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Revisiting Traditional Fishing Rights: Sustainable Fishing in the Historic and Legal Context

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Abstract: Poor fishing practices and overfishing are now imperiling livelihoods on small-scale fishing. Traditional fishing rights as one of the legal guarantees for small-scale artisanal fishers under SDG 14 may be abused in various maritime zones, which is precisely because such rights are not well-reflected in the United Nations Convention on the Law of the Sea (UNCLOS), leading to uncertainty between theories and practice. In order to better implement SDG 14 and its targets for sustainable fishing, this paper examines the practical meaning of traditional fishing rights through tracing back the origins, nature and legal elements of such fishing rights by jurisprudence and state practice, and it differentiates its distinctions between 'historic rights'. Based on this, the paper analyzes the application of these fishing rights in different maritime zones and suggests sustainable ways of making a balance between the jurisprudence and practice for a healthy ocean.

Keywords: sustainable fishing; SDG 14; UNCLOS; traditional fishing rights; law of the sea

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1. Introduction

Along with the development of the modern law of the sea, the allocation regime of fishery resources has undergone great changes, which are mainly reflected in the constant expansion of the fishery jurisdiction of coastal states, until the 200-nautical-mile exclusive economic zone (EEZ) regime was established by the United Nations Convention on the Law of the Sea (UNCLOS) [1]. UNCLOS has greatly expanded the exclusive jurisdiction of coastal states over the marine living resources and substantively restructured the pattern of global allocation and jurisdiction of fishery resources. With the exploration of the oceans and the development of the economy, the demand for seafood is rapidly increasing in more and more developing states as entrepreneurs comprehensively implement industrial fishing. Accordingly, small-scale fisheries with traditional methods and fishermen's livelihoods are impacted [2] in different maritime zones, which therefore need legal support.

There is no provided official definition of the "traditional fishing rights" in UNCLOS. According to the existing literature, traditional fishing rights refer to the rights of fishermen of a state mainly living off fishing to habitually fish in certain international waters for a long-term practice [3,4]. However, such rights as fundamental rights of fishermen to fish on a small scale are not well reflected in UNCLOS. Further, the uncertainty about traditional fishing rights and their legal application may also leave the door open for the fishing nations which had enjoyed or sometimes abused the freedom of fishing in a region with which they had no geographical or economic connection. Thereby, it is necessary to clarify the meaning of traditional fishing rights in the context of ongoing practice and its prospects alongside the development of the law of the sea to keep sustainable fishery management.

This paper will trace back the key concepts and legal status of traditional fishing rights towards sustainable fishing, namely their origins, nature and legal elements. Attention will be given to whether and how these fishing rights under customary international law survived in light of fishing-related treaties. The paper also attempts to differentiate

traditional fishing rights from 'historic rights'. Based on this, the paper delves into the legal application of traditional fishing rights from a sustainable perspective in various maritime zones. Then, it finally suggests possible ways to bridge the gaps between jurisprudence and practice of these fishing rights towards sustainable fishery management.

2. The Origins and Nature of Traditional Fishing Rights under SDG 14

In 2015, the Sustainable Development Goals (SDGs) were adopted by the United Nations as a comprehensive call to action to protect the planet, end the poverty and ensure that all people enjoy peace and prosperity by 2030 [5]. Thereinto, the Sustainable Development Goal (SDG) 14 "Life Below Water" seeks to "conserve and sustainably use the oceans, seas, and marine resources [5]" and its targets 14.4, 14.7 and 14.B explicitly involve different respects of sustainable fishing [5]. This concerns not only fishermen fishing in their own exclusive economic zones but also their traditional fishing rights in waters beyond their jurisdiction. At the international law level, this paper does not address the issue of fishing rights in national waters, as these rights undoubtfully belong to local fishermen, but rather focuses on the traditional fishing rights in other waters to keep sustainable fisheries management between states. Under such circumstances, traditional fishing rights need to be regulated towards sustainable ocean exploitation and fishery management. Their legal elements have been constantly optimized and improved by cases and state practice. This section will outline and summarize the origins and nature of these fishing rights in the light of recent developments in the law of the sea.

2.1. Origins

There is no clear definition of traditional fishing rights [4]. These rights arise from long state practice. In the early history, human beings fished in the shallow waters adjacent to the land, and fishing was regarded as a vital means of survival for coastal inhabitants. On this basis, coastal states have long advocated for the subordination of shallow seas to their national jurisdiction. After the Industrial Revolution (1760s–1940s), many states, due to the development of science and technology, gradually realized that the lack of control over fishing activities would pose a threat eventually to the continuance of marine living resources [6] (p. 1) and cause the uncertainty of exercising fishing rights in different maritime zones.

Since UNCLOS entered into force, traditional fishing rights are rights granted to certain groups of fishermen who have been habitually fishing in certain areas for a long period of time. Some scholars divide this right into two categories: one is the traditional right to fish exercised by traditional local communities or indigenous peoples within their national maritime jurisdiction in a certain area where they have long fished [7]. In this type of case, the subjects of the fishing rights are individuals. The other is the right of nationals of a state to fish in the maritime areas under the jurisdiction of other states because of their long-standing fishing habits or historical factors [7]. This circumstance of such fishing rights is quite complicated in that they can either arise from the doctrine of vested or private rights or be claimed on the basis of the principle of historic titles or historic rights.

2.2. Nature

The main view of traditional fishing rights is that they are protected under customary international law [8] (para. 2). Many states tend to recognize traditional fishing rights existed before the conclusion of UNCLOS through bilateral or regional agreements. For example, the 1974 Boundary Agreement between India and Sri Lanka stated that "vessels of Sri Lanka and India will enjoy in inter se waters such rights as they have traditionally enjoyed therein [9] (Article 6)", recognizing and protecting the traditional fishing rights of fishermen in both states. The 1978 boundary agreement between Australia and Papua New Guinea also protected the "traditional way of life and livelihood [10] (Article 10 (3), p. 215) [8] (para. 11)" including traditional fishing. Hence, these fishing-related agreements could, as mentioned in Article 51 of UNCLOS, be a condition for limiting the

legal elements of traditional fishing rights. Or they may, instead, serve as evidence of bilateral or multilateral recognition of the existence of traditional fishing rights in a given area. In any case, these agreements are able to offer general goals or detailed guidance for sustainable fishing.

However, it is debatable whether these fishing rights were replaced by treaty rights, or exist independently from treaties. The current literature in debating this issue has mainly been divided into two views. One argument states that these fishing rights cease to exist in treaties as these treaty-based "fishing rights" are not "traditional" or "historic" in themselves, much less understood as a "historic" right through a process of "historical" consolidation, for the fishing activities in treaty-based "traditional or historic fishing rights" are not naturally shaped in the history but regulated by treaties. This argument is based on Articles 30(3) and 59 of the 1969 Vienna Convention on the Law of Treaties relating to the incompatibility of UNCLOS as a subsequent treaty according to Article 311(2) of UNCLOS [11]. The London Fisheries Convention is a key case study of this question, reflected in Article 3 of the London Fisheries Convention, where this Convention only provides for fishing rights for a particular period of time, rather than fishing rights that are sustained over a long period of time in a particular area [12] (Article. 3). The "fishing rights" under the London Fisheries Convention are treaty-based rights. Unlike natural rights, treaty-based rights do not exist independently of the treaty. The right thus disappears when a state's withdrawal from the treaty takes effect. In this regard, traditional or historic fishing rights shall be considered based on their legal elements. Alternatively, fishing rights by treaty rights largely depend on the way the text of the treaty is drafted. Fishing rights are sustained if, in the drafting of the treaty, the aim or content of the treaty tended to take into account their fishing rights as the rights consistent with the legal elements of traditional or historic fishing rights.

Another argument is that the traditional or historic fishing rights as customary international law may operate in parallel with the treaty-based fishing rights [13,14]. This view is fully reflected by the declaration in the 2022 *Nicaragua v. Colombia* case. However, a treaty provision may "embod [y]" a pre-existing rule of customary law [15] (p. 38, para. 24) or may "constitute the foundation of, or has generated a rule" [16] (p. 41, para. 71). Pre-existing rights under customary international law should continue to exist and apply under customary international law unless such rights are expressly denied by treaty law or a new customary rule [17] (p. 424, para. 73). This illustrates that customary international law continues to exist parallel with treaty law. Thus, the areas regulated by these two sources of law do not overlap [18] (p. 94, para. 176). In the modern law of the sea, historic fishing rights as a type of historic rights are not regulated by UNCLOS and continue to be governed by customary international law, which can, together with UNCLOS, explain matters that are separate but interrelated.

3. Legal Elements of Traditional Fishing Rights towards Sustainable Fishing

Traditional fishing rights have emerged from a long process of historical consolidation of socio-economic conditions and behavior. It recognizes that traditional livelihoods and cultural patterns, reflecting the long-established ways of subsistence, cultural traditions and habits of local fishermen are vulnerable to the development of inter-state relations [8] (para. 2). Thus, in order to achieve sustainable fishing, traditional fishing rights require ipso facto special protection [16] (para. 788). Considering the origin and nature of traditional fishing rights, the existence of traditional fishing rights shall be examined on a case-by-case basis [8] (para. 2). From relevant international judicial and arbitral cases and practices, the legal elements that form the traditional fishing rights are as follows:

3.1. Vested Rights

From the views of the *Eritrea/Yemen* case, traditional fishing rights are understood as the rights similar to a property right acquired by generations of fishermen who earn their living through long-term artisanal fishing. The 2022 *Nicaragua v. Colombia* case and

South China Sea case confirmed the views of the *Eritrea/Yemen* case. They explicitly state that the subjects of traditional fishing rights are individuals and communities who have been fishing in an area for a long time [19] (para. 798) [20] (Para. 220). It is thus clearly a private right rather than the right of state.

As far as private rights are concerned, the *South China Sea* case explains that developments in the concepts of international boundaries and sovereignty should, as far as possible, avoid modifying individual rights. As mentioned by the Permanent Court of International Justice in its advisory opinion in the case of *Settlers of German Origin in Poland* and by the tribunal in the *Abyei Arbitration*, "traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation", implying that a change of sovereignty is not a necessary condition for the cessation of private rights [21,22]. The same principle was affirmed by the arbitral tribunal in the Bering Sea Arbitration with respect to rights at sea, namely that the arbitral tribunal dispensed with the division of jurisdiction for indigenous peoples in relation to the hunting of fur seals in the Bering Sea [23] (p. 271). Therefore, traditional fishing rights are held by individuals and communities.

3.2. Constant Exercise for a Lengthy Period of Time

Long-term and constant exercise of rights means that the exercise of rights should last a period of time, at least, in order to fully accumulate and consolidate the fisheries interests and relations to the extent that such claims of rights could be established preliminarily in law. In other words, the exercise of rights should have continued over a certain period of time. Thus, traditional fishing rights should meet the requirements of long-term and constant exercise of rights.

However, as for the duration of the exercise of rights, neither general international law nor the judgements and awards of international judicial and arbitral institutions have provided a unified and clear standard. On the contrary, both national and international judicial/arbitral practice consider the time factor of exercise of rights case-by-case, under the premise of taking into account the specific situation of each region. For instance, in the circumstance of the 2022 *Nicaragua v. Colombia* case, even 40 years could not be long enough to qualify such fishing as "a long-standing practice" [20] (para. 220). Additionally, there is a view that the evidence of duration of fishing is flexible. It cannot be measured in terms of a fixed number of years. The key point is that the duration must be long enough to reflect the existence of such traditions and cultures [8] (para. 16). Therefore, the duration of time is certainly an integral part of the basis of continuity, but international jurisprudence does not emphasize the specific requirement of time duration unless the continuity of the action [24] and the nature of its tradition are confirmed.

3.3. Artisanal Fishing

As the SDG 14 B states, "small-scale artisanal fishers [2]" need considering for achieving sustainable fishing. Correspondingly, to formulate sustainable fishing, traditional fishing rights should include artisanal fishing, which is essentially carried out in accordance with the long-standing customs of the community in which it is practiced. It means 'those entitlements that all fishermen have exercised continuously through the ages [25] (p. 359, para. 104).' But artisanal fishing does not include industrial fishing because industrial fishing is a serious departure from traditional practices. The Food and Agriculture Organization of the United Nations ("FAO") in the *Eritrea/Yemen* case offers preliminary explanation of artisanal fishing. It notes that artisanal fishing does not extend to industrial fishing, nor to fishing by third-country nationals, whether on a small scale or on an industrial scale [25] (para. 105). The tribunal in the *South China Sea* case accepts this view and states that the "artisanal fishing" is used as opposed to "industrial fishing" [25]. However, although the tribunal recognized artisanal fishing is the means of traditional fishing, it fails to clearly define artisanal, only to identify that artisanal fishing 'will be simple and carried

out on a small-sale with fishing methods varying from region to region in keeping with local customs [19] (para. 797)'.

Hence, the traditional fishing rights could be judged and distinguished by whether the vessels are simple enough or whether the fishing is of the artisanal nature rather than industrialized. As for the "industrial fishing", the tribunal in the *South China Sea* case did not specify the exact threshold of the methods of fishing that can be considered industrial fishing [19] (para. 806), nor did the tribunal find it necessary to consider how and when traditional fishing practices would change over time as technology developed [19] (para. 806) because traditional fishing is different from industrial one in means of fishing [8] (Para. 2). It seems to be judged on a case-by-case basis, leaving more space to discretion.

3.4. Differences from 'Historic Fishing Rights'

Since UNCLOS does not specifically state the meaning of "traditional fishing rights", the issue emerges as to whether such rights are equal to "historic rights [26]". To clarify the more idiographic requirements of traditional fishing rights, this part will make a distinction between traditional fishing rights and history ones in the following two discussions of non-exclusive rights and the requirements of vessels.

3.4.1. Non-Exclusive Rights

Unlike "historic fishing rights", which approached the level of sovereignty as a part of "historic rights", the initial establishment of traditional fishing rights originates from fishermen's private activities motivated by the needs of survival and reliance on resources. It is difficult for activities undertaken by individuals for their own interests without government authorization to be established evidence of national sovereignty, even if these practices have accumulated over a certain period of time and have not been interfered in by other states regardless of the number and the extent of private acts or vested rights [27] (p. 157) [28] (p. 47). Consequently, traditional fishing rights are non-exclusive, which are not given territorial sovereignty in nature.

In general, non-exclusive traditional fishing rights only involves conserving and continuing exercise of the existing rights, instead of the acquisition of new rights. These rights do not have to be based on anything beyond the private acts approved or authorized by states [28] (p. 51). Additionally, regarding traditional fishing rights as non-exclusive rights, the cases like the 2022 *Nicaragua v. Colombia* case and the *South China Sea* case emphasized the importance of considering the livelihoods of fishers in a comprehensive manner and analyzing evidence sensitively [19] (p. 805). These illustrate how the sufficient historic evidence and official documents could play a significant role in proving the existence of traditional fishing rights.

3.4.2. Requirements of Vessels

Meanwhile, traditional fishing rights strictly limit the requirements of vessels. The tribunal in the *Eritrea/Yemen* case provided minimum standards on fishing gear and vessel equipment in the context of traditional fishing rights. They were extensively discussed based on guidance on artisanal fishing in the Red Sea from a report by the FAO. Referring to the FAO study on artisanal fishing, the tribunal noted that the artisanal vessels 'are usually canoes fitted with small outboard engines, slightly larger vessels (9–12 m) fitted with 40–75 hp engines, or fishing sambuks with inboard engines. Dugout canoes and small rafts (ramas) are also in use. Hand lines, gill nets and long lines are used [25] (p. 360, para. 105).' This sets a standard for the artisanal vessels which might meet the requirements of traditional fishing rights; however, in the Report on Fishing in Eritrean waters, the FAO study states that this artisanal fishing gear, which varies according to the boat and the fish, is "simple and efficient" [25] (p. 360, para. 105), leaving less limitation on how simple the vessels should be. But still, as for the historic fishing rights, there is no limitation on vessels compared with traditional ones.

Another key problem is to balance the simpleness degree of the vessels or gears when allowing that these vessels can be improved in the techniques of navigation, communication or in the techniques of fishing. While historic fishing rights may place restrictions on particular species to be fished, there are no restrictions on technological change under the context of historic rights, meaning that advances in technology can facilitate more efficient fishing. Therefore, technology change will influence fishing under historic rights as opposed to traditional fishing, showing that traditional rights are more fixed and narrower if fishing technology changed. However, in point of detail, this change does not exclude improvements in powering small-boats, navigation, communications or fishing technology [25] (p. 360, para. 106).

Therefore, traditional fishing rights are narrower or relatively conditioned in their scope of protection compared with historic rights. These limitations are mainly manifested on the extent of their exclusive extent, means of fishing and factors to prove the existence of this tradition and culture.

4. The Application of Traditional Fishing Rights for Sustainability

As is stated above, traditional fishing rights and historic fishing rights are different per se. Based on their development, the legal application of traditional fishing rights under these legal elements needs further exploring. For clarifying the application, this section will be discussed separately by different maritime zones.

4.1. In the Territorial Sea

It is not directly pointed out whether traditional fishing rights still exist in the territorial sea under UNCLOS. However, the judicial precedent is in favor of the legality of these fishing rights in the territorial sea. In the *Eritrea/Yemen* Arbitration, the tribunal stated that traditional fishing rights continue to exist in the territorial sea after the adoption of UNCLOS [25] (para. 109). This was then accepted by the *South China Sea* case, concluding that UNCLOS continues to apply the existing legal regime, and that protection of traditional fishing rights in the territorial sea remains essentially unchanged [19] (para. 804). This opinion was also reflected by Article 2(3) of UNCLOS [19] (para.804), stating that 'the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law [1] (Article. 2(3))'. It was confirmed by the awards in the *Chagos Marine Protected Area Arbitration* case [29] (para. 514). The Tribunal notes that Article 2(3) of UNCLOS covers the obligation of states to exercise their sovereignty subject to "other rules of international law". It follows that, while exercising their sovereignty over their territorial waters, states must also observe other rules of international law. This illustrates that Article 2(3) provides a broader scope for coastal states' obligations. Traditional fishing rights can be considered as other rules of international law even if they are not expressed in UNCLOS.

Traditional fishing rights in the territorial sea are not de facto up to the level of right of states. Rather, they belong to individuals. In the *South China Sea* case, traditional fishing rights were recognized as vested rights, and therefore, the tribunal 'considers the rules of international law on the treatment of the vested rights of foreign nationals [30] (p. 42) to fall squarely within the "other rules of international law" applicable in the territorial sea [19] (para. 808)'. Accordingly, the tribunal agreed to include respect for a state's traditional fishing rights among the "other rules of international law" in Article 2(3) of UNCLOS, which means that the vested rights of other states' nationals in the territorial sea are protected. The ratio decidendi is evaluated as one of the court's greatest contributions to the traditional fishing regime [7]. In practice, most of the traditional fishing was happening in waters close to the coastline [19] (para, 804(c)), suggesting that much of the traditional fishing took place in territorial seas. This view provides a favorable legal basis for such situations for foreign nationals.

However, in the absence of a unified international standard for the specific practice of traditional fishing, and given the different understandings of traditional fishing rights in

different countries due to differences in fishing habits, such fishing activities in the territorial seas of other states on the basis of traditional fishing rights weaken the jurisdiction of coastal states over their own territorial seas. Moreover, legal uncertainty of traditional fishing rights may be a justification for overfishing the resources of coastal states, which may pose challenges to the effective regulation of the resources of the territorial sea by coastal states.

4.2. In the Archipelagic Waters

An archipelago is made up of one or more islands, and thus, the archipelagic principle developed from the regime of islands in their territorial seas. In UNCLOS, the archipelagic state means 'a State constituted wholly by one or more archipelagos [1] (Article. 46)' and the sovereignty of it 'extends to the waters enclosed by the archipelagic baselines, which is described as archipelagic waters [1] (Article. 49(1))'. But the archipelagic state should respect the existing rights and all other legitimate interests which its neighboring state has traditionally exercised in such waters and all rights stipulated by agreement between those states [1] (Article. 47(6)), if those existing rights lie inside the archipelagic waters of the archipelagic state. This shows that such 'existing rights and all other legitimate interests' of neighboring states in archipelagic waters existing prior to the adoption of UNCLOS may still be valid in the UNCLOS regime.

In order to make the definition of existing fishing rights and interests more specific, Article 51 of UNCLOS interprets them in more detail, including traditional fishing rights of neighboring states [1] (Article. 51(1)). However, there are conditions that need to be noted when considering traditional fishing rights in the archipelagic waters: first, before the exercise of such rights, states shall consider their 'nature, extent and the areas to which they apply' [1] (Article. 51(1)), and any special circumstance concerning the rights shall be regulated by bilateral agreements between the states [1] (Article. 51(1)); and second, these rights 'shall not be transferred to or shared with other states or their nationals [1] (Article. 51(1))'.

Thus, traditional fishing rights in the archipelagic waters are explicitly protected by UNCLOS. However, due to the long-standing fishing practices in various maritime zones, regulating traditional fishing of the immediately adjacent neighboring states in the archipelagic waters by UNCLOS does not mean there is a legal basis to eliminate the existence of traditional fishing rights under other maritime zones.

4.3. In the Exclusive Economic Zone

The establishment of EEZ regime not only reflects the major concerns of coastal states about industrial and commercial fishing and the exploitation of living resources by foreign vessels in their coastal waters but ensures the demand for optimum utilization of the natural resources of the sea, which fundamentally changed the limits of fishing in the oceans and ends the freedom to fish internationally within the exclusive economic zone of the coastal state [8] (Para. 6).

There is a view in case law that traditional fishing rights are extinguished in the EEZ [19] (para. 804). Instead, the article 62(3) of UNCLOS states that 'in giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors including, inter alia,. . . the need to minimize economic dislocation in States whose nationals have habitually fished in the zone' [1] (Article. 62). This means that coastal states would only consider allowing other fishing states in its EEZ if there was a surplus of the allowable catch, including sates whose nationals traditionally fished in the area [31]. Apparently, this conclusion is extremely over-sweeping, as the factors this Article 62 highlights for consideration do not encompass all circumstances regarding to traditional fishing rights [8] (Para. 8). The determination of the allowable catch of living resources in the EEZ and the capacity of the coastal state to exploit them concerns political, economic, social and ecological factors. Thus, the existence of a residual allowable catch is entirely at the discretion of the coastal state, and other states have no right to participate in the determination of the allowable catch of living resources in the

exclusive economic zone, giving much discretion for the coastal state in term of other states' traditional fishing in its EEZ.

In fact, the establishment of the EEZ regime in UNCLOS does not by itself extinguish traditional fishing rights that, as Section 2 stated, exist under customary international law [8] (para. 9), which are also confirmed in international jurisprudence [8] (para. 12). The arbitral tribunal in the *Eritrea/Yemen* case observed that traditional fishing rights are 'not qualified by the maritime zones specified under the United Nations Convention on the Law of the Sea . . . The traditional fishing regime operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters and ports [25] (p. 361, paras. 109–110).' It was also cited in the *Abyei* arbitration, stating that 'traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation [32] (pp. 408–410 and 412, paras. 753–760 and 766)'. Importantly, the criteria for proving whether a state has traditional fishing rights in other EEZ need to be cautiously considered [20] (para. 218). The evidence should strictly satisfy all the legal elements of the traditional fishing right.

Additionally, it should be pointed out that UNCLOS does not preclude states from continuing to recognize traditional fishing rights located within the EEZ either in bilateral agreements [20] (para. 232) or through regional fisheries management organizations [19] (para. 804), promoting states to respect such rights outside of UNCLOS [19].

In summary, traditional fishing rights in different maritime zones are illustrated in Table 1 above. From a sustainable perspective, the application of traditional fishing rights has somewhat weakened the opacity of the coastal states' fishing industry. Local fishermen are able to maintain sustainable fishing in the relevant maritime zones by regularly monitoring the information sharing on the catches of coastal states. Meanwhile, joint collaboration among states can be facilitated via bilateral and multilateral negotiations, using legislative means to agree on and mutually monitor states' sustainable fishery management.

Table 1. Traditional fishing rights in different maritime zones.

Maritime Zones	UNCLOS	Referred by Judicial Precedents or Not
territorial sea	does not exist	yes
archipelagic waters	Article 51	/
EEZ	does not exist	yes

5. Sustainable Ways to Balance Traditional Fishing Rights between Jurisprudence and Practice

The above analytical discussions show that, theoretically, there are detailed arguments on the legal elements of traditional fishing rights. However, as for the application of traditional fishing rights in various maritime zones, the extent to which the coastal state restrains the foreign state in traditional fishing activities is ambiguous when the latter exercises its traditional fishing rights in the waters of coastal state. Practically, this ambiguous situation gives coastal states a certain degree of discretion in managing the exercise of traditional fishing rights by other states. Thus, with the goal towards better sustainable fishery management, it is desirable that coastal states may strike a balance between maintaining sovereign rights to fishing activities and allowing other states to exercise traditional fishing rights within coastal states' jurisdiction. To achieve such a balance, the extent of the sustainable measures to be justified need to be clarified.

5.1. Bilateral Negotiation

To promote the conservation and management of fisheries resources, coastal states are obliged to regulate fishing activities in their waters. This is exemplified by the *North Atlantic Coast Fisheries Arbitration* case, in which the tribunal noted that coastal states, as sovereign states, have the duty of preserving and protecting the fisheries. Thus, they are

not only entitled but obliged to provide for the protection and preservation of the fisheries in the form of their national laws or rules.

In practice, a workable solution to this matter would be for the parties to negotiate a bilateral treaty that would detail the extent to which the coastal state would regulate traditional fishing rights in its waters [19] (para. 232). In case the parties fail to take the 'obligation to execute the cooperative treaties between coastal states and fishing states in good faith' [33] (p. 104), or, as the *North Atlantic Coast Fisheries Arbitration* case held, bilateral agreement does not include the fisheries that parties recognize as requiring regulation to maintain, the coastal state is entitled to make reasonable provisions that are not inconsistent with its obligations under the agreement, for the protection of marine living resources in its own maritime zones [33]. A good example is provided by the *North Atlantic Coast Fisheries Arbitration*, which requires coastal states to make rules or regulations in respect to details of fishing effort, such as governing the fishermen's hours, days or seasons for fishing [33]. A similar practice in the South China Sea may be found where China imposes fishing moratoria in certain areas of the South China Sea. During the moratoria, all types of fishing vessels, including supporting vessels, are prohibited from fishing. Meanwhile, China's law-enforcement vessels conduct regular inspections and enforcement to combat illegal fishing activities [34]. The results have been positive, yet it needs to be noted that a coastal state must be cautious in exercising this right to restrict the traditional fishing rights of other states. This view is reflected in the *North Atlantic Coast Fisheries Arbitration*, where the laws enacted by the coastal state should be aimed at fishery conservation. As stated by the United States, though fishery regulations are to some extent restrictions, regulations for the purpose of preserving fisheries resources—the common fishery interest for both parties—should explicitly be distinguished from purposeless fishing restrictions [33].

5.2. Means of Fishing

Regulation of fishing practices by the coastal state is also the obligation of coastal states. In the *North Atlantic Coast Fisheries Arbitration* case, the tribunal held that 'the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on coasts [33]' are supposed to be stipulated in written laws. These relevant laws can be used as legal elements to approve means of fishing, which is distinct from industrial fishing. Although UNCLOS does not provide precise standards for means of fishing, as discussed above, and the FAO and relevant judicial practices offering the minimum standard on fishing gear and vessel equipment may serve as a reference for coastal states in their regulation.

However, it is important that, regardless of the means of fishing, the coastal state ensures, in the course of regulation, that the fishing rights of the fishing state meet all the relevant legal elements of traditional fishing rights towards sustainable fishing, i.e., that the means of fishing is visibly distinct from industrial fishing.

5.3. Fishing Licenses

While it is controversial whether fishing licenses are issued to fishermen exercising their traditional fishing rights, fishing licenses can be important evidence of the fishing state's fishing rights and coastal state's regulatory obligations. For example, in *the Territorial and Maritime Dispute in the Caribbean Sea case* (Nicaragua v. Honduras, 2007), Honduras claimed that it owned the historic fishing rights in the maritime area near the Savanna reef and thus could grant fishing licenses to fishermen [35] (p. 711, para. 170, pp. 716–717, para. 190). The Court pointed out that the acts of granting fishing licenses and managing fishing vessels by the Honduras government could be regarded as evidence of regulative and de facto control, and such acts constituted a relevant display of effective exercise [35] (pp. 712–713, paras. 174–175). Similarly, in the Fisheries case (United Kingdom of Great Britain v. Norway, 1951), the Court viewed that Norway enjoyed the historic fishing rights over the waters of Lopphavet. One of the ratio decidendi for the Court is that as long as

200 years ago, the Norwegian government has granted local fishermen fishing licenses for the exclusive privilege to fish and hunt whales [36] (p. 142).

To sum up, the North Atlantic Fisheries case provides good practice for the international community with regard to balancing the regulation of traditional fishing rights by coastal states, which serves as a valuable guideline for sustainable fishing. Integrating the nature and development of traditional fishing rights into sustainable fishing, coastal states and fishing states should mutually negotiate to bridge the theoretical and practical gaps in traditional fishing rights through sustainable means such as legislation, limiting means of fishing and granting fishing licenses.

6. Concluding Remarks

As fisheries operations have developed, the treatment of traditional fishing rights has adapted in response to the need for sustainable fishery management, progressively forming sustainable traditional fishing rights. Since the establishment of the EEZ regime, traditional fishing rights have been weakened to some extent, but these rights are continuously governed under customary international law. In this circumstance, controversial practices may exist between such fishing rights and fishing-related treaties. Whether such fishing rights exist in a treaty or operate in parallel to it, the survival of fishing rights in light of treaties depends on whether these rights are naturally shaped in the history or how the text of the fishing-related treaty is worded.

Furthermore, traditional fishing rights are based on long-standing practices. They also belong to individuals like local fishermen and native communities. However, these rights may be different from historic rights in these legal elements. Traditional fishing rights are conditional in some aspects, whose limitations are respectively reflected by requirements for sustainable fishing under the SDG 14. First, this limitation is manifested in the requirements for vessels. Traditional fishing rights require that the fishing vessels and means of fishing are simple while historic fishing rights seem not to clearly limit the technology of vessels, except for the requirements for fishing particular species; and second, the limitation manifests in the means of fishing. The fishing means of traditional fishing rights should be understood as artisanal fishing, which means that they cannot reach the level of industrial fishing, while the historic fishing rights rarely have conditions in fishing means.

Last but not least, although states or fishermen enjoyed freedom of traditional fishing, this freedom was not the same as compliance with the restrictions imposed by the coastal states. At the same time, the restrictions imposed by the coastal states, while not contrary to international tradition, do not recognize the right of the fishermen to require their consent to such restrictions. While the above sets out the possibilities of what a coastal state can do to balance the theory and practice of the traditional fishing rights in the sustainable exploitation of the ocean, it does not mean that the rights and obligations of coastal states and fishing states are invariably set on dealing with these fishing rights. Rather, as the law of the sea and marine environment evolve, this relationship of rights and obligations should be dynamic, and bilateral negotiations are the most appropriate way to deal with this dynamic change for mutual benefit and a sustainable ocean.

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