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Fishing in Troubled Waters - Somalia's Maritime Zones and the Case for Reinterpretation

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Introduction

The efforts of the international community to suppress piracy off the coast of Somalia will not succeed unless accompanied by measures that provide for political stability and food security within the country. These objectives could be furthered by promoting the development of a competitive and

sustainable Somali fishing industry. However, the fish stocks off the Somali coast have been the target of illegal, unreported, and unregulated (“IUU”) fishing for a long time.[1] The European Union (“EU”) addressed this problem by amending the mandate of the European Union Naval Force (“EU NAVFOR”) Somalia – Operation ATALANTA. Originally limited to the protection of vessels off the Somali coast, as well as the deterrence, prevention, and repression of acts of piracy and armed robbery in the region,[2] the mandate has been extended to include the monitoring of fishing activities.[3]

The difficulties posed by the new mandate are twofold. First, the breadth and legal status of the maritime belt over which Somalia enjoys certain rights with regards to fisheries is uncertain. It is internationally disputed whether Somalia has rights reaching beyond its territorial sea, whose breadth is again problematic. This goes to the heart of assessing the legality of fisheries—an important part of monitoring fishing activities—and consequently hinders the EU from executing its mandate. Secondly, the resulting practical problems have fueled Somali distrust. The warships are perceived as ineffective in monitoring fishing activities, raising suspicion that they merely safeguard their flag states’ economic interests by protecting foreign vessels engaging in IUU fishing.

Against this background, this *Insight* analyzes the legal status of Somalia’s maritime zones under public international law.

Background

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For centuries, the breadth of the territorial sea has been a controversial issue. It was not until the 1970s that a trend in favor of a twelve nautical mile (“nm”) territorial sea emerged.[4] Notwithstanding this tendency, Somalia claimed an extension of its territorial sea from twelve to 200 nm in 1972[5] and advocated a corresponding rule during the Third United Nations Conference on the Law of the Sea.[6] At that time, extensive territorial sea claims were quite common among African and Latin American coastal states.[7] However, Article 3 of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”),[8] as adopted, limits coastal states to claim a maximum territorial sea of twelve nm.

Although Somalia signed UNCLOS in 1982 and ratified the treaty in 1989 without declarations or reservations,[9] it has not harmonized its national legislation on maritime zones with the UNCLOS regime. As of today, Somalia is one of six coastal states that persist in claims to territorial seas exceeding twelve nm.[10] Members of the international community have explicitly protested Somalia’s territorial sea claim.[11] The resulting ambiguity over Somalia’s territorial sea leads to difficulties in monitoring fishing activities off the Somalian coast and potentially hinders Somalia in executing its rights of maritime jurisdiction.

It is a well-established principle of public international law that coastal state sovereignty extends to the territorial sea. In an area beyond and adjacent to the territorial sea, the so-called Exclusive Economic Zone (“EEZ”), the coastal state has sovereign rights to explore and exploit, conserve and manage the natural resources. The coastal state’s management responsibilities include determining the allowable catch of living resources in its EEZ.[12] However, as the 1972 Somalian territorial sea claim contravenes public international law, and since there is no Somalian EEZ legislation in place, the Somalian government arguably lacks exclusive fishing and fishery management rights in the waters off the Somalian coast. This view is prominently expressed by the Adviser to the Secretary-General on Legal Issues related to Piracy off the Coast of Somalia, Jack Lang: “In the absence of delimitation in accordance with international law, Somalia is legally deprived of a territorial sea and an exclusive economic zone.”[13] A consequence of this would be the unrestricted access of international fishing fleets to the natural resources in these waters.

The United Nations and the International Contact Group on Piracy off the Coast of Somalia have unsuccessfully attempted to end to the legal limbo by convincing Somalia to declare a 200 nm EEZ. The Somalian parliament opposes such a move, seeing it as giving up sovereignty.[14] Even though an unequivocal declaration of a Somalian EEZ would end the legal uncertainty, the question arises whether the current situation hinders Somalia from exercising its rights associated with the EEZ and the EU naval forces from fulfilling their Operation ATALANTA mandate to monitor fishing activities, or whether it is merely used as an excuse. Unlike fishing activities, anti-piracy efforts off Somalia would not be affected by the establishment of an EEZ. The states have the right to fight piracy on the High Sea and in the Somalian EEZ (Articles 105, 107, and 58, paragraph 2, UNCLOS) as well as in the Somalian territorial sea by virtue of the Security Council Resolution 1816 and Somalia’s permission.[15]

The 1972 Somalian Declaration on the Territorial Sea

Somalian Law No. 37 on the Territorial Sea and Ports specifically states that “[t]he Somali territorial sea includes the portion of the sea to the extent of 200 nautical miles within the continental and insular coasts.”[16] Furthermore, it continues, “[t]he Somali Territorial Sea is under the sovereignty of the Somali Democratic Republic. Offences committed within the

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limits of the territorial sea on board a vessel relating to penal health [sic] and public security shall be governed by Somali law.”^[17] However, it is silent on other maritime zones recognized in the modern law of the sea such as the contiguous zone, the EEZ, and the continental shelf.

Reinterpreting the 1972 Declaration Part One - The Territorial Sea

A coastal state does not need to *claim* a territorial sea in order to establish sovereignty over its adjacent waters. On the contrary, the coastal state’s sovereignty extends to the territorial sea by virtue of its sovereignty over the coastline.^[18] As a consequence, the coastal state only needs to determine the specific breadth of its territorial sea within the limits set forth in international law.^[19] However, while both Article 3 UNCLOS and identical customary international law lay down a maximum breadth of twelve nm, neither regime specifies the minimum breadth of the territorial sea.^[20]

Thus, the following conclusions are theoretically conceivable. First, Somalia’s claim should be treated as excessive and therefore legally void. As a result, the Somali territorial sea lacks legally established outer limits. Second, Somalia’s territorial sea claim is valid under international law. However, Somalia has a legal obligation to harmonize its national legislation with the UNCLOS regime. Third, Somalia’s 1972 declaration is to be interpreted in light of Somalia’s obligations under UNCLOS. This means that the breadth of Somalia’s territorial sea is, contrary to the wording of the Somali legislation, limited to twelve nm. While there is no legal basis for the first conclusion in international law, and the second conclusion also raises concerns, the third conclusion seems most reasonable.

The Somali declaration of 1972 expresses the intent to establish the outer limit of Somalia’s territorial sea at 200 nm, although the claim to a 200 nm territorial sea may have surpassed the extent deemed permissible in 1972 in light of the 1970s trend in favor of a twelve nautical mile territorial sea. Consequently, the delineation might not have withstood legal challenge at the time it was made.

Somalia ratified UNCLOS in 1989, thereby accepting the provisions on the breadth of the different maritime zones, including the territorial sea, without reservations, declarations, or statements on the breadth of its territorial sea. Nor could such a declaration or statement have excluded or modified the legal effect of UNCLOS in its application to Somalia.^[21] Moreover, Somalia is obliged to fulfill its obligations under UNCLOS in good faith and to exercise the rights, jurisdiction, and freedoms recognized by UNCLOS in a manner which does not constitute an abuse of right.^[22] Somalia may not invoke the provisions of its national laws to justify actions contradicting UNCLOS.^[23] While national legislation contravening UNCLOS is not necessarily null and void, participation in the treaty imposes a duty on Somalia to harmonize this legislation.^[24] Additionally, good faith mandates Somalia not to treat waters seawards of the twelve nm limit as territorial sea with respect to other states. However, Somalia’s intent to establish a territorial sea as far as deemed permissible could be allowed to stand. Consequently, with respect to other states, the Somali territorial sea could be limited to the waters off the Somali coast up to a limit of twelve nm.

Reinterpreting the 1972 Declaration Part Two - The Exclusive Economic Zone

The legal assessment of the Somali EEZ is subject to different reasoning. To exercise

sovereign rights and jurisdiction within the waters beyond and adjacent to the territorial sea, the coastal state has to *establish* an EEZ. These rights do not inure automatically to a coastal state. To date, Somalia has not made an explicit declaration of its EEZ. Therefore it could be argued that Somalia lacks an EEZ and thus exclusive fishery management rights beyond its territorial sea. However, taking into account the 1972 Somalian declaration, this conclusion appears doubtful.

Again, the question calls for analysis of Somalia's 1972 declaration of a 200 nm territorial sea. First, the 1972 declaration explicitly refers to "territorial sea." Secondly, it places the waters off the Somalian coast under the sovereignty of Somalia. Under public international law, sovereignty is associated with the territorial sea and not with the EEZ. Thus, at first sight, the wording strongly supports the conclusion that the 1972 declaration cannot be read as including the establishment of an EEZ.

However, the interpretation of unilateral declarations goes beyond their phrasing. It needs to regard any relevant rules of international law applicable between the declaring states and the addressees.^[25] The 1972 declaration was issued before the concept of the EEZ became widely accepted during the Third United Nations Conference on the Law of the Sea from 1973 to 1982 and was acknowledged by Somalia when it ratified UNCLOS in 1989. This allows for the reinterpretation of the 1972 declaration in light of the modern law of the sea.

Furthermore, it has been noted that the intention of the declaring states and the *bona fide* expectations of the addressees have to be taken into account.^[26] Somalia clearly intended to assert the right to exercise sovereign powers within the 200 nm limit. This claim explicitly includes the fishery management rights now associated with the EEZ.^[27] Yet, while coastal states exercise sovereignty in their territorial sea, they only exercise functionally limited competences in the EEZ.^[28] In that regard, the territorial sea is something inherently different from the EEZ. However, the rights of a coastal state associated with the EEZ are encompassed in the rights it exercises in the territorial sea. As such, by claiming 200 nm as territorial sea, Somalia also intended to claim the rights now associated with the EEZ within these limits. Consequently, the Somalian declaration should be understood today as containing the intention to establish an EEZ.^[29]

The *bona fide* expectations of the addressee, in this case the international community, should also be considered when interpreting the unilateral act of a state. The above reasoning also applies here: The international community could reasonably conclude that Somalia intends to exercise sovereignty over the 200 nm broad zone. Consequently, the international community could also expect that Somalia intends to exercise the rights associated with the EEZ. This conclusion may be more reasonable than the current interpretation by the international community that Somalia has yet to establish an EEZ^[30] and that its existing claim is invalid and factually ignored.

Moreover, other states have also claimed a 200 nm territorial sea prior to acceding to UNCLOS and nonetheless considered their national legislation to be in conformity with UNCLOS. Upon signing of UNCLOS in 1982, Brazil declared that "the regime which is applied in practice in maritime areas adjacent to the coast of Brazil is compatible with the provisions of the Convention."^[31] Similarly, on the occasion of the signing and the ratification of UNCLOS in 1982, Uruguay declared that "[t]he provisions of the Convention concerning the territorial sea and the exclusive economic zone are compatible with the main

purposes and principles underlying Uruguayan legislation in respect of Uruguay's sovereignty and jurisdiction over the sea adjacent to its coast and over its bed and subsoil up to a limit of 200 miles.”^[32] The authors are not aware of objections to these states' declarations.^[33] These examples clearly indicate that contrary to its wording, older national legislation on the territorial sea may well be reinterpreted as applying to the EEZ, although it should be added that both Brazil and Uruguay established a twelve nm territorial sea and a 200 nm EEZ in 1993 and 1998 respectively.^[34]

Consequences

This brief analysis has shown that Somalia's 1972 declaration on the territorial sea may provide sufficient legal content to consider Somalia's territorial sea and its EEZ as established in accordance with public international law. A further unambiguous declaration of an EEZ may be desirable in terms of legal security, but is not needed by the EU to execute its protective mandate or by Somalia to establish a fisheries regime. Consequently, IUU fishing may be treated as such.

This certainly does not solve all the problems. In practice, it remains problematic who may license fishing activities, and some local leaders have issued licenses with dubious legal effect. However, the proposed reinterpretation of Somalia's 1972 declaration, in accordance with international principles of legal interpretation, does away with one of the fundamental issues encountered by the UN and the EU ATALANTA Mission and will hopefully serve to cut the legal Gordian knot associated with the fight against piracy and IUU fishing.

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Endnotes:

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[2] Council Joint Action No. 2008/851/CFSP of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast, 2008 O.J. (L 301/3), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:301:0033:0037:EN:PDF>.

[3] Council Decision No. 2009/907/CFSP of 8 December 2009 Amending Joint Action 2008/851/CFSP on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast, 2009 O.J. (L 322/2), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:322:0027:0027:EN:PDF>.

[4] Sarah Wolf, *Territorial Sea* ¶ 4, in Max Planck Encyclopedia for Public International Law (Rüdiger Wolfrum ed., 2009).

[5] Law No. 37 on the Territorial Sea and Ports [Somal.] (Sept. 10, 1972) (*reprinted in* 8 New Directions in the Law of the Sea 57 (S. Houston Lay, Robin Rolf Churchill, Myron H. Nordquist & Kenneth R. Simmonds eds., 1981)) [hereinafter Law No. 37]. Prior to this, Somalia had claimed a six nm territorial sea; see N.S. Rembe, *Africa and the International Law of the Sea* 92 (1980).

[6] Third United Nations Conference on the Law of the Sea, Summary Records of Meetings of the Second Committee 26th Mtg., at 209, U.N. Doc. A/CONF.62/C.2/SR.26, *available at* http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_II/a_conf-62_c-2_sr-26.pdf.

[7] Third United Nations Conference on the Law of the Sea, 25th Mtg. of the Third Committee, at 82, U.N. Doc. A/CONF.62/SR.25, *available at* http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_IV/a_conf-62_c-3_sr-25.pdf. Hugo Caminos, *Harmonization of Pre-Existing 200-Mile Claims in the Latin American Region with the United Nations Convention on the Law of the Sea and its Exclusive Economic Zone*, 30 U. Miami Inter-Am. L. Rev. 9 (1998-1999).

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[11] See, e.g., U.S. State Dept. Telegram 231502 (Aug. 18, 1982).

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[13] Report of the Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Letter Dated 24 January 2011 from the Secretary-General to the President of the Security Council, Annex, ¶ 89, U.N. Doc. S/2011/30 (Jan. 25, 2011).

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[16] Law No. 37, *supra* note 5, art. 1(1).

[17] *Id.* art. 1(2).

[18] Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116, 160 (Sep. Op. Mc Nair, J.), *available at* <http://www.icj-cij.org/docket/files/5/1809.pdf>; Robin Churchill & Vaughan Lowe, *The Law of the Sea* 81 (1999).

[19] Graf Vitzthum, *Handbuch des Seerechts* [Handbook on the Law of the Sea] 121 (2006).

[20] Wolf, *supra* note 4, ¶ 4; Churchill & Lowe, *supra* note 18, at 81.

[21] *Cf.* UNCLOS, *supra* note 8, art. 310.

[22] *Id.* art. 300.

[23] Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, *available at* http://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf.

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[26] Matthias Herdegen, *Interpretation in International Law* ¶ 53, in Max Planck Encyclopedia for International Law (Rüdiger Wolfrum ed., 2010); Ipsen, *supra* note 24, at 238.

[27] UNCLOS, *supra* note 8, art. 5.

[28] Wolf, *supra* note 4, ¶ 2.

[29] Cf. René-Jean Dupuy & Daniel Vignes, *A Handbook on the New Law of the Sea* 1049 (1991).

[30] See, e.g., Secretary-General Report on Protection of Somali Natural Resources, *supra* note 1, ¶¶ 28, 29; see also Contact Group on Piracy off the Coast of Somalia, Communique, Tenth Plenary Session of the Contact Group on Piracy off the Coast of Somalia, at 2 (Nov. 17, 2011), available at http://www.missionfnnewyork.um.dk/NR/rdonlyres/7E12C100-DECB-4D56-88CC-1531EAD94F5E/0/Communique_FINAL.pdf.

[31] *Law of the Sea Bulletin* No. 25, at 25 (1994).

[32] *Id.* at 37.

[33] Cf. *LotS Bulletins* 1-70, *supra* note 9, at 36.

[34] *Law of the Sea Bulletin* No. 23, at 17 (1993); *Law of the Sea Bulletin* No. 41, at 46 (1999).