>233</sup> In this light, overexploitation could be interpreted as an issue for all States, as well as contrary to Part XII in a general sense. This sentiment is realized under the modern ecosystem approach, as living resources do not respect maritime zone boundary lines, whilst the interrelatedness and dependencies on all ocean species cannot be understated.

This chapter will review the question of whether the use of environmental impact assessments (EIAs) and the modern ecosystem approach in a subsidies fisheries dispute can help frame the issue as a Part XII dispute, thus enabling it to fall under the *UNCLOS* compulsory dispute settlement regime, and effectively subject to legally binding scrutiny. More specifically, breaches to the obligations of Article 192 and 193, as well as those found under Section 4, relating to monitoring and environmental assessment will be addressed.

A number of matters will first need to be visited in order to elaborate on this issue. First, the ecosystem approach, championed under the *CBD* will be interpreted so as to apply to the general obligations under Part XII as well as fisheries subsidies. The importance of this section is primarily rooted in strengthening a legal argument against overfishing and the subsidies that perpetuate it, while including a more modern approach to resource management. Furthermore, an ecosystem approach expands the scope of fisheries subsidies as their effects extend beyond simply fish. To illustrate, the effects of subsidizing fisheries can directly correlate with damage to the general ecosystem, as seen with the collapse of the Atlantic northwest cod fishery. This is important as the limit of Article 192 may be through the interpretation of other agreements, thus enabling the applicability of the ecosystem approach under the *CBD*.

Secondly, the principle of prevention will be briefly touched upon to guide the discussion into the realm of EIAs. EIAs most importantly demand the disclosure of information and the efforts of due diligence to be exercised. In order to fulfill this, fishery subsidy efforts by the State government may need to be characterized as a “project” to run congruently with case law, and fit the meaning of “activity” in order to fall under *UNCLOS* Article 206. Ultimately, States have an

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<sup>232</sup> *Supra* note 9 at art. 297(1)(c).

<sup>233</sup> *Ibid*, preamble.

obligation to conduct EIAs for activities that pose potential danger to the marine ecosystem, which corresponds with the negative obligations of due diligence as per *UNCLOS* Articles 192 and 193. Failure to act in such a manner, and crossed with the findings of previous chapters, subsidizing a fishing fleet to cause overfishing should be seen as an issue to all and contrary to the fundamental legal obligation to protect and preserve the marine environment.

## 6.1 Reading the Ecosystem Approach into *UNCLOS*

While interpreting ‘marine environment’ in the preceding text, ecosystem was included in many definitions, as well as in Article 194(5) of *UNCLOS*. If “ecosystem” is to be read under *UNCLOS*, could then the ecosystem approach of the *CBD* be read so as to fall under the Part XII positive/negative due diligence obligations? This interpretation could be deemed evolutionary so as to include a holistic approach to marine living resource management consistent with Part XII, which must be explored further.

The ecosystem approach is the “primary framework for action under the [*CBD*],”<sup>234</sup> and is described as, “a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way.”<sup>235</sup> One importance of the *CBD*, according to Wolfrum and Matz is that in regards to the protection of marine living resources, unlike *UNCLOS*, the *CBD* “includes in its concept the potential needs of future generations as well as the recognition of an intrinsic value of biodiversity.”<sup>236</sup> This argument is well founded as there is no mention of future generations in the *UNCLOS* preamble or elsewhere, and with the only mention read implicitly through the interpretation of “preserve.”

“The ecosystem approach as applied *vis-à-vis* marine living resources means in general that biological and ecological interactions [...] in [all] neighbouring jurisdiction zones, and the ecological conditions of the physical surroundings have to be reflected in the fishery policy.”<sup>237</sup> This notion appears to be more in line with the true essence<sup>238</sup> of sustainability read into

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<sup>234</sup> “Ecosystem Approach.” *Convention on Biological Diversity*. Online: [www.cbd.int/ecosystem/](http://www.cbd.int/ecosystem/) (Accessed August 12, 2018).

<sup>235</sup> *Ibid.*

<sup>236</sup> *Supra* note 207 at p. 464.

<sup>237</sup> *Ibid.*, p. 450.

<sup>238</sup> *UNCLOS* preamble states that due regard, equitable and efficient use of resources, conservation and protection and preservation of the marine environment are all goals.

*UNCLOS*, as opposed to some socio-economic factors that have driven (predominately) developed States to overexploit fisheries domestically under the guise of ‘exploitation rights.’<sup>239</sup>

Regarding coastal States’ conservation and management measures, Young argues the *CBD* is a valuable tool for providing information on the interdependencies of stocks, fishing patterns and generally recommended international minimum standards.<sup>240</sup> Under this explanation, actions by China in the *South China Sea Arbitration* could be read in line with the effects of Chinese fisheries subsidies effectively building up the capacity to an excessive fleet size, which in turn has caused overfishing<sup>241</sup> as well as harmful fishing practices.<sup>242</sup> The Tribunal noted:

Where a State is aware that vessels flying its flag are engaged in [...] inflicting significant damage on [...] the habitat of depleted, threatened, or endangered species, its obligations under [*UNCLOS*] include a duty to adopt rules and measures to prevent such acts and to maintain a level of vigilance in enforcing those rules and measures.<sup>243</sup>

Although this can be viewed as overstressing the intentions of the tribunal, specifically regarding harmful fishing practices such as the Chinese use of dynamite, their excessive fleet size is worthy of mention as the results are extensive overfishing. More importantly, this quote relates directly to the due diligence obligations that must be undertaken by States, while citing reference to the ecosystem approach through “habitat.”

Article 194(5) of *UNCLOS* stipulates that measures taken in accordance with Part XII “shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.”<sup>244</sup> The South China Sea is one such area producing paltry fish stocks due to overfishing,<sup>245</sup> and in the *South China Sea Arbitration*, the tribunal stated, “In addition to preventing the direct harvesting of species recognized internationally as being threatened with extinction, Article 192 *extends* to the prevention of harms that would affect depleted, threatened, or endangered species *indirectly*

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<sup>239</sup> FAO, *The State of World Fisheries and Aquaculture 2016*. Rome: 2016, 200 pp. general findings.

<sup>240</sup> *Supra* note 12 at p. 13.

<sup>241</sup> Exhausted Chinese domestic fisheries are a direct result of overcapacity. Efforts have been made on paper, yet enforcement and results are unknown with capacity efforts increasing. For more information, please see Justin Pearce: [blogs.scientificamerican.com/expeditions/the-status-of-fisheries-in-china-how-deep-will-we-have-to-dive-to-find-the-truth/](https://blogs.scientificamerican.com/expeditions/the-status-of-fisheries-in-china-how-deep-will-we-have-to-dive-to-find-the-truth/).

<sup>242</sup> A comprehensive study by Mallory outlined of the 6.5 billion USD (2013) spend on subsidizing the Chinese fishing fleet, 95% were harmful to sustainability. For more information, please see: [www.sciencedirect.com/science/article/pii/S0308597X16000415](https://www.sciencedirect.com/science/article/pii/S0308597X16000415).

<sup>243</sup> *Supra* note 113 at para. 959.

<sup>244</sup> *Supra* note 9 at art. 194(5).

<sup>245</sup> Michael Slezak, *Coral comeback: Reefs have secret weapon against climate change*. NewScientist: June 17, 2015. Online: [www.newscientist.com/article/mg22630260-500-coral-comeback-reefs-have-secret-weapon-against-climate-change/](https://www.newscientist.com/article/mg22630260-500-coral-comeback-reefs-have-secret-weapon-against-climate-change/) (Accessed August 8, 2018).



through the destruction of their habitats.”<sup>246</sup> In this light, it becomes clear that Article 192 envisages a protection whereby harm to living resources such as fish (if harvested to a state of overexploitation) equal harm to habitats and biodiversity. Here we see the *implicit* reference and origin of the ecosystem approach within the *UNCLOS* text, as ruled in the *South China Sea Arbitration*. Guggisberg argues that the obligation of coastal States to “adopt and implement conservation measures to avoid overexploitation [... is the] first step towards an ecosystem approach.”<sup>247</sup> However, one could make a case that even before that step, the principle of prevention must be followed.

## 6.2 The Principle of Prevention

From the mid-twentieth century, the *Trail Smelter Case* established the principle of prevention in international environmental law. The case specifically dealt with a project, which caused transboundary pollution between Canada and the United States. The tribunal found:

No State has the right to use or permit the use of its territory in such a manner as to cause injury [...] in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>248</sup>

The facts of *Trail Smelter* surrounded “fumes” specifically in relation to transboundary injury. However, the decision by the tribunal was adopted through subsequent treaties, such as Principle 21 of the *Stockholm Declaration 1972* and Principle 2 of the *Rio Declaration* addressing “damage to the environment” more broadly.

Schatz notes, the principle of prevention creates a ““positive” obligation to take steps to prevent transboundary harm [...and has been included] indirectly in Article 193 *UNCLOS* with respect to the marine environment [through *Trail Smelter*].”<sup>249</sup> Citing Wolfrum, Schatz recites, “several statements submitted in ITLOS, *Case No. 21* claim that the preventative principle applies to fishing in the EEZ.”<sup>250</sup> This is further supported through the conclusions reached in Chapter 4, whereby environmental obligations supersede exploitation rights within the EEZ. In order to fulfill the obligations of the principle of prevention, States have a duty to conduct EIAs

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<sup>246</sup> *Supra* note 113 at para. 959.

<sup>247</sup> *Supra* note 227 at p. 32.

<sup>248</sup> *Trail Smelter Case* (United States, Canada) (Decision of 11 March 1941) (‘Second Decision’) 3 RIAA 1911, p. 1965.

<sup>249</sup> *Supra* note 167 at p. 406.

<sup>250</sup> *Ibid.*

for activities under *UNCLOS* as well as the *Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)*.

### **6.3 Environmental Impact Assessments**

The importance of EIAs to assist in framing fisheries subsidies as a Part XII dispute is twofold. First, EIAs require the State to conduct research before any actions of their activity. In this case, that activity would be subsidizing their fisheries under the category of capacity enhancing/ambiguous (harmful). From this, due diligence would need to be completed to prove their actions will not harm the environment. Secondly, the State must publish the results of their research. In theory, other States *should* be granted access to those results. In this regard, two possible breaches could occur. Firstly, a breach in not conducting the research and/or providing the information, which would run subject to mandatory dispute settlement mechanisms under *UNCLOS*. Secondly, a breach could occur against the protection and preservation of the marine environment even after the publication of results is made. However, this breach would obviously indicate the State knowingly endangered the marine environment contrary to their Part XII obligations, or that they failed to enforce their own EEZ, ultimately ending with the same result; subject to mandatory dispute settlement under *UNCLOS* Article 297(1)(c).

Although read into *UNCLOS*, *Espoo Convention* establishes the obligations of its signatories to conduct EIAs, as well as properly define the term. EIAs are defined as, “a national procedure for evaluating the likely impact of a proposed activity on the environment.”<sup>251</sup>

### **6.4 UNCLOS Article 206**

#### **6.4.1 “Activities”**

Article 206 of *UNCLOS* outlines EIAs through the title, “Assessment of potential effects of activities.”<sup>252</sup> It is first pertinent to determine if “activities” can be linked to the practice of fisheries endeavours, and the process of subsidizing fisheries. While “activities” is mentioned numerous times throughout *UNCLOS*, the closest thing to an appropriate definition can be found

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<sup>251</sup> *Environmental Impact Assessment in a Transboundary Context (Espoo Convention)*, Espoo, Finland, February 25, 1991, art. 1.

<sup>252</sup> *Supra* note 9 at art. 206.

under Article 1(1)(3). Although written in the context of the Area, Article 1(1)(3) explicitly defined activities as those linked to the exploration and exploitation of resources. This definition should suffice in application to fisheries and subsequent discussion will reveal pertinent jurisprudence supports this notion.

Blitza argues, “[In] *Southern Bluefin Tuna* the ITLOS – in essence – held that an EIA needs to be conducted if there is some evidence of a risk of significant harm.”<sup>253</sup> Boyle opines a similar statement through a ‘generous’ interpretation of paragraph 79 of *Southern Bluefin Tuna*. Paragraph 79 maintains there was “scientific uncertainty”<sup>254</sup> regarding the stock and a divergence in opinions on conservation measures. Yet, it must be understood that both parties agreed, “the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern.”<sup>255</sup> Despite the agreement, Japanese intentions to increase fishing efforts could easily be argued as proposing a risk of significant harm.

Boyle and Blitza interpreted the effect of the provisional measures order in *Southern Bluefin Tuna* requiring, “further studies of the state of the stock,”<sup>256</sup> as consistent with the requirements of an EIA. Under the *Espoo Convention*, the requirement of “national procedure”<sup>257</sup> for EIAs arguably cannot be fulfilled in *Southern Bluefin Tuna*, as the case involved trilateral efforts and an RFMO dealing with fishing endeavours, primarily in the high seas, where national legislation lacks binding quality on third States. However, it would appear that the second requirement under the *Espoo Convention* of “evaluating the likely impact of a proposed activity on the environment,”<sup>258</sup> arguably can be seen as fulfilled within the context of *Southern Bluefin Tuna* as, “the effect of [ITLOS’] order was that catch quotas could only be increased by agreement after further studies of the state of the stock.”<sup>259</sup>

Therefore, in determining the applicability of fisheries endeavours to an EIA, the first hurdle to overcome was defining activities. Article 206 mentions “planned activities,”<sup>260</sup> yet makes no efforts to define what that specifically entails. The general definition found in Article 1

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<sup>253</sup> Eike Blitza. "Articles 204-206." In *United Nations Convention on the Law of the Sea: A Commentary*, by Alexander Proelss (Ed.). Munich: C. H. Beck, 2017, p. 1374, para. 9.

<sup>254</sup> *Supra* note 222 at para. 79.

<sup>255</sup> *Ibid*, para. 71.

<sup>256</sup> Alan Boyle. "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea." *The International Journal of Marine and Coastal Law* (Koninklijke Brill NV) 22:3(2007): 369-381, p. 378.

<sup>257</sup> *Supra* note 251 at art. 1(6).

<sup>258</sup> *Ibid*.

<sup>259</sup> *Supra* note 256.

<sup>260</sup> *Supra* note at 9 art. 206.

provides some assistance in outlining ‘exploration’ and ‘exploitation’ as components of the term, but does not make an explicit link to fishery endeavours as its context is rooted in the ‘Area’. Meanwhile, the interpretation by Boyle and Blitza, based on the outcome in *Southern Bluefin Tuna*, links fisheries to “activities” through the interpretation of para. 79, and the effect of the provisional measures on the subsequent endeavours of the parties concerned for failing to conduct an EIA.

One additional point to illustrate this issue is that although not explicitly defined in *The Case Concerning Gabčíkovo-Nagymaros Project*, the term “project” was used interchangeably with the term “activity,”<sup>261</sup> which is conducive to EIAs. As the ICJ judgment in *Gabčíkovo-Nagymaros* illustrated, “[the] need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”<sup>262</sup> The connection between fisheries and sustainable development is well documented and promoted, specifically through the FAO including its implementing agreements, such as the *Code of Conduct for Responsible Fisheries*. Under the *Code of Conduct for Responsible Fisheries*, one of its main objectives is to “facilitate and promote technical, financial and other cooperation in conservation of fisheries resources and fisheries management and development.”<sup>263</sup>

#### **6.4.2 “...or significant and harmful changes to the marine environment”**

The ‘middle section’ of the text found in Article 206 of *UNCLOS* calls for an EIA when planned activities pose a serious risk of, “pollution of or significant and harmful changes to the marine environment.”<sup>264</sup> The first question to determine is the applicability of Article 206 beyond a strict interpretation that might solely encompass pollution. Article 206 is part of Part XII, which aims to encompass protection and preservation of the marine environment completely. However, the location of Article 206 directly preceding the six articles that address pollution specifically may be noteworthy. Furthermore, the full title of the *Espoo Convention*, where EIAs are defined, relates EIAs in a transboundary context, which also links directly to pollution.

During the *Geneva Conventions* it appeared that many States likened Article 206 to relate

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<sup>261</sup> *Gabčíkovo–Nagymaros Project, Hungary v Slovakia*, (1997) ICJ Rep 3; ICGJ 65 (ICJ 1997), 5 February 1997, para. 140.

<sup>262</sup> *Ibid.*

<sup>263</sup> *Supra* note 158 at art. 2(e).

<sup>264</sup> *Ibid.*

specifically to pollution,<sup>265</sup> however, *UNCLOS* ultimately proved to be a political compromise.<sup>266</sup> In that light, the placement of “or” in a literal reading should be read so as to extend beyond pollution specifically. Herein lies an important determination, as was previously noted, *Southern Bluefin Tuna* linked living resources (fisheries) as a component of the marine environment.<sup>267</sup> Therefore, it should be concluded that fisheries activities fulfill the first two requirements of interpreting *UNCLOS* Article 206, as they would fall under “or significant changes to the *marine environment*.”<sup>268</sup>

### 6.4.3 “Assess the potential effects”

The assessment of potential effects is a fundamental component of *UNCLOS*, in relation to marine resources.<sup>269</sup> Often, marine resources extend beyond the borders of one State’s maritime zones into another’s, or into the high seas. Article 61, which outlines the conservation of living resources, is one such article that calls for the “best scientific data available”<sup>270</sup> to assist in determining the appropriate management measures to avoid mismanagement and promote sustainable conservation. The assessment of potential effects of activities under Art. 206 follows suit of Art. 61 in a similar fashion, and even requires States to share their reports. Yet, Art. 206 goes even further as it exists as, “an enforceable obligation.”<sup>271</sup> The obligation, however, left by the wording of Art. 206 remains vague and as per the *Case Concerning Land Reclamation in and around the Straits of Johor* (Malaysia v. Singapore), breaches will likely only occur when no EIA has been conducted,<sup>272</sup> or when an EIA has been deemed unsatisfactory.<sup>273</sup>

Section 4, Part XII of *UNCLOS* maintains that environmental assessments shall be consistent with “recognized scientific methods”<sup>274</sup> and “competent international

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<sup>265</sup> *Supra* note 253 at pp. 1370-73.

<sup>266</sup> “Conservation and the new law of the sea: Critique of the Informal Composite Negotiating Text of *UNCLOS* III submitted by the International Union for Conservation of Nature and Natural Resources.” *Environmental Policy and Law* 4, no. 2-3 (July 1978): 126-131, p. 126.

<sup>267</sup> *Supra* note 222.

<sup>268</sup> *Supra* note 9 at art. 206.

<sup>269</sup> *Supra* note 261.

<sup>270</sup> *Supra* note 9 at art. 61.

<sup>271</sup> *Supra* note 253 at p. 1376, para. 14.

<sup>272</sup> *Supra* note 127 at para. 106.

<sup>273</sup> *Supra* note 253 at p. 1376, para 14.

<sup>274</sup> *Supra* note 9 at art. 204.

organizations.”<sup>275</sup> Blitza describes competent international organizations as those, “international organizations with respective expertise and the capability to actually engage in research in the field.”<sup>276</sup> In the field of fisheries, *UNCLOS* lists the Food and Agriculture Organization of the United Nations (FAO) as the competent expert.<sup>277</sup>

The FAO conducts and publishes a comprehensive list to include capture and global production under a global database and an annual yearbook.<sup>278</sup> Furthermore, FAO is responsible for establishing ‘soft-law’ instruments, such as the *Compliance Agreement*, and publishes fact sheets including the FAO Major Fishing Areas, ASFIS List of Species for Fishery Statistics Purposes, and the CWP Handbook of Fisheries.<sup>279</sup> With a wealth of knowledge, science and statistics available at the disposal of States involved in subsidizing fisheries endeavours, the results of an adequate EIA, if followed correctly and according to the findings, should not result in the furtherance of unsustainable fishing practices in areas, or on stocks, that are in need of restoration. Anything less could be deemed contrary to general obligations to protect and preserve the marine environment.

#### **6.4.4 “Communicate reports of the results”**

The final aim of *UNCLOS* Article 206 is to provide all States with the information collected by an EIA. Explicit reference is made to Art. 205 in this regard. The wording of “shall” creates an obligation for the coastal State, however the use of “should” does not create a strict obligation for international organizations, which receive the information first, to disseminate the information. “If a State publishes [the] results itself, it ensures that other States are able to access this information.”<sup>280</sup> However, *UNCLOS* does “not impose direct obligations on international organizations.”<sup>281</sup> The reasoning for an international organization not to reveal the findings of a coastal State would be perplexing, however it is unclear whether this effort could be viewed as contrary to Art. 197: Cooperation on a global or regional basis.

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<sup>275</sup> *Ibid.*, arts. 204-5.

<sup>276</sup> *Supra* note 253 at p. 1362, para. 18.

<sup>277</sup> *Supra* note 9 at Annex VII, art. 2.

<sup>278</sup> “Statistics – Introduction.” *Fisheries and Aquaculture Department*. FAO: 2018, Online: [www.fao.org/fishery/statistics/en](http://www.fao.org/fishery/statistics/en) (Accessed July 30, 2018).

<sup>279</sup> *Ibid.*

<sup>280</sup> *Supra* note 253 at p. 1369, para. 13.

<sup>281</sup> *Ibid.*

A question then remains as to the applicability of Arts. 197, 205-06 on the disclosure of subsidies information by coastal States. As was previously argued, fisheries subsidies endeavours should fall under the designation of activities for the purposes of *UNCLOS*. Furthermore, a direct link was made between “projects” and “activities” in *Gabčíkovo-Nagymaros*.<sup>282</sup> One could make the argument that “planned activities under their jurisdiction”<sup>283</sup> encompass fisheries subsidies undertakings and the disclosure and publication of information falls under the direct obligation of conducting and publishing EIAs. However, Churchill and Lowe argue, “[the vagueness of] coastal State’s fishery management duties set out in [*UNCLOS*] articles 61 and 62 [...] mean that it would be very difficult, if not impossible, to tell whether any particular case the duties had been observed.”<sup>284</sup> EIAs for subsidies activities/projects would demand the disclosure of scientifically supported data on domestic fish stocks be made public. Such an argument would ultimately compel a coastal State to oblige the first step of the ‘four-point plan’ for UNDG target 14.6, which encourages States to, “provide information on the subsidies they are providing to their fisheries sector.”<sup>285</sup> The UNDGs ultimately remain a soft-law instrument with non-binding obligations, however a hard-law obligation to disclose information on subsidies projects in the form of EIAs could compel greater involvement from major fishing States.

## 6.5 Conclusion

To conclude, based on observations previously stated and compiled with the findings of previous chapters, there is a case to be made to characterize a fisheries dispute as a Part XII dispute, with subsidies at the root of the issue. Specifically, the positive and negative obligations of *UNCLOS* Article 192 and 193, coupled with the obligation to conduct EIAs and disclose information on the state of stocks and the specifics of the activity (subsidies). Based on comprehensive research from the Organization for Economic and Co-operation and Development (OECD), Chen concludes, “The environmental impact of fisheries subsidies can be large enough to cause damage to the whole ecosystem and biodiversity.”<sup>286</sup> What Chen fails to state is that

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<sup>282</sup> *Supra* note 261.

<sup>283</sup> *Supra* note 9 at art. 206.

<sup>284</sup> *Supra* note 2 at p. 290.

<sup>285</sup> *Supra* note 35.

<sup>286</sup> *Supra* note 42 at p. 17.

fisheries subsidies *are* large enough now, and yet they are still increasing in size.<sup>287</sup> Jurisprudence such as the *South China Sea Arbitration* has shown the applicability of the ecosystem approach with *UNCLOS*. Science has proven the interdependencies of species,<sup>288</sup> biodiversity and marine habitats, and as displayed in Canada after the collapse of the cod fishery, the results of overfishing can be “irreversible.”<sup>289</sup> This poses an issue for all States who share the oceans and harvest resources that are inextricably linked to one another and demand each other to thrive.

Through reference to more specific treaties, the use of ecosystem and the ecosystem approach espoused under the *CBD* may be applied to shed light on what *UNCLOS* Article 192 obligations entail and how wide the scope is. Monitoring and environmental assessment through Section 4, Part XII of *UNCLOS* may be seen to more specifically correspond to subsidizing efforts through “activities” and interchangeably through “projects,” which might be necessary for supporting jurisprudence if a case were to be brought forward. In this light, *Gabčíkovo-Nagymaros* is important to show how the court interpreted EIAs and the obligation they impose on all States before an activity. If a government-subsidizing program is deemed an “activity/project” they would be compelled to do research on the effects of their subsidies and disclose information on the current state of the fish stocks their activities wished to exploit. From this, if overexploitation were to arise, their previous EIA would reveal either they knowingly overfished an area, or were negligent in their enforcement. Both of these could then fall under Part XII obligations and would entail mandatory dispute settlement from a third State and as previously argued, is afforded that right as Part XII obligations could be deemed *erga omnes*.

## **Chapter 7: Interaction with WTO Law**

Ultimately, the objective of this thesis hinges on substantiating a subsidies dispute through *UNCLOS*, outside of the scope of the WTO. Although the subsidies regime within the WTO may provide a valuable tool to incite meaningful change, *UNCLOS* provides another avenue, and *change* is the objective in addressing the issue of overfishing and subsidies.

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<sup>287</sup> OECD. “Trade and Agriculture Directorate Fisheries Committee.” *OECD Review of Fisheries 2017*. TAD/FI(2017)FINAL, January 23, 2018, general findings.

<sup>288</sup> Julia Pyper. “Overfishing and Pollution Kill More Corals than Climate Change.” *Scientific American*: July 2, 2014. Online: [www.scientificamerican.com/article/overfishing-and-pollution-kill-more-corals-than-climate-change/](http://www.scientificamerican.com/article/overfishing-and-pollution-kill-more-corals-than-climate-change/) (Accessed August 9, 2018).

<sup>289</sup> *Supra* note 42 at p. 17.



Much like *UNCLOS*, WTO law possesses its own compulsory dispute settlement mechanisms and there is much debate on how the two regimes may interact when a dispute applies to both. The ILC regards this issue as the “fragmentation of international law,”<sup>290</sup> which can lead to “forum shopping.”<sup>291</sup> Furthermore, the problem of having the same subject under simultaneous dispute settlement forums can lead to infringement proceedings over the more applicable forum. This was one issue in *MOX Plant* with the European Court of Justice (ECJ), ITLOS, and the Annex VII tribunal, where the ECJ ultimately prevailed. Lamy notes, “Short of any agreement between the parties and in the absence of any international rule as to how these two different mechanisms should interact, many scenarios may emerge.”<sup>292</sup> These questions were hinted at in *Shrimp-Turtle*, and the *EC-Swordfish* dispute was likely to yield results, if it had gone to trial. Had it actually proceeded, Lamy claims, “If both processes were triggered at the same time, it is quite probable that the WTO panel process would proceed much faster than any other process.”<sup>293</sup> This does not necessarily mean that WTO would prevail regarding regime interplay, only that ITLOS would take longer to hear the case and inevitably yield a finding. It is important to raise the issue regarding the principle of *lex specialis*, which entails, “a more specific treaty will usually trump the general treaty.”<sup>294</sup> However, as previously argued, an issue of overfishing must be framed as one primarily rooted in protection and preservation of the marine environment; fisheries subsidies act as a causation for overfishing, which inevitably breaches *UNCLOS* Part XII.

Despite the unknown question of regime interaction, under WTO law, the *Agreement on Subsidies and Countervailing Measures (ASCM)* does not appear to strongly function in accordance with the objective of this dissertation, having only one reference to the environment. However, Article 25(2) of the *ASCM* requires members to submit and notify the WTO of the

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<sup>290</sup> Martti Koskenniemi. “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.” *Report of the Study of the International Law Commission*. United Nations General Assembly A/CN.4/L.682, April 13, 2006.

<sup>291</sup> Marc L. Busch. “Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade.” *International Organization* 61, (Fall 2007), pp. 735-61.

<sup>292</sup> Pascal Lamy. “The Place of the WTO and its Law in the International Legal Order.” *The European Journal of International Law* (EJIL.), 17:5 (2007): 969-984, p. 983.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Supra* note 62.

subsidies they provide.<sup>295</sup> This would appear to coincide with the *UNCLOS* requirement to disseminate information prior to undertaking activities, as per Article 206; EIAs.

While these comments barely scratch the surface of regime interplay and *ASCM* provisions regarding the submission of information, it does illustrate that environmental provisions are more important in regards to *UNCLOS*. In this light, Neumayer argues, “the WTO has done little to promote environmental protection so far and there is little hope that this is likely to change in the future.”<sup>296</sup> This notion and the title of Neumayer’s article indicate that one of the biggest criticisms to the WTO is that it seems that trade always trumps environmental concerns. However, whether a WTO panel would even be well suited enough to determine environmental law provisions remains to be seen. For now, it appears there is an opportunity for fisheries subsidies-related disputes to be heard before a *UNCLOS* dispute settlement body as a dispute primarily rooted in environmental protection and preservation concerns, until proven otherwise.

## **Chapter 8: Conclusion**

The objective of this thesis was to determine whether *UNCLOS* could provide a means to mitigate overfishing. More specifically, whether subsidies to fisheries leading to EEZ overfishing can be effectively addressed within the current *UNCLOS* legal regime. Data implicitly provides three important statistics which reveal the significance of what I was attempting to achieve. 1.) More than \$35 billion is annually governmentally subsidized worldwide enabling fisheries to harmful capacity-enhancement.<sup>297</sup> 2.) 90% of all fishing occurs within the EEZ.<sup>298</sup> 3.) Scientists suggest in 30 years all worldwide fisheries will collapse.<sup>299</sup> This issue is extremely important, and why it has not been addressed beyond the scope of WTO law was my question and inspiration for enquiry.

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<sup>295</sup> *Agreement on Subsidies and Countervailing Measures*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 [hereinafter *ASCM*], art. 25(2).

<sup>296</sup> Eric Neumayer. “The WTO and the environment: its past record is better than critics believe, but the future outlook is bleak.” *Global Environmental Politics* 4:3. (August 2004): 1-8, p. 1.

<sup>297</sup> *Supra* note 17.

<sup>298</sup> *Supra* note 11.

<sup>299</sup> Charles Clover. “All seafood will run out in 2050, say scientists.” *The Telegraph*: Nov 3, 2006. Online: [www.telegraph.co.uk/news/uknews/1533125/All-seafood-will-run-out-in-2050-say-scientists.html](http://www.telegraph.co.uk/news/uknews/1533125/All-seafood-will-run-out-in-2050-say-scientists.html) (Accessed August 10, 2018).

The first hurdle to overcome was determining the causal link between general subsidies, fisheries subsidies and overfishing. While there is some debate as to the answer, there is irrefutable evidence that there is a link between fisheries subsidies and overcapacity, and that overcapacity leads to overfishing.

After limiting the scope of application to the EEZ, it was determined that flag State overfishing and coastal State overfishing are two very different issues, usually occurring in very different areas around the world. Flag State overfishing through overcapacity caused by subsidies is a major issue presently off of West Africa, among others. However, enforcement and lack thereof is one of the primary hurdles to overcome here, whereas overfishing by the coastal State, in their own EEZ leads to a whole other issue.

Within a coastal State's EEZ, discretion over fisheries is heavily protected through the exclusion clause of Article 297(3)(a). However, if framed in a different light, overfishing should be deemed a Part XII issue as it runs contrary to the fundamental obligation to protect and preserve the marine environment. Chapter 4 found that this obligation supersedes exploitation sovereign rights and arguably falls under the *erga omnes* obligation that is owed to all States.

While framing fisheries subsidies as contrary to Part XII, it was determined that while not directly fishing, governments that promote overfishing through their subsidies would facilitate an activity, and therefore fall within the realm of EIAs. This obligation would demand governments conduct adequate research and release the results publically. Both of which are issues that plague organizations such as the FAO from compiling more thorough research. Furthermore, if research revealed fisheries are already overexploited, the State would effectively be compromising itself if stocks deteriorated further.

Effectively reading the ecosystem approach into the equation reveals that the oceans are a shared resource, which extends beyond the premise of the maritime boundaries. Negative results in one area can affect those of other States and this relationship must be recognized if adequate results are to prevail. The oceans demand change now and while the WTO provides one avenue for potential change, *UNCLOS* should be deemed acceptable to provide another.

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