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The Northeast Asian 'Provisional' Maritime Regime(s)

*A Focus on Fisheries Agreements as
'Provisional Arrangements of a Practical Nature'*

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ABBREVIATIONS

AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
CBD	Convention on Biological Diversity
CJIL	Chinese Journal of International Law
DARS	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishing Zone
EJIL	European Journal of International Law
FAO	Food and Agriculture Organisation of the United Nations
HILJ	Harvard International Law Journal
ICJ	International Court of Justice
ICNT	Informal Composite Negotiating Text
ICRW	International Convention for the Regulation of Whaling
ILC	International Law Commission
ILM	International Legal Materials
IMO	International Maritime Organisation
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, Unreported and Unregulated [Fishing]
IYIL	Italian Yearbook of International Law
JAIL	Japanese Annual of International Law
JFA	Japanese Fisheries Agency
JFC	Joint Fisheries Commission
JHC	Japanese House of Councillors
JHR	Japanese House of Representatives
JIA	Japan Interchange Association

JIIA	Japan Institute of International Affairs
LOSC	United Nations Convention on the Law of the Sea
MOFA-JP	Ministry of Foreign Affairs of Japan
MOFA-PRC	Ministry of Foreign Affairs of the People's Republic of China
NJIL	Nordic Journal of International Law
NM	Nautical Mile
OAU	Organisation of African Unity
ODIL	Ocean Development and International Law
PMJ	Prime Minister of Japan and His Cabinet [<i>Shushō Kantei</i>]
PRC	People's Republic of China
RGDIP	Revue Général de Droit International Public
RIAA	Reports of International Arbitral Awards
ROK	Republic of Korea
SFCO	Sakaiminato Fisheries Coordination Office
TAC	Total Allowable Catch
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNDESA	United Nations Department of Economic and Social Affairs
UNDOALOS	United Nations Division for Ocean Affairs and the Law of the Sea
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
USA	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of the Treaties
VJIL	Virginia Journal of International Law
YILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

INTRODUCTION

This thesis addresses the topic of maritime border delimitation in the Northeast Asian region through the analysis of some legal issues entailed in the operation of ‘provisional arrangements’, as the *interim* solution envisaged in Arts. 74 (3) and 83 (3) of the *LOSC* pending final agreement on the EEZ and on the continental shelf between States with opposite or adjacent coasts. The conceptual framework chosen in this work in order to situate its research object is by and large functional, drawing on the assumption that the process of delimitation itself constitutes a means laying the foundation for the peaceful coexistence of States and, more noticeably, for their cooperation in a number of fields which require joint management efforts. The first research objective is therefore to unravel such rationales from the substantive provisions and the actual path of implementation of the reviewed agreements, hence tracing them back to the impact produced by the modern evolution of the law of the sea in the geographical context of Northeast Asia. The position is consequently upheld that such arrangements, though theoretically limited as to their temporal scope and undeniably conditioned by the geopolitical peculiarities of the region where they find application, can – and indeed, should – be organically understood as a constitutive element of the flexible, yet consistent, organisational regime of ocean spaces developed through the *LOSC*. This outcome is in turn defended through reference, on one hand, to the negotiating history of the *LOSC* provisions on maritime delimitation, representing the formal source of the agreements; on the other, to the framework for the management of natural resources laid down in related instruments, reflecting the needs that account for the concrete typologies taken on by provisional arrangements.

More specifically, it is at first observed how, according to the vast literature now existing on the development of the law of the sea since its 1958 codifications, the second half of the twentieth century has increasingly witnessed the emergence of a ‘sea enclosure movement’ dominated by ‘zonal’ concerns on the (re-)allocation of jurisdiction over maritime areas. The ultimate goal of such approach should thus be the achievement of a balance between the traditional freedoms of use of ocean spaces and the exercise of national control over the same, which is accomplished through a

functional definition of those sectors and the consequent adoption of ‘flexible’ criteria for their delimitation between adjacent or opposite States. An entirely ‘zonal’ interpretation of the ocean regime, however, is not immune to ambiguities arising from the spatial relationship of the areas so individuated, as apparent from the different policy objectives of States participating in UNCLOS III and the subsequent international case law on maritime delimitation during the 1980s. Moreover, though aimed at providing a solid legal foundation for the national management of offshore areas, this approach does not satisfactorily account for cooperative obligations that, especially with reference to such living resources as straddling and transboundary fish stocks, highly migratory species, or aquatic life of the high seas, seem to exist across – or, indeed, irrespectively of – established State jurisdictions. The analytical framework to be adopted should therefore be able to elucidate the coexistence of the ‘zonal’ model with one focused on the ‘integrated management’ of resources, hence explaining the *prima facie* exceptionality of agreements regulating cooperation through zones whose jurisdictional nature differ from the usual definitions of the EEZ and the continental shelf.

Considering the agreements as ‘fora’, whose legality and structure influence the realisation of their substantive content, the first two chapters gauge through concrete case studies of the Northeast Asian region how such formal aspects have been adapted to a variety of cooperative ‘scopes’, emphasising one or the other model of ocean governance. While not denying the interrelation of the two approaches in the negotiations, which are in turn duly considered by having reference to the available literature and primary sources, it has been preferred therefore to deal with each of them separately for the sake of clarity. This choice has firstly the merit of linking the variance found in the structure and actual performance of provisional arrangements addressing different kinds of maritime areas – namely, joint management of the EEZ, as against joint development of portions of the continental shelf – to the rationales for cooperation that they appear to privilege. If a unifying element is undoubtedly found in the similar formulation of Arts. 74 and 83 of the *LOSC*, arguably allowing for a ‘broad’ definition of joint development encompassing both living and non-living resources in undelimited areas, arrangements of the first type have generally proven to be more

suitable to address ‘integrated management’ concerns, with consequences also for the level reached by international cooperation in each field. Secondly, this kind of exercise also evidences the theoretical limits of each explanatory approach in isolation, since provisional arrangements could not be regarded but as a temporary anomaly to the ‘zonal’ regime of ocean spaces, whereas ‘integrated management’ still appears as an open-ended framework, enlarging the potential terms of reference well beyond the *LOSC* specific provisions on delimitation.

Having developed the arguments on the necessity of merging the two interpretative models, the third chapter then draws on the notion of a ‘dual approach’ to the law of the sea, as well as on that of the ‘international public domain’ formerly elaborated by the French doctrine. It is accordingly sought to demonstrate how the regime of maritime areas accomplishes the function of protecting a certain degree of ‘State exclusivism’ along with the interests of the international community, in turn balanced by the prevailing notion of ‘public good’ to which the task of fostering agreement on the appropriate legal institutions for any kind of space is entrusted. By including therein areas regulated through provisional arrangement, the twofold aim is to respond to the radical critique on the ‘indeterminacy’ of international law – invited by the intrinsic *ad hoc* nature of the agreements – while avoiding to end up in a ‘static’ justification of the existing order, as the different ‘open dialectic’ model has at times been criticised. The evolutionary nature of the notion of ‘public good’, subject to a vast array of geographical and temporal factors, is hence emphasised as the key to nurture a proactive attitude on the part of actors bringing their national preferences into the negotiated ‘fora’, and of regulatory bodies concretely enacting cooperation – also possibly through strategies of harmonisation with different regimes.

Whereas the limited range of case studies considered necessarily precludes any definitive statement of general validity, this thesis attempts, nevertheless, to make some findings on the conditions that should be sought to ensure functionality in an organisational framework of ocean spaces relying upon provisional arrangements. The conclusions consequently claim that, all else equal, agreements leaving space for a ‘broad’ scope of cooperation – rather than one limited to the removal of obstacles to resource exploitation, as a solely ‘zonal’ approach would suggest – have

higher possibilities to provide an effective, though temporary, alternative to maritime boundary delimitation. Such outcome appears, however, to require a careful crafting of ‘agreed areas’ so as to avoid at the same time the complete lack of inter-State regulation and, having consideration for the peculiar situation of semi-enclosed seas, conflicts with different sets of obligations that one actor might have contracted with a third party. The ‘preventive’ element of the arrangements, whose rationale has been traced back to their orientation toward final delimitation, seems in turn best serving the purposes of the *LOSC* when the concerns of the involved parties come to include joint regulatory efforts capable of surviving even the establishment of a boundary, beyond a merely passive restraint from activities prejudicial thereto. Finally, it is argued that adequate publicity to the criteria informing the internal processes of coordination bodies, such as joint fisheries commissions, would be desirable in order to rise domestic and international awareness of the specific interests and concerns that shape the ‘public domain’, thus also facilitating the task of the different bilateral authorities in harmonising multiple regimes.

The choice of Northeast Asia and, specifically, of the State practice of Japan, the People’s Republic of China and the Republic of Korea as the field of application of this thesis, has undeniably been influenced also by the somehow arbitrary preferences and interests of the candidate – holding a BA in Japanese Studies previously obtained at the University of Venice. The possibility of having direct access to primary sources in Japanese, as well as the invaluable opportunity provided by a one-year exchange programme for research at the Graduate School of International Cooperation Studies of the Kōbe University (Japan) have thus admittedly played an important role in the definition of the topic of this work. Nevertheless, the candidate also considers such choice justified in light of the value-added that the consideration for the Northeast Asian area appears to contribute to the type of research pursued here. Firstly, those three States – sharing as a matter of geography the same maritime areas, while the political situation and, in two cases, the existence of territorial disputes limit the perspectives of agreement on delimitation – have been looking for possibilities of joint access and regulation of such spaces even before the notion of ‘provisional arrangements’ was codified in the 1982 *LOSC*. Reference to the respective positions on issues of the law of the sea and

to past agreements is therefore provided whenever necessary to single out the changes brought about by the *LOSC*, but also the elements of continuity in national policies against a background of shifting technological capacities among regional actors and declining levels of living resources. Concerns over the establishment of sovereignty in the long run, the relationship between the two functional regimes envisaged by the *LOSC* and the need to promote the parallel development of potentially hydrocarbon-rich areas thus underpin the individuation of two aspects, ‘incentive’ and ‘preventive’, in the way the legal regime of specific zones is structured pursuant to the relevant arrangement. Moreover, the semi-enclosed nature of the Northeast Asian seas and the relative proximity of the States involved in negotiations render them at the same time coastal and distant-fishing States in each other’s EEZs, therefore warranting the analysis of relative rights and obligations, along with the difficulties currently faced by fisheries agreements, that is conducted in the second chapter.

Northeast Asia, though still largely affected by ongoing political tensions and a historical reluctance about regional multilateralism, may ultimately provide for the same reasons a good chance to consider the instrumentalities and conditions under which States can attempt to regulate areas functionally requiring their engagement beyond mere coexistence in a ‘cold peace’ situation. It is hoped that the present work, through its elaboration on existing analytical approaches and their combination, will offer a modest contribution to the systematisation of the general understanding of provisional arrangements pending maritime delimitation, as well as to the debate on ocean spaces management in the Northeast Asian context.

Kōbe, Japan

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INTRODUZIONE

La presente tesi affronta il tema della delimitazione dei confini marittimi nel contesto asiatico-nordorientale attraverso l'analisi di alcuni salienti aspetti legali riconducibili al regime degli 'accordi provvisori' quale strumento *ad interim* previsto dagli artt. 74 (3) e 83 (3) della *Convenzione di Montego Bay sul Diritto del Mare (CDM)* nel periodo antecedente la conclusione di un accordo finale delimitante le zone economiche esclusive (ZEE) e le piattaforme continentali di Stati costieri frontisti o adiacenti. Il quadro teorico adottato nella concettualizzazione dell'oggetto di ricerca all'interno dell'elaborato è essenzialmente di tipo funzionale, fondandosi sull'ipotesi che il processo di delimitazione in sé costituisca un mezzo utile a stabilire le premesse per la coesistenza pacifica dei membri della comunità internazionale e, più significativamente, per la loro cooperazione in una quantità di settori richiedenti un impegno gestionale congiunto. Primo obiettivo dello studio è pertanto individuare tali *rationes* sulla base delle disposizioni sostanziali degli accordi e della loro effettiva implementazione, ricondotte di conseguenza all'impatto prodotto dalla moderna evoluzione del diritto del mare in Asia nordorientale. È dunque sostenuta la posizione secondo cui gli 'accordi provvisori', per quanto teoricamente limitati in senso temporale e innegabilmente influenzati dalle peculiarità geopolitiche dell'area geografica d'implementazione, possano – e invero debbano – trovare collocazione organica quale elemento costitutivo all'interno del flessibile, eppur coerente, regime degli spazi marittimi sviluppato tramite la *CDM*. Tale conclusione è a propria volta difesa attraverso il riferimento, da un lato, alla storia negoziale delle disposizioni della *CDM* in tema di delimitazione marittima, costituenti la fonte formale degli accordi in questione; dall'altro, al quadro per la gestione delle risorse naturali rintracciabile negli strumenti giuridici connessi, in cui si riflettono le concrete esigenze giustificanti le tipologie di volta in volta assunte dai primi.

L'analisi muove nello specifico dalla constatazione di una tendenza alla 'chiusura' degli spazi marittimi nel corso della seconda metà del ventesimo secolo, dominata da un'attenzione di tipo 'zonale' verso la (ri)allocazione della giurisdizione statale esercitata sui medesimi, secondo quanto ampiamente riconosciuto dalla vasta letteratura oggi disponibile in merito agli sviluppi

del diritto del mare dalle sue codificazioni del 1958. Tale tendenza troverebbe giustificazione nella necessità di bilanciare le tradizionali libertà d'uso dei mari con il controllo esercitativo dagli Stati: obiettivo questo raggiunto attraverso la creazione di zone aventi base funzionale e la conseguente adozione di criteri 'flessibili' per la delimitazione delle stesse fra Stati con coste opposte o adiacenti. Un'interpretazione interamente 'zonale' del regime degli spazi marittimi non è tuttavia immune da aspetti controversi traenti origine dalla relazione fra le diverse aree così individuate, come risulta evidente dall'esame delle differenti politiche perseguite in materia dagli Stati partecipanti alla Terza Conferenza delle Nazioni Unite sul Diritto del Mare e, successivamente, dai casi di delimitazione decisi dalla Corte Internazionale di Giustizia durante gli anni Ottanta. Un simile approccio, inoltre, malgrado inteso a offrire un solido fondamento giuridico alla gestione di tali spazi da parte di singoli Stati, non consente di trovare piena giustificazione per obblighi di cooperazione che, particolarmente in riferimento a risorse viventi quali stock ittici transzonali e transfrontalieri, specie altamente migratorie, o peschiere dell'alto mare, paiono sussistere al di là delle unità giurisdizionali isolatamente considerate – se non in modo addirittura indipendente dalla loro stessa esistenza. Il quadro analitico da applicarsi dovrebbe pertanto essere in grado anzitutto di gettar luce sulla coesistenza di un modello 'zonale' con un altro mirato alla 'gestione integrata' delle risorse, spiegando di conseguenza l'apparente eccezionalità di accordi disciplinanti forme di cooperazione interstatale mediante l'istituzione di aree la cui natura giurisdizionale si differenzia tanto dalle usuali definizioni della ZEE, quanto da quelle della piattaforma continentale.

Nei primi due capitoli si considera quindi mediante lo studio di casi concreti riferiti alla regione dell'Asia nordorientale come gli accordi, ivi concettualizzati quali *fora* il cui contenuto sostanziale si ritiene influenzato dalla struttura e connotazione giuridica ad essi attribuite, siano stati concepiti in relazione a tali aspetti formali per adattarsi a una pluralità di ambiti cooperativi, di volta in volta ponenti l'accento sull'uno o sull'altro modello di gestione marittima. Senza con ciò intendere negare l'interrelazione dei due approcci nel corso dei negoziati sugli accordi provvisori, cui si è fatto riferimento ogniqualvolta possibile tramite il ricorso a fonti primarie e secondarie, esigenze di chiarezza esplicativa hanno reso preferibile trattare separatamente ciascuno di essi, così

ricollegando in primo luogo le varietà di struttura ed effettivo funzionamento degli accordi stessi – trovanti applicazione relativamente a differenti zone marittime, come nel caso della gestione comune della ZEE, rispetto allo sviluppo congiunto di porzioni della piattaforma continentale – alle *rationes* che essi appaiono privilegiare nel creare obblighi internazionali di cooperazione. Se un elemento unificante è dunque indubbiamente rappresentato dalla simile formulazione degli artt. 74 e 83 della *CDM*, sulla base dei quali si è scelto di estendere la definizione di ‘sviluppo congiunto’ a includere sia le risorse viventi che le minerali, purché situate in aree non delimitate, si nota purtuttavia come gli accordi del primo tipo si siano generalmente rivelati più adeguati all’inclusione di aspetti relativi alla ‘gestione integrata’, con ricadute evidenti anche sul livello raggiunto dalla cooperazione internazionale in ciascuno dei due settori. Tale metodo analitico contribuisce inoltre ad evidenziare i limiti teorici di ambedue gli approcci esplicativi qualora separatamente considerati, stante l’impossibilità d’intendere gli accordi provvisori come altro da una mera anomalia temporanea all’interno di un regime ‘zonale’ degli spazi marittimi, laddove la nozione di ‘gestione integrata’ si configura tuttora come un quadro incompleto, potenzialmente orientato all’espansione dei termini di riferimento per il giurista ben oltre gli specifici articoli della *CDM* in tema di delimitazione.

Coerentemente con l’argomentazione così sviluppata in merito alla necessità di applicare entrambi i modelli interpretativi, il terzo capitolo fonda la propria linea d’indagine sul concetto di un ‘duplice approccio’ al diritto del mare, nonché sulla nozione di ‘*domaine public international*’ precedentemente elaborata dalla dottrina francese. Si cerca in tal modo di dimostrare come il regime degli spazi marittimi svolga la funzione di tutelare contemporaneamente un dato livello di ‘esclusivismo’ nazionale insieme agli interessi generali della comunità internazionale, bilanciati a propria volta dalla prevalente rappresentazione del ‘bene pubblico’ cui è demandato il compito di favorire la formazione di accordi sulle istituzioni giuridiche più appropriate ad ogni tipologia di area. Nell’includere gli accordi provvisori all’interno di un simile quadro teorico, l’obiettivo, in sé duplice, è di rispondere alla posizione radicale che vorrebbe il diritto internazionale un oggetto intrinsecamente ‘indeterminato’ – come sin troppo facilmente suggerito nel caso in questione dalla natura *ad hoc* degli accordi considerati – evitando al tempo stesso una riduzione dell’analisi a

giustificazione ‘statica’ dell’ordine giuridico esistente, come invece sostenuto da alcune critiche alla differente caratterizzazione del diritto quale ‘dialettica aperta’. Il fatto che una natura evolutiva, soggetta qual è a una vasta gamma di fattori geografici e temporali, sia riscontrata nel concetto stesso di ‘bene pubblico’ è conseguentemente sottolineato in quanto strumento favorente un atteggiamento proattivo da parte di attori impegnati nel trasferimento di preferenze e interessi nazionali all’interno di contesti negoziati e organismi regolatori concretamente realizzanti le forme di cooperazione – ivi incluse, se possibile, strategie di armonizzazione con regimi differenti.

Per quanto la limitatezza della casistica esaminata necessariamente precluda allo stadio presente una conclusione definitiva di validità generale, si è nondimeno cercato di porre in luce alcune osservazioni sui fattori da ricercare al fine di assicurare funzionalità in un sistema di norme giuridiche disciplinante l’organizzazione degli spazi marittimi attraverso il ricorso ad accordi provvisori. Nelle conclusioni si afferma dunque che, a parità di ogni altra condizione, accordi in grado di garantire un ambito di cooperazione ‘ampio’ – se comparato al più limitato compito di rimozione degli ostacoli allo sfruttamento di risorse, quale invece suggerito da un approccio meramente ‘zonale’ – presentano maggiori possibilità di costituire un’alternativa efficace, seppur temporanea, allo stabilimento di un confine marittimo. Tale risultato richiede, d’altro canto, attenzione nello strutturare le caratteristiche delle aree così regolate, in maniera da evitare al tempo stesso la completa mancanza di forme di controllo interstatale e, in considerazione della particolare connotazione geografica dei mari semi-chiusi, conflitti con diversi sistemi di obblighi che un singolo attore potrebbe aver contratto con una terza parte. L’aspetto ‘preventivo’ degli accordi provvisori, la cui motivazione è ricondotta all’orientamento dei medesimi verso la delimitazione finale, appare inoltre servire al meglio l’oggetto e lo scopo della *CDM* qualora gli interessi delle parti coinvolte giungano a includere sforzi di regolazione congiunta perpetuabili indipendentemente dalla presenza o meno di un confine, dunque oltre la semplice astensione passiva da azioni pregiudicanti tale risultato. Si sostiene infine come una più adeguata pubblicità dei criteri seguiti da organismi di coordinazione, quali le commissioni congiunte per la pesca, nei propri processi decisionali interni sia desiderabile al fine di sensibilizzare l’opinione domestica e internazionale in merito agli specifici

interessi e preoccupazioni caratterizzanti la forma assunta dalla nozione di ‘bene pubblico’, agevolando così anche il compito dei diversi organi bilaterali nell’armonizzare una pluralità di regimi giuridici con attori parzialmente differenti.

La scelta dell’Asia nordorientale e, nello specifico, della prassi di tre Stati – il Giappone, la Repubblica di Corea e la Repubblica Popolare Cinese – quale campo d’applicazione della presente ricerca risente innegabilmente delle preferenze e interessi, in certa misura arbitrari, conseguiti dal candidato durante il precedente percorso triennale di Studi Giapponesi completato nel 2012 presso l’Università Ca’ Foscari. Un importante ruolo nella definizione della tematica di lavoro è stato pertanto svolto dalla possibilità di avere accesso diretto a fonti primarie in lingua giapponese, così come dall’inestimabile opportunità di partecipare ad un programma annuale di scambio per ricerca presso la Graduate School of International Cooperation Studies dell’Università di Kōbe, cui va la più sentita gratitudine del candidato. Nondimeno, tale scelta si è ritenuta altrettanto giustificata in considerazione del valore aggiunto che lo studio dell’area geografica eletta a oggetto è in grado di offrire alla ricerca qui perseguita. I tre Stati in questione – necessariamente condividenti per ragioni geografiche le medesime aree di oceano, a fronte di limitate prospettive di accordo sulla loro delimitazione in ragione delle circostanze politiche e, in due distinte situazioni, dell’esistenza di dispute territoriali – hanno innanzitutto esplorato possibili regimi giuridici per l’accesso congiunto e la regolazione di tali spazi ben prima che la nozione degli ‘accordi provvisori’ fosse codificata nella *CDM*. Si è quindi optato per far riferimento alle rispettive posizioni degli Stati in tema di diritto del mare e agli accordi non più in vigore ogniqualvolta necessario al fine di indicare i cambiamenti prodotti dalla *CDM*, senza per questo ignorare gli elementi di continuità nelle politiche nazionali implementate sullo sfondo di un riequilibrio nelle capacità tecnologiche degli attori regionali e di un declino generalizzato degli stock di risorse viventi nei mari dell’Asia orientale. Le diverse posizioni sullo stabilimento di diritti sovrani nel lungo periodo e sulla relazione fra i due regimi funzionali previsti all’interno della *CDM*, nonché la necessità di promuovere il parallelo sfruttamento di aree potenzialmente ricche di idrocarburi, sostanziano così l’individuazione di due aspetti, uno ‘incentivante’ e uno ‘preventivo’, nel modo in cui gli accordi considerati strutturano il regime

organizzativo di zone specifiche. La natura semi-chiusa dei mari dell'Asia nordorientale e la relativa prossimità geografica degli Stati coinvolti pongono infine gli stessi nella condizione di essere contemporaneamente Paesi costieri e 'utenti distanti' delle risorse alieutiche in rapporto alle rispettive ZEE, rendendo di conseguenza necessario il tipo di analisi dei diritti e obblighi relativi, così come delle problematiche attualmente fronteggiate dagli accordi sulla pesca, sviluppata nel secondo capitolo.

Per quanto ad oggi segnata dal protrarsi delle tensioni politiche, nonché da una storica riluttanza a forme regionali di organizzazione multilaterale, l'Asia nordorientale può in ultima analisi costituire per le medesime ragioni una preziosa occasione per lo studio dei mezzi e dei presupposti in base ai quali i singoli Stati acquisiscono la capacità di regolare aree funzionalmente necessitanti un coinvolgimento attivo al di là della mera coesistenza in una situazione ben paragonabile a una 'pace fredda'. È ambizione del candidato che la presente ricerca, attraverso l'elaborazione in essa condotta e la combinazione di approcci analitici esistenti, abbia a offrire il proprio modesto contributo alla sistematizzazione della nozione generale relativa agli 'accordi provvisori di natura pratica', nonché alla discussione sulla gestione degli spazi marittimi nella regione.

Kōbe, Giappone

13 luglio 2014

CHAPTER 1

PROVISIONAL ARRANGEMENTS IN A 'ZONAL' PERSPECTIVE

Outline of the Argument

As set out in the *Introduction*, this chapter will be concerned with the first stage of the present investigation into the Northeast Asian maritime regime, mainly drawing on a 'zonal' interpretation of provisional arrangements concluded pursuant to Arts. 74 (3) and 83 (3) of the *LOSC*. The concept of a 'zonal approach' to ocean governance reflects indeed a traditional need for the identification of spaces distinguished by the extent of coastal States' sovereignty and jurisdiction, underpinning the construction of maritime regimes to the point that, in Tanaka Yoshifumi's words, "the history of international law of the sea is that of the division of the ocean"¹. The close linkage existing between provisional arrangements and maritime boundary delimitation, actually envisaged by the construction itself of the relevant *LOSC* provisions², indicates therefore the 'zonal approach' as the logical starting point for the assessment of the agreements to be reviewed in this research.

Taking into account the way in which such concept is employed in the above-mentioned study by Tanaka, *Section I* of the present chapter will further substantiate the extent of the consideration received by 'zonal' concerns during UNCLOS III, highlighting in particular the increasing degree of flexibility recognised to the ocean regime for the purpose of ensuring a stable and continuous access to natural resources. Difficulties in the actual implementation of a "geometrical apportionment"³ of the seas from the point of view of resource exploitation when hindrances exist to prompt delimitation will be subsequently discussed taking the pre-1996

¹ TANAKA, 2008: 1.

² Art. 74 (*Delimitation of the exclusive economic zone between States with opposite or adjacent coasts*); Art. 83 (*Delimitation of the continental shelf between States with opposite or adjacent coasts*).

³ LEANZA & SICO, 2001: 66 (in Italian, own translation).

Northeast Asian maritime regime as a concrete example⁴. Elements of dysfunctionality, leading to the over-exploitation of living resources and uncertainties as to the possibility of development of the continental shelf, provided the rationale for the negotiation of a new set of agreements from the second half of the 1990s, whose legal basis can be directly traced back to the “obligation to cooperate”⁵ individuated in Arts. 74/83 of the *LOSC*.

Section II will consequently offer a basic insight into the juridical nature of provisional arrangements as “fora”⁶ where the obligation to cooperate, functional to the exploitation-related aspects of the ‘zonal approach’, is fulfilled by States without prejudice to the final establishment of jurisdiction. Such double nature found in provisional arrangements – “in essence incentive and preventive obligations”⁷ – constitutes the common ground for considering from a unified perspective agreements dealing either with joint fisheries management, or with the joint development of mineral resources. In the second half of this section, the relevant Northeast Asian arrangements will therefore be analysed with an intention to assess the extent to which contracting governments have been able to provide viable fora for discharging their ‘incentive’ and ‘preventive’ obligations, further setting out the possible reasons for the diverse performance of joint fisheries and continental shelf joint development arrangements.

Drawing on this analysis, the *Conclusions* will finally make the point about the risks posed to the overall functionality of a ‘zonal’ ocean regime when the balance between the ‘incentive’ and the ‘preventive’ aspects of provisional arrangements is upset by concerns over final delimitation to such a degree that a “de facto moratorium”⁸ takes the place of joint resource exploitation. The argued

⁴ 1996 is the year in which the three Northeast Asian States here considered have become parties to the *LOSC*. More specifically, the Republic of Korea has accessed the Convention on 29 January 1996, the People’s Republic of China on 07 June 1996, and Japan on 20 September 1996 (UNDOALOS, 2014).

⁵ LAGONI, 1984: 355.

⁶ LEE S., 2012: 27.

⁷ LAGONI, 1984: 366.

⁸ ZHANG, 2011: 54.

adaptiveness of fisheries-related agreements in achieving the internal balance of those objectives, on the other hand, raises issues regarding their viability as sound international management regimes, to which the 'zonal approach', by definition concerned with the clear-cut establishment of national sovereignty as the basis for resource conservation and management, cannot provide a completely adequate analytical framework. The last part of this chapter will thus set forth the fundamental questions requiring in turn the adoption of an 'integrated management approach' in *Chapter 2*.

Section I

The ‘Zonal Approach’ and Its Implications in Northeast Asia

ESSENTIAL CHARACTERISTICS OF THE APPROACH

The basic insight underlying the concept of ‘zonal approach’ is that of a need to reconcile the interests of coastal States with those of other sea users, such as distant-fishing States, which is in turn accomplished through a balance between the control on offshore resources exercised by the formers and the freedom of utilisation recognised to the latter⁹. In this regard, the “sea enclosure movement”¹⁰, largely setting aside both resource- and area-specific concerns, has represented the preferential venue to achieve a reconfiguration of that balance whenever a new definition of the scope of regulatory power attached to the exercise of jurisdiction was warranted by the “notion of special interests of the coastal State”¹¹. UNCLOS III constituted no exception in the sense that “the issue of the extent of national jurisdiction was indeed the dominant issue”¹² before the opening of the first plenary meeting in 1973, as even a cursory analysis of the *List of Subjects and Issues to be Discussed at Law of the Sea Conference* adopted by the Seabed Committee on 16 August 1972

⁹ See TANAKA, 2008: 64. Similarly, CONFORTI, 1958: 202-203 noted how the law of the sea has traditionally been concerned with disciplining the conflict between “the interest of the coastal State to control offshore activities, in response to certain needs of the territorial community, and the interest of other States in the freedom of navigation and exploitation of maritime resources” (in Italian, own translation).

¹⁰ VALENCIA & AMAE, 2003: 190.

¹¹ DEL VECCHIO, 1984: 80 (in Italian, own translation). The reconciliation of the diverging interests of the coastal and other States through concrete limits cast on the spatial scope wherein a member of the international community may legitimately exercise its coercive power is indeed central in the definition of “zonal regulation” – complemented by an interest-based “functional regulation”, specifying the content of such power – elaborated by CONFORTI, 1958: 204-209.

¹² LODGE, 1999: 193.

clearly indicates¹³. The 1945 ‘Truman Proclamations’ are recognised as the starting point for the expansion of jurisdiction in the post-WWII period¹⁴, subsequently upheld by the 1955 ILC *Articles Concerning the Law of the Sea* as the coastal State’s “special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea”¹⁵. A similar legal concept was thereafter embedded in several declarations of Latin-American countries, aiming at the unilateral extension of coastal States’ sovereignty on the basis of “reasonable criteria”¹⁶. The absence in these declarations, also reflected in the 1958 LOSCs¹⁷, of any clear distance criteria

¹³ For the ‘zonal’ concerns found in the elaboration of these issues by the Seabed Committee with respect to the new EEZ regime, see in particular Pts. 6.5 (*Exclusive Economic Zone Beyond the Territorial Sea – Limits: Applicable Criteria*), 6.7.2 (*Sea-Bed Within National Jurisdiction – Delimitation Between Adjacent and Opposite States*), and 6.7.4 (*Sea-Bed Within National Jurisdiction – Limits: Applicable Criteria*).

¹⁴ Respectively, the *Proclamation No. 2667 of 28 September 1945 – Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, spearheading the subsequent developments of the offshore oil industry (see KRUEGER & NORDQUIST, 1979: 325 and GAO Z., 1998: 109), and the *Proclamation No. 2668 of 28 September 1945 – Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas*, equally interpreted as a response to technological developments, even though arguably “still lacking a precise formulation and cogent motivations” (DEL VECCHIO, 1984: 64 – own translation).

¹⁵ Art. 54 (1). For a description of this (proposed) provision as “a rather programmatic one [...] applied to an undefined sea area”, see however DEL VECCHIO, 1984: 81-82 (own translation).

¹⁶ See in particular the resolution adopted on 04 February 1956 by the Third Inter-American Council of Jurists (*Principios de México sobre Régimen Jurídico del Mar, A – Mar Territorial*, Para. 2); the declaration adopted on 08 May 1970 by nine Latin-American States (*Declaración de Montevideo sobre el Derecho del Mar*, Arts. 2, 5); and the declaration adopted on 08 August 1970 by the Latin American Meeting on Aspects of the Law of the Sea (*Declaración de Estados Latinoamericanos sobre el Derecho del Mar*, Art. 2). A commentary on these resolutions is found in DEL VECCHIO, 1984: 78, 106.

¹⁷ Reference is made in particular to the *Convention on the Territorial Sea and the Contiguous Zone* and to the *Convention on the Continental Shelf*, both signed at Geneva on 29 April 1958 along with two other Conventions and an Optional Protocol. A brief account of the negotiating process leading to the adoption of such instruments, after the first studies on the regime of the high seas and of the territorial sea had been initiated by the ILC in 1950 and 1951, is usefully found in CONFORTI, 1958: 201, n. 2.

defining the *ratione loci* scope of the ‘special interests’ does not detract from the fundamental considerations substantiating such developments in the global maritime regime. On one hand, namely, “the safeguard of national interest of coastal States”¹⁸ was the element triggering the process; on the other, the “struggle for State jurisdiction”¹⁹ required distant sea users to compromise so as to ensure the maintenance of a margin for access to resources. The ‘zonal’ governance of maritime spaces can therefore be interpreted as an “exploitation-oriented”²⁰ approach, setting “due regard for the *sovereignty* of all States” (*i.e.*, the core term of reference for differentiating the legal nature of the multiple sea areas individuated under the *LOSC*) as the premise for the promotion of the “equitable and efficient *utilisation*” of sea resources²¹.

Such exploitation-oriented driver, inherent to the ‘zonal approach’, was indeed recognised also by Treves, who traced back two of the rationales for the adoption of the *LOSC* to the accomplishment of the ‘permanent sovereignty’ of States over natural resources, alongside the exploitation of mineral resources outside national jurisdiction for the benefit of mankind²². It may be actually noticed that this aspect of the contemporary law of the sea is accepted as a touchstone for the effectiveness of maritime regimes even by authors otherwise critical of the centrality taken by the jurisdictional debate, arguing in this case that the ‘zonal approach’ would have failed to create an appropriate regime “to govern common *exploitation*”²³. Environmental protection, as the third rationale indicated by Treves, similarly appears to have been conceived on the basis of firmly established national jurisdiction. Art. 194 (2) of the *LOSC* in fact provides to this extent that “States

¹⁸ TANAKA, 2008: 64.

¹⁹ HEWISON, 1999: 161.

²⁰ TANAKA, 2008: 64.

²¹ Para. 4 of the *Preamble* to the *LOSC* (emphasis added). Significantly, the perceived ‘crisis’ of the traditional freedom of the seas in the second half of the XX century was justified in light of the scarce help arguably provided by the principle of freedom “if exploitation of ocean resources assume[d] a place of primary importance on an international scale of economic values” (CONFORTI, 1975a: 12).

²² See TREVES, 1983: 4 (in Italian).

²³ HEWISON, 1999: 161 (emphasis added).

shall take all measures necessary to ensure that activities *under their jurisdiction or control* are so conducted as not to cause damage by pollution *to other States*” (emphasis added). The same approach was taken in the first UNGA resolutions addressing the issue of inter-State cooperation in the fields of the environment and shared resources²⁴.

A shared belief existed therefore that the adoption of a uniform regime providing for the expansion of coastal States’ jurisdiction – conveniently coupled with the recognition of a conditional possibility of access to living resources for the benefit of distant sea users²⁵ – would have resulted in a sound management framework²⁶. Environmental concerns were hence subsumed to “the dominant issue of the extent of national jurisdiction”²⁷, taking precedence also over the specific features of such areas as enclosed and semi-enclosed seas, which bear a particular relevance to the present research in light of the geographical characteristics of the Northeast Asian seas here considered²⁸. It is emblematic in this sense that proposals like the Iranian one, aiming to apply the

²⁴ See LAGONI, 1979: 234. Some of the relevant resolutions are A/RES/2995 (XXVII), *Co-operation between States in the Field of the Environment*, Paras. 1, 2; A/RES/3129 (XXVIII), *Co-Operation in the Field of Environment Concerning Natural Resources Shared by Two or More States*, Para. 2; and A/RES/3281 (XXIX), *Charter of Economic Rights and Duties of States*, Art. 3. The latter, requiring the introduction of “a system of information and prior consultations in order to achieve optimum use of [...] resources without causing damage to the legitimate interest of others”, is regarded by GAO Z., 1998: 117 as “a direct legal basis for the principle of joint development” (see also BECKER-WEINBERG, 2010: 39).

²⁵ See Arts. 62 (2), 69, 70 of the *LOSC*, setting out the conditions for access to the EEZ by nationals of other States, with particular regard to developing, land-locked, and geographically disadvantaged States.

²⁶ See CHRISTIE, 1999: 396.

²⁷ LODGE, 1999: 194.

²⁸ Namely, the Sea of Japan, the Yellow Sea, and the East China Sea, all of which “consist[] entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States” pursuant to the definition provided in Art. 122 of the *LOSC*. Given the degree of controversy over the denomination of the above-mentioned seas, the names which appear most often employed in English language academic publications on this topic will be used here, without any implications as to the position of the author on issues of sovereignty and jurisdiction exercised or claimed by coastal States in the region.

general rules of the *LOSC* to enclosed and semi-enclosed seas “in a manner consistent with the special characteristics of these seas and the needs and interests of their coastal States”²⁹, were finally rejected by the Conference in favour of the current formulation of Art. 123, taking the opposite approach in calling upon cooperation by coastal States “in the exercise of their rights and in the performance of their duties under [the] Convention”.

On the other hand, it is undeniable that perpetuating the ‘zonal approach’ within the *LOSC* required the adoption of increasingly functional distinctions, thus allowing for the evolution from the rigid dichotomy between territorial and high seas, still to be found in Art. 1 of the 1958 *Geneva Convention on the High Seas*³⁰, to a regime where maritime zones can coexist in the same geographic area (as in the case of the EEZ with respect to the continental shelf) and differentiate between the concepts of “sovereign rights” and “jurisdiction” to be exercised therein³¹. Such linkage of the rights recognised within the newly established zones to a functional definition of the same constituted indeed the other side of the widespread acceptance of limitations to the traditional freedom of the high seas. It is actually on these grounds that a “legal analogy”³² was individuated between the EEZ

²⁹ A/CONF.62/C.2/L.72, *Iran: Draft Articles on Enclosed and Semi-Enclosed Seas*, Art. 2. See also LODGE, 1999: 198.

³⁰ Formally, the *Convention on the High Seas*, signed at Geneva on 29 April 1958 (hereinafter, the *High Seas Convention*). The distinction was made even sharper from the point of view, adopted also by the International Law Commission (ILC, 1956b: 265), which interpreted Art. 1 of the *Convention on the Territorial Sea and the Contiguous Zone* as exactly equating the rights exercised by the coastal State over the territorial sea to those enjoyed over other parts of its territory (see CONFORTI, 1958: 210).

³¹ *LOSC*, Art. 56 (1) (a), (b) (*Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*). Such distinction is recognised also by TREVES, 1983: 24-25 as one between purely ‘economic’ activities (to which coastal States’ ‘jurisdiction’ applies) and other types of undertakings (which appear to be more strictly subordinated to the extension of coastal States’ ‘sovereign rights’). This would therefore underscore the “functionalistic motivations that have brought States to envisage the new scope of authority exercised over the seas” (DEL VECCHIO, 1984: 123 – own translation).

³² The line of argumentation on the concept of a “legal analogy” between the two regimes, notwithstanding their historically different origins, has been developed by IGUCHI, 1998: 73-74 (in Japanese). This is reflected,

and the continental shelf regimes, leading to a re-conceptualisation of State sovereignty over the seas as a “functional balance of activities”³³. The coexistence of the two regimes, however, has not proven uncontroversial, in light of the partially different interpretation that States have given to the *LOSC* provision establishing sovereign rights in the EEZ also over “natural resources [...] of the seabed and its subsoil”³⁴. In this regard, a brief review of the main orientations emerging from doctrine and State practice, though beyond the immediate scope of this research, is nevertheless necessary given the relevance assumed by the (alleged) legal nature of a disputed area in the delimitation process³⁵.

As a first point, it should be observed that the different historical process leading to the codification of the EEZ and continental shelf regimes, as well as the indication derived from Art. 56 (3) of the *LOSC*, stating that the rights on the seabed and subsoil set out for the EEZ shall be exercised “in accordance with” provisions governing the continental shelf, have brought a number of authors to uphold a position referred to as “separatism”³⁶. Under this approach, the “speciality of the regime”³⁷ recognised to the continental shelf allows for its “primacy [...] over the EEZ as regards

from the point of view of the formal sources, by the emergence of both notions as customary institutions of international law through an ‘accelerated’ process, arguably warranted by the concrete “needs of international life” (CARREAU & MARRELLA, 2012: 309 – in French, own translation). On such characterisation of customary norms, well developed in the Italian doctrine, see also GIULIANO, SCOVAZZI & TREVES, 1991: 46-48 (in Italian).

³³ LEANZA & SICO, 2001: 56 (own translation). Such conclusion was indeed reached, in a nutshell, also by CONFORTI, 1975a: 12, observing a resolute movement of international law towards the characterisation of the rights exercised over ocean spaces as ‘functional’ ones, to the extent that “in the relations between the coastal State and other States [...] the prevalent principle is that all States, including the coastal one, must strictly keep themselves within the limits of their rights”.

³⁴ *LOSC*, Art. 56 (1) (a).

³⁵ See BAUTISTA, 2012: 110. For a similar reasoning, specifically concerning the nature of continental shelf delimitation disputes in Northeast Asia, see also KANG, 2003: 115.

³⁶ EVANS, 1994: 291. See also PARK H.-K., 2000: 37 for a connotation of the two regimes as “different in both genesis and character”.

³⁷ DEL VECCHIO, 1984: 140 (own translation).

rights to the sea-bed and subsoil”³⁸, therefore theoretically admitting also the possibility of different boundaries being established and overlapping when delimitation of these zones between adjacent or opposite States is concerned³⁹. Concretely establishing separate boundaries for the EEZ and continental shelf areas, however, is not by itself a necessary element in order to identify the presence of such orientation in State practice – different provisions found in national legislation addressing the two regimes usually being sufficient to infer the adoption of a ‘separatist’ position⁴⁰. In this sense, it appears that, among the three Northeast Asian States whose practice is being investigated in this research, ‘separatism’ is followed both by the Republic of Korea⁴¹ and by the People’s Republic of China, whose domestic legislation substantially adopts the same wording of the *LOSC*⁴². Whereas the ‘separatist’ approach fundamentally assumes a degree of complementarity between the EEZ and continental shelf regimes, “parallelism”⁴³ invokes instead a single distance criterion “in all respects save in regard to the outer continental shelf between the 200-mile and 350-mile limits”⁴⁴. In this sense, the ‘natural prolongation criterion’ still endorsed by the ICJ in the 1969 *North Sea Continental Shelf Case*⁴⁵ would be discarded in light of the rights established by the EEZ-related provisions of

³⁸ EVANS, 1994: 287.

³⁹ See TREVES, 1983: 34. Cf. also GAO J., 2010: 175-176 with reference to the 1997 *Delimitation Agreement* between Australia and Indonesia, concretely adopting a similar approach.

⁴⁰ See EVANS, 1994: 292.

⁴¹ Issues concerning the seabed and its subsoil were indeed left under the *Submarine Mineral Resources Development Act*. Law No. 2184 of 1 January 1970, even after the adoption of the *Exclusive Economic Zone Act*. Law No. 5151 of 8 August 1996.

⁴² See Arts. 2 and 3 of the *Exclusive Economic Zone and Continental Shelf Act*. Adopted at the Third Meeting of the Standing Committee of the Ninth National People's Congress on 26 June 1998.

⁴³ EVANS, 1994: 290.

⁴⁴ *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*. Judgment, Dissenting Opinion of Judge Oda: para. 61. CONFORTI, 1986: 24, commenting on the judgment, equally remarked how “the Court ‘buried’ the geomorphological criteria inspired by the natural prolongation principle for delimitation between coasts located less than 400 NM apart” (in French, own translation). The theory of the “decline of geomorphology” has been advanced also by WILLIS, 1993: 75.

⁴⁵ See in particular *North Sea Continental Shelf*. Judgment: para. 19.

the *LOSC* with regard to the resources of the marine seabed and subsoil. The ‘parallelism’ orientation – especially in its ‘dynamic’ variant, aiming at the progressive harmonisation of the two regimes⁴⁶ – though not denying their separate and reciprocally independent existence⁴⁷, concretely argues that a single delimitation line should be preferable. The ultimate objective is thus individuated in the establishment of a single State’s jurisdiction over both the water column and the seabed within 200 NM, so as to avoid the “superimposition of two different boundaries”⁴⁸. Traces of ‘parallelism’ in State practice can be individuated in national legislations addressing the EEZ and continental shelf regimes in an identical manner, such as the Japanese 1996 *EEZ and Continental Shelf Law*⁴⁹. This domestic provision namely employs in both cases the 200-NM criterion, while equidistance is envisaged as the preferred approach to delimitation with adjacent or opposite States (Arts. 1 (2) and 2 (1))⁵⁰.

Finally, it would be useful to recall that, beyond positions recognising the coexistence of the two regimes under different degrees of harmonisation, a more radical, or “assimilationist”⁵¹, stance is at the origin of the “ambiguities”⁵² still partially found in their reciprocal relation. Such position ensued from the fact that the EEZ was apparently intended by some States to supplement seabed jurisdiction not adequately granted under the ‘exploitability-based’ regime envisaged by Art. 1 of

⁴⁶ See EVANS, 1994: 296. On the use of the concept of “harmonisation” of the regimes, cf. also IGUCHI, 1998: 76.

⁴⁷ See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*. Judgment, Separate Opinion of Vice-President Oda: paras. 71, 74.

⁴⁸ *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*. Judgment, Dissenting Opinion of Judge Oda: para. 126. In similar terms, PAIK, 1995: 15 argues the paucity of rationales for the existence of different boundaries of the two zones.

⁴⁹ *Law on the Exclusive Economic Zone and the Continental Shelf*. Law No. 74 of 14 June 1996.

⁵⁰ See also MOFA-JP, November 2006 (in Japanese).

⁵¹ EVANS, 1994: 288.

⁵² See IGUCHI, 1998: 75, asserting that “it is correct to see the development of the negotiations [during UNCLOS III] as lacking clarity on this fundamental understanding” (own translation).

the 1958 *Geneva Convention on the Continental Shelf*⁵³. Beginning with the declaration issued by the group of States participating in the 1972 Yaoundé Seminar – none of which benefited from a broad continental shelf⁵⁴ – ‘assimilationism’ was consistently upheld by African countries, which claimed the establishment of an economic zone “embod[ying] *all economic resources* comprising both living and non-living resources such as oil, natural gas and other mineral resources”⁵⁵. The group of the Latin-American States joined in this stance as well, after their renunciation to the ‘200-NM territorial sea’ principle⁵⁶. In particular the 1972 *Draft Articles* by Kenya, recognised as forming the basis for Pt. C (7) of the 1974 *OAU Declaration*⁵⁷, on top of upholding the principle of jurisdiction “encompass[ing] *all the economic resources* of the area, living and non-living”⁵⁸, envisaged access to living resources by “neighbouring developing land-locked, near land-locked and countries with a small shelf”⁵⁹. Such proposal for a ‘narrow-shelf States’ category was not reflected in the subsequent provisions of the *LOSC* dealing with access to the living resources of the EEZ⁶⁰,

⁵³ Art. 1 provided in particular for the extension of the continental shelf “to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits the exploitation of the natural resources of the said areas”.

⁵⁴ See EVANS, 1989: 35.

⁵⁵ A/AC.138/79, *African States’ Regional Seminar on the Law of the Sea*, Pt. III (1) (emphasis added). See also EVANS, 1994: 287, n. 22, characterising the Yaoundé Seminar as endorsing the assimilation of the continental shelf into the EEZ regime.

⁵⁶ See IGUCHI, 1998: 83.

⁵⁷ A/CONF.62/33, *Declaration of the OAU on the Issues of the Law of the Sea*. See KRUEGER & NORDQUIST, 1979: 328 and DEL VECCHIO, 1984: 107.

⁵⁸ A/AC.138/S.C.II/L.10, *Kenya: Draft Articles on the Concept of an Exclusive Economic Zone beyond the Territorial Sea*, Art. IV (emphasis added).

⁵⁹ *Ib.*, Art. VI.

⁶⁰ See in particular Arts. 69 (*Right of land-locked States*) and 70 (*Right of geographically disadvantaged States*). Noticeably, the proposal of granting preferential access rights to land-locked and geographically disadvantaged (including ‘shelf-locked’) countries in respect to the non-living resources of the economic zone is already excluded from the Kenyan draft, as it ultimately proved unacceptable to the large majority of coastal States (see HUANG, 2010: 105).

since the extension of this area is determined for the purposes of the Convention independently from considerations related to the continental shelf breadth. This evidence therefore illustrates the intention of at least one regional group of States to foster the development of an entirely new regime, encompassing also the pre-existing one of the continental shelf. The 200-NM figure finally adopted in Art. 76 (1) of the *LOSC* has consequently appeared to some authors as a discretionary provision for the benefit of the narrow-margin countries, not amounting to “an obligation for the wide-margin States by any means”⁶¹ as far as delimitation with adjacent or opposite States is concerned.

While ‘assimilationism’ as an approach does not appear to have been adopted by any of the Northeast Asian States here examined, the opinion that Art. 76 (1) on the ‘inner’ continental shelf should not be construed as affecting in any way the right of broad-margin States to extend their sovereign rights up to the outer edge of the continental margin seems to have played a role in the legal positions taken by some of them. This is particularly the case of the People’s Republic of China – essentially relying on the ‘natural prolongation criterion’ even when the distance from the opposite State is less than 400 NM⁶² – as well as of the more complex stance taken by the Republic of Korea – invoking natural prolongation towards Japan and equidistance based on the 200-NM figure towards China⁶³.

Having thus individuated the main elements characterising the ‘zonal approach’ and briefly introduced some of the contradictions that may arise when it comes to the delimitation of differently defined maritime zones, the second part of this section will illustrate the difficulties faced by the three Northeast Asian States in implementing such regime towards their adoption of the *LOSC*. The

⁶¹ GAO J., 2010: 173.

⁶² See MOFA-PRC, 9 July 2001.

⁶³ This form of ‘selective reliance’ (PARK H.-K., 2000: 41) may be justified in the Korean case because of the different characteristics of the seabed separating it from the Chinese mainland, on one hand, and from the Japanese Southwest Islands, on the other. In the first case, the homogeneous nature of the seabed would require the application of the distance criterion as the only feasible means for delimitation, whereas in the second one, the presence of geographical features (most notably, the Okinawa Trough) would enable considerations related to the ‘natural prolongation’ concept to play a role (see LEE K.-G., 2012: 147).

rationale for the negotiation of provisional arrangements, whose nature is to be further investigated in *Section II*, will then be assessed in light of the situation of the Northeast Asian maritime regime before and immediately after the entry into force of the Convention for the relevant States in 1996.

IMPLICATIONS OF THE 'ZONAL APPROACH' IN THE NORTHEAST ASIAN CONTEXT

Maritime delimitation, notwithstanding its highly complex and time-consuming nature, is still the preferential method for dealing with issues of overlapping claims⁶⁴ and the Northeast Asian States constitute no exception in this sense, as demonstrated by their consistent resort to such an approach in order to pursue the goal of rational exploitation of maritime resources. From this point of view, the first rationale prompting the expansion of national sovereignty over the Northeast Asian seas in the post-WWII period can be individuated, as further explained, in the need to reduce perceived 'threats' to the rational management of (especially living) resources, resulting from the activities of third-country nationals. The second main concern, urged by the acceptance of the *LOSC*, was in turn the avoidance of 'legal gaps' that could have undermined the effectiveness of the new management regime if overlapping areas within the 200-NM limit had been left without an established boundary⁶⁵. Among these rationales, the 'defensive' one had already emerged by the time overlapping claims began constituting a critical issue after the uniform acceptance of the 200-NM jurisdiction principle by the relevant States. It will therefore be considered at first, before moving on to the analysis of the ambiguities found in the regime-building process in Northeast Asia and of their consequences from the perspective of the exploitation of living and non-living maritime resources.

⁶⁴ See SCHOFIELD, 2012: 155. CARREAU & MARRELLA, 2012: 374 note the complexity of the issue by pointing to the duality of norms and procedures involved therein, as "States are *prima facie* competent to define their maritime and air spaces, which they accomplish through unilateral acts, but in the exercise of such competence they must respect the prescriptions of international law" (own translation, emphasis in the original).

⁶⁵ Cf. PARK H.-K., 2000: 67, mentioning "[t]he lack of a fisheries agreement and overlapping jurisdictional claims" between the Republic of Korea and the People's Republic of China among the factors contributing to the present-day depletion of fisheries resources in the Yellow Sea.

As already stated, the expansion of jurisdiction motivated by concerns about the degree to which activities carried out by foreign nationals could endanger resources of potential interest for the coastal State, at a time when even the 12-NM territorial sea was not universally accepted⁶⁶, was first and foremost driven by considerations over the status of fisheries. The same cause is also found providing the rationale for the first agreements negotiated between the three Northeast Asian countries from the 1960s. Given the superior technological capacity of the Japanese fishing fleet at that time⁶⁷, protective measures were mainly taken from the Chinese and Korean side, respectively in the form of the 1950 ‘Mao Zedong Line’⁶⁸, and of the 1952 ‘Syngman Rhee Line’ (or ‘Peace Line’)⁶⁹, followed by the 1953 *Fisheries Resources Protection Act*⁷⁰. Incidents leading by 1962 to the seizure of 77 Japanese fishing vessels by Chinese authorities and 117 by the Korean ones⁷¹, as well as arrests in Chinese waters of Korean boats, whose fishing capacity was rapidly overtaking that of the Asian neighbour in the mid-1970s⁷², prompted therefore the conclusion of a first series of arrangements. Such agreements basically consisted in the reciprocal recognition of exclusive

⁶⁶ Both the 1st and the 2nd LOS Conferences failed in fact to “resolve some fundamental issues relating to the law of the sea, including the issue of the breadth of the territorial sea” (LODGE, 1999: 193). Similarly, a joint proposal by the USA and Canada for a 12-NM fishing zone, submitted to the 2nd LOS Conference, failed to obtain the sufficient majority to be adopted (see DEL VECCHIO, 1984: 94).

⁶⁷ See KEYUAN, 2003: 126.

⁶⁸ Formally, the ‘East China Motor Trawl Prohibition Line’, established by the Commission of Military Administration for Eastern China on 6 December 1950 (see ODA, 1962: 52, n. 110). Unlike the Korean ‘Syngman Rhee Line’, this provision was initially not announced by the Chinese Government, so its existence was discovered following the arrest of a Japanese fishing vessel on 7 December 1950 (see KEYUAN, 2003: 126) and analogous incidents concerning Korean vessels within the delimited area (see KIM, 2004: 265).

⁶⁹ Formally, the *Presidential Declaration of Sovereignty over the Adjacent Seas of 18 January 1952*, establishing “jurisdiction and control” by the Republic of Korea (Para. 3) over resources of both the continental shelf and the superjacent water column (Paras. 1, 2).

⁷⁰ *Fisheries Resources Protection Act*. Law No. 298 of December 12, 1953.

⁷¹ See ODA, 1962: 25.

⁷² See XUE, 2005: 163.

fishing zones⁷³, with ‘joint control zones’ – characterised by the principle of flag-State jurisdiction – being established by some of them⁷⁴.

On the other hand, flaws in the overall asset of the resulting regime, essentially conceived as a limitation to the activities of the Japanese and, to a lesser extent, of the Korean fishing fleets, became apparent with the shift in the balance of exploitation capabilities emerging from the 1980s. The issue was particularly evident in the Japanese case, as Japan had not implemented any regulatory measures beyond the territorial sea and, even since a 200-NM Exclusive Fishing Zone had reluctantly been established in 1977⁷⁵, an ‘exception-based’ regime remained in place for Chinese and Korean fishing vessels⁷⁶, whose distant-fishing capacities were nevertheless rapidly increasing

⁷³ As in the case of the first private arrangements negotiated between the fisheries councils of Japan and of the People’s Republic of China in 1955, 1963 and 1965 (see ODA, 1962: 33 and MIYOSHI, 1998: 32) and between the fisheries councils of the latter and of the Republic of Korea in 1989 (see KIM, 2004: 265 and XUE, 2005: 163). Following the restoration of diplomatic relations in 1972, also the *Agreement on Fisheries between the People’s Republic of China and Japan* of 15 August 1975 (hereinafter, the 1975 PRC – Japan Fisheries Agreement) was concluded.

⁷⁴ Arts. II and IV of the *Agreement on Fisheries between the Republic of Korea and Japan* of 22 June 1965 (hereinafter, the 1965 ROK – Japan Fisheries Agreement).

⁷⁵ *Law on Provisional Measures Relating to the Fishing Zone*. Law No. 31 of 2 May 1977. Japan, a traditionally distant-fishing State, had been opposing the establishment of exclusive fishing zones beyond the limits of a narrow territorial sea (see IGUCHI, 1998: 90, PARK H.-K., 2000: 37 and XUE, 2005: 162): the decision taken in 1977 was itself conceived as a response to the analogous move made by the USSR the previous year.

⁷⁶ Art. 6 of the *Order Enforcing the Law of Provisional Measures relating to the Fishing Zone*. Cabinet Order No. 212 of 17 June 1977. See PARK C.-H., 1993b: 1059 and PAIK, 1995, 13. Such exceptions, based on the pre-existing agreements, were left in place even after the Japanese adoption of the 1996 *EEZ and Continental Shelf Law* through the disposition of Art. 2 of the *Supplementary Provisions to the Law on the Exercise of Sovereign Rights, Etc. Concerning Fishing Activities, Etc. in the Exclusive Economic Zone*. Law No. 76 of 14 June 1996. See SAKAMOTO, 1999: 11 (in Japanese).

in the meanwhile⁷⁷. Similar exceptions were recognised for the benefit of Chinese vessels operating in the Korean EEZ after its proclamation in 1996, even if in this case the exemption from the application of the relevant provisions was limited to one year⁷⁸. On one side, such an ‘exception-based’ regime was reported to have led to an increment of IUU fishing by Chinese vessels in Korean waters during the negotiations of the fisheries agreement to be concluded in 2000⁷⁹, in the face of an alarming reduction of the stocks of living resources found in the Yellow Sea⁸⁰. In the case of Japan a compromise was instead reached as early as in 1980 with the adoption of a set of ‘Autonomous Fishing Operations Regulatory Measures’, through which the Republic of Korea voluntarily limited the fishing activities of its nationals in the waters surrounding the Japanese islands of Kyūshū and Hokkaidō⁸¹. The lack of solidity of this regime, not intended to replace the substantially permissive framework of the 1965 *ROK – Japan Fisheries Agreement*⁸², was however

⁷⁷ See KANG, 2003: 116 and XUE, 2005: 181 for the increase in the activities of Chinese fishing vessels by the mid of the 1980s. On the other side, the scale reached over the same period by Korean fishing activities within 200 NM from the Japanese baselines is mentioned as a reason for the inefficacy of the 1965 *ROK – Japan Fisheries Agreement* (see SUGIYAMA, 1999: 101 – in Japanese – and PARK H.-K., 2000: 58).

⁷⁸ Art. 3 of the *Addenda to the Enforcement Decree of the Act on the Exercise of Sovereign Rights on Foreigners’ Fishing, Etc. within the Exclusive Economic Zone*. Presidential Decree No. 15449 of 6 August 1997. The two States nevertheless maintained a tacit agreement on the non-enforcement of the respective rules and regulations concerning fisheries during the negotiations following the ratification of the *LOSC* (see KIM, 2004: 302, n. 67).

⁷⁹ According to the data reported by KANG, 2003: 119, the number of cases of illegal activities involving Chinese fishing vessels in Korean waters grew from 526 in 1992 to 1592 in 1998.

⁸⁰ See PARK, 2000: 68.

⁸¹ See KANG, 2003: 117. The ‘Autonomous Fishing Operations Regulatory Measures’ also provided for the limitation of Japanese activities around the Korean island of Jeju and were partially amended in 1987 in a more restrictive sense.

⁸² Arts. I and IV of the 1965 treaty provided in fact for exclusive coastal-State jurisdiction within 12 NM from the baselines, as against flag-State enforcement and adjudicatory jurisdiction outside the respective fisheries zones. Such principle was upheld also by the 1980 agreement on the ‘Fishing Operations Regulatory

evidenced when the Republic of Korea decided its discontinuation until 1 July 1998 in response to the unilateral denunciation of the agreement by Japan on the previous 23 January⁸³. While the decision taken by the Republic of Korea has been understood as a form of countermeasure⁸⁴, some clarification is perhaps in order here about the term, normally referring to acts “contrary to international law, but justified by a violation of international law allegedly committed by the State against which they are directed”⁸⁵. The early formulations of the principle by international adjudicatory bodies have been further upheld by Arts. 22 and 49 of the 2001 ILC *DARS*, which aim at excluding the “wrongfulness of an act of a State not in conformity with an international obligation towards another State” when the same conduct constitutes a countermeasure “against a State which is responsible for an internationally wrongful act”. Some scholars have accordingly described countermeasures as “the pacific – or non-military – side of reprisals”⁸⁶, the latter being a ‘traditional’ institution of international law intended to allow in general “conducts that are *per se* unlawful in response to unlawful acts by others”⁸⁷. The original wrongfulness of both acts, by the ‘violating’ and

Measures’, which were therefore ‘autonomous’ in the sense that they had been conceived to be complied with by fishing vessels under the jurisdiction of their own flag State (see KIM, 2004: 251).

⁸³ See SFCO, *Outline of the Events up to the Conclusion of the Agreement between Japan and the Republic of Korea Concerning Fisheries* (in Japanese).

⁸⁴ See, for instance, HOKKAIDŌ RESEARCH ORGANISATION, 1998 (in Japanese) and KIM, 2004: 251, 296, n. 13. Mr. Anami Koreshige, then Director of the Asian Affairs Bureau of the Japanese Ministry of Foreign Affairs, also reported to the Japanese Diet in 1997 that “the Minister of Foreign Affairs of the Republic of Korea, Mr. Yoo Chong-Ha, has explained that, being the issue one related to fisheries, reactions have been confined to such field, by taking *countermeasures* on fishing activities” (JHR, 19 March 1998: 32 – in Japanese, own translation, emphasis added).

⁸⁵ *Air Services Agreement Case*. Judgement: para. 84. See FOCARELLI, 1994: 75 (in Italian) and CARREAU & MARRELLA, 2012: 613. In similar terms, the ICJ (*Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*). Judgement: paras. 82-83) considered that the wrongfulness of an international act might be precluded if “taken in response to a previous international wrongful act of another State and [...] directed against that State”.

⁸⁶ CARREAU & MARRELLA, 2012: 614 (own translation)

⁸⁷ FOCARELLI, 1994: 270 (own translation). CASSESE, 2005: 299 ff. thus appears to keep a distinction between “reprisals” – in turn classified into “peaceful” and “military” – and “countermeasures”, according to the

the ‘responding’ State, is hence necessary if ‘countermeasures’ are to be conceptually distinguished from mere ‘retorsions’, which instead entail “an unfriendly act not amounting to a violation of international law, to either (a) a breach of international law or (b) an unfriendly act, by another State”⁸⁸. In the case in question, it should consequently be affirmed that the unilateral denunciation of the 1965 agreement by Japan constituted itself an internationally wrongful act, which, absent a violation of any provisions of the treaty itself⁸⁹, might only be traced back to a more general obligation to maintain the *status quo* pending final delimitation⁹⁰. If such point of view were accepted⁹¹, it would moreover be necessary to consider the Korean decision to suspend the implementation of the ‘Autonomous Fishing Operations Regulatory Measures’ as originally

historical background, represented by ‘traditional’ international law in the former case and by the contemporary one in the latter. CARREAU & MARRELLA, 2012, 599 ff. rely instead on a slightly different vocabulary, distinguishing between the “recourse to armed force” (“*Le recours à la force armée*”) and “non-military ‘means of pressure’” (“*Les ‘moyens de pression’ non militaires*”) within the broader category of the “recourse to measures of constraint” (“*Le recours à des mesures de contrainte*”) as part of the overall system that controls the application of international law norms. Nevertheless, as Cassese (and CONFORTI, 2002: 381 – in Italian), the Authors finally observe that “in current terminology, reference will rather be made to ‘countermeasures’” (CARREAU & MARRELLA, 2012: 611 – own translation).

⁸⁸ CASSESE, 2005: 310 (see also CONFORTI, 2002: 382-383, however introducing a broader category of “self-protection” that would include both countermeasures and retorsions). CARREAU & MARRELLA, 2012: 593 similarly appear to maintain a rigorous distinction between the two categories, including the “*mesures de rétorsion*” among the means usually employed to control the application of international law in absence of its violation (“*Le contrôle en l’absence de toute violation du droit international*”).

⁸⁹ Unilateral denunciation of the agreement was indeed possible pursuant to Art. X (2), upon notice given to the other contracting party.

⁹⁰ See KIM, 2004: 57.

⁹¹ Understandably, this position was not shared by the Japanese government: the account on ‘countermeasures’ being implemented by the Republic of Korea, mentioned at n. 84 above, was in fact strictly limited to reporting the official explanation provided by the Korean government. In a similar vein, the 1998 JFA *Annual Report* only referred to “the unilateral suspension of the ‘Autonomous Fishing Operations Regulatory Measures’ in the waters off the coasts of Hokkaidō, following notice of termination of the agreement” (JFA, 1998 – in Japanese, own translation).

unlawful. The latter point could actually be upheld if such measures were deemed as international obligations pending on parties to an agreement. However, although there is some *prima facie* evidence of the nature of the regulatory measures as ‘internationally agreed’ ones⁹², the primary and secondary sources within the author’s knowledge do not allow for a straightforward characterisation thereof⁹³, thus leaving at least a margin of doubt on the proper legal connotation of their brief suspension in 1998.

Setting such issue aside, it might be concluded that the early attempts at establishing a regime for living resources in the Northeast Asian seas through the extension of national sovereignty and the consequent delimitation of maritime areas provided the typical example of how “a purely zonal approach can and does pose unwanted and unnecessary challenges to environmental and resource management”⁹⁴. The imbalance initially found in the implementation of national regulatory measures hindered in fact the rational exploitation of resources, previously described as the foundation of the ‘zonal approach’ to the law of the sea. The need to avoid political confrontation over delimitation between States with adjacent or opposite coasts, reflected in subsequent international agreements, all but reduced instability of the overall regime. The pure application of a

⁹² SFCO, *Outline of the Events up to the Conclusion of the Agreement between Japan and the Republic of Korea Concerning Fisheries* refers, for instance, to “breaches of the ‘Autonomous Fishing Operations Regulatory Measures’ *agreed upon by the two countries*” (own translation, emphasis added). The account given to the Japanese Diet by the Deputy-Director of the Fisheries Agency, Mr. Kimura Kunio, upon partial amendment of the measures in 1987 (on which, see n. 81 above) also consistently makes reference to inter-State “consultations” on provisions having a “termination date” (JHR, 17 September 1987: 10 – in Japanese, own translation), like in the case of a treaty. Although less precise, the terminology employed by KIM, 2004: 251, who, relying upon a governmental source in Korean, defines the measures as “a compromise formula” reached between the two countries, appears equally significant.

⁹³ None of the evidences considered so far namely allows for the secure recognition of “a merger of the wills of two or more international subjects for the purpose of regulating their interests by international rules” (CASSESE, 2005: 170), as against the case of a unilateral commitment possibly influenced by consultations with another State.

⁹⁴ TOWNSEND-GAULT, 2012b: 113.

‘zonal approach’ thus did not appear to fare very well from the point of view of avoiding the over-exploitation of living resources and easing political relations in Northeast Asia – to which, it might be said, rather added a new topic of concern. At the same time, better results were not evident even in the field of development of the seabed and its subsoil. In this regard, the extension of sovereignty over the ‘legal’ continental shelf⁹⁵ made delimitation a core issue from the beginning, finally leading to the conclusion in 1974 of two agreements between Japan and the Republic of Korea, incorporating the principle of joint development⁹⁶. However, also in this case, pending delimitation issues between the People’s Republic of China and its two neighbouring States, at the origin of the severe criticism attached by the Chinese side to the 1974 agreements as infringements upon China’s sovereign rights⁹⁷, rendered exploitation of disputed sectors of the continental margin practically unfeasible⁹⁸.

While such a situation of hindrance to the development of mineral resources is lasting even nowadays⁹⁹, divergence on the principles applicable to continental shelf delimitation, as reflected in

⁹⁵ The continental shelf was still defined in the 1958 Geneva Convention – to which none of the Northeast Asian States considered here are party – according to the mixed criteria of water depth and technical exploitability (see n. 53 above). The 1969 *North Sea Continental Shelf Case* subsequently provided the recognition of ‘natural prolongation’ as a customary norm laying the foundation of the title to the seabed and its subsoil (see n. 45 above).

⁹⁶ The *Agreement Concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries* (hereinafter, the 1974 *Japan – ROK Northern Continental Shelf Agreement*) and the *Agreement Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries* (hereinafter, the 1974 *Japan – ROK Southern Continental Shelf Agreement*), both signed at Seoul on 30 January 1974.

⁹⁷ See PARK C.-H., 1993a: 298 and *Id.*, 1993b: 1058.

⁹⁸ See VALENCIA & AMAE, 2003: 191.

⁹⁹ See, for instance, the protest lodged by the People’s Republic of China in 2005, leading to the abandonment of prospections undertaken by the Korean National Oil Corporation in the ‘K-2 Zone’ and to an analogous move by the Republic of Korea with respect to the prospection contract concluded between the China National Offshore Oil Corporation and the US-based Devon Oil Corporation for ‘Zone 11/34’ in 2006 (LEE K.-G., 2012: 148). Similarly, the peculiar position of the Longqing/Asunaro gas field was mentioned in explaining the decision of the People’s Republic of China and Japan to drop the joint exploitation project of the reservoir

domestic legislations, as well as disagreement over a number of base-points and historical disputes on territorial sovereignty¹⁰⁰, make perspectives for the accomplishment of final delimitation very remote. The Republic of Korea on 18 April 2006, followed by the People's Republic of China on 25 August 2006, has actually filed a declaration under Art. 298 (1) of the *LOSC*, aiming at excluding from compulsory settlement procedures entailing binding decisions the three categories of disputes listed in the provision¹⁰¹, among which the disposition of Art. 298 (1) (a) (i) on “disputes [...] relating to sea boundary delimitations” bears a particular importance in light of the unresolved status of the Senkaku/Diaoyu and Dokdo/Takeshima islands¹⁰². Since the same article stipulates that “any

in 2008, since it could have apparently affected potential resources located in the (still unexploited) Japanese-Korean joint development zone (see DRIFTE, 2008: 32 and DAVENPORT, 2012: 143).

¹⁰⁰ It is not the purpose of this research to provide an examination of all bi- and tri-lateral disputes existing in Northeast Asia with regard to base-points and straight baselines based on Art. 7 of the *LOSC* (for which, see in general PARK, 1993a, SAKAMOTO, 2000: 13, n. 10 – in Japanese – and PRESCOTT & SCHOFIELD, 2001). It is however worth mentioning at least, from the point of view of unresolved sovereignty disputes, the issues of the Senkaku/Diaoyu islands, contended between Japan and the People's Republic of China (see SMITH & THOMAS, 1998: 6 and LEE S., 2002b: 1-4) and of the Dokdo/Takeshima island, claimed by both the Republic of Korea and Japan (see PARK C.-H., 1973: 248, LEE S., 2002a: 2 and KIM, 2004: 222).

¹⁰¹ Since Art. 298 (3) precludes the author of such declaration from unilaterally taking advantage of the acceptance of compulsory jurisdiction by another party, it would seem that these States have valued the exclusion of the possibility of becoming defendants in an international lawsuit over the hindrance to the submission of their own cases to a court (see TREVES, 2006: 74-75). Arguably for the same reason, none of the three Northeast Asian States has made a declaration on the choice of a dispute settlement procedure under Art. 287 (see UNDOALOS, 2013), thus automatically accepting to submit any disputes not already covered by a declaration under Art. 298 only to an arbitral tribunal pursuant to Art. 287 (3). The preference for a dispute settlement procedure that noticeably allows States to exclude the intervention of third parties (see TREVES, 2006: 70) appears actually in line with the relatively low degree of multilateralism and institutionalisation of inter-State relations found in Northeast Asia (see further n. 151).

¹⁰² When making reference to disputed territories, the author's choice has been to indicate both toponymies officially employed by the claimant parties, mentioning first the geographical name recognised by the State actually in control of the territory, followed by the other claimed designation. Such editing arrangement is

dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded” even from conciliation under Annex V, Section 2¹⁰³, the *LOSC* does not ultimately itself offer a binding procedure for the complete establishment of a ‘zonal maritime regime’ in Northeast Asia¹⁰⁴. Agreement between the concerned States is left therefore as the only solution in order to overcome the contradictions resulting from the initial implementation of the ‘zonal approach’ and allow for the realisation of its ultimate objective, *i.e.*, the smooth and rational exploitation of every kind of ocean resources. *Section II* will thus take into consideration the nature of provisional arrangements as the practical legal instrument offered by Arts. 74 (3) and 83 (3) of the *LOSC* in order to deal with this type of situations, and subsequently evaluate their performance in facilitating resource access and development in the region.

without any implications as to the position of the author on issues of sovereignty and jurisdiction exercised or claimed by the relevant States.

¹⁰³ ‘Compulsory conciliation’ pursuant to Art. 298 (1) (a) (i) could hence still be possible as between the Republic of Korea and the People’s Republic of China, in absence of bilateral territorial disputes bearing relevance for maritime delimitation. Yet, the further requirement found in the same paragraph that the dispute shall have arisen “subsequent to the entry into force of [the] Convention” would be problematic, since private arrangements between fisheries organisations of the two countries – possibly indicating the existence of different national positions on delimitation – had been in place since 1989 (see n. 73 above). Similarly, as observed at n. 97 above, the People’s Republic of China lodged a protest on the establishment of the Japanese-Korean joint development zone as early as 1974, thus making it reasonable to consider that, in case of an attempt to conciliation, “[m]uch will depend [...] on the logical structure of the plaintiff’s request” (*Ib.*: 77).

¹⁰⁴ See CHINKIN, 1995: 250 and KIM, 2004: 16-17. After the filing of the 2006 declarations by the Republic of Korea and the People’s Republic of China, the position according to which “in broad regions as East Asia [...] compulsory jurisdiction will apply in most cases” (TREVES, 2006: 74) appears therefore no more actual, at least for the portion of East Asia considered in the present research.

Section II

Provisional Arrangements for Resource Development

THE DOUBLE NATURE OF PROVISIONAL ARRANGEMENTS IN A 'ZONAL' PERSPECTIVE

Based on the need to identify the legal forms and the role of provisional arrangements in a 'zonally defined' maritime regime, such agreements will firstly be assessed with respect to the constitutive elements set forth in the mentioned provisions of the *LOSC* – namely, their “practical nature”, coupled with the absence of “prejudice to the final delimitation”. The former aspect has been described by Rainer Lagoni as the realisation of an “incentive approach”¹⁰⁵ within the scope of the arrangements. It basically indicates the orientation to find a pragmatic solution to concerns that, as illustrated in *Section I* of this chapter, arise whenever the attempts to establish a division of maritime spaces do not bring about the desired results in terms of enhanced possibilities of access to and management of natural resources found therein. In this sense, it is exemplary that the Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen individuated the need to find a “practical and equitable solution of the questions concerned”¹⁰⁶ as the rationale for the applicable law in issuing its recommendation on the establishment of a joint development zone between the Icelandic and Norwegian continental shelves. Whereas the reference to an “equitable solution” can be interpreted as reflecting Para. 1 of Arts. 74/83 of what at that time was the *Draft LOSC (ICNT/Rev. III*¹⁰⁷), due to the intention of the Commission to ascertain the guidelines for delimitation, the “practical” element appears more closely related to the nature of the legal instrument suggested for settling the dispute: joint development as indeed “the most widely

¹⁰⁵ LAGONI, 1984: 354.

¹⁰⁶ *Report and Recommendations to the Governments of Iceland and Norway*. Decision of June 1981: 23. See KWIATKOWSKA, 1993: 80.

¹⁰⁷ A/CONF.62/WP.10/Rev.3, *Informal Composite Negotiating Text, Rev. III*.

used form of interim measure”¹⁰⁸. Whereas economic factors are not *per se* a relevant circumstance for maritime delimitation in the practice of international adjudicatory bodies ¹⁰⁹, they may nevertheless play a role in boundary agreements as a “leitmotif”¹¹⁰, or recurring elements of concern, whose foremost aspect is ensuring that exploitation of resources be made possible by providing a suitable forum for coordination between the involved States.

As observed, joint development is probably the most common realisation of provisional arrangements in State practice. However, given that the *LOSC* does not provide any formal definition of the concept – nor, indeed, prescription that it shall be the preferential venue to reach agreement pending final delimitation – an assessment in light of the rationale for the introduction of the provision of Arts. 74/83 is required in order to identify a common ground between various types of “interim measures”¹¹¹ agreed upon by States to deal with both living and non-living resources. In this regard, it should firstly be observed that joint development has usually been referred to in literature as a form of interstate agreement governing “the exploration and exploitation of minerals extending across a boundary or lying in an area of overlapping claims”¹¹². Several distinctions have been further proposed within this generally defined framework, differentiating in particular between “unitisation”, as private contractual undertakings directed towards a known reservoir stretching across an agreed boundary, and “intergovernmental joint development”, taking instead the form of international agreements for the development of undefined deposits located in disputed areas¹¹³. In

¹⁰⁸ GAO Z., 1998: 114. “Interim measure” is here used by the Author in the meaning of ‘agreement pending delimitation’.

¹⁰⁹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*. Judgment: para. 237. See EVANS, 1989: 187.

¹¹⁰ KWIATKOWSKA, 1993: 103.

¹¹¹ LAGONI, 1984: 349.

¹¹² KWIATKOWSKA, 1993: 86. Similarly, see GAO Z., 1998: 110 and MIYOSHI, 1999: 5.

¹¹³ GAO Z., 1998: 111. LAGONI, 1979: 222 also distinguishes between arrangements related to discovered and undiscovered deposits, but subsequently includes within the first category several types of agreements among

addition, a broader notion of “maritime cooperation” has been proposed to designate in general regimes for the joint exercise of rights and responsibilities at sea¹¹⁴, thus including in the definition also arrangements related to living resources. The latter concept, having the merit to cover the whole spectrum of possibilities envisaged in the relevant provisions of the *LOSC*, appears indeed particularly convenient for the type of analysis pursued here.

Such an “exception to the jurisdictional status quo”¹¹⁵ grounded on the priority of delimitation otherwise upheld in the Convention is in turn best understood in light of the inability of States in UNCLOS III to agree on a catch-all binding mechanism for dispute resolution, which should have been the logical premise of an entirely delimitation-based ‘zonal approach’. A brief perusal of the drafting history of the *LOSC* shows that Arts. 74 (3) and 83 (3) firstly appeared in a form close to the present one in the 1979 *Suggested Compromise Formula*¹¹⁶, to be subsequently included in the 1980 *ICNT/Rev. II*¹¹⁷. It is significant that, over the same period, the coordinator of the group of States sponsoring the so-called NG7/2 proposal¹¹⁸ presented the Conference with the

which both unitisation and intergovernmental joint development are found, so that its practical relevance for the understanding of the concept in light of Art. 83 of the *LOSC* appears to be limited.

¹¹⁴ TOWNSEND-GAULT, 2012b: 109.

¹¹⁵ *Id.*, 2012a: 9.

¹¹⁶ Conf. Doc. NG7/38, *Suggested Compromise Formula for Articles 74 (3) and 83 (3)*, Prepared by a Private Group Convened by the Chairman of NG 7, for which see A/CONF.62/C.2/SR.57, *Reports of the Chairmen of Negotiating Groups 4 and 7*, Paras. 33-46.

¹¹⁷ A/CONF.62/WP.10/Rev.2, *Informal Composite Negotiating Text, Rev. II*. See LAGONI, 1984: 353. Similar provisions were previously found in A/CONF.62/WP.8/Rev.1, *Revised Single Negotiating Text*, Part 2, Arts. 62, 71 (6 May 1976); A/CONF.62/WP.10, *Informal Composite Negotiating Text*, Arts. 74, 83 (15 July 1977); Conf. Doc. NG7/10, *Informal Suggestion by Algeria, Etc.* (1 May 1978); A/CONF.62/WP.10/Rev.1, *Informal Composite Negotiating Text, Rev. I*, Arts. 74, 83 (28 April 1979).

¹¹⁸ Conf. Doc. NG7/2, *Informal Suggestion Relating to Paragraphs 1, 2 and 3 of Articles 74 and 84* (20 April 1978). This document, sponsored among others by Japan, maintained the formulation of A/CONF.62/WP.8/PART II, *Informal Single Negotiating Text*, Part 2, Arts. 61, 70 (7 May 1975) in proposing

issue of adopting a binding settlement procedure in light of the “greater subjectivity of delimitation criteria”¹¹⁹ that had been meanwhile recognised in the formulation of the first paragraphs of both articles. Failure of the Conference to do so, as emblematically demonstrated by the statutory and optional exceptions to binding third party mechanisms created in Arts. 297 and 298, warranted therefore the confirmation of provisional arrangements as a substantially new and non-customary legal instrument¹²⁰ in order to allow States to come to grips with very complex or undefined delimitation criteria in absence of any comprehensive obligation to submit their issues to an international adjudicatory body. Such consideration of the *travaux préparatoires* of the *LOSC* thus reinforces the case for regarding provisional arrangements, or forms of ‘maritime cooperation’, from a single perspective, linking their existence to the presence of an unresolved boundary dispute irrespectively of the type of resources (living or mineral) whose exploitation they aim to regulate. Alternative proposals, as that for a moratorium regime pending delimitation¹²¹, or for the median line criterion envisaged in NG7/2, would have likely hampered the development of ocean resources due to the nature itself of the suggested ‘solution’, in the former case, or to the foreseeable opposition by specific groups of States to the invoked principles, in the latter. This evidence further substantiates the significance of the ‘incentive approach’ as the element justifying the establishment of cooperation areas.

a ban on the extension of the national EEZ or continental shelf area beyond the median line pending agreement on delimitation (see LAGONI, 1984: 351, n. 39, EVANS, 1989: 29 and KIM, 2004: 35).

¹¹⁹ A/CONF.62/SR.112, 112th Plenary Meeting, Para. 20. Taking a retrospective view of the *LOSC*, ten years after its entry into force, TREVES, 2006: 63 concludes in fact that “Articles 74 and 83 omit stating a substantive principle” for delimitation.

¹²⁰ While, admittedly, the ‘equitable solution rule’ envisaged by Arts. 74 (1) and 83 (1) “does not add anything to customary law” (*Ib.*: 64), Rainer Lagoni – writing two years after the adoption the final text of the Convention – did not consider provisional arrangements as codifying any customary obligations already existing at that time (see LAGONI, 1984: 354).

¹²¹ See for instance Conf. Doc. NG7/15, *Informal Suggestion by Papua-New Guinea* (09 May 1978). GAO Z., 1998: 114 considers moratorium regimes as a theoretically possible, if unlikely, forms of provisional arrangement.

To conclude on the ‘incentive’ aspect of provisional arrangements, it may be pointed out that the obligation established by Arts. 74/83 to find a practical solution pending delimitation, as well as the further rights and duties specifically designated by the provisions of the agreement to be concluded between the concerned parties, consistently ascribe them to the general ‘obligation to cooperate’ as the foremost objective of international treaty law¹²². Provisional arrangements, when considered from the point of view of the incentive provided to the exploitation of resources, therefore perform what is perhaps the most typical function of treaty law, *i.e.*, the creation of a legally defined venue, or ‘forum’, in which the agreed ‘scope’ (in this case, cooperation for sound and stable access to resources) can be effectively pursued¹²³. This interpretation appears preferable particularly in light of the *de contrahendo* nature of the relevant provisions found in the *LOSC*, aiming at the establishment of an “obligation to seek agreement in good faith”¹²⁴. The overall regime framed by Arts. 74/83, in combination with the dispositions creating sovereign rights for the coastal State over the EEZ and the continental shelf, will hence be quite different from the situation in which “jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States”¹²⁵. On the contrary, and not unlike what found by the Arbitral Tribunal in the *Lac Lanoux Case*, States will be obliged “to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of such an agreement”¹²⁶. It goes without saying, however, that also in this case the customary requirement of negotiations in good faith¹²⁷, encompassed in the “every effort” clause of Arts. 74 (3) and 83

¹²² See GIULIANO, SCOVAZZI & TREVES, 1991: 221-222 and TREVES, 2005: 244-245 (in Italian).

¹²³ The concepts and definitions of ‘forum’ and ‘scope’ for the analysis of the structure of international obligations are taken from LEE S., 2012: 27.

¹²⁴ LAGONI, 1984: 355.

¹²⁵ *Affaire du Lac Lanoux*. Judgment: para. 11.

¹²⁶ *Ib.*

¹²⁷ The principle was upheld by the ICJ in *North Sea Continental Shelf*. Judgment: paras. 85-86. See also TREVES, 2005: 586.

(3)¹²⁸, shall be respected. In this regard, good-faith negotiations both vest with legitimacy the legal obligations concretely defining the forum for cooperation once it has been established and constitute a means to avoid unreasonable assertions¹²⁹, so as to avoid the risk of negotiations for provisional arrangements resulting in a “reward for excessive claims”¹³⁰. In the field of joint development, in particular, good faith has explicitly been linked to the double aim of enhancing resource utilisation – the ‘incentive’ approach, responding to the ultimate rationale of maritime delimitation – and promoting mutual restraint¹³¹, which appears instead more closely connected to the second element of provisional arrangements as stated at the beginning of this section. The legal meaning of ‘mutual restraint’, founding the delimitation-related aspect of provisional arrangements, will be then considered, in order to complete the assessment of their constitutive characteristics.

As it has been noted, the obligation assumed by States under Arts. 74 (3) and 83 (3) “not to jeopardize or hamper the reaching of the final agreement” in the transitional period prior to delimitation is “functionally related to the ‘reaching’ of the final agreement”¹³², therefore being equally inherent to the framework for common exploitation established by the *LOSC* as the

¹²⁸ See LAGONI, 1984: 354. This view was also shared by the Arbitral Tribunal in *Arbitration between Guyana and Suriname*. Judgment: para. 461.

¹²⁹ Such good faith-based criterion of ‘reasonableness’ of the claims was similarly considered by the ICJ in order to assess the issue of allowing intervention by a State in a delimitation-related case under Art. 62 of its *Statute (Continental Shelf (Libyan Arab Jamahiriya v. Malta), Application by Italy for Permission to Intervene*. Judgment: para. 23). It is therefore considered that the notion of ‘reasonable claims’ would include the task of “provisionally and *prima facie* ascertaining whether the claims themselves are well grounded” (CONFORTI, 1986: 340 – own translation).

¹³⁰ SCHOFIELD, 2012: 160.

¹³¹ This elaboration is found in ZHANG, 2011: 58 with respect to joint development of the continental shelf, but may as well be applied, *mutatis mutandis*, to the broader scope of ‘maritime cooperation’ encompassing living resources.

¹³² LAGONI, 1984: 364.

‘incentive’ element also is¹³³. Such ‘mutual restraint’ involves in turn two aspects: the first, which may be called a form of ‘legal restraint’, affects the nature of the agreements themselves, ensuring that they will be limited as for their temporal scope (the ‘provisional’ element) and non-prejudicial to the final establishment of sovereignty by the concerned States. The second, directly applying to the actions taken by parties pending delimitation, appears instead to regulate substantial matters of conduct, or ‘practical restraint’. These elements thus underscore the operation, within the treaty-based provisions of Arts. 74 (3) and 83 (3), of a norm regulating the ‘coexistence’ between States in the exercise of their sovereignty, which, unlike norms on proactive ‘cooperation’ embodied by international conventions, is mainly the concern of international customary law¹³⁴. The issue of what kind of State activities is to be considered as banned by the good-faith obligation in the context of ‘interim measures’ pending delimitation will be more specifically addressed in the last part of this section. Suffice it to notice at this point that the individuation of both an ‘incentive’ and a ‘preventive’ element in provisional arrangements requires that they be internally balanced, so as in particular to avoid restraint hampering the process of progressive regime building in the area and resulting in a *de facto* moratorium.

In this sense, fostering an expeditious delimitation process, on one hand, and exercising restraint over potentially feasible activities in the jointly agreed area, on the other, may actually constitute a trade-off. It is observed, in fact, that having mutually acceptable standards of management implemented in the zone, combined with the political will of at least one party to keep the *status quo*, would likely prevent negotiations from being furthered towards the conclusion of a

¹³³ GAO Z., 1998: 120 states in this regard that “the principle of joint development is inherently both incentive and prohibitive in nature”. Similarly, BECKER-WEINBERG, 2010: 51 concludes that “[b]oth, the common development of resources and States’ sovereignty claims coexist under [the] internationalization of marine natural resources”.

¹³⁴ See for instance *Delimitation of the Maritime Boundary in the Gulf of Maine Area*. Judgment: para. 111 (“customary international law [...] in fact comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community”). Cf. SCOVAZZI, 2001: 65 (in Italian), GIULIANO, SCOVAZZI & TREVES, 1991: 218-221 and TREVES, 2005: 242.

definitive agreement¹³⁵. The arrangements concluded in the 1970s between the USSR and two Scandinavian countries may actually be regarded as an illustrative example thereof. Namely, while the 1977 USSR – Sweden ‘White Zone Agreement’ ultimately proved ineffective at limiting overfishing and was followed by final delimitation in 1988, the 1978 USSR – Norway ‘Grey Zone Agreement’, considered an effective example of a TAC-quota system being implemented within a provisional area¹³⁶, was followed by delimitation only very late, in 2010¹³⁷. Similarly, it was observed that “political evaluations carried out by the [Japanese] government on the opportunity of creating a new chance to foster negotiations”¹³⁸ were among the reasons for the unilateral denunciation of the 1965 *ROK – Japan Fisheries Agreement*, which finally led to the conclusion of a new treaty between the parties within one year.

Taken together, these considerations would also suggest that particular caution is needed whenever States wish to apply the ‘estoppel theory’ in relation to forms of restraint unilaterally observed by one party in an area of overlapping claims. The notion of ‘estoppel’ has been defined by the ICJ in the *Land, Island and Maritime Frontier Dispute* as “a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it”¹³⁹. In this sense, the explicit requirement of Arts. 74 (3) and 83 (3) of the *LOSC* that provisional arrangements shall be “without prejudice to the final delimitation” clearly excludes the possibility of applying the ‘estoppel theory’ to the performance of, or abstention from certain activities by one party *after* the conclusion of the relevant treaty¹⁴⁰. It is however less evident whether acquiescence, or at least lack of substantial opposition, to the undertakings of the

¹³⁵ KIM, 2004: 123 expresses this trade-off as “early delimitation at the cost of effective management, or effective management at the cost of an early final delimitation”.

¹³⁶ See SAKAMOTO, 2000: 16, n. 27.

¹³⁷ See KIM, 2004: 111, 124.

¹³⁸ SAKAMOTO, 1999: 13 (own translation).

¹³⁹ *Land, Island and Maritime Frontier Dispute, Application by Nicaragua for Permission to Intervene*. Judgment: para. 63. See TREVES, 2005: 274-275.

¹⁴⁰ See LAGONI, 1984: 359.

counterpart *before* even negotiation of any such agreements is initiated could constitute a “previous allegation, denial, or *conduct*, or admission”¹⁴¹ barring the subsequent claim of a right by the former party. On one hand, the ICJ in the recent *Maritime Delimitation in the Black Sea Case* has observed how State activities can only be taken into account for the purposes of establishing sovereign rights over a disputed maritime area “if they ‘reflect a tacit agreement’ which might constitute a relevant circumstance for delimitation”¹⁴². On the other, the Japanese financing, through the Asian Development Bank and the Japan Bank of International Cooperation, of development operations undertaken by Chinese companies in the Pinghu oil and gas field¹⁴³, as well as participation in the development of the Chunxiao/Shirakaba field, have sometimes been portrayed as elements barring further Japanese claims to the area. In this case, the reasoning would go that Japan, having thereby “supported China’s development”¹⁴⁴ of the fields, is ‘estopped’ from asserting its sovereignty over the two reservoirs. While the latter statements will be better understood in light of the so-called *Principled Consensus on the East China Sea Issue*¹⁴⁵, to be addressed later in this section, it is nevertheless useful to consider at a first stage how the invocation of the ‘estoppel theory’ could possibly affect the ‘mutual restraint’ element of the negotiating process envisaged by Arts. 74 (3) and 83 (3) of the *LOSC*, especially acting as a disincentive to restraint and bringing about such a tense situation in disputed areas that exploitation and development activities would be ultimately prevented. On one side, the ‘incentive’ aspect of provisional arrangements namely appears to be threatened by an over-cautious attitude of States due to political concerns about possible reactions of third parties, as in the kind of situation described in *Section I*. On the other, the opposite stance of fostering unilateral exploitation in areas of overlapping claims typically ends up escalating tensions and discouraging private investment in the zone. That the practical result – a *de facto*

¹⁴¹ CASSESE, 2005: 74 (emphasis added).

¹⁴² *Maritime Delimitation in the Black Sea*. Judgment: para. 193. See BAUTISTA, 2012: 119.

¹⁴³ See DRIFTE, 2008: 36.

¹⁴⁴ ZHANG, 2012: 318.

¹⁴⁵ MOFA-JP, 18 June 2008 (*Understanding between China and Japan Concerning Joint Development in the East China Sea* – in Japanese); MOFA-PRC, 18 June 2008.

moratorium on activities – turns out to be the same in both cases, can just be attributed to a lack of balance between the ‘incentive’ and the ‘preventive’ elements found in the structure of provisional arrangements, running against the exploitation-oriented function performed by such agreements in a ‘zonal approach’ perspective.

Keeping in mind the approach to provisional arrangements outlined here, the second part of this section will move on to the examination of the concrete regime created by the operation of maritime agreements in Northeast Asia, mainly focusing on the most recent set of them, concluded after the entry into force of the *LOSC* for the concerned parties. The 1997 *Japan – PRC Fisheries Agreement*¹⁴⁶, the 1998 *Japan – ROK Fisheries Agreement*¹⁴⁷, and the 2000 *ROK – PRC Fisheries Agreement*¹⁴⁸ will therefore constitute the core of the argument. The 1974 *Japan – ROK Southern Continental Shelf Agreement* and the 2008 *Principled Consensus*, though strictly ascribable to the scope of Art. 83 (3) of the *LOSC*, present instead further difficulties, raised in the first case by the substantial absence of developments since the joint regime was firstly devised¹⁴⁹, and in the second by the ambiguous legal nature of the *Principled Consensus* itself¹⁵⁰. The latter arrangements will

¹⁴⁶ *Agreement between Japan and the People’s Republic of China Concerning Fisheries* of 11 November 1997, in force as from 1 June 2000 (hereinafter, the *Japan – PRC Fisheries Agreement*).

¹⁴⁷ *Agreement between Japan and the Republic of Korea Concerning Fisheries* of 28 November 1998, in force as from 22 January 1999 (hereinafter, the *Japan – ROK Fisheries Agreement*).

¹⁴⁸ *Fisheries Agreement between the Government of the Republic of Korea and the Government of the People’s Republic of China* of 3 August 2000, in force as from 30 June 2001 (hereinafter the *ROK – PRC Fisheries Agreement*).

¹⁴⁹ See PARK C.-H., 1993a: 298 and DAVENPORT, 2012: 153.

¹⁵⁰ Though lacking a formal signature, ratification, date of entry into force, and even an agreed title and authentic text, the *Principled Consensus* may nevertheless constitute a valid agreement outside the scope of Art. 2 (1) (a) of the *VCLT*, therefore constituting “by nature a provisional arrangement ‘in the transitional period prior to delimitation’ as stipulated in the Law of the Sea Convention, Article 83, paragraph 3” (ZHANG, 2012: 317; similarly see GAO J., 2009: 297). *Contra*, HAYASHI, 2012: 45, drawing on the position expressed by the Japanese Minister of Foreign Affairs, characterising the document as a “political accord”. See MOFA-

thus be given consideration insofar as an analysis of the approach followed therein can contribute to the objectives of the current research.

THE 'INCENTIVE' ELEMENT OF PROVISIONAL ARRANGEMENTS IN NORTHEAST ASIA

The general statement on the relative lack of regional institutionalisation in Northeast Asia, resulting in “bilateralism dominat[ing] both political and economic relations”¹⁵¹ appears to hold true also in the case of the provisional arrangements currently in force, whose basic attempt has been to deal in a bilateral way with issues which are only partially bilateral. The situation in the central portion of the East China Sea, where at least claims by Japan, the Republic of Korea and the People’s Republic of China overlap (setting aside the question of parallel claims by the Republic of China/Taiwan¹⁵²), is emblematic of such approach. Some of the issues raised by such “conflicts between one exclusive bilateralism against another”¹⁵³ will constitute the subject of *Chapter 2* and be therefore temporarily set aside in this section. The three main venues represented by the establishment of ‘EEZ-like areas’, joint fishing zones, and ‘unregulated zones’ will instead be

JP, 18 June 2008 (*Joint Press Conference of the Minister of Foreign Affairs Kōmura and the Minister of Economy, Trade and Industry Amari* – in Japanese).

¹⁵¹ VALENCIA & AMAE, 2003: 189.

¹⁵² In this respect, a historical arrangement was concluded between the Japanese and the Taiwanese side on 4 April 2013, leading to the establishment of an agreed area in the EEZ around the disputed Senkaku/Diaoyu islands, where relevant national rules and regulations will not be applied to the counterpart (Art. 2 (4)). Art. 2 (3) (a) further provides for a “Special Cooperative Zone” where “activities of both parties’ nationals based on amity and mutually beneficial cooperation are to receive maximum respect” (own translation). Given Japan’s non-recognition of the Republic of China, however, the arrangement was concluded in a private form between the Japan Interchange Association and the Taiwanese East Asia Relations Commission (the abbreviate version of its denomination is *Private Japan – Taiwan Fisheries Agreement*, for which see JIA, 4 April 2013 – in Japanese). Minutes of the JFC meetings are thus to be “reported to the concerned national offices, to which the two Associations will request to take necessary measures in order to implement their content” (Art. 3 (3) – own translation), and the very existence of the agreement “shall not be deemed influencing the position of the respective competent Authorities on issues of the law of the sea” (Art. 4 – own translation).

¹⁵³ KIM, 2004: 294.

reviewed here as forms of cooperation at the bilateral level in order to enhance possibilities of resource access and development.

The first approach, which has been employed in each of the three agreements, is the one most resembling ‘pure’, though provisional, maritime delimitation, as it is intended to designate areas ‘deemed as’¹⁵⁴ the national EEZs for practical purposes related to fishing activities. Art. 1 of all agreements defines in fact their *ratione loci* scope of application as “the Exclusive Economic Zone” of the two contracting parties, which is to be regarded as a necessary premise in order for them to legitimately assert jurisdiction and exercise their sovereign rights in agreeing on the regime of the concerned waters. This provision leads therefore to the conclusion that not only the areas designated ‘as’ EEZs for the purposes of having “citizens and fishing vessels of the other contracting party [to] comply with measures for marine living resource conservation”¹⁵⁵, but indeed *all* waters governed by the treaty-based regime are in principle part of the EEZ of one State. In this regard, the EEZ-like nature of the “agreed waters” referred to in Art. 6 of the *Japan – PRC* and the *ROK – PRC Fisheries Agreement*, as well as in Art. VII of the *Japan – ROK Fisheries Agreement*, is furthermore inferable from the provisions regulating the coastal State’s exercise of enforcement jurisdiction over nationals and vessels of the other party, pursuant to Art. 73 (2) of the *LOSC*¹⁵⁶. On the other hand, it should be noted that the agreements address the issue of jurisdiction only from the point of view

¹⁵⁴ See Art. VII (1) of the *Japan – ROK Fisheries Agreement* (“pursuant to the provisions of articles II to VI, these territorial waters shall be *deemed* [the contracting State’s] exclusive economic zone”) and Art. 1 of Annex II to the same agreement (“that zone is *deemed to be* [the contracting State’s] exclusive economic zone for the purpose of applying provisions of articles II to VI of this Agreement” – emphasis added).

¹⁵⁵ Art. 5 (1) of both the *Japan – PRC* and the *ROK – PRC Fisheries Agreement*. Cf. Art. VI (1) of the *Japan – ROK Fisheries Agreement*, establishing that a party may, in the portion of waters further identified in Art. VII (1), “take the measures necessary to ensure that nationals and fishing vessels of the other contracting State [...] are in compliance with the specific conditions established by the contracting State”.

¹⁵⁶ Art. 5 (2) of the *Japan – PRC* and the *ROK – PRC Fisheries Agreement* and Art. VI (3) of the *Japan – ROK Fisheries Agreement*, stipulating the prompt release of detained vessels or crews upon the posting of appropriate bond, appear to reflect the provision of Art. 73 (2) of the *LOSC* that “[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security”.

of “sovereign rights regarding fishing”¹⁵⁷, to the extent that they substantially accomplish the “extraction of sovereign rights concerning fisheries from all those enjoyed by coastal States in their respective EEZs”¹⁵⁸. The rationale behind such ‘extraction’ of fisheries-related rights is that domestic laws of all parties define as ‘EEZ’ areas where fishing by foreign nationals is subject to regulation by the competent national authorities¹⁵⁹. The employment of such terminology was thus required in order to allow the relevant internal provisions to be applied to the situation. That the arrangements are without prejudice to the final establishment of sovereign rights over the area¹⁶⁰ leads to the conclusion that the State currently exercising jurisdiction over fishing activities based on the treaty regime need not necessarily be the one that will be found enjoying it pursuant to final delimitation of the reciprocal EEZs.

The resource-related aspect of cooperation in the designation of the ‘EEZ-like areas’ is found in the provisions of Art. 3 of each agreement, setting the conditions for fishing activities carried out by nationals of the other contracting party within the agreed waters, to which access shall be granted “on the basis of the principle of reciprocity and in accordance with the [...] Agreement

¹⁵⁷ Art. VII (1) of the *Japan – ROK Fisheries Agreement*. The same subject matter is identifiable in the clause contained in Art. 5 (1) of the *Japan – PRC* and the *ROK – PRC Fisheries Agreement*, referring to “measures for marine living resource conservation and other conditions set out under [...] relevant domestic laws and statutes”.

¹⁵⁸ SAKAMOTO, 1999: 15 and *Id.*, 2000: 2 (own translation). KANEHARA & ARIMA, 1999: 15, discussing the *Japan – ROK Fisheries Agreement*, similarly observe that the term ‘EEZ’ used therein “is not the EEZ as defined in UNCLOS, but refers to areas in which both parties recognise the other party’s right to exclusively exercise sovereign rights over fishing activities in accordance with the Agreement”.

¹⁵⁹ Art. 5 (1) of the Japanese *Law on the Exercise of Sovereign Rights, Etc. Concerning Fishing Activities, Etc. in the Exclusive Economic Zone* and of the Korean *Act on the Exercise of Sovereign Rights on Foreigners’ Fishing, Etc. within the Exclusive Economic Zone*; Art. 5 of the Chinese *Exclusive Economic Zone and Continental Shelf Act*. See SAKAMOTO, 2000: 3.

¹⁶⁰ Art. 12 of the *Japan – PRC Fisheries Agreement*; Art. XV of the *Japan – ROK Fisheries Agreement*; Art. 14 of the *ROK – PRC Fisheries Agreement*.

and with [the contracting State's] own laws and statutes"¹⁶¹. The principle regulating access by foreign nationals to the 'agreed areas' thus differs in all three cases from the one envisaged by Art. 62 (3) of the *LOSC*, as the presence or absence of a surplus is not mentioned in the agreements as an element directly affecting the obligation to authorise activities by the other party's fishing vessels. On the other hand, the specific items for consideration by coastal States in regulating foreign operations appear generally in line with the requirements of Arts. 62 (3) and 70 (3). Art. 62 (3), in particular, provides a non-exhaustive list of factors, encompassing the "national interests" of the coastal State in relation to the living resources of the EEZ, the rights of land-locked and geographically disadvantaged States, the "requirements of developing States in the subregion or region", and "the need to minimize economic dislocation" as a means of acknowledging habitual activities or "substantial efforts in research and identification of stocks" undertaken by other countries. Moreover, whereas none of the Northeast Asian States here considered are land-locked, all of them could be considered as geographically disadvantaged in the meaning of Art. 70 (2) of the *LOSC*¹⁶², hence warranting the application of Para. 3 of the same article as well. Art. 70 (3) namely

¹⁶¹ Art. 2 (1) and Art. II, respectively of the *Japan – PRC Fisheries Agreement* and of the *Japan – ROK Fisheries Agreement*. 'Reciprocity' is not mentioned, instead, in Art. 2 (1) of the *ROK – PRC Fisheries Agreement*, but reference made in following Art. 3 (2) to "the status of each other's fisheries" as an element for the annual determination of operating conditions pursuant to Art. 3 (1) likely allows for individuating a common denominator in the approach taken by the three treaties.

¹⁶² This is not to deny the ambiguities arising from the formulation of Art. 70 (2) with respect to the first category of geographically disadvantaged States, to which the three Northeast Asian countries might be ascribed (see HUANG, 2010: 97-98). In particular, proving a sufficient restriction of the national EEZ, also considering its interaction with those of neighbouring coastal States, might be problematic for Japan, which is in fact able to claim an unrestricted 200-NM area in the Pacific Ocean. On the other hand, the important role played in ensuring Japan's food security by fisheries resources (see FAO, 2008), 58% of which was still nationally supplied in 2012 (JFA, 23 May 2013: 113 – in Japanese), would invite the conclusion that Japan is "dependent upon the exploitation of the living resources" possibly found in the Chinese and Korean EEZs for at least "part" of its population, according to the provision of Art. 70 (2). The requirement of having "established a pattern of fishing in the neighbouring exclusive economic zone[s] due to the limited resource potential of its own" (HUANG, 2010: 96) appears moreover fully realised in all three cases reviewed here.

requires *inter alia* consideration for the avoidance of adverse effects to the economy of the coastal State (Art. 70 (3) (a)), the reciprocal situation of the distant-fishing State with respect to the coastal State(s) and other geographically disadvantaged States (Art. 70 (3) (b), (c)), and the nutritional needs of the respective populations (Art. 70 (3) (d)).

Temporarily setting aside the question of the ‘priority’ that Art. 70 (4) seems to accord to developing geographically disadvantaged States regardless of the existence of a surplus in the coastal State’s EEZ¹⁶³, which will be addressed in *Chapter 3* and is not expressly contemplated in any of the provisional arrangements analysed here, the identical clause on “other associated factors” found in Art. 3 of the agreements would *per se* be sufficient to ensure that items stated in the above-mentioned provisions of the *LOSC* be not excluded from consideration in implementing the treaties. More specifically, the three agreements present a common set of criteria for regulating activities of the other contracting party, encompassing the status of marine living resources in the ‘EEZ-like area’, the coastal State’s own fishing capacity and the situation of mutual entries (or “status of each other’s fisheries”¹⁶⁴). In this respect, while consideration for own fishing capacity may be seen as integrating at the operational level the requirement for the existence of a surplus in the EEZ, lacking in Art. 2 of each agreement, the “status of marine living resources”, when interpreted from the point of view of avoiding adverse effects on the economy and national interests of the coastal State, seems to fit well with the provisions of Arts. 62 (3) and 70 (3) (a) of the *LOSC*. Moreover, “the situation of mutual entries”, if assessed in light of the tri-lateral relationship between geographically disadvantaged States created by the three agreements as a whole, would respond to the *caveat* of

¹⁶³ See CAFLISH, 1983: 38 and DEL VECCHIO, 1984: 121.

¹⁶⁴ The clause “situation of mutual entries” is employed in the *Japan – ROK Fisheries Agreement*, whereas “status of each other’s fisheries” is used in the two other agreements. However, the identity of the Japanese text between Arts. III (2) and Art. 3, respectively of the *Japan – PRC* and of the *Japan – ROK Fisheries Agreement* (“相互入会いの状況”), and of the Chinese text between Art. 3 of the latter arrangement and of the *ROK – PRC Fisheries Agreement* (“相互入鱼状况”), as well as of the Korean text between Arts. III (2) and 3 (2) of the *Japan – ROK* and of the *ROK – PRC Fisheries Agreement* (“상호입어의 상황”), suggests a univocal interpretation of the English translation.

Art. 70 (3) (c) about imposing an excessive burden on the EEZ of only one coastal State¹⁶⁵. Finally, the reference directly found in Arts. 3 and 3 (2), respectively of the *Japan – PRC* and of the *ROK – PRC Fisheries Agreement*, to “traditional fishing activities”¹⁶⁶ may well be understood under the meaning of ‘habitual fishing activities’ mentioned in Art. 62 (3) of the *LOSC*. In this regard, even though the latter element does not appear in the *Japan – ROK Fisheries Agreement*, it is recognised that the provision of Art. III (1) on the annual determination of fishing conditions in the ‘EEZ-like areas’ has actually been employed in the implementation phase so as to ensure that the Japanese and Korean traditional operations would not be immediately prejudiced. On one side, an arrangement was namely reached, allowing the continuation of access by Japanese vessels to the surroundings of the Korean Jeju Island. Conversely, the extension of the Japanese ‘EEZ-like area’ was limited to just more than half of the productive Yamatotai squid fishing ground in the Sea of Japan, while a

¹⁶⁵ Even though no agreement explicitly provides for consideration of “the extent to which other geographically disadvantaged States [...] are participating in the exploitation of the living resources”, as required by Art. 70 (3) (c) of the *LOSC*, it appears that the principle of reciprocity implied in the notion of “situation of mutual entries” would almost automatically act as a ‘balancer’ against the risk of overfishing in only one ‘EEZ-like area’. Each State, in fact, taking into consideration the “status of maritime living resources” as influenced also by activities of third parties, should adjust the issuance of entry permits, receiving at the same time a proportional treatment within the counterpart’s ‘agreed waters’. As a result, the provision of Art. 70 (3) (c), while not specifically envisaged in the text of any bilateral arrangements, would nevertheless be realised at the regional level.

¹⁶⁶ The English translation of Art. 3 of the *Japan – PRC Fisheries Agreement* actually reads “[e]ach Contracting Party shall take account of [...] its traditional fishing activities” (emphasis added). A *prima facie* interpretation could therefore lead to regard this provision as protecting the traditional operations of the coastal State itself, rather than of the distant-fishing State, the terms of reference rather being the ‘national interest’ clause, or the ‘avoidance of detrimental economic effects’ requirement found in Arts. 62 (3) and 70 (3) (a) of the *LOSC*. Absence of any grammatical element referring the “traditional fishing activities” to the “Contracting Party” in the Japanese authentic version (“各締約国は、[...]伝統的な漁業活動[...]を考慮し”), as well as in the Chinese one (“締約各方[...]考慮[...]伝統漁業活動”), which merely coincides with Art. 3 (2) of the *ROK – PRC Fisheries Agreement*, should however induce to discard this hypothesis. See also the French translation of the two provisions (“les activités de pêche traditionnelles” – emphasis added).

progressive three-year plan was devised for phasing out Korean fishing of Alaska pollock and large crab over the same zone¹⁶⁷.

The most interesting aspect of the regulatory regime envisaged for the ‘EEZ-like areas’ is, however, the additional provision of the three arrangements that each State shall “respect the results of the consultation” of the bilateral Joint Fisheries Commission established by the same agreement when deciding the annual catch quota to be notified to the other contracting party. Treaty articles governing the operation of JFCs stipulate that, as far as matters related to catch quotas in the ‘EEZ-like areas’ are concerned, their competences shall consist in the formulation of “recommendations”¹⁶⁸, which, especially in light of the meaning assumed for the expression with reference to the Northern Japanese-Korean ‘Provisional Zone’, should be interpreted as providing non-binding indications¹⁶⁹. In point of fact, the Northern ‘Provisional Zone’ – essentially a joint fishing zone between Japan and the Republic of Korea – was established in the waters surrounding the disputed territory of Dokdo/Takeshima¹⁷⁰, where the main concern from the Korean side was to avoid giving the impression that anything resembling a condominium, or the 1978 Norwegian-Soviet ‘Grey Zone’, had been created¹⁷¹. The term “recommendations” was therefore employed in this case in opposition to the strongest clause on “compl[iance] with the decisions”, found in Art. 3 (2) of Annex I to the agreement with reference to the Southern ‘Provisional Zone’¹⁷², and was

¹⁶⁷ See SAKAMOTO, 1999: 14, 20. Cf. also *Id.*, 2000: 5, interpreting Art. III (1) of the *Japan – ROK Fisheries Agreement* as “establishing agreement on the determination by each contracting party of [...] ‘the specific conditions of fishing in its own exclusive economic zone’ with due regard to past actual catches, in light of the recognition of the Republic of Korea as a ‘State whose nationals have habitually fished in the zone’ pursuant to Art. 62 (3) of the *LOSC*” (own translation).

¹⁶⁸ Art. 11 (2) (a) of the *Japan – PRC Fisheries Agreement*; Art. XII (4) (1) of the *Japan – ROK Fisheries Agreement*; Art. 13 (2) (1) (a) of the *ROK – PRC Fisheries Agreement*.

¹⁶⁹ See KIM, 2004: 256 and NISHIDA, 2005: 33-34 (in Japanese).

¹⁷⁰ The list of geographical coordinates is provided in Art. IX (1) of the *Japan – ROK Fisheries Agreement*.

¹⁷¹ See KANG, 2003: 119 and KIM, 2003: 100.

¹⁷² As will be later illustrated in further detail, this provision applies to the area individuated by the geographical coordinates set forth in Art. IX (2) of the *Japan – ROK Fisheries Agreement*.

actually included as Art. XII (4) (5) within the same category of competences also recognised to the JFC in respect to the regulation of the ‘EEZ-like areas’. The circumstance that the three provisional arrangements were negotiated mainly over the same period of time and by the same parties, further featuring a clear distinction in the use of the clause “recommendations” as opposed to “decisions”¹⁷³, would thus suggest to attach to the former a non-binding meaning, while interpreting the latter as attributing binding powers to the JFCs.

Indication that such “recommendations” should nevertheless be “respected” implies, however, that the JFCs do enjoy a certain degree of authority over the implementation of catch quotas. Such result is easily understood in light of the fact that, since both ‘recommendations’ and ‘decisions’ can be adopted in the Commissions solely by unanimity of government representatives¹⁷⁴, the event of one contracting party disregarding what bilaterally agreed in the JFC is quite unlikely¹⁷⁵. It appears, in fact, from the data published by the concerned ministries that the yearly negotiations conducted within the three JFCs have been the substantial basis for the subsequent allocation of quotas. In the case of the *Japan – ROK Fisheries Agreement*, for instance, the initial quota reflected the need to level catches in the respective ‘EEZ-like areas’ over a period of three years from 1999¹⁷⁶,

¹⁷³ See Arts. 7 (2) and 11 (2) (b) of the *Japan – PRC Fisheries Agreement*, as well as Arts. 7 (2) and 13 (2) (3) of the *ROK – PRC Fisheries Agreement* (“in line with the decisions”, “consult and decide”); Art. XII (5) and Art. 3 (2) of Annex I to the *Japan – ROK Fisheries Agreement* (“deliberate and take decisions”, “comply with the decisions”). The identity of the authentic texts in all three cases (for “recommendations”: “勸告” in Japanese, “建议” in Chinese, “권고” in Korean; for “decisions”: “決定” in Japanese, “決定” in Chinese, “결정” in Korean) further confirms this interpretation.

¹⁷⁴ Art. 11 (1), (3) of the *Japan – PRC Fisheries Agreement*; Art. XII (2), (6) of the *Japan – ROK Fisheries Agreement*; Art. 13 (1), (3) of the *ROK – PRC Fisheries Agreement*.

¹⁷⁵ See SAKAMOTO, 1999: 16. The situation would in fact resemble a ‘coordination game’ where risks of opportunism by one single actor are low, both because, as in the case of ‘quasi-public goods’, most benefits arising from rational management directly accrue to the parties, and because defection of one of them would imply the collapse of the regime (see RAUSTIALA, 2005: 593, 600).

¹⁷⁶ See KANG, 2003: 119 and NISHIDA, 2005: 34. The agreement on implementation of the catch quotas was reached on the basis of the *Japanese Unilateral Letter of Intent on Fishing Quotas* (“漁獲割当に関する日

a trend observed also in the framework created by the *Japan – PRC Fisheries Agreement*. The latter has seen a slight increase in the number of Japanese vessels admitted into the Chinese ‘EEZ-like area’ between 2000 and 2013, however more than offset by the halving of the catch quota enjoyed by Chinese fishers within the Japanese agreed waters, so as to bring the two areas altogether to a quantitatively similar regime¹⁷⁷. Bilateral consultations are finally reported to have played a role in the reduction and balancing of reciprocal fishing activities in the case of the *ROK – PRC Fisheries Agreement* as well, beginning from a situation in 2001 still upset in favour of Chinese operations as for the number of vessels admitted into Korean waters¹⁷⁸.

本側よりの一方的意図表明の書簡”, reproduced in SUGIYAMA, 1999: 104) and included the provision on the phasing out of Korean catches of Alaska pollock in two years and of large crab in three years, respectively at Paras. 1 and 2. Consistently with that approach, the maximum catch allowed to each party in 2013 has been set on the equal basis of 60,000 t (unchanged from 2012 and reduced by 500 t since 2007), to be harvested by 860 fishing vessels (10 less than in 2012 and 165 less than in 2007). For the 2012 and 2013 data, see JFA, 24 June 2013; for the 2007 data (the oldest made available online by the Japanese Fisheries Agency), see JFA, 17 December 2007 (both in Japanese).

¹⁷⁷ VALENCIA & AMAE, 2003: 195 report that the initial numbers of vessels admitted in 2000 into the ‘EEZ-like areas’ of Japan and the People’s Republic of China were set, respectively, at 600 and 317. The annual data for 2013, instead, envisaged the access of 321 Chinese fishing vessels, with a catch limit of 9,814 t (25 vessels and 60 t less than in 2012), equalled as to both the number of boats and the fishing quota by the operations conducted by Japanese nationals in Chinese waters. See JFA, August 2013 (in Japanese). The levelling of quotas reciprocally allocated between the two countries’ ‘EEZ-like areas’ had, in fact, been achieved in 2002 (see NISHIDA, 2005: 34).

¹⁷⁸ In 2001, 2,796 Chinese fishing vessels, enjoying a quota of 109,600 t, were admitted into the Korean ‘EEZ-like area’, in the face of 1,402 Korean boats given permission to fish in Chinese waters up to 60,000 t (see KATAOKA, 2004: 62 – in Japanese). The fishing quota allocated to Chinese nationals by the Republic of Korea was subsequently reduced by 70% in the first five years after the entry into force of the agreement (see NISHIDA, 2005: 36). In 2011 the People’s Republic of China agreed to a 2,500 t cut in the quota enjoyed by its nationals, thus establishing a maximum catch of 62,500 t, not dissimilar from the 62,000 t recognised to Korean fishers. The number of Chinese vessels was moreover reduced from 1,700 in 2010 to 1,650 in 2011, while the counterpart’s equivalent remained stable at 1,600. See YONHAP NEWS, 2011 and ZHAO & ZHU, 2012.

The official position of the Chinese Ministry of Foreign Affairs on the *Japan – PRC Fisheries Agreement* also mentions “utilisation and development of the fishery resources in the East China Sea” as one of the key factors in the negotiation of the arrangement¹⁷⁹. It is hence reinforced the evidence of the ‘incentive’ role played by the agreements in ensuring access to living resources pursuant to the relevant provisions of the *LOSC*, as well as to additional conditions envisaged by each specific treaty regime. Even more clearly, Japan managed to have some degree of regulatory measures applied to the Northern ‘Provisional Zone’ with the Republic of Korea, of particular concern for the Japanese side given the presence of the valuable Hamadaoki and Oki Hoppō large crab fishing grounds, only by connecting the matter to the issuance of fishing permits within the national ‘EEZ-like area’. In this sense, the Korean acceptance of a compromise, firstly prohibiting the use of gillnets within the Japanese ‘EEZ-like area’¹⁸⁰ was sufficient to break the stalemate encountered by negotiations after the entry into force of the provisional arrangement on 23 January 1999, allowing for catch quotas to be established on 5 February of the same year¹⁸¹. On the other hand, concrete results for the Northern ‘Provisional Zone’ were more mixed, notwithstanding the fact that a private agreement between the fisheries councils of both parties, providing for rotation in the use of the Oki Hoppō area, had been reached in 2007. The arrangement was actually followed by the observation that “the occupation of large crab fishing grounds by Korean fishing vessels employing fixed gear (gillnets and pots)”¹⁸² was actually continuing, and warranted consideration

¹⁷⁹ MOFA-PRC, 9 July 2001.

¹⁸⁰ See SAKAMOTO, 1999: 22.

¹⁸¹ See SFCO, *Outline of the Events up to the Conclusion of the Agreement between Japan and the Republic of Korea Concerning Fisheries*.

¹⁸² SFCO, July 2009 (in Japanese, own translation).

still in 2007¹⁸³ and 2013¹⁸⁴. The threat to the ‘incentive approach’ that would have ensued from the prolongation of the uncompromising attitude of the two involved sides, however, had been avoided, thus making possible “the beginning by name and by fact of a new fisheries order between Japan and the Republic of Korea, grounded on the new agreement”¹⁸⁵.

Beyond the designation of areas to be treated as the national EEZs for the purposes of management and access to living resources, the most innovative feature of the three agreements is probably the establishment of variously denominated joint fishing zones¹⁸⁶. The existence of such zones, subject to the regulatory authority of the JFCs, may indeed be seen as upholding the interpretation of provisional arrangements as fora for cooperation. Their legal nature, intrinsically different from both that of the ‘EEZ-like areas’ and of the ‘unregulated’ ones, poses in fact new

¹⁸³ The Tenth Japanese-Korean JFC stressed in this occasion the importance of a “resolute intervention aimed at the expeditious conclusion of the private agreement on the Hamadaoki area, currently under negotiation”. The issue was further specified as one of “practical impossibility for the Japanese nationals to conduct operations in the area due to its occupation by fishing gear employed by Korean vessels” (JFA, 17 December 2007 – own translation).

¹⁸⁴ The Fifteenth Japanese-Korean JFC had to agree on the deployment of two Korean surveillance vessels, respectively in the Hamadaoki and Oki Hoppō areas, in order to “stop illegal fishing operations carried out by Korean boats in Japanese waters [*rectius*: in the Northern ‘Provisional Zone’, *TN*], mainly during the large crab fishing season [...] from October to March” (JFA, 24 June 2013 – own translation).

¹⁸⁵ SUGIYAMA, 1999: 105, n. 10 (own translation).

¹⁸⁶ KANEHARA & ARIMA, 1999: 17 remark this aspect by reporting a statement made before the Japanese Diet by the Director-General of the Treaties Bureau of the Ministry of Foreign Affairs, Mr. Tōgō Kazuhiko, in 1998: “[W]e believe that concluding an agreement which prescribes provisional measures in areas where Japan and the Republic of Korea cannot agree on delimitation [...] can be fully supported with the basic spirit of UNCLOS”. See JHR, 11 December 1998: 13 (in Japanese). Direct reference to the provisions of the *LOSC* previously discussed is also found with respect to the establishment of the Sino-Japanese joint fishing zones, which the Deputy Director-General of the Treaties Bureau, Mr. Ebihara Shin, presented to the Japanese Diet in 1998 as “provisional measures recognised under Art. 74 of the *LOSC*” and “an attempt at drafting an agreement which makes the best out of the Convention” (JHR, 17 April 1998: 14 – in Japanese, own translation).

challenges to the role assumed by the bilateral Commissions in ensuring their viability. It has actually been observed with regard to the Northern Japanese-Korean ‘Provisional Zone’ that Art. 2 (2) of Annex I to the relevant agreement, though not constituting an exhaustive list due to the use of the “including” clause, concretely mentions only “the maximum number of operating fishing vessels for each type of fishing” among the items for consideration, therefore seemingly renouncing to the TAC-based management envisaged in Art. 61 (1) of the *LOSC*¹⁸⁷. The same holds true also for the Southern Japanese-Korean ‘Provisional Zone’, as Art. 3 (2) of Annex I is expressed in identical terms, whereas Art. 7 (2) of both the *Japan – PRC* and the *ROK – PRC Fisheries Agreement* employs the broader term “quantity-management measures”, without enumerating any examples. Taken together, these preliminary issues underscore the degree of responsibility entrusted to the JFCs in “undertaking appropriate resource management even in case that difficulties persist as to the agreement on a TAC-quota, through the combination of different items, such as areas and periods of operations”¹⁸⁸. Tackling the issue of fishing practices in the Northern Japanese-Korean ‘Provisional Zone’ via private arrangements encouraged by the bilateral JFC and surveillance initiatives entrusted to one party, as described above, can be regarded as a good example of the multi-level functioning of the Commissions in the management of joint fishing zones.

The names attached by each agreement to these areas, as well as the degree of authority recognised to the JFCs with respect to access and operational conditions, slightly vary according to the arrangement considered, thus requiring a brief examination of the types of joint fishing zones currently existing in Northeast Asia. As far as denomination is concerned, both the *Japan – PRC* and the *ROK – PRC Fisheries Agreement* designate the area individuated by the geographical coordinates listed in Art. 7 (1) as ‘Provisional Measures Zones’¹⁸⁹, whereas the *Japan – ROK*

¹⁸⁷ See SAKAMOTO, 2000: 5.

¹⁸⁸ *Ib.*: 6 (own translation).

¹⁸⁹ The areas are indicated in Map 1 as ‘Provisional Waters’ (respectively, in the East China Sea and in the Yellow Sea). The Chinese text, identical in both agreements, employs the term “暂定措置水域” (for reference,

Fisheries Agreement does not employ any specific definition, plainly making reference in Arts. XII (4) (5) and XII (5) to “the maritime zones defined in paragraph 1 of article IX” and “the maritime zones defined in paragraph 2 of article IX”¹⁹⁰. Such areas are thus usually referred to as ‘Provisional Zones’ in Japanese subsequent documents¹⁹¹, while the Korean side appears to prefer ‘Middle Waters’, so as to avoid giving the impression that such zones have been established as a consequence of the failure to reach agreement on final delimitation¹⁹². Another ‘unnamed’ zone, also encompassing a politically critical area (Taiwan and the Senkaku/Diaoyu territory), is mentioned in Art. 6 (b) of the *Japan – PRC Fisheries Agreement* as “agreed waters of the East China Sea to the south of 27° north latitude, and to the west of 125° 30’ east longitude”, with the further specification that “the area of the exclusive economic zone of the People’s Republic of China in the South China Sea”, undefined in the agreement, shall be excluded therefrom¹⁹³. Finally, Art. 8 (1) of the *ROK –*

the Japanese and Korean equivalents used in Art. 7 (1) are, respectively, “暫定措置水域” and “잡정 조치 수역”).

¹⁹⁰ See SAKAMOTO, 2000: 16, n. 21, comparing this linguistic choice with the more explicit terms found in the *Japan – PRC Fisheries Agreement*.

¹⁹¹ See Map 2, employing the Japanese equivalent of ‘Provisional Zones’ (“暫定水域”), while ‘Middle Waters’ appears to be preferred in Map 1.

¹⁹² See KIM, 2004: 297, n. 20. It should be noted that explicitly recognising the status of ‘Provisional Zones’ to the ‘agreed areas’ in the Sea of Japan and in the East China Sea would imply for the Republic of Korea to admit unequivocally that the fisheries agreement is a ‘provisional agreement pending delimitation’ in the meaning of Art. 74 (3) of the *LOSC*, therefore still leaving a margin to the Japanese claims on the waters surrounding the disputed territory of Dokdo/Takeshima, since such agreements “shall be without prejudice to the final delimitation”. This however seems rather a matter of the Korean policy to “explain[] to the Korean people that the middle zone in the East Sea is not ‘jointly’ managed by Korea and Japan” (KIM, 2003: 100) and does not affect the substance of the agreement.

¹⁹³ JFA, *Outline of the Agreement between Japan and the People’s Republic of China Concerning Fisheries* (in Japanese) simply designates it as the “Area to the South of 27° North Latitude” (“北緯 27 以南水域”); KIM, 2004: 275 employs instead the term “Untitled Provisional Zone”, which will be used also here for convenience.

PRC Fisheries Agreement added two ‘Transitional Zones’¹⁹⁴, to which the joint fishing regime was to be applied until their reversion to the respective EEZs after four years from the entry into force of the treaty in 2001, pursuant to Art. 8 (5)¹⁹⁵. This provision was necessary for the purposes of reaching a compromise with the Korean position, claiming for a spatially restricted joint fishing zone, so as to limit the intense operations undertaken by Chinese nationals in the concerned area¹⁹⁶. As “the principle of flag State jurisdiction basically applie[d] to living resource management in these areas”¹⁹⁷, set aside the “joint supervisory and inspection measures” envisaged by Art. 8 (3), they did not differ as for the exercise of legislative and enforcement jurisdiction from the other joint fishing zones governed by the flag-State principle¹⁹⁸.

As for the concrete powers attributed to the bilateral JFCs in each of the areas, the *Japan – PRC* and the *Japan – ROK Fisheries Agreement* present a rather similar structure, differentiating between ‘weak’ regimes, where the competences of the respective Commissions amount to “recommendations”¹⁹⁹, and ‘strong’ ones, where deliberations result in the adoption of binding

¹⁹⁴ Indicated as ‘Transitional Waters’ in Map 1, to the East and the West of the Sino-Korean ‘Provisional Measures Zone’/‘Provisional Waters’.

¹⁹⁵ The year 2005 was thus to mark “a new stage in the fisheries order in Northeast Asia” (KATAOKA, 2004: 62 – own translation). Pursuant to the expected reversion of the two ‘Provisional Zones’, also the fishing access rights reciprocally allocated between the Republic of Korea and the People’s Republic of China could in fact reach a complete balance in terms of allowed quotas (see also NISHIDA, 2005: 33).

¹⁹⁶ See KANG, 2003: 120.

¹⁹⁷ PARK H.-K., 2000: 70.

¹⁹⁸ No State may in fact directly enforce the national laws and regulations adopted pursuant to decisions or recommendations of the JFCs on nationals and vessels of the counterpart in the joint fishing areas (Art. 7 (3) of both the *Japan – PRC* and the *ROK – PRC Fisheries Agreement*; Arts. 2 (1) and 3 (1) of Annex I to the *Japan – ROK Fisheries Agreement*). ROSENBERG, 2005: 4 notes how, even though boarding and inspection in the Sino-Korean ‘Transitional Zones’ might be exercised jointly, it is the flag State of each vessel which should bear responsibility for enforcing compliance with JFC regulations.

¹⁹⁹ For the Sino-Japanese ‘Untitled Provisional Zone’, see Art. 11 (2) (a) of the *Japan – PRC Fisheries Agreement*, making reference to the area individuated in Art. 6 (b) as one where the JFC shall “make

“decisions”²⁰⁰. The issue of the legal and practical meaning to be attached to ‘recommendations’ issued by the JFCs has already been addressed in the context of the ‘EEZ-like areas’ by analogy with the specific political considerations related to the Northern Japanese-Korean ‘Provisional Zone’, so that it will not be necessary to reiterate the argument here. For clarity’s sake and in order to confirm the inference about the lesser strength of the joint regime in areas regulated by ‘recommendations’, it is however possible to recall the ministerial exchange of letters that took place upon conclusion of the *Japan – PRC Fisheries Agreement*. The intention of each contracting State not to apply its relevant laws and regulations to the nationals and fishing vessels of the other was expressed thereby “on condition that both Japan and the People’s Republic of China are in co-operative relations in order to ensure that the maintenance of marine living resources is not endangered by over-exploitation”²⁰¹. Given the “complexity of the situation concerning fisheries in the area”²⁰² – a clear reference to the inclusion of the Senkaku/Diaoyu Islands in it – it appears therefore that the parties wished a clear statement of the implications on flag-State jurisdiction already contained in the ‘negative’ provision of Art. 6 (b)²⁰³, drawing on the more blurred premise

recommendations”. For the Northern Japanese-Korean ‘Provisional Zone’, see Art. 2 (2) of Annex I to the *Japan – ROK Fisheries Agreement*, governing the zone established under Art. IX (1) and requiring contracting parties to “respect the recommendations” issued by the Commission.

²⁰⁰ Art. 11 (2) (b) of the *Japan – PRC Fisheries Agreement*, establishing JFC’s powers to “consult and decide” with respect to the ‘Provisional Measures Zone’ individuated in Art. 7 (1); Art. 3 (2) of Annex I to the *Japan – ROK Fisheries Agreement*, providing that States shall “comply with the decisions” of the bilateral Commission in the Southern ‘Provisional Zone’ of Art. IX (2).

²⁰¹ The English translation is reproduced in KIM, 2004: 346. The exchange of letters dated 11 November 1997 between the Japanese Minister of Foreign Affairs Obuchi Keizō and the Chinese Ambassador Xu Dunxin is further quoted and explained in the above-mentioned term in an account given to the Japanese Diet by the Vice-Prime Minister, Mr. Okada Katsuya, in 2012. See JHR, 6 November 2012: Questions No. 4 and 5 (in Japanese).

²⁰² *Ib.*, Question No. 2 (own translation).

²⁰³ Pursuant to Art. 6 (b), the application of the ‘EEZ-like regime’ – encompassing also the exercise of legislative and enforcement jurisdiction by the coastal State, as set forth in Art. 5 (1) – is in fact excluded in the case of the ‘Untitled Provisional Zone’.

of ‘co-operative interstate relations’ in the field of conservation. A ‘strong’ joint regime, with powers to “consult and decide” recognised to the JFC, was instead created with respect to both the ‘Provisional Measures Zone’ and the ‘Transitional Zones’ in Art. 13 (2) (3) of the *ROK – PRC Fisheries Agreement*. From the point of view of ensuring access to resources in spite of possible political tensions, the latter provision was significant in that it practically prevented each side from abruptly introducing provisions giving effect to the EEZ regime in its ‘Transitional Zone’ over the four years of progressive implementation envisaged by Art. 8 (2)²⁰⁴.

The wider variety of typologies within the category of ‘joint fishing zones’, as compared to the more uniform ‘EEZ-like regime’, comprehensively indicates the need for increased flexibility in dealing with situations where not only (provisional) delimitation proved impossible, but also ‘joint exploitation’ was somehow constrained by political concerns about creating the impression of giving up on territorial issues. The cases of the ‘mitigation’ of the joint regime within the sensitive Sino-Japanese ‘Untitled Provisional Zone’ and Northern Japanese-Korean ‘Provisional Zone’ have in turn been considered as concrete examples of how the concerned States have cooperated in enabling the orderly access to living resources over the unstable situation that would have ensued from the protracted unilateral application of domestic norms. In this regard, it is significant that Japan accepted the Northern ‘Provisional Zone’ to encompass up to 40% of the Yamatotai squid fishing ground, which would have been almost entirely included within the Japanese EEZ if an equidistance-based process of delimitation had been carried out²⁰⁵. The unfeasibility of final delimitation – as well as the foreseeable increase in the number of incidents following denunciation of the 1965 *Japan – ROK Fisheries Agreement* and the suspension of the ‘Autonomous Fishing Operations Regulatory Measures’ – warranted the establishment of a joint fishing zone as the only viable alternative to ensure the stability of access to the fishing ground.

The last category in which it is possible to divide the regimes created by the three fisheries agreements is represented by ‘unregulated’ areas, *i.e.*, zones subtracted from both direct regulation

²⁰⁴ See KIM, 2004: 270.

²⁰⁵ See SUGIYAMA, 1999: 101, 104, SAKAMOTO, 1999: 14 and *Id.*, 2000: 4.

by the coastal State and indirect regulation through the JFCs. Also in this case denomination, when not expressly provided by the text of the agreement, may vary according to the commentator. ‘Current Fishing Pattern Zone’ has been employed, for instance, both with reference to the areas established to the north and to the south of the Sino-Korean ‘Provisional Measures Zone’ in the Yellow Sea, and in respect to that created to the north of the Sino-Japanese joint fishing zone in the East China Sea²⁰⁶. As for the *ratione loci* scope of application of the relevant provisions, Art. 9 of the *ROK – PRC Fisheries Agreement* – according to which one State “shall maintain its current fisheries activities [...] and refrain from applying its fisheries laws and regulations to the citizens and fishing vessels” of the counterpart – is actually unclear, thus requiring interpretation in light of the attached *Memorandum of Understanding*²⁰⁷. Para. 2 of the *Record of Agreed Matters* attached to the *Japan – PRC Fisheries Agreement*, which established the ‘Intermediate Zone’ (or ‘No Fishing Permit Zone’²⁰⁸), is equally unspecified in its geographical extension²⁰⁹ and further requires

²⁰⁶ See KIM, 2003: 104-105 and *Id.*, 2004: 176 for the use of ‘Current Fishing Pattern Zone’ with regard to Art. 9 of the *ROK – PRC Fisheries Agreement*. Para. 2 of the *Record of Agreed Matters* attached to the *Japan – PRC Fisheries Agreement* is similarly expressed in terms of “respect [for] currently existing fishing activities” by contracting parties.

²⁰⁷ Art. 9 namely refers to “the portion of waters north of the north latitude line” delimiting the ‘Provisional Measures Zone’ and “the portion of waters south of the Provisional Measures Zone [...] and the Transitional Zone”. The *Memorandum of Understanding* further clarifies the existence of areas within the two ‘Current Fishing Pattern Zones’ where coastal State’s jurisdiction is instead applied (such as the ‘Special Prohibition Zone’ between the Republic of Korea and the Democratic People’s Republic of Korea and the fisheries conservation area off the Chinese Yangtze River). See KIM, 2003: 104.

²⁰⁸ The former denomination is usually found in Japanese documents: see Map 2 and JFA, *Outline of the Agreement between Japan and the People’s Republic of China Concerning Fisheries*, employing the Japanese equivalent “中間水域”. Among commentators, KEYUAN, 2003: 134 and XUE, 2005: 192 use that term, whereas the latter one is found in KIM, 2003: 107 and *Id.*, 2004: 277. ‘Intermediate Zone’ will be used here for having the advantage of reflecting the denomination currently adopted by at least one party to the agreement.

²⁰⁹ XUE, 2005: 192. The text of the agreement only mentions “waters of the section of the East China Sea north of the northern limit” of the ‘Provisional Measures Zone’. Based on the ministerial exchange of letters,

consideration of the following ministerial exchange of letters in order to determine its substantive content. In this sense, whereas the clause on “respect [for] currently existing fishing activities” seems actually less clear than the language of the *ROK – PRC Fisheries Agreement*, the exchange of letters disambiguates the intention to maintain a ‘free fisheries regime’ not necessitating the issuance of permits from the other contracting party²¹⁰. The common element to such ‘unregulated’ areas – that is, both exclusion from the *ratione loci* scope of application of the ‘EEZ-like regime’ and lack of mention among the JFCs’ recommendatory or decisional competences – is also found in Art. 3 of Annex II to the *Japan – ROK Fisheries Agreement* with regard to an area located northwest of the Northern ‘Provisional Zone’²¹¹. This zone, however, was left ‘unregulated’ mainly due to issues of delimitation involving the Russian Federation and the Democratic People’s Republic of Korea besides Japan and the Republic of Korea²¹², so it partially falls beyond the scope of this analysis. Finally, even if some commentators²¹³ refer to the ‘Untitled Provisional Zone’ established pursuant to Art. 6 (b) of the *Japan – PRC Fisheries Agreement* as to a ‘Current Fishing Pattern Zone’, the provision of Art. 11 (2) (a) entrusting the JFC with recommendatory powers on the area, suggests a better understanding thereof as a ‘weak’ joint fishing regime, rather than as one where ‘current fishing patterns’ are to be entirely maintained.

however, JFA, *Outline of the Agreement between Japan and the People’s Republic of China Concerning Fisheries*, makes a specific reference to “the portion of the East China Sea north of 30° 40’ north latitude and between 124° 45’ and 127° 30’ east longitude” (own translation).

²¹⁰ *Ib.* See also the account given to the Japanese Diet by the Minister of Agriculture, Forestry and Fisheries, Mr. Tamazawa Tokuichirō, in 2000: “As for the area of overlapping EEZ claims adjacent to the ‘Provisional Measures Zone’, consultations registered difficulties due to the divergence of positions of both parties. In this occasion, however, we managed to establish a so-called ‘Intermediate Zone’ between 124° 45’ and 127° 30’ east longitude, where vessels of the two countries will be able to carry out operations without the need to obtain a permit from the other party [...]” (JHR, 28 February 2000: 1 – in Japanese, own translation).

²¹¹ Unlike the two previous cases, a specific list of geographical coordinates is provided in the same article.

²¹² See KANG, 2003: 122 and KIM, 2004: 254.

²¹³ See ROSENBERG, 2005: 4.

The ‘incentive’ rationale is most interestingly analysed in the case of ‘unregulated’ areas upon consideration of zones being at the same time valuable fishing grounds and critical fields for political confrontation over tri-lateral overlapping claims. This is, in particular, the situation of the central portion of the East China Sea, where both the Sino-Japanese ‘Intermediate Zone’ and the Sino-Korean ‘Current Fishing Pattern Zone’ have been established and which corresponds to an area of intense activities by Japanese and Chinese fishers²¹⁴. Taking that area away from coastal State’s jurisdiction and even from flag-State enforcement pursuant to JFC’s deliberations, which would have nevertheless implied recognition of the zone as constituent of either party’s EEZ²¹⁵, was warranted as a matter of prudence in light of the third-State issue entailed in each case. For this reason, the People’s Republic of China insisted for maintaining the *status quo*, instead of applying the ‘EEZ-like regime’, in what would become the ‘Intermediate Zone’²¹⁶, given the concurring claims by the Republic of Korea to the same area up to 200 NM from the island of Marado in order to avoid being ‘cut off’ from the high seas²¹⁷. The same claim is also at the origin of the Sino-Korean

²¹⁴ The information on activities by Japanese fishers is reported by KIM, 204: 306, n. 125. Moreover, it appears that during the negotiations with the People’s Republic of China, both Japan and the Republic of Korea urged the establishment of geographically restricted ‘joint fishing zones’ vis-à-vis the Chinese position, so as to limit the intense operations carried out by the other party’s nationals (see KANG, 2003: 120 and KEYUAN, 2003: 135). According to SAKAMOTO, 2000: 13, n. 10 the number of Japanese and Chinese fishing vessels admitted into the ‘Intermediate Zone’ upon its establishment in the 1999 negotiations was respectively 317 and 900.

²¹⁵ As recalled from the beginning of this part of *Section II*, Art. 1 of each agreement namely specifies that its provisions are to be applied to the contracting parties’ EEZ. Since also the ‘unregulated’ areas are established by agreement, the principle of their inclusion within either EEZ is actually upheld, but the strictly ‘negative’ formulation of the dispositions addressing those zones avoids at least the exercise of legislative jurisdiction through action of the bilateral JFCs, which could well conflict with parallel claims formulated by a non-party.

²¹⁶ See KEYUAN, 2003: 134.

²¹⁷ See KIM, 2004: 215. Interestingly enough, the ‘cut-off avoidance’ criterion that the Republic of Korea seems to be invoking for EEZ delimitation was initially upheld by the ICJ as “non-encroachment” with reference to *continental shelf* delimitation (*North Sea Continental Shelf*. Judgment: paras. 15, 101 (C) (1). See EVANS, 1989: 154). However, even though the Korean position on maritime delimitation has been outlined in *Section I* as one close to the ‘separatist’ orientation, this does not necessarily contrast with the invocation of a

compromise on the southern limit of the ‘Current Fishing Pattern Zone’²¹⁸ and, incidentally, of the issue involved in the delimitation of the Southern Japanese-Korean ‘Provisional Zone’, which will be addressed in detail in *Chapter 2*. The need to allow resource access, without touching on the issue of whether this would actually constitute an infringement upon sovereignty of a third State, hence accounts for the ambiguous wording of the above-mentioned provisions²¹⁹. Their strictly negative formulation²²⁰, aims in fact at excluding the exercise of regulatory powers, rather than at establishing in clear terms ‘rights’ or ‘concessions’ for the other party’s nationals.

THE ‘PREVENTIVE’ ELEMENT OF PROVISIONAL ARRANGEMENTS IN NORTHEAST ASIA

As set forth in the first part of *Section II*, the aspect dealing with interstate ‘coexistence’ and ‘mutual restraint’ within the forum created by provisional arrangements is functionally related to their orientation towards final delimitation. Such orientation should in turn be reflected by their non-prejudicial and transitional application, as well as by concerns over activities that could “hamper the reaching of the final agreement”. From the point of view of the purpose of the arrangements, it firstly

single criterion, or actually a single line, in light of the particular circumstances of the concerned area. ‘Separatism’ regards in fact only distinction *in principle* between the two regimes, while “any criteria, whether related exclusively to one regime or the other, are potentially applicable” (EVANS, 1994: 297).

²¹⁸ In this case, the People’s Republic of China ended up accepting a boundary at 29° 43’ north latitude – therefore causing an overlap with the Sino-Japanese ‘Provisional Measures Zone’, whose northern limit is established at 30° 40’ north latitude. In exchange therefor, the Korean government committed itself to have its nationals respect certain fishing limitations in the area pursuant to Chinese laws and regulations. See KIM, 2003: 105 and *Id.*, 2004: 272.

²¹⁹ See the observations reported above at n. 207 and 209 on the geographical indeterminacy of the areas designated by agreement.

²²⁰ “[N]ot cause undue prejudice to the fishery interests of the other Contracting Party” (Para. 2 of the *Record of Agreed Matters* attached to the *Japan – PRC Fisheries Agreement*) and “refrain from applying its relevant fisheries laws and regulations” (Art. 9 of the *ROK – PRC Fisheries Agreement*). See for reference also Art. 3 of Annex II to the *Japan – ROK Fisheries Agreement*, on the ‘unregulated zone’ northwest of the Northern ‘Provisional Zone’ (“neither contracting State shall apply its own laws and regulations regarding fishing against the nationals and fishing vessels of the other contracting State”).

appears that concerns for final delimitation have resulted in attempts by the parties to ensure themselves the best negotiating position in the long run, even when delimitation itself has been formally abandoned as a condition for subsequent joint management and exploitation²²¹. Even though both ‘non-prejudice’ and *ratione temporis* application clauses are included in each of the agreements²²², it is evident how the amount of time and efforts invested in negotiations, as well as the ongoing deadlock on delimitation, would likely act together in rendering the current regime “preliminary but by no means provisional”²²³. The three treaties actually continue to remain in effect, since none of the parties has opted to denounce them after the initial period of three or five years has lapsed, to the extent that “it cannot perhaps be denied that they will be entrusted with a substitute function to EEZ delimitation between the concerned parties over a remarkably long period”²²⁴.

²²¹ The negotiation of the *Japan – ROK Fisheries Agreement* is emblematic in this sense, since the initial stalemate was overcome only when the Republic of Korea changed its position in August 1998, firstly admitting the possibility of a joint fishing zone without any type of delimitation in place (see SUGIYAMA, 1999: 101 and KIM, 2004: 252). The compromise was subsequently announced in the joint press conference of the Korean President Kim Daejung and the Japanese Prime Minister Obuchi Keizō. See PMJ, 8 October 1998 (in Japanese).

²²² For the ‘non-prejudice’ clause, see n. 160 above. The duration of the agreements is specified in Arts. 14 (2) and 16 (2), respectively of the *Japan – PRC* and of the *ROK – PRC Fisheries Agreement* (five years), and in Art. XVI (2) of the *Japan – ROK Fisheries Agreement* (three years). Each agreement shall remain in force thereafter until one party decides to terminate it (upon a year’s notice in the former two cases and upon a six months’ one in the latter).

²²³ LAGONI, 1984: 361. The observation was formulated with respect to the 1974 *Japan – ROK Southern Continental Shelf Agreement*, which envisaged a duration of fifty years pursuant to its Art. XXXI (2), but it may well turn to be the case also for the current ‘provisional’ fishing regime. The answer given by the Japanese Minister of Foreign Affairs, Mr. Obuchi Keizō, to a Representative in the Diet, questioning in 1998 whether in the case of the Sino-Japanese ‘Provisional Measures Zone’ “the ‘provisional’ element would not end up to continue indefinitely”, is emblematic in such sense: “The ‘reasonable period of time’ referred to in Art. 74 of the *LOSC*, does not actually envisage a concrete lapse of time; rather, it mandates that contracting States shall do so as not to delay efforts in the negotiations, or to shun them” (JHR, 17 April 1998: 5 – own translation).

²²⁴ SAKAMOTO, 2000: 15, n. 14 (own translation).

The parties' intention to transfer to the largest extent possible their position on final delimitation into the 'provisional' regime is apparent in the negotiations concerning the geographical scope of joint fishing zones, as well as in the attempt to establish a linkage with pre-existing agreements, thus *de facto* aiming at a connection between EEZ and continental shelf delimitation. The first situation has mainly regarded Japanese and Korean efforts to restrict the area of Chinese fishing activities, while expanding national jurisdiction under the 'EEZ-like regime' – especially after the establishment of any such zones in the central portion of the East China Sea had become clearly impossible due to the tri-lateral overlapping claims. As mentioned earlier, negotiations saw therefore the confrontation of a position favouring limited joint fishing zones against one claiming for larger areas regulated by the bilateral JFCs. The compromise led in the first case to the adoption of 52-NM 'EEZ-like areas' in the East China Sea, thus balancing the Japanese request for 100-NM zones and the Chinese stance in favour of 24-NM ones²²⁵. In the second instance, a 'Provisional Measures Zone' was established in the Yellow Sea, dividing it in nearly equal parts²²⁶ and avoiding explicit mention of the extension of the Chinese and Korean 'EEZ-like areas'²²⁷. Similarly, the Director of the Asian Affairs Bureau of the Japanese Ministry of Foreign Affairs reported to the Diet in 1998 how divergence between the Japanese position, supportive of a geographically limited and regulated area, and the Korean one, in favour of a large free zone, originated the compromise on the

²²⁵ See KEYUAN, 2003: 135.

²²⁶ See KIM, 2004: 268.

²²⁷ As observed by KANG, 2003: 120 and NISHIDA, 2005: 32, also in this case the central concern to the Korean side was to limit Chinese requests for a wider joint fishing zone. The choice of what is roughly an 'equidistance criterion' from the respective coasts, instead of the area of overlapping EEZ claims, is further motivated by disagreement between the two parties on the base points from which the breadth of the territorial sea (and, consequently, of the EEZ) should be measured (see KIM, 2004: 208, 232, n. 64 and XUE, 2005: 186, n. 197). Direct reference to the geographical extension of the 'EEZ-like areas' is generally avoided in the three agreements, so that they are individuated by subtraction from the whole agreement area of the zones designated as part of the joint fishing or free fishing regimes (Art. 6 of both the *Japan – PRC* and the *ROK – PRC Fisheries Agreement*; Art. VII (1) of the *Japan – ROK Fisheries Agreement*).

shaping of the Northern ‘Provisional Zone’²²⁸. In this respect, legal difficulties are noted in making an argument about issues of territorial sovereignty on the sole basis of the fisheries agreement²²⁹, and actually even in portraying the area as a ‘condominium’²³⁰. It is however remarkable that a hypothesis on the possible strengthening of Korean titles to Dokdo/Takeshima has been made out of the fact that the ‘Provisional Zone’ covers more of the eastern (Japanese) than of the western (Korean) sea area divided by a hypothetical equidistance line between the ‘undisputed’ islands of Ulleungdo (Republic of Korea) and Oki Shotō (Japan)²³¹. The degree to which negotiations have

²²⁸ The account by Director Anami Kōreshige before the Japanese House of Councillors reads: “The Korean side initially claimed for the establishment of an area to be as large as possible and close in nature to the high seas, where it could accomplish the exercise of its sovereign rights. On our part, we supported a position according to which, being actually such zone ‘provisional’, its geographical scope should be as limited as possible and, moreover, its nature should be such as to enable both parties to cooperate in resource conservation and rule enforcement, rather than maintaining the current situation of unregulated high seas fishing. From this point of view, it is apparent how the positions of the parties differed to a large extent from the beginning” (JHC, 3 December 1998: 6 – in Japanese, own translation). See also SAKAMOTO, 2000: 4.

²²⁹ See for instance the finding by the ICJ in the *Minquiers and Ecrehos Case*: “Even if it be held that these groups lie within this common fishery zone, the Court cannot admit that such an agreed common fishery zone in these waters would involve a régime of common user of the land territory of the islets and rocks, since the Articles relied on refer to fishery only and not to any kind of user of land territory.” (*The Minquiers and Ecrehos Case*. Judgment: 58).

²³⁰ See the ‘*Lac Lanoux test*’, recognising co-imperium or condominium only in situations where “jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States” (n. 125 above).

²³¹ See KIM, 2004: 258. Such consideration essentially relies on the fact that both Art. 1 (2) of the Japanese *EEZ and Continental Shelf Law* and Art. 5 (2) of the Korean *EEZ Act* recognise equidistance as the appropriate method for delimitation, so that apparent disregard of this principle if only Ulleungdo and Oki Shotō were to be considered as base points, would suggest that Dokdo/Takeshima has been accorded some weight in moving the border of the ‘Provisional Zone’ towards the Japanese side. Both KIM, 2004: 260 and PARK H.-K., 2000: 64 admit however that this line of argumentation would ultimately be untenable, which seems confirmed also by the presence of different and more convincing motivations for the actual shaping of the area, as reported above.

received attention in the long-term perspective of laying the foundations for final delimitation leads therefore to identify a common thread between the first fisheries agreements – concluded during the 1970s with a clear ‘protective’ intent against foreign nationals’ activities²³² – and the compromise on the extension of ‘EEZ-like areas’ in the current regime. The difference lays in the recognition of a regulated right of entry to the ‘EEZ-like areas’, demonstrating how the relevant provisions of the *LOSC* on the utilisation of EEZ resources have been taken into consideration in order to balance the ‘preventive’ element of provisional arrangements against the ‘cooperative’ need of ensuring stability of access.

The second situation – *i.e.*, the projection of provisional arrangements in the long term through connection with continental shelf delimitation issues – can be found in the designation of the same geographical coordinates adopted in the 1974 *Japan – ROK Northern Continental Shelf Agreement* as the line dividing the Japanese and Korean ‘EEZ-like areas’²³³. It should be noted however that such a plain relation between the two regimes, though already envisaged in literature²³⁴ and consistent at least with the Japanese ‘parallelist’ orientation on maritime delimitation²³⁵, did not prove viable in cases where territorial issues or access to the high seas were involved. The relation between the *Japan – PRC Fisheries Agreement*, establishing a ‘Provisional Measures Zone’ in the East China Sea and an ‘Untitled Provisional Zone’ to the south of 27° north latitude, and the 2008 *Principled Consensus* is emblematic of the first case. Whereas Para. II (1) of the Sino-Japanese *Consensus* provided indeed for a joint development block geographically located within the same

²³² See notes 68 – 73 above.

²³³ Cf. Art. VII (1) of the *Japan – ROK Fisheries Agreement* with Art. I (1) of the *Japan – ROK Northern Continental Shelf Agreement*.

²³⁴ See PARK C.-H., 1973: 238 and EVANS, 1989: 56 on the possibility of utilising the 1974 continental shelf delimitation line for a future agreement on the division of the water column.

²³⁵ SAKAMOTO, 2000: 3 points out how none of the arrangements upholds the ‘median line’ envisaged by the relevant Japanese law (for which see notes 49 and 50 above), even if the fact that a single line has been adopted would be sufficient to observe, from the point of view of the practical results, that a ‘parallelist’ approach has been maintained.

area previously designated as ‘Provisional Measures Zone’, the “participation of Japanese legal persons” in the development of the Chunxiao/Shirakaba gas field pursuant to Para. III was negatively influenced by the incidents in the waters surrounding the nearby Senkaku/Diaoyu Islands²³⁶ and, unlike the ‘Untitled Provisional Zone’ covering a broader area around the disputed territories and Taiwan, resulted in a *de facto* moratorium²³⁷. The second case is that of the tri-lateral dispute about the southern boundary of the Southern Japanese-Korean ‘Provisional Zone’, unspecified in the fisheries agreement²³⁸ and apparently interpreted by Japan according to the tri-equidistance point between the islands of Marado (Republic of Korea), Haijiao (People’s Republic of China) and Torishima (Japan). The Japanese reliance on Point 6 of the continental shelf joint development zone pursuant to the 1974 agreement²³⁹ was however confronted in this case by the Korean claims for a boundary located further to the south²⁴⁰, as well as by the earlier Chinese denunciation of the joint

²³⁶ For an account of the incidents, further escalated after the decision of Tōkyō Governor Ishihara Shintarō to purchase the islands from private ownership in 2012 and following nationalisation in September of the same year (MOFA-JP, March 2013: 1), see SMITH & THOMAS, 1998: 2, VALENCIA & AMAE, 2003: 197 and MCCORMACK, 2012. A schematic representation of the geographical framework for the implementation of the *Principled Consensus*, however without coordinates, is reproduced here as Map 3 from MOFA-JP, 18 June 2008 (*Understanding between China and Japan Concerning Joint Development in the East China Sea*).

²³⁷ ZHANG, 2011: 54 observes that the *Principled Consensus* has by now evolved into “a *de facto* moratorium on joint development in the agreed block as well as joint operations in the Chunxiao field”.

²³⁸ In this regard, Art. IX (2) of the *Japan – ROK Fisheries Agreement* limits itself to provide that the Southern ‘Provisional Zone’ shall extend up to “the line of latitude marking the extreme south of the exclusive economic zone of the Republic of Korea”.

²³⁹ Art. II (1) of the 1974 *Japan – ROK Southern Continental Shelf Agreement*, almost corresponding to the tri-equidistance point between Japan, the Republic of Korea and the People’s Republic of China (see PRESCOTT, SCHOFIELD, 2001: 21 and KIM, 2004: 245, n. 208).

²⁴⁰ As observed above at n. 217, this issue is at the centre of delimitation issues in the middle portion of the East China Sea. KANEHARA & ARIMA, 1999: 13 report that “the Republic of Korea objected by claiming that it could not agree to some of the baselines that Japan was using and that the equidistance line is closer to Japan than the northern section of the joint continental shelf”.

development zone as infringing upon its sovereign rights²⁴¹. The result was the failure of such attempt to establish a comprehensive delimitation regime based on ‘parallel’ premises, accompanied by ongoing disagreement on the limits of the ‘Provisional Zone’²⁴².

Drawing on the reported case studies, it may be observed that long-term concerns on delimitation and control of the activities of the other party’s nationals can lead to a functional realisation of provisional arrangements, provided that some form of compromise is reached so as not to hamper their ‘incentive’ nature. Nonetheless, excessive reliance on the future implication of ‘agreed areas’ ultimately threatens their role in the active maintenance of a ‘zonal’ maritime regime. Disagreement on the proper degree of joint regulation and on the meaning itself of the agreement, implying restraint on the exercise of national sovereignty over the concerned area, emerged for instance during the negotiations for the Northern Japanese-Korean ‘Provisional Zone’ and for the Southern Sino-Korean ‘Current Fishing Pattern Zone’. The resulting delay between signature and ratification of those treaties was however eventually solved in both cases, thus preserving the balance between the two constitutive elements of provisional arrangements. On the other hand, the “fascinating attempt to bridge the gap”²⁴³ between Japan and the People’s Republic of China, individuated in the language of Para. III of the 2008 *Principled Consensus*, did not prove able to stand up to the fundamental divergence on sovereignty issues in the area²⁴⁴, providing at best an

²⁴¹ See n. 97 above.

²⁴² Reference may usefully be had to Map 1 and Map 2, reproduced at the end of this section. The former reports the Korean representation of the concerned area, with the Southern ‘Provisional Zone’ delimited by the 200-NM line from Marado, while the latter is drawn in accordance to the Japanese interpretation of the southern boundary, following the line based on Point 6 of the 1974 agreement and avoiding overlap with the Sino-Japanese ‘Provisional Measures Zone’.

²⁴³ DRIFTE, 2008: 43.

²⁴⁴ As against the clear-cut Chinese position, considering the “participation of Japanese legal persons” to the development of the Chunxiao/Shirakaba field as an “investment to participate in the cooperative development according to Chinese law, which is different in nature from joint development” (MOFA-PRC, 19 January 2010), the Japanese side took a less evident stance. It did maintain, however, that the *Principle Consensus* should be interpreted as not prejudicing sovereignty issues (see HAYASHI, 2012: 44). In this respect, the

example of how provisional arrangements conceived as “last gasp solutions”²⁴⁵ to jurisdictional disputes would most likely lose the initial ‘incentive’ approach and become *de facto* moratorium regimes. Even in the case of the above-mentioned fisheries agreements, however, the lamented scarce transparency about procedural rules and motivations of JFCs’ regulations²⁴⁶ may be regarded as an index of the scarce comfortableness of the parties in giving a wide echo to measures that, in an overheated political climate, could give the impression of being prejudicial to the respective national interests. The non-prejudicial attitude flowing from the exercise of ‘mutual restraint’ by the concerned States before and after the conclusion of the arrangement²⁴⁷ should consequently be underscored in the promotion of a correct public understanding of the ‘incentive’ nature of the agreements. International law, and the *LOSC* provisions in particular, would thus act as a source of legitimacy, their ultimate goal being to “prevent such agreements from triggering political crises”²⁴⁸, as seen instead in the cases of the 1974 *Japan – ROK Southern Continental Shelf Agreement* or of the 2008 Sino-Japanese *Principled Consensus*.

Comparing fisheries and mineral joint development agreements from the point of view of the balance between the two objectives of ‘coexistence’, based on mutual restraint and good faith, and ‘cooperation’ for resource exploitation and management, also suggests that arrangements in the former category have generally fared better in achieving such equilibrium, even at the stage of

Japanese Minister of Foreign Affairs Kōmura Masahiko declared in a 2008 press conference that “whether to call this ‘joint development’ or not is just a definitional issue” (MOFA-JP, 18 June 2008 (*Joint Press Conference of the Minister of Foreign Affairs Kōmura and the Minister of Economy, Trade and Industry Amari*) – own translation).

²⁴⁵ SCHOFIELD, 2012: 159-160.

²⁴⁶ See XUE, 2005: 194.

²⁴⁷ LAGONI, 1984: 364 expresses the view that, in light of the object and purpose of the obligation of mutual restraint found in Arts. 74/83 of the *LOSC* – *i.e.*, to avoid defeating the meaning of negotiations and indeed of the conclusion of the agreement itself – “one has to endorse the opinion that [such obligation] must arise as soon as the claims overlap”.

²⁴⁸ ZHANG, 2012: 312.

negotiations. It may be recalled in this respect how even the Japanese denunciation of the 1965 fisheries agreement while negotiations for a new arrangement were ongoing – an act interpreted by the Korean government and by some authors as a breach of the principle of good faith pending delimitation²⁴⁹ – did not eventually hamper (and may have in fact hastened) the whole process. This may in turn be ascribed to the broader variety of management regimes available under fisheries agreements, which have proven able to accommodate to a great extent States’ concerns on resource access and territorial sovereignty issues through a host of options for the exercise of jurisdiction, ranging from areas to be treated as the national EEZ to joint fishing zones. Moreover, it should be noted that customary international law appears to recognise a higher degree of tolerance to the continuation of traditional fisheries in undelimited areas, as against heavier ‘mutual restraint’ obligations imposed on the exploitation of mineral resources. The latter category of activities would thereby be considered as ‘jeopardising or hampering the reaching of the final agreement’ in the meaning of Arts. 74/83 of the *LOSC*. In such sense it has been pointed out that the two relevant provisions do not expressly “preclude all activities in a disputed maritime area”²⁵⁰, at least insofar as they are carried out with “due regard to the rights of the other coastal States”²⁵¹, thus representing a specification of the general obligation established by Art. 58 (3) of the *LOSC* on the exercise of rights and duties within a third State’s EEZ²⁵². The issue is consequently to single out ‘prejudicial’ activities to be avoided pending delimitation unless otherwise agreed. In this regard, the maintenance

²⁴⁹ See KIM, 2004: 57.

²⁵⁰ *Arbitration between Guyana and Suriname*. Judgment: para. 465.

²⁵¹ LAGONI, 1984: 362. Similarly GAO Z., 1998: 115 individuates the *ratione materiae* application of the ‘mutual restraint’ obligation in those “activities that might cause damage to the *legitimate rights and interests* of other states enjoyed under international law” (emphasis added).

²⁵² Art. 58 (3) provides that States “shall have due regard to the rights and duties of the coastal State” while carrying out activities in its EEZ. The principle, which finds its correlative in Art. 56 (2) on the exercise of rights and duties *by* the coastal State, may well be considered as operating also in the case of undelimited areas, with the additional caution warranted by the indeterminacy as to whose EEZ the disputed area will ultimately be deemed to belong to.

of traditional fisheries has been deemed possible “even when the delimitation of extended fisheries zones is at stake”²⁵³, whereas unilateral appropriation of mineral resources may lead to infringing upon a State’s “sovereign rights to the minerals in place”²⁵⁴ and should consequently be avoided pending delimitation or provisional arrangement, due to its ‘non-transitory’ character. This criterion for distinguishing activities which may be allowed pending delimitation from those which could be prejudicial to the final establishment of sovereign rights has been inferred from the ICJ ruling in the *Aegean Sea Continental Shelf Case*²⁵⁵ and further received confirmation in the 2007 Guyana/Suriname arbitration. In the latter case the tribunal namely distinguished “unilateral acts which do not cause a physical change to the marine environment” from those which do so and should therefore “be undertaken pursuant to an agreement between the parties [...], as they may hamper or jeopardise the reaching of a final agreement on delimitation”²⁵⁶. By analogy, it is worth noting that also the concept of ‘provisional arrangement’ as envisaged in the provisions of the 1995 *Fish Stocks*

²⁵³ LAGONI, 1984: 365, drawing on the ICJ jurisprudence in the 1973 *Fisheries Jurisdiction Case*. The Court namely found that “immediate implementation” of the jurisdictional measures established by one party over a disputed area, aiming at driving out foreign vessels, would “prejudice the rights claimed by” the other party to the dispute and “affect the possibility of their full restoration” at a later stage (*Fisheries Jurisdiction, Interim Protection*. Order: para. 22).

²⁵⁴ LAGONI, 1979: 235. Such infringement is further specified in *Ib.*: 217 as a violation of the principle of territorial integrity by “unwarranted mining through the boundary line into that part of a common deposit on the territory or continental shelf of a neighbouring state”. It should be added to this consideration that, pending delimitation, it would be practically impossible for States to know which part of their activities is infringing upon the other party’s sovereign rights. See also PARK C.-H., 1973: 259, on the risk that unilateral exploitation of a common deposit, even when carried out only on one side of the hypothetical boundary line, causes exhaustion of the entire reservoir to the disadvantage of the other concerned State(s).

²⁵⁵ *Aegean Sea Continental Shelf, Interim Protection*. Order: para. 30. See LAGONI, 1984: 366.

²⁵⁶ *Arbitration between Guyana and Suriname*. Judgment: para. 467. See GAO J., 2009: 301, n. 47.

*Agreement*²⁵⁷ with respect to the compatibility of conservation and management measures, does not necessarily suggest any form of moratorium to be imposed on fishing activities of either party²⁵⁸.

The higher standard of restraint requested in the field of mineral resources has nevertheless often resulted, as already observed, in *de facto* moratoria on exploitation, either as a result of its ‘unbalanced’ application when the third State-issue was involved²⁵⁹, or as a consequence of tensions and uncertainties brought about by its alleged violation. A clear example of such case is represented by the disagreement between Japan and the People’s Republic of China on the legitimacy of exploration activities carried out by the latter in a portion of the continental shelf to which Japan considers not to have “renounced in title”²⁶⁰. The contentious issue would rest here with the fact that

²⁵⁷ Formally, the *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, signed at New York on 4 August 1995 (hereinafter, the *Fish Stocks Agreement*).

²⁵⁸ Art. 7 (6) of the *Fish Stocks Agreement* prescribes in fact that such provisional arrangements “shall have due regard to the rights and obligations of all States concerned”, thus arguably including reference to the rights enjoyed by the coastal State in its EEZ and by every State on the high seas pursuant, respectively, to Arts. 56 and 87 of the *LOSC*. Even Art. 16 of the *Fish Stocks Agreement*, dealing with the more critical issue of the so-called ‘high seas enclaves’, does not reach beyond the obligation for States to ensure that vessels flying their flag do not “engage in fisheries which could undermine the stocks concerned” pending the establishment of the provisional arrangement referred to in Art. 7 and falls therefore short of creating an additional right for the coastal State to request in every case a moratorium on fishing activities to be put in place (see LODGE, 1999: 214).

²⁵⁹ See for instance n. 99 above on the joint decision by Japan and the People’s Republic of China not to undertake the development of the Longqing/Asunaro gas field.

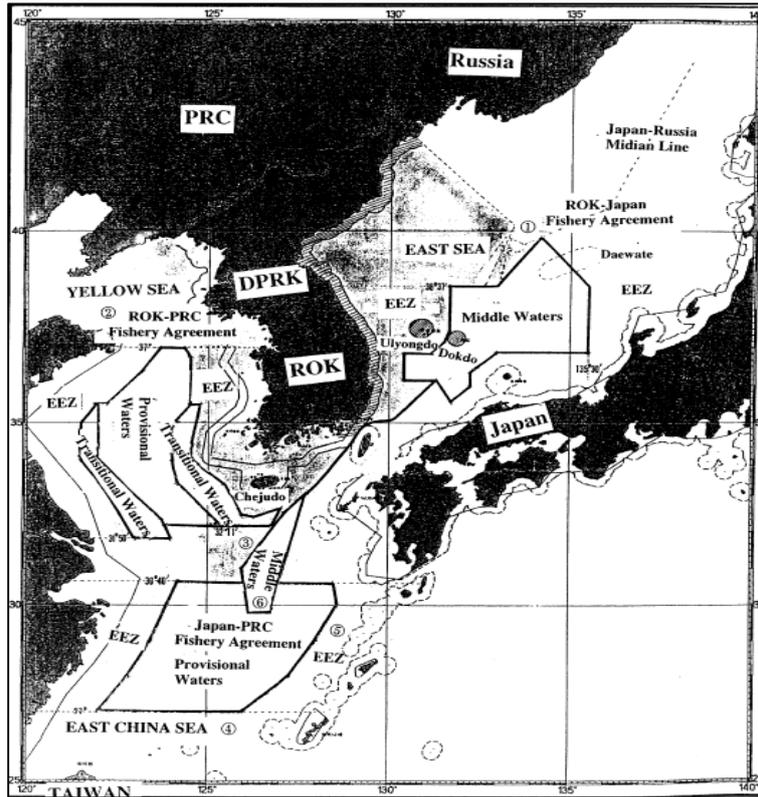
²⁶⁰ HAYASHI, 2012: 39 (similarly, ZHANG, 2011: 56). Chinese activities in the areas that Japan appears to consider subject to the ‘mutual restraint’ obligation as “other parts of the East China Sea” designated for future joint development pursuant to Para. IV of the *Principled Consensus*, were firstly made public in Japan in July 2013 (see PMJ, 3 July 2013 – in Japanese). The Japanese Foreign Ministry Spokesperson declared on the same day that “Japan’s position is not to allow unilateral development [of mineral resources] in areas where claims by the two parties overlap” (MOFA-JP, 3 July 2013 – in Japanese, own translation).

such zone was not clearly designated for joint development in the 2008 *Principled Consensus*, while being actually located on the Chinese side of a hypothetical equidistance line²⁶¹. The orientation towards “joint development at relatively large waters”, initially endorsed in a 2007 Sino-Japanese joint press release²⁶², was indeed coherent with those interpretations of provisional arrangements as treaties devised to cover the entire area of overlapping jurisdictions²⁶³. Yet, substitution of the delimitation dispute with adverse claims on the infringement of the ‘mutual restraint’ obligation ended up voiding the treaty regime in content, leading to the current stalemate in its implementation. The compromise reached instead on the establishment of the two joint fishing zones around the Senkaku/Diaoyu and Dokdo/Takeshima suggests, on the other hand, that the type of activities involved and the consequent degree of perceived limitation to the exercise of sovereignty would decisively affect the balance between the ‘incentive’ and the ‘preventive’ elements of the agreements. Such material considerations – rather than the geographical scope of application of provisional arrangements – would therefore determine the overall functionality of the resulting regime in serving the objective of a ‘zonal approach’ to ocean management.

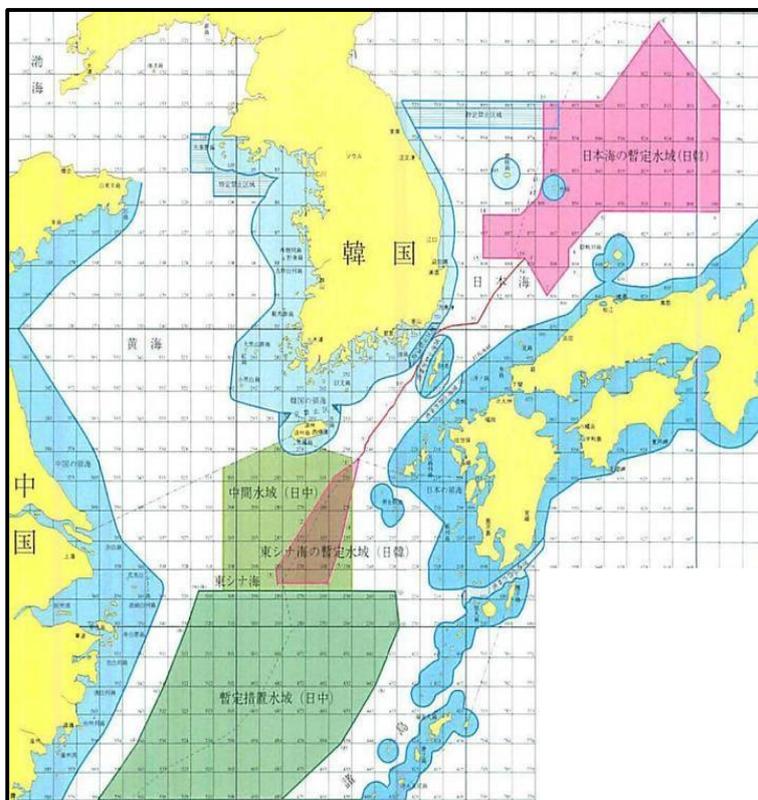
²⁶¹ See GAO J., 2009: 296 and ZHANG, 2011: 54. The official position of the People’s Republic of China is that no obligation of restraint is in place in the concerned area, as its location westwards of the equidistance line would render it an ‘undisputable’ part of the Chinese continental shelf. Since Japan actually envisages equidistance as the preferential delimitation criterion under Art. 2 (1) of its *EEZ and Continental Shelf Law*, such assertions from the Chinese side may be considered an attempt to apply the ‘estoppel theory’ also to this case, besides the situation concerning the Pinghu and Chunxiao/Shirakaba fields (cf. n. 144 above and ZHANG, 2012: 318, observing that Japan would have “accepted the so-called median line”).

²⁶² MOFA-JP, 11 April 2007 (in Japanese). The quoted translation is reported by DRIFTE, 2008: 42.

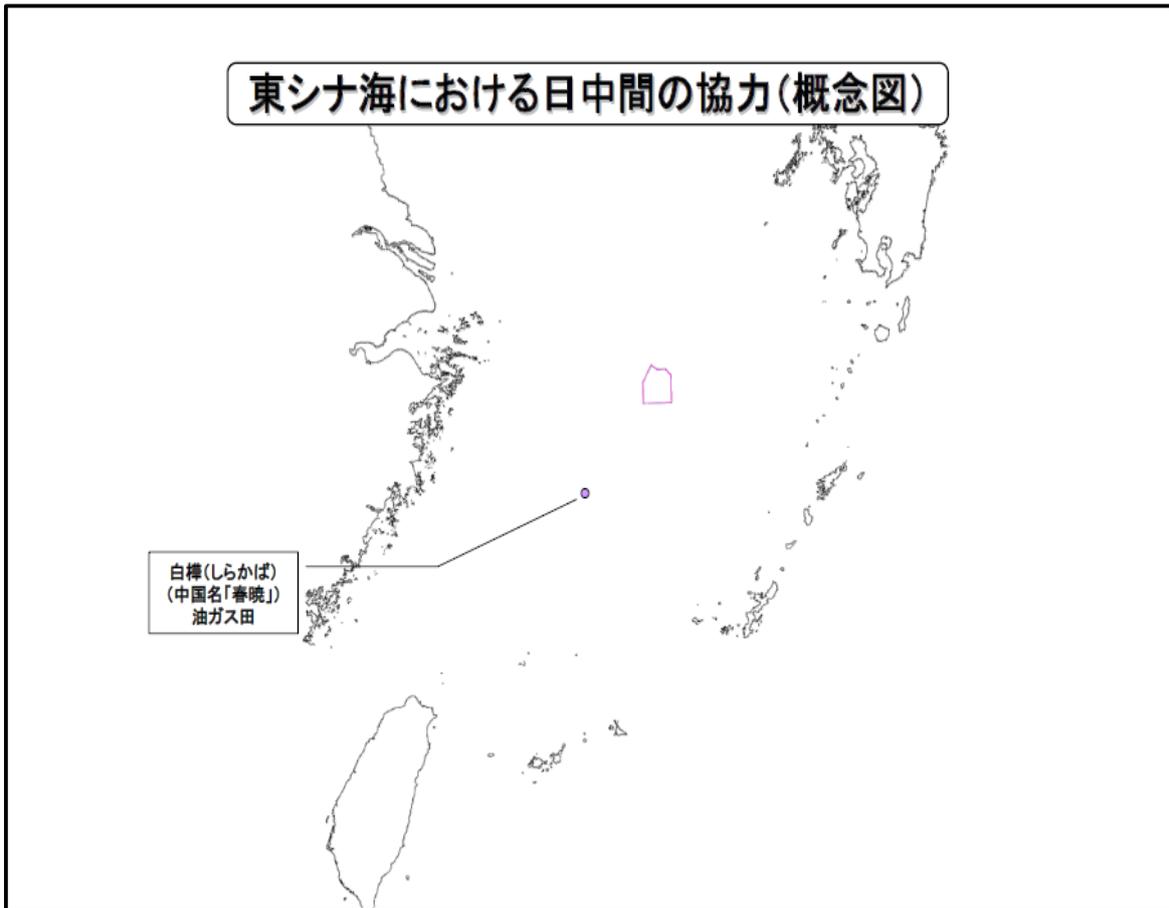
²⁶³ See LAGONI, 1984: 357 and HAYASHI, 2012: 43.



Map 1 (KANG, 2003: 118)



Map 2 (SFCO Homepage)



Map 3 (MOFA-JP Homepage)

The larger area corresponds to the block designated for joint development by the PRC and Japan pursuant to the 2008 Principled Consensus, whereas the smaller spot indicates the location of the Chunxiao/Shirakaba oil and gas field.

Conclusions of Chapter 1

Drawing on the premises set out in *Section I* on the content of the ‘zonal approach’ to maritime management as found in the *LOSC*, provisional arrangements have been described in *Section II* as legal instruments devised in order to fulfil an ‘incentive’ function with respect to the development of natural resources in areas of overlapping claims. While such goal has usually been accomplished by means of the establishment of variously regulated zones of ‘maritime cooperation’ – final delimitation being practically left as a rather remote objective which should not be ‘jeopardised or hampered’ – sovereignty-related concerns have often affected both negotiation and implementation of the agreements. In this sense, it has been observed that, among the provisional arrangements currently in force in Northeast Asia, the fisheries-related ones have usually proven flexible enough to ensure continued access to shared resources, even when critical issues involving the role of third parties or of disputed territories were involved. Failure, to a large extent, of continental shelf joint development agreements negotiated in the same region to provide a viable forum in order to balance the ‘obligation to cooperate’ with the ‘mutual restraint’ requirement cast by Art. 83 (3) of the *LOSC* indicates in turn the perception of concerned States that such activities shall at best be carried out under a regime of exclusive national jurisdiction²⁶⁴.

²⁶⁴ The current situation of the Japanese-Korean joint development zone has actually been ascribed mainly to the lack of results after exploration had been conducted between 1980 and 1986 (see DRIFTE, 2008: 32). However, see LEE K.-G., 2012: 138 on the possible allegation from the Korean side “that its counterpart is dragging its feet, believing that the zone will revert exclusively to Japan as part of its EEZ upon termination of the Agreement”. Refusal of one contracting government to participate, for whatever reason, in activities within a jointly administered area would of course not hamper the unilateral continuation of operations by the counterpart in the case of a fisheries agreement, given its different regulatory framework. In the latter case, the system would namely be based on the issuance of permits to foreign vessels, which can therefore carry out operations independently, unlike in a situation requiring agreement between authorised concessionaires of the parties.

On the other hand, it is undeniable that the greater ‘flexibility’ allowed for by fisheries agreements has mainly resulted from the application of a plurality of regulatory environments, among which ‘weak’ management regimes have been devised as the solution to issues of territorial sovereignty and tri-lateral overlapping claims. Such peculiarity has been traced back to the lesser degree of restraint arguably required by customary international law with respect to fishing activities in disputed areas. In other words, there would exist a greater potentiality for passive ‘coexistence’ of States in the considered field of operations, even when commitments to proactive ‘cooperation’ through joint regulation are absent – an observation which raises, however, further questions on the effectiveness of those arrangements beyond the narrowly defined scope of ‘provisional’ maritime delimitation. Whereas Arts. 74 (3) and 83 (3) of the *LOSC* are indeed situated in the context of delimitation, provisional arrangements themselves are likely to represent a suboptimal and limited solution to sovereignty issues²⁶⁵, therefore warranting any comprehensive assessments to be conducted in light of the general ‘practicality’ criterion found in the mentioned *LOSC* provisions. The ‘practical nature’ of the agreements should in turn consist in their orientation to “provide practical solutions to actual problems regarding the use of an area”²⁶⁶. In this regard, it should be recalled that the ‘dysfunctional’ elements in the Northeast Asian maritime regime, leading to the conclusion of the new fisheries agreements after 1996, mainly concerned the lack of a coherent scheme for the enforcement of laws and regulations over all sea users in the area, so as to avoid the depletion of resources. In this sense, the new arrangements had the merit to put an end to the pre-existing ‘exception-based’ regime and further to envisage the establishment of areas to be jointly regulated by contracting governments, thus ensuring a degree of uniformity in law-making and enforcement at least at the bilateral level. It seems legitimate, nevertheless, to question whether some of the features described as innovative elements of those agreements – such as the presence of JFCs often operating on the basis of criteria different from TAC-quotas, or the creation of zones where States are to maintain their ‘traditional’ fishing activities – could actually affect the overall

²⁶⁵ See GAO Z., 1998: 123.

²⁶⁶ LAGONI, 1984: 358.

effectiveness of the resulting regime. In other terms, a parallel may be drawn with the ‘trade-off’ between early delimitation and effective management discussed in *Section II*. In the present case provisional arrangements, which will hardly be superseded by final delimitation in the short and mid run, could well be criticised for providing a solution limited to immediate jurisdictional concerns, without really taking into account the current situation of the resources whose exploitation they aim to regulate²⁶⁷.

That such criticism has emerged with respect to fisheries agreements can be interpreted at first as a confirmation of their effectiveness at dealing to a satisfactory extent with the basic issue of resource access pending delimitation, representing the core of the ‘exploitation-oriented’ approach adopted in this chapter. Suitability of the treaties to provide an orderly development of the concerned industrial sector would not be questioned if stable exploitation of the relevant resources were not actually taking place, as it has been the case with the continental shelf joint development agreements here examined. In this respect it has been observed that continental shelf-related provisional arrangements, dealing with resources which are by definition non-renewable, intrinsically possess a “more limited multipurpose approach”²⁶⁸ as compared to agreements establishing joint fishing areas and aiming at their rational management through provisions which constitute an integral part thereof. A partial departure from the analytical framework represented by the consideration of the law of the sea as a ‘zonal’ regime, principally concerned with the ongoing utilisation of maritime resources, is therefore necessary in order to tackle the questions raised here with a more appropriate set of theoretical tools. Keeping in mind that the ‘zonal approach’ adopted heretofore need not be incompatible with a management-related ‘integrated’ perspective – as no utilisation of renewable resources is indeed sustainable, unless accompanied by a sound management scheme – *Chapter 2* will attempt an assessment of the Northeast Asian fisheries agreements against a broader host of criteria than those immediately found in Arts. 74/83 of the *LOSC*.

²⁶⁷ See PARK H.-K., 2000: 50.

²⁶⁸ KWIATKOWSKA, 1993: 77.

CHAPTER 2

PROVISIONAL ARRANGEMENTS IN AN 'INTEGRATED MANAGEMENT' PERSPECTIVE

Outline of the Argument

As anticipated in the concluding remarks of *Chapter 1*, to address the question of the appropriateness of provisional arrangements in the field of environmental management and resource conservation requires that a broader set of references be put in place than in the case of an analysis entirely focused on the 'zonal' issue of overlapping jurisdictions. Such perspective, described by Tanaka as "relat[ing] to the use of *the ocean as a whole* in international law"²⁶⁹, is referred to in the same study as "integrated management approach"²⁷⁰, thus reflecting a fundamental understanding on the interrelation of the problems of the ocean space²⁷¹, as well as the diffuse nature of the interests found therein²⁷². The basic insight that individuates the relevant centre of interests in the international society, therefore assigning to the law of the sea the task of governing the common usage of resources with a particular focus on ecosystems and through an institutionalised

²⁶⁹ TANAKA, 2008: 18, n. 71 (emphasis in the original).

²⁷⁰ *Ib.*: 16.

²⁷¹ See Para. 3 of the *Preamble* to the *LOSC*.

²⁷² The recognition of the "common interests of the 'international community'" as a conceptual condition for the existence of any form of 'integrated management' (TANAKA, 2008: 21-22) is in fact consistent with an understanding of ocean spaces flowing from "the notion, or the perspective of the '*domaine public international*' as an '*espace d'intérêt international*'" (KUWAHARA, 1987: 874 – in Japanese, own translation). *Chapter 3* will deal more specifically with these concepts; "國際公域" and "國際利益空間" are the translations employed by the above-mentioned Author, respectively for the notion of '*domaine public international*', as found in Scelle, Ruzié and Nguyen Quoc Dinh, and for that of '*espaces d'intérêt international*' used by Mme Bastid.

implementation framework²⁷³, lays thus the foundation for the assessment of provisional arrangements to be conducted in this chapter. Furthermore, the ‘non-prejudice clause’ contained in Chapter 17.1 of *Agenda 21*²⁷⁴ on the establishment of programme areas requiring “approaches that are integrated in content” points to a close analogy with the concept of provisional arrangements pursuant to Arts. 74/83 of the *LOSC*²⁷⁵, or, to employ the terminology adopted in *Chapter 1*, indicates the potential adequacy of the ‘forum’ provided by the latter to the ‘scope’ set by the former²⁷⁶.

After having individuated the overall rationale for the application of such analytical approach, mainly to be found in the need to grasp the functional motivations underpinning the ‘obligation to cooperate’, *Section I* will move on to trace the elements in the Northeast Asian provisional agreements specifically allowing for the type of considerations presented in this chapter. The point in such exercise is not to demonstrate that all the legal instruments reviewed here beyond the *LOSC* – principally *Agenda 21*, the *FAO Code of Conduct for Responsible Fisheries*²⁷⁷, and the

²⁷³ See TANAKA, 2008: 21-25.

²⁷⁴ *Agenda 21* is the final, ‘soft-law’ document adopted by the Plenary of the United Nations Conference on Environment and Development at Rio de Janeiro on 14 June 1992. Chapter 17 is entitled “*Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-Enclosed Seas and Coastal Areas, and the Protection, Rational Use and Development of Their Living Resources*”.

²⁷⁵ Note 3 to Chapter 17.1 specifies that programme areas – including *inter alia* the “[s]ustainable use and conservation of marine living resources under national jurisdiction” (Ch. 17.1 (d)) and “international, including regional, cooperation and coordination” (Ch. 17.1 (f)) – should not “be interpreted as prejudicing the rights of the States involved in a dispute of sovereignty or in the delimitation of the maritime areas concerned”.

²⁷⁶ See n. 123 above.

²⁷⁷ The *Code of Conduct on Responsible Fisheries*, like *Agenda 21* a ‘soft-law’ document, was adopted by consensus at the Twenty-eighth Session of the United Nations Food and Agriculture Organisation Conference on 31 October 1995.

*Fish Stocks Agreement*²⁷⁸ – were equally binding on parties to the agreements established in Northeast Asia at the time of their negotiation. Rather, it should be understood as providing some useful indication on how the agreements in question may be researched from the point of view of what is arguably the current ‘legal best practice’ for the integrated management of marine living resources.

Drawing on such premises, *Section II* will concretely examine two critical issues evidenced by literature with reference to the Northeast Asian fisheries agreements – namely, the apparent absence of provisions directly addressing the conditions of fish stocks, and the overlap of ‘agreed areas’ established under different arrangements. Consideration of the margin left to the bilateral JFCs for taking conservation measures under the multiple legal regimes envisaged in the treaties, as well as of the normative and enforcement issues arising from the overlap of joint fishing zones will hence refer to all three levels – “ecological, normative and implementation”²⁷⁹ – over which the ‘integrated management approach’ is structured. With particular regard to the ‘normative’ and ‘implementation’ dimensions, an attempt at classification of the above-mentioned matters will be made on the basis of the juridical status recognised to the waters involved in each case.

The *Conclusions* will complete the assessment of the degree to which different competences attributed to the JFCs, along with the third-State issue arising in the peculiar geographical circumstance represented by semi-enclosed seas, may be working against the realisation of a framework for an ‘integrated ocean management’ within the scope of the provisional arrangements. The lack of a complete identity between the ‘agreed waters’ and either the high seas or the EEZ of

²⁷⁸ See n. 257 above. The *Fish Stocks Agreement* has been into force as from 11 December 2001; among the three Northeast Asian States here considered, Japan has ratified it on 7 August 2006 and the Republic of Korea on 1 February 2008, whereas the People’s Republic of China is still only a signatory since 6 November 1996.

²⁷⁹ TANAKA, 2008: 18. These concepts are subsequently defined in *Ib.*: 19-20 respectively as “the conservation of ecosystem structure and functioning”, “coordination of relevant rules of treaties”, and “the adoption of relevant rules, standards and guidelines as well as furthering the aims and rules of a treaty by means of subsequent action”.

one party²⁸⁰, limiting the forms assumed by both ‘discretion’ and ‘cooperation’ under each regime, will thus set the stage for the final remarks on the interplay of the ‘zonal’ and ‘integrated management’ approaches, further elaborated upon in *Chapter 3*.

²⁸⁰ See SAKAMOTO, 2000: 7 and SUGIYAMA, 1999: 101.

Section I

Significance and Scope of Applicability of the Approach

THE LEGAL CONTEXT OF THE 'OBLIGATION TO COOPERATE'

As recalled from *Section II* of *Chapter I*, provisional arrangements pursuant to Arts. 74/83 of the *LOSC* may be analysed as the manifestation of both 'positive' and 'negative' obligations pending the final establishment of the correlative regime of rights and duties envisaged in Parts V and VI of the treaty. Those obligations have in turn been described as the product of an 'incentive' need to encourage the sound exploitation of resources, in line with the overall orientation of the 'zonal' approach adopted in the Convention. The significance in making such observations explicit evidently rests with the basic finding that "international law does not require cooperation for its own sake"²⁸¹, thus warranting consideration of the broader framework where the obligation is created, beyond its immediate terms of reference. To proceed along these guidelines suggests therefore that, assuming exploitation-related concerns as the rationale for cooperation from a 'zonal' point of view, a more general requirement of "functionality and effectiveness"²⁸² shall be sought upon review of provisional arrangements in an 'integrated management' perspective. Such rationale clearly encompasses also the host of issues considered under the 'zonal' approach, since the exploitation of resources may well itself constitute a 'functional and effective' aspect of the way through which States look at ocean spaces. Its usefulness appears, however, even more evident when the management and conservation of living resources are deemed to deserve equal attention in order to

²⁸¹ TOWNSEND-GAULT, 2012b: 115.

²⁸² *Ib.*: 114.

achieve an overarching goal of ‘sustainable development’ beyond the (instrumental) establishment of delimitation²⁸³, thus assisting to firstly define ‘cooperation’ in its regional geographical scope²⁸⁴.

It is therefore worth noting how, notwithstanding the prevailing ‘zonal’ nature of concerns emerged during UNCLOS III, regional arrangements were initially indicated for consideration by the Seabed Committee in relation to the envisaged regime of the EEZ²⁸⁵, arguably on a functional basis justified by the parallel negotiation of both general and subject- or area-specific resource issues²⁸⁶. On one hand the drive for uniformity of the legal regime, as well as the interest in differentiating coastal and land-locked States’ rights of access to resources, lead to abandon a number of more radical ‘functionalistic’ proposals, aiming at the recognition of a greater weight to the regional dimension of the ocean regime²⁸⁷. On the other, nonetheless, the need to protect resources of national interest, which had initially rallied support for the unilateral expansion of

²⁸³ See XUE, 2005: 169.

²⁸⁴ Art. 1 (d) of the *Fish Stocks Agreement*, for instance, may be regarded as providing a convenient indication of such insight, defining as arrangement “a *cooperative* mechanism established [...] for the purpose, inter alia, of establishing *conservation and management* measures in a *subregion or region*” (emphasis added).

²⁸⁵ See in particular Pt. 6.4 (*Regional Arrangements*) of the *List of Subjects and Issues to be Discussed at Law of the Sea Conference*.

²⁸⁶ See, for the general issues, *Ib.*, Pts. 6.1 (*Nature and Characteristics, Including Rights and Jurisdiction of Coastal States in Relation to Resources, Pollution Control and Scientific Research in the Zone. Duties of States*) and 6.2 (*Resources of the Zone*). Pts. 6.6.3 (*Management and Conservation*) and 6.6.4 (*Protection of Coastal States’ Fisheries in Enclosed and Semi Enclosed Seas*) specify in content some of the concerns whose accommodation was found to require an approach functionally based on regional cooperation.

²⁸⁷ See Art. VII of Kenya’s *Draft Articles* (n. 58 above) and Pt. I (5) of the *African States’ Regional Seminar on the Law of the Sea* (n. 55 above), making the limits of the proposed Economic Zone conditional upon, *inter alia*, “the resources of the region”. Art. 4 (2) – (4) of a 1973 joint proposal by Uganda and Zambia (A/AC.138/SC.II/L.41, *Draft Articles on the Proposed Economic Zone*, on which see DEL VECCHIO, 1984: 17) went even further in proposing the establishment of a ‘Regional or Sub-regional Economic Zone’, wherein rights over non-living resources would have been exclusively vested in an Authority. According to the same proposal, fisheries would have been reserved for “the exclusive use, exploration and exploitation *by all the States* within the relevant Region or Sub-region” under the supervision of a Commission (emphasis added).

jurisdiction even outside the group of advocates of the ‘New International Economic Order’²⁸⁸, proved at least partly conducive to an “increased commitment to regional and global cooperation”²⁸⁹, finally resulting in the “tempered exclusivism”²⁹⁰ adopted by the Conference.

Just as, even within the sphere of national jurisdiction, neither ‘pure exploitation’ nor ‘pure conservation’ of living resources seemed conceivable – the two notions always appearing deeply interrelated in the *LOSC*²⁹¹ – the achievement of both (interdependent) goals in particular situations necessarily required participation in the regime by coastal States, yet remaining beyond the single capacities of each. In other terms, the existence of circumstances individuating functional areas of cooperation that “need not be created by States”²⁹² – as in the case of transboundary and straddling stocks²⁹³, highly migratory species and the ecosystems of enclosed and semi-enclosed seas – was

²⁸⁸ OGLE, 1981: 250, n. 4 notes that not only the ‘Group of 77’ but also “Norway, Iceland, the east coast US fishing industry, and [...] the EEC” had become supportive of the ‘sea enclosure revolution’ by the beginning of the 1980s. It may be recalled from *Chapter 1* that even a State as Japan, traditionally reluctant to assert or recognise claims of extended maritime jurisdiction, moved on to establish an EFZ in 1977 (see n. 75 above). CARREAU & MARRELLA, 2012: 283, hence substantiating the functional understanding of customary norms remarked at n. 32 above, accordingly observe how “in a few years [...] the ‘exclusive economic zone’ had indeed become a customary institution of international law” (own translation).

²⁸⁹ KRUEGER & NORDQUIST, 1979: 356, envisaging such result as an alternative to “attempt[s] to protect ‘local’ resources by joint or individual effort in order to expand assertions of jurisdiction”.

²⁹⁰ SCOVAZZI, 2001: 49-50 (own translation); similarly, see also TREVES, 1983: 13.

²⁹¹ Drawing upon Arts. 61 (3) and 63 (1) of the *LOSC* – mandating, respectively, conservation “at levels which can produce the maximum sustainable yield” and “conservation and development” of stocks – TANAKA, 2008: 33 describes in fact conservation as “an anthropological concept”. A similar position was recently upheld by Judge Owada of the ICJ, observing that “‘conservation of fisheries resources’ contains the element of ‘maximum/optimum sustainable yield’” (*Whaling in the Antarctic*. Judgment, Dissenting Opinion of Judge Owada: para. 10), while the Court, examining the *Preamble* of the *ICRW*, where both objectives are stated, confined itself to take note of their coexistence without any further remarks (*Ib.* Judgment: para. 56).

²⁹² TOWNSEND-GAULT, 2012b: 109.

²⁹³ With reference to Art. 63 of the *LOSC*, this research adopts the terminology employed in MUNRO, VAN HOUTTE & WILLMANN, 2004: 3, referring to “fish resources crossing the EEZ boundary of one coastal State

found defying the traditional concept of sovereignty still largely embodied by Arts. 61/62 of the *LOSC*, whereby “the coastal State remains its own judge on the determination of its own harvesting capacity, any allocation of surplus or the adoption of conservation and management measures”²⁹⁴. The consistent opposition of the major maritime powers during UNCLOS III to recognise any further expansion of coastal States’ jurisdiction in such areas, beyond what already conceded on the ‘zonal’ base of the 200-NM EEZ²⁹⁵, reinforced the need for designating regional or sub-regional fisheries organisations as the preferential venue in order to achieve the objective of rational management. Arts. 63 (2), on straddling fish stocks, 64, on highly migratory species, and 123, on the regime of enclosed and semi-enclosed seas, account therefore also for the jurisdictional concerns of distant sea users, mandating cooperation “directly or through appropriate subregional or regional organisations” both “within and beyond the exclusive economic zone”²⁹⁶. Conversely, EEZ-related provisions found in Arts. 61, 62 and 63 (1), which address conservation and utilisation of living resources and transboundary stocks, appear to take into consideration the intrinsic limits of unilateral State action, subordinating it “to an impressive array of conditions”²⁹⁷. On one hand, it is thus noted how the ‘total allowable catch principle’ – which, under Art. 61 (1), should provide guidance to States in achieving “the objective of optimum utilisation of the living resources in the exclusive economic

into the EEZ(s) of one, or more, other coastal States” as “transboundary stocks”, whereas “all other fish stocks (with the exception of anadromous/catadromous stocks) that are to be found both within the coastal State EEZ and the adjacent high seas” are designated as “straddling stocks”.

²⁹⁴ GAVOUNELI, 2007: 103.

²⁹⁵ See LODGE, 1999: 208, noting that “a special treatment on jurisdictional grounds” for enclosed and semi-enclosed seas was opposed by the USA, the EEC and all three Northeast Asian States considered in this research. The abandonment of proposals, such as the Iranian one, aiming at a result opposite to what was finally envisaged in Art. 123 of the *LOSC* (see n. 29 above) is emblematic in this sense.

²⁹⁶ Explicit reference to areas beyond the national EEZ is found in Arts. 63 (2) and 64; Art. 123, instead, does not directly touch upon such issue, but reference found in the *chapeau* and in Para. (b) to ‘rights and duties under the Convention’ should be construed as including and strengthening the relevant provisions of Arts. 63/64.

²⁹⁷ GAVOUNELI, 2007: 118.

zone” (Art. 62 (1)) – may possibly lead to dysfunctional practices whenever a shared resource is managed differently according to the regulator²⁹⁸. The same provision, however, would be only understood in connection to such items as the “interdependence of stocks” (Art. 61 (3)), “effects on species associated with or dependent upon harvested species” (Art. 61 (4)) and “States whose nationals are allowed to fish in the exclusive economic zone” (Art. 61 (5)). It is consequently arguable that the actual implementation of the envisaged system would be dubious absent the bi- or multilateral framework of an appropriate organisation²⁹⁹. Though representing the momentum for the expansion of coastal States’ jurisdiction over the seas on the basis of rather rigid geographical criteria – or perhaps *because of* such reason – the *LOSC* assumed at the same time a “highly integrated model of international society”³⁰⁰ as the necessary premise for the fulfilment of cooperative obligations of an essentially *de contrahendo* nature³⁰¹.

Among the early efforts to ensure the realisation of such model of international society with respect to the field of living resources management, where provisions of the *LOSC* were deemed incomplete even before their entry into force³⁰², *Agenda 21* is acknowledged as a meaningful starting point in the move towards the increasingly tight requirements envisaged in following instruments³⁰³. Though a ‘soft-law’ document, the preparatory role recognised to *Agenda 21* with respect to binding instruments – such as the 1995 *Fish Stocks Agreement*, whose adoption was envisaged in Chapter 17.49 (a)³⁰⁴ – suggests that due consideration shall be given to those provisions specifying

²⁹⁸ See PARK H.-K., 2000: 75 and TOWNSEND-GAULT, 2012b: 113.

²⁹⁹ See GAVOUNELI, 2007: 119.

³⁰⁰ TREVES, 1983: 12 (own translation).

³⁰¹ See CONFORTI, 1983: 11.

³⁰² See SANDS & PEEL, 2012: 398. In this regard it has been indeed observed that “Agenda 21 takes up where UNCLOS might be said to leave off” (TOWNSEND-GAULT, 2012a: 13).

³⁰³ KEYUAN, 2003: 129, writing with the 1997 *Japan – PRC Fisheries Agreement* in mind, mentions *Agenda 21* as one evidence of increasingly tight environmental standards following UNCED.

³⁰⁴ Paragraph (a) called upon States to “[g]ive full effect to [*LOSC*] provisions with regard to fisheries populations whose ranges lie both within and beyond exclusive economic zones (straddling stocks)”.

obligations stated in the *LOSC*, or further developed by subsequent agreements. Chapter 17.1 appears, in particular, remindful of Para. 3 of the *Preamble* to the *LOSC*, setting forth the need for management approaches that are “integrated in content” and based on the consideration of the marine environment as an “integrated whole”. Such guidelines find their application at the organisational level in the recommendation of conduct found in Chapter 17.120 (a), which, critically for the type of arrangements here investigated, individuates “intergovernmental regional cooperation”, along with “regional and subregional fisheries organisations and regional commissions”, among the items for consideration by States. Though still largely unspecified as for the substantive content of the results to be achieved, the basic understanding reached in *Agenda 21*, “encouraging integrated management of coastal and marine areas and resources”³⁰⁵, at least confirms the interpretation of the *LOSC* as an instrument to be preferentially implemented at the inter-State level for what concerns its resource management dimension.

Similarly, the 1999 FAO Ministerial Meeting remarked “the important role that regional fishery management organisations can play”³⁰⁶ with respect to the implementation of the *Code of Conduct for Responsible Fisheries*. The intuition about the future acquisition of binding effects by some principles of the *Code*³⁰⁷ appeared thus founded, given the long-lasting influence of this instrument even outside the direct regulatory scope of the FAO³⁰⁸. In order to consider the degree of

According to SANDS & PEEL, 2012: 407, “Agenda 21, in its Chapter 17, provided a roadmap which influenced some of the steps taken subsequently”.

³⁰⁵ CHRISTIE, 1999: 413.

³⁰⁶ Para. 8 of the *Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries*, adopted by the FAO Ministerial Meeting on Fisheries held in Rome on 10-11 March 1999. The declaration was adopted by 126 members of the FAO, including Japan, the Republic of Korea and the People’s Republic of China.

³⁰⁷ See CHRISTIE, 1999: 416, arguing that principles “already reflected in the *LOSC* [...] already have, or may in the future, have binding effects”. GAVOUNELI, 2007: 108 similarly observes that “the provisions of the *Code* reflect to a large extent the general principles of fisheries law and as such have acquired customary law status”.

³⁰⁸ See SANDS & PEEL, 2012: 411, on the relevance of the *Code of Conduct* for the negotiations leading to the establishment of the South Pacific Regional Fisheries Management Organisation in 2009, and MUNRO, VAN

cooperation required for the ‘integrated management’ of stocks, it is significant that, in spite of the formally equal position recognised to the “bilateral, subregional or regional” levels of implementation under Art. 7.1.3, as in Chapter 17.120 (a) of *Agenda 21*, further provisions make clear that in most cases multilateral arrangements would be the best venue in order to deal with the considered issues. In particular, participation standards, requiring the inclusion into such organisations of “representatives of States in whose jurisdictions the resources occur, as well as representatives from States that have a real interest in the fisheries” (Art. 7.1.4), stock-based management over the “entire area of distribution” (Art. 7.3.1)³⁰⁹ and compatibility of “conservation and management measures” (Art. 7.3.2) adopted for the stocks referred to in Art. 7.1.3 are likely to be met only through broader fora than those associated to ‘traditional’ bilateral diplomacy. The significance of Chapter 17 of *Agenda 21* is remarked in Art. 3.2 (c) of the *FAO Code of Conduct*, however requiring interpretation “in the light of” the former document – as against “in conformity to” the *LOSC* (Art. 3.1) and “in a manner consistent with” the *Fish Stocks Agreement* (Art. 3.2 (a)) – in order to give account of the binding character of the latter legal instruments³¹⁰.

HOUTTE & WILLMANN, 2004: 10, on the general significance of the *Code*’s provisions (especially those concerning shared stocks).

³⁰⁹ Furthermore, Para. 6 of the 1999 *Rome Declaration* (see n. 306 above) pledged the adoption of “more appropriate ecosystem approaches to fisheries development and management”. Though not defined in the declaration, the ‘ecosystem approach’ appears in *COP 5 Decision V/6* (Nairobi, 15-26 May 2000) of the parties to the *CBD* as “a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way” (Para. A (1)), whose “scale of analysis and action should be determined by the problem being addressed” (Para. A (3)), thus arguably overtaking in scope and number of involved actors even the stock-based approach envisaged in the *Code of Conduct* (see TANAKA, 2008: 77 and SANDS & PEEL, 2012: 345, 411). Japan, the Republic of Korea and the People’s Republic of China had all become parties to the *CBD* before the end of 1994.

³¹⁰ It appears therefore that, were the *FAO Code of Conduct* a treaty, the instruments mentioned in Arts. 3.1 and 3.2 (a), (b) would be taken into account for interpretation as “relevant rules of international law applicable in the relations between the parties” under Art. 31 (3) (c) of the *VCLT*. Given the ‘soft-law’ nature of *Agenda 21*, the same reasoning cannot be applied with regard to it, unless by analogy – which can nevertheless be

Whenever the further expansion of coastal State powers did not appear either desirable or practical, a ‘glossing’ of the *LOSC* finally appeared necessary in order to overcome the limits posed by its overall ‘zonal’ connotation. Such was the case of Arts. 7 (2) and 15 of the *Fish Stocks Agreement*³¹¹, addressing respectively the compatibility of conservation and management measures between the high seas and waters under national jurisdiction, and the implementation of the agreement “tak[ing] into account the natural characteristics” of enclosed and semi-enclosed seas. In this respect, the requirement of Art. 7 (2) (a) that “measures adopted and applied in accordance with article 61” of the *LOSC* be given consideration in determining compatibility, may appear as an attempt at recognising a leadership role to coastal States³¹², whose relevant measures would constitute the ground for subsequent obligations to be imposed on States fishing on the high seas. Such conclusion warrants, however, caution from at least two points of view. The first is that mention of Art. 61 of the *LOSC*, with its array of associated conditions and reference to action taken in cooperation with international organisations, should inherently temper any ‘exclusivist’ reading of Art. 7 (2) (a). The second would take into account the opposition encountered by the 1958 *High Seas Fishing Convention*³¹³ with respect to its Arts. 6 (4) and 7, providing for a ban on conservation measures incompatible with those established by the coastal State in its jurisdictional waters, as well as for the adoption of unilateral measures by the same State in the waters adjacent to its territorial sea. A proposed amendment of Art. 63 (2) of the *Draft LOSC*³¹⁴ – closely remindful of Art. 7 of the *High Seas Fishing Convention*, except for the difference that unilateral provisions had been

meaningful in light of the binding character assumed by some of its principles, either reflecting customary law (e.g. the various ‘obligations to cooperate’), or subsequently adopted in treaty-based law (see n. 304 above).

³¹¹ See LODGE, 1999: 216.

³¹² See CHRISTIE, 1999: 414 and HEWISON, 1999: 186.

³¹³ Formally, the *Convention on Fishing and Conservation of the Living Resources of the High Seas*, signed at Geneva on 29 April 1958 (hereinafter, the *High Seas Fishing Convention*). The Convention entered into force on 20 March 1966 and only 39 States – among which none of the three Northeast Asian countries here considered – are now parties to it.

³¹⁴ A/CONF.62/L.114, *Australia, Etc.: Amendments to Art. 63* (13 April 1982).

substituted by a tribunal order taking into account “those measures applied to the same stocks by the coastal State” – was either not put to the vote during UNCLOS III³¹⁵. It would be quite evident therefore that a likely interpretation of the *Fish Stocks Agreement* would exclude the re-introduction of similar clauses³¹⁶. Moreover, it has been noted that the duty to “seek [...] to agree upon the measures necessary for the conservation of these stocks” – essentially an obligation to negotiate imposed on both coastal and high seas fishing States by Art. 7 (1) (a) of the *Fish Stocks Agreement* – would be pointless unless related to a mutual construction of the provision found in Art. 7 (2) (a)³¹⁷. The agreement did actually encounter a more mixed response from States on the issue of the rights of access to and enforcement powers on high-seas fisheries recognised to members of regional fisheries organisations with respect to non-members³¹⁸. ‘Compatibility’, as also less problematically stated under Art. 7.3.2 of the *FAO Code of Conduct*, was however the term of reference chosen to bridge the gap between the positions of the different interest groups represented in the 1995 Conference³¹⁹.

The consideration required for the natural characteristics of enclosed and semi-enclosed seas under Art. 15 furthermore invites thinking about the fact that countries bordering such maritime areas are often at the same time coastal and distant-fishing States in each other’s respect. Such situation has been existing in Northeast Asia at least from the second post-war period – shifts in

³¹⁵ See HEWISON, 1999: 179.

³¹⁶ HAYASHI, 1999: 79 observes in this regard that, in light of the sharp division on the issue of coastal States’ rights and interests in areas adjacent waters under national jurisdiction, focusing negotiations on the functional requirement of compatibility “was a wise solution because [...] no agreement on the exact definition of such ‘rights’ and ‘interests’ would have been possible”.

³¹⁷ See TANAKA, 2008: 81.

³¹⁸ Arts. 8 (4), 17 (1), (2) and 21. Preference for regional fisheries organisations over bilateral coordination under Art. 8, similarly to the approach followed in Art. 7.1.3 of the *FAO Code of Conduct*, is recognised by MUNRO, VAN HOUTTE & WILLMANN, 2004: 39. SANDS & PEEL, 2012: 410 further note how the unusual extent of powers attributed to such organisations “is precisely one of the provisions that has prevented some states from joining the Agreement”.

³¹⁹ See HEWISON, 1999: 185.

emphasis on the degree to which any particular actor has been perceived as representing more the ‘defensive’ interests of coastal States or the ‘liberal’ ones of distant sea users mostly depending on the development of technical capacities associated to the respective fishing fleets³²⁰. A consistent application of the ‘compatibility principle’ by States bordering any enclosed and semi-enclosed sea where the type of situation described above is produced would therefore also entail a convergence of management measures adopted for the concerned stocks in waters under the respective national jurisdictions, with positive consequences from the point of view of transboundary conservation³²¹. That the coastal States’ EEZs nowadays have come to cover the entirety of the Northeast Asian seas – thus strictly leaving no grounds for the application of the *Fish Stocks Agreement*³²² – should not conceal the fact that many of those areas were still part of the high seas until the entry into force of the *LOSC*. It appears besides that commentators have generally been sensible to the possible linkage between the new fisheries agreements and considerations on the high-seas regime³²³, which becomes even more evident when ‘unregulated zones’ are analysed in light of their legal status, comparable

³²⁰ See in particular the evolution of the attitude of the three Northeast Asian countries in reciprocal fisheries affairs, dating back at least to the 1970s for what concerns Sino-Korean relations and to the 1980s for the Sino-Japanese ones (pp. 15 ff. above).

³²¹ As recalled from the previous paragraphs, the *Fish Stocks Agreement* does not directly regulate conservation and management of transboundary stocks; yet, this type of resource becomes relevant under Art. 63 (1) of the *LOSC*, as well as under Art. 7.3.2 of the *FAO Code of Conduct*, so that it appears useful to consider any indirect implication that the agreement may have in such regards.

³²² Art. 3 (1) namely specifies that the agreement “applies to the conservation and management of straddling fish stocks and highly migratory fish stocks *beyond areas under national jurisdiction*” (emphasis added), a part from the provisions on the precautionary approach (Art. 6) and on compatibility of measures (Art. 7), which apply as appropriate also in areas under national jurisdiction.

³²³ See KEYUAN, 2003: 128 and SAKAMOTO, 2000: 2. The latter, making reference to Part VII, Section II of the *LOSC*, affirms that “[t]he rationale at the basis of the regime adopted by the *LOSC* lies in the necessity to establish appropriate measures in order to avoid the exhaustion of fisheries [...]. By concluding the new fisheries agreement, *Japan and Korea have shown a common understanding about this issue*” (own translation, emphasis added).

on practical grounds to that of the high seas as for the application and enforcement of fisheries regulations³²⁴.

The overall picture of maritime cooperation with respect to the conservation and management of living resources, as framed under the *LOSC* and subsequent instruments, reveals therefore the existence of a whole range of provisions – Arts. 62, 63 and 123 of the *LOSC in primis* – specifically devised to be implemented by means of separate agreements³²⁵, as well as a margin for evolutionary interpretation where the wording employed inherently acquires such nature by taking the current factual or legal situation as a term of reference³²⁶. This observation has been made in particular with respect to the use of terms like “endangered by over-exploitation” and “international minimum standards” (Art. 61 (2), (3)), whose meaning depends on the actual status of resources and the prevailing norms on their utilisation, thus being especially sensible to developments affecting States’ exploitation capacities and knowledge of best management practices³²⁷. The latter expression, applying to the practice of States within the respective EEZs, can thus be interpreted as involving consideration for the coordination and compatibility of national measures on shared fish stocks required under Art. 63 and post-*LOSC* instruments, arguably on the way to becoming, at least in part, a corpus of customary law regulating the management of such resources. While customary law is generally regarded as providing little indication on matters other

³²⁴ Treaty-based provisions avoiding mention of such areas among the JFCs’ competences are not, however, *per se* sufficient to completely equate the ‘unregulated zones’ with the high seas (see p. 35 above). The argument is valid *a fortiori* considering that, with respect to the joint fishing zones, “it cannot be inferred from the mere circumstance that flag-State jurisdiction has been maintained that the legal nature of those areas directly corresponds to that of the high seas” (*Ib.*: 7 – own translation).

³²⁵ See CHRISTIE, 1999: 407.

³²⁶ The test for evolutionary interpretation, taking at first into account the character of the concerned term “by definition” has been employed by the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. Advisory Opinion: para. 53. See INAGAKI, 2014.

³²⁷ See CHRISTIE, 1999: 407.

than international ‘coexistence’³²⁸, the reference to an additional element of “vital co-operation” in the ICJ’s *Gulf of Maine Case* should itself be evolutionarily interpreted as for what allows inter-State relations to attain a ‘vital’ level in each sensitive area – not least the management of shared goods. A shift from the ‘zonal’ focus on the extent to which State activities are tolerated where jurisdiction is either untenable or uncertain to an ‘integrated management’ one, prioritising the compatibility of such activities with respect to each other and to the overarching need of rational resource management, would likely contribute to maintain such relations ‘vital’. Based on these premises, the following half of this section will further individuate elements within the considered agreements justifying the broadening of the field of investigation beyond strictly jurisdictional issues.

‘INTEGRATED MANAGEMENT’ ASPECTS IN THE NORTHEAST ASIAN PROVISIONAL ARRANGEMENTS

In order to begin the proposed assessment of the scope left to interpret the Northeast Asian provisional arrangements from an ‘integrated management’ perspective, it appears sensible to examine the rationales explicitly provided in the respective *Preambles*, which, especially in the case of fisheries-related agreements, seem not to be exclusively concerned with ‘zonal’ (delimitation and exploitation) issues. Thus, “rational conservation and management as well as optimal use of marine living resources” is stated as an objective in the *Preamble* to the *Japan – ROK Fisheries Agreement*, echoed by “conservation and rational utilisation of the living resources of the seas” in both the other agreements. Such wording, closely mindful of that employed in Arts. 61 (2) and 62 (1) of the *LOSC*, is coupled by the provision on the “harmonious management of fishing operations in the East China Sea” contained in the *Agreed Minute* attached to the first treaty which, while arguably including reference to navigational safety and prompt settlement of accidents at sea (Art. XI (1))³²⁹,

³²⁸ For such observation and the following mention of the *Gulf of Maine Case*, see n. 134 above.

³²⁹ The degree of consideration given to the ‘operational’ aspects of fishing activities is even more evident from Para. 4 of the *Agreed Minute*, which employs the same expression with reference to the critical third-State issue (“harmonious management [...] in accordance with the provisions of the Agreement and of any fisheries agreement that the two countries may conclude or may have concluded with each third country”).

should not either exclude consideration for the parallel ‘harmonisation’ of provisions governing the conduct of such operations, as required *inter alia* under Art. 63 (1) of the *LOSC*, Art. 7.3.2 of the *FAO Code of Conduct* and, by analogy with the high seas, Art. 7 (2) of the *Fish Stocks Agreement*. The three *Preambles* finally mention the circumstance of signatories being parties to the *LOSC*, stating that it should be the base for the “new fisheries order between the two countries” (*Japan – ROK Fisheries Agreement*), or that the arrangement should be “in accordance with” the relevant provisions of the *LOSC* (*Japan – PRC* and *ROK – PRC Fisheries Agreement*). The *LOSC* – conservation and management provisions included – appears therefore beyond any doubt a relevant rule for interpretation of the treaties under Art. 31 (3) (c) of the *VCLT*. The main objectives of the new agreements have been accordingly individuated in the maintenance of fishing order, promotion of fisheries cooperation and desirable utilisation of marine living resources in accordance with the *LOSC*³³⁰. With particular reference to the *Japan – PRC Fisheries Agreement*, such overarching goals have also been described as the fulfilment of the obligations to “cooperate, [...] enter into negotiations, and [...] regulate by agreement” based on Art. 63 (1) of the *LOSC*, while “tak[ing] into account the natural characteristics of the semi-enclosed sea[s]” according to Art. 15 of the *Fish Stocks Agreement*³³¹. Similarly, the *Japan – ROK Fisheries Agreement* has been defined as concluded “for the purpose of ensuring ‘responsible fisheries’ in the Sea of Japan and the East China Sea [...] by introducing the concept of conservation and management for a sustainable use of fisheries, as established in the *LOSC*”³³², in comparison to the partially different framework established by the old arrangement³³³. The unity of views among commentators on the need to understand the fisheries agreements within a broader framework should not be surprising indeed,

³³⁰ See KANG, 2003: 122.

³³¹ KEYUAN, 2003: 128. Since the People’s Republic of China has not yet become a party to the latter agreement (see n. 278 above), it appears that the Author considers its provision on enclosed and semi-enclosed seas as already customary, which would likely be the case if Art. 15 were interpreted as providing a ‘gloss’ to the *LOSC* (see n. 311 above).

³³² SAKAMOTO, 2000: 1 (own translation).

³³³ See *Id.*, 1999: 21.

given the subject- and area-specific nature of provisional arrangements and their resulting necessity of “striv[ing] [...] to make linkages between the ‘external’ and the ‘internal’”³³⁴. Reference to such independent concepts and principles as ‘conservation’, ‘optimal use’, or ‘harmonisation’ is the way through which functional and regional regimes aim at attaining consistency with the ‘universal’ ones, to the extent that those principles “even when placed within a specific normative context, derive further value from their more general application”³³⁵. In the situation here considered – the ‘universal’ regime being represented by customary law, the *LOSC* and subsequent instruments influencing its interpretation and application – the rationale for tracing ‘internal’ principles of the agreements back to their ‘external’ application is all the more reinforced.

As compared to the three fisheries arrangements, the 2008 Sino-Japanese *Principled Consensus* only includes in its Para. I³³⁶ a general reference to the principle of the “Sea of Peace, Cooperation and Friendship”, which had been previously advanced during the Japanese Prime Minister’s official visit to China in October 2006³³⁷ and reaffirmed in two separate occasions the following year³³⁸. With regard to this enunciation, it is significant that, on the same day in which the

³³⁴ FRENCH, 2012: 56. The Author expressed such views in the context of the Antarctic Treaty System; yet, the broader reference subsequently made to “all regional and functional regimes” would render them applicable also to the framework of the arrangements reviewed here.

³³⁵ *Ib.*: 58.

³³⁶ Since there is no authentic text of the document (see n. 150 above), an official title for each of its three sections does not exist. The first, preambular one is referred to as “Cooperation Between China and Japan in the East China Sea” in the English-language Chinese version (MOFA-PRC, 18 June 2008), to which the Japanese version adds the specification “Japan-China Joint Press Statement” (MOFA-JP, 18 June 2008 (*Understanding between China and Japan Concerning Joint Development in the East China Sea*) – own translation).

³³⁷ See PMJ, 8 October 2006 (in Japanese).

³³⁸ The principle was mentioned in a joint press conference by the Japanese Prime Minister Abe Shinzō, and the Chinese Premier of the State Council Wen Jiabao, in April 2007 (see MOFA-JP, 11 April 2007). It was subsequently confirmed during the official talks between Wen and the new Japanese Prime Minister Fukuda

Wen-Fukuda *Common Understanding* was released, the Japanese Minister of Foreign Affairs nevertheless declared in a press conference that the distance between the principles invoked by the two parties was such that a rapid resolution of the issue could not be expected³³⁹. Delimitation criteria and, arguably, territorial sovereignty concerns therefore still constituted the principal terms of reference (or ‘principles’) relied on by the parties for the negotiation of any future arrangements, as it was the case with the 2008 *Principled Consensus*. The 1974 *Japan – ROK Southern Continental Shelf Agreement* also includes a number of technical provisions in the *Exchange of Notes* addressing the “prevention and removal of pollution of the sea” resulting from activities in the joint development zone. Such articles do not appear, however, to be part of any particular ‘integrated management’ scheme with respect to the sedentary species of the continental shelf or to the ecosystem of the superjacent water column, nor are they mentioned as one of the objectives of the agreement within its *Preamble*. As recalled from the *Conclusions of Chapter I*, the different nature of provisional arrangements providing for the exploration and exploitation of mineral resources has been indeed described as presenting a “more limited multipurpose approach”³⁴⁰: this is also the reason for which this chapter will primarily be focused on fisheries-related agreements.

A second aspect which appears worthy of consideration is the temporal one, as already mentioned in *Section II of Chapter I* with respect to the ‘preventive’, long-term oriented element found in provisional arrangements³⁴¹. On one side, it is certainly undeniable that governments have negotiated the agreements with a view to securing the best outcome on jurisdictional issues. Nevertheless, the possibility that some already regulated aspects could survive even the final delimitation³⁴² should induce to consider the ‘provisional’ arrangements in light of those functional

Yasuo, held in December of the same year (see MOFA-JP, 28 December 2007 (*New Common Understanding of the Heads of State of China and Japan Concerning the East China Sea Issue*) – in Japanese).

³³⁹ See MOFA-JP, 28 December 2007 (*Press Conference of the Minister of Foreign Affairs* – in Japanese).

³⁴⁰ KWIATKOWSKA, 1993: 77 (see n. 268 above).

³⁴¹ See p. 54 above.

³⁴² See KWIATKOWSKA, 1993: 77 and GAO Z., 1998: 119.

areas of cooperation which would require inter-State coordination independently of a boundary being in place. This would of course be the case for mineral resources, should final delimitation determine the situation in which a single reservoir stretches across the agreed boundary, thus warranting some form of unitisation in order to avoid the risk that development activities on one side affect the overall status of the common deposit under the so-called “rule of capture”³⁴³. Whereas such type of consideration alone would, again, not be conducive to any form of ‘integrated management’ if exclusively dictated by concerns about apportionment, the possibility would be more likely to occur in the case of marine living resources, whose rational management implies the maintenance of cooperation between all concerned States over time. That a margin for taking into account the compatibility of conservation measures independently of claims to jurisdiction is actually offered under fisheries-related provisional arrangements, is illustrated by the development of the Japanese-Korean negotiations on the Northern ‘Provisional Zone’ and of the Sino-Korean ones establishing the boundary of the Southern ‘Current Fishing Pattern Zone’³⁴⁴. At stake in both situations were, indeed, the assertions of sovereignty by the Republic of Korea on the EEZ surrounding Dokdo/Takeshima and up to 200 NM from the territory of Marado. The final compromises however, leading to the issuance of entry permits to the Japanese ‘EEZ-like area’ and to the establishment of a boundary favourable to the Korean claims in the ‘Current Fishing Pattern Zone’, were linked to such conditions on the acceptance of fishing regulations of the coastal States as to suggest an emerging pattern of ‘harmonisation’ between management measures.

A final remark should also be made on the legal nature of the framework established by the provisional arrangements in order to ascertain, beyond the objectives set forth in the *Preambles*, the structural appropriateness of such venue for the purposes of an ‘integrated management’ model to

³⁴³ LAGONI, 1979: 219. CONFORTI, 1958: 232 envisaged, indeed, in the concrete operation of the 1958 *Geneva Convention on the Continental Shelf* the issue of “boundaries crossing reservoirs that, for technical reasons, are exploitable only through a unitary plan” (own translation). On the practice of unitisation, see also GAO Z., 1998: 111 (quoted at n. 113 above).

³⁴⁴ See p. 43 above for the first case and n. 218 for the second.

be accomplished in the Northeast Asian seas. In this sense, to research the functional rationale for the characterisation of provisional arrangements as instruments for the “pooling [of] sovereign rights”³⁴⁵ logically brings to the observation that the resources constituting the object of those rights form themselves a “common pool”³⁴⁶, whose sensible management would warrant in every circumstance that certain sovereign prerogatives be made less exclusive in their exercise. The need to achieve a complete correspondence between the ‘legal’ pooling of jurisdictions and the ‘functional’ one of “management capabilities”³⁴⁷, mostly required by the current trend of decline in stocks and increasing demand for fisheries products in Northeast Asia³⁴⁸, would critically involve the resolution of the third-State issue. This may in turn happen either asymmetrically, through bilateral agreements acquiesced by the party not included therein³⁴⁹, or, as recommended by Art. 7.1.4 of the *FAO Code of Conduct*, through a multilateral regional organisation including “representatives from States which have a real interest in the fisheries”. Not all provisions of the *LOSC* referred to in this section actually mention the forum constituted by inter-State agreements, but also those omitting such indication, as Art. 123, do appear to rely on ‘international organisations’, which may well be considered the functional realisation of the arrangements laying at their foundation³⁵⁰. Needless to say, caution is warranted whenever the vocabulary of ‘international organisations’ is employed with reference to the operation of bilateral fisheries commissions,

³⁴⁵ GAO Z., 1998: 111.

³⁴⁶ XUE, 2005: 157. In similar terms, see KEYUAN, 2003: 137.

³⁴⁷ SCHOFIELD, 2012: 156.

³⁴⁸ See PARK H.-K., 2000: 67, VALENCIA & AMAE, 2003: 193 and XUE, 2005: 156-160.

³⁴⁹ This may have been the case for the resolution of the overlap between the Sino-Korean Southern ‘Current Fishing Pattern Zone’ and the Sino-Japanese ‘Provisional Measures Zone’, which occurred in an area located in the geographical proximity of the Chinese coast (see n. 218 above). The issue was not, however, so easily dealt with in the case of the Southern Japanese-Korean ‘Provisional Zone’ with respect to the Sino-Japanese ‘Provisional Measures’ and ‘Intermediate’ zones (see n. 238 above and, further, pp. 104 ff.). Attention shall be paid to the fact that the term ‘acquiescence’ has not been employed here in its narrow legal meaning, since jurisdictional claims are formally maintained and, indeed, left unprejudiced under the agreements.

³⁵⁰ See KIM, 2004: 44.

especially taking into account that even the more structured fora established in the form of the Conference of Parties under several multilateral environmental agreements are not currently regarded as constituting ‘organisations’ endowed with international legal personality³⁵¹. Nevertheless, it may also be observed that, in a manner specular to the use of the concept under Art. 123 of the *LOSC*, Art. 1 (d) of the *Fish Stocks Agreement* refers to ‘arrangements’ as “cooperative mechanism[s] established [...] by two or more States for the purpose, inter alia, of establishing conservation and management measures”. Whether or not establishing ‘international organisations’, such ‘arrangements’, either bi- or multilateral, seem thus suited to fit in with the rationale found in the relevant provisions of the international legal instruments envisaging their existence. The structure of the obligations established by Arts. 74/83 of the *LOSC* being essentially individuated in “seek[ing], by preliminary negotiations, terms for an agreement”³⁵², it is possible to consider provisions on management and conservation found both in the Convention and in subsequent instruments – basically adopting the same scheme devised for provisional arrangements³⁵³ – as incremental to the significance of the negotiations themselves. Provisional arrangements would therefore be structurally apt to offer a forum for the fulfilment of a rational resource management model, provided that their ‘scope’, as further inferable from the respective *Preambles*, is interpreted in a way inclusive of such dimension.

Any considerations on the theoretical possibility for provisional arrangements to offer a reasonable venue for the achievement of optimal resource management would be nevertheless incomplete without regard for the space concretely left to such issues by the specific provisions of

³⁵¹ See SHIBATA, 2011: 54.

³⁵² The reference, as in n. 126 above, is to the *Lac Lanoux Arbitration*.

³⁵³ See for instance KEYUAN, 2003: 128, noting with reference to the *Japan – PRC Fisheries Agreement* and Art. 63 of the *LOSC* that “the bilateral fishery arrangement between China and Japan is only regarded as a first step of a regional arrangement [that] can ideally fulfil the treaty obligations derived from the *LOSC*.” Similarly, SAKAMOTO, 2000: 2 recognises a “double nature” in the *Japan – ROK Fisheries Agreement*, pursuant at the same time to Art. 74 (3) of the *LOSC* and to the need for “an emended agreement establishing a fishing order appropriate to the era of the 200-NM EEZ” (own translation).

each agreement. In this sense, the lack of explicit mention of any stock- or ecosystem-based requirements for the management of living resources under the three fisheries agreements³⁵⁴, as well as further difficulties in the development of a consistent regional regime arising from the partial overlap of ‘agreed areas’, warrant a more in-depth assessment, which will be the subject of *Section II*.

³⁵⁴ See in particular the criticism expressed by PARK, 2000: 50, SAKAMOTO, 2000: 6 and TANAKA, 2012: 8 (in Japanese). Since no procedural rules, or ‘items for consideration’ by the JFCs appear to exist – at least at the public level – it is arduous to affirm beyond any doubt that such requirements always receive due consideration in the annual bilateral negotiations. On the issue of the scarce transparency of the JFCs, see n. 246 above.

Section II

Critical Issues in the Northeast Asian Provisional Fisheries Regime

THE SCOPE OF ACTION OF THE JOINT FISHERIES COMMISSIONS

The concern that schemes devised to manage particularly sensitive zones through the accommodation of related sovereignty issues may end up “entangled in and [...] sidelined by the competition that these preoccupations entail”³⁵⁵ has once been expressed with respect to the debate on the ‘common heritage’ regime. While joint fishing zones fundamentally differ from areas considered to represent the ‘common heritage of mankind’, given the only temporary and materially limited suspension of the exercise of exclusive jurisdiction realised therein, they equally arise from contrasting interpretations on the forms that sovereignty may *pro tempore* assume³⁵⁶ and are thus open to the same potential flaws. Concretely reviewing the mandates and powers entrusted to the JFCs for achieving the sustainable management of stocks will consequently shed some light on how much concerns about resource access and preservation of national attributes to the greatest possible extent may risk displacing the objective of rational and harmonious conduct of fishing operations.

Beginning with the regime envisaged for the ‘EEZ-like areas’, where the exercise of coastal State discretion appears to be strongest, Art. 3 of all the agreements mentions the “status of the marine living resources” as an item for consideration in deciding whether to grant access to nationals of the reciprocating party. Such provision basically finds its precedent in the TAC-quota system

³⁵⁵ BRUNNÉE, 2007: 564.

³⁵⁶ With reference to the debate on the legal regime of the deep seabed, as one of the generally recognised ‘common heritage’ areas, KOSKENNIEMI & LEHTO, 1996: 553 observe for example that the major disagreement during the years of UNCLOS III was more focused on the form and content of the agreement, than on the opportunity of actually having one in place. In a similar vein, once the parties began to consider beneficial to conclude the provisional arrangements investigated in this research, negotiations mainly developed around the specific extension and characteristics that such areas would acquire pending final delimitation (see pp. 53 ff. above).

established by Art. 61 (1) of the *LOSC*, while not excluding in principle a margin for action by the JFCs in issuing ‘recommendations’, as will be contended below. It is useful, moreover, to recall from the brief analysis of Art. 61 conducted in *Section I* of the present chapter that the existence of an international body providing coordination between the regulatory efforts of the parties in their own EEZs should actually constitute the privileged way in order to give complete effect to the complex requirements of the *LOSC*. In this respect, both Arts. XII (4) (3) and 13 (2) (1) (c), respectively of the *Japan – ROK* and of the *ROK – PRC Fisheries Agreement*, recognise to the JFCs the power to formulate non-binding recommendations³⁵⁷ on issues concerning the “status and conservation of marine living resources”, to which no spatial limitation within the geographical area of application of the treaty is attached. An identical clause is found also in Art. 11 (2) (a) (iii) of the *Japan – PRC Fisheries Agreement*, which appears, however, to be limited *ratione loci* to the ‘EEZ-like areas’ (through reference to “the provisions of article 3” contained in Art. 11 (2) (a)) and to the ‘Untitled Provisional Zone’ (“the waters referred to in paragraph 2 of article 6”, according to the formulation of the same provision). The ‘Intermediate Zone’ established to the north of the ‘Provisional Measures Zone’ would thus be seemingly excluded from the scope of operation of the Sino-Japanese JFC – an observation that shall nevertheless be considered in light of the (admittedly less incisive) power of the Commission to “study the implementation of the present Agreement and other issues” relating thereto under Art. 11 (2) (d). The outcomes of the Third Preparatory Meeting of the Fourteenth Sino-Japanese JFC in August 2013 reported in fact a preliminary undertaking finalised to the adoption of agreed regulatory measures in the ‘Intermediate Zone’³⁵⁸. The repetition of the same expression over the JFC documents since July 2011, however, is not indicative of

³⁵⁷ On the connotation of ‘recommendations’ as non-binding measures, see the discussion in *Section I* of *Chapter 1* (p. 40 above).

³⁵⁸ See JFA, 12 August 2013: “continuation of negotiations and consultations, along with relevant preparations and exchanges, in order to allow each contracting party to present the documentation required for the adoption of resource-management measures [in the ‘Intermediate Zone’]” (in Japanese, own translation).

progress being achieved by the parties in this field³⁵⁹. Finally, a range of competences on matters alternatively described as “conservation and management of marine living resources” (Art. XII (4) (5) of the *Japan – ROK Fisheries Agreement*), “preventing the danger of [...] over-exploitation” (Art. 7 (2) of the *Japan – PRC Fisheries Agreement*), or “common conservation and quantity-management measures” (Art. 7 (2) of the *ROK – PRC Fisheries Agreement*) are specifically devised to be exercised within designated areas, either in the form of ‘recommendations’, or of binding ‘decisions’. The first instance is that of measures applied to ‘EEZ-like areas’ (as under Art. 11 (2) (a) (iii) of the *Japan – PRC Fisheries Agreement* discussed above), or to ‘weak’ joint fishing zones (Art. XII (4) (5) of the *Japan – ROK Fisheries Agreement*, referring to Art. IX (1) for the Northern ‘Provisional Zone’, and Art. 11 (2) (a) of the *Japan – PRC Fisheries Agreement*, for the ‘Untitled Provisional Zone’). The latter area was especially recognised as dependent upon the operation of the Sino-Japanese JFC during a debate in the Japanese House of Representatives in 2013, when a government official remarked how “the Sino-Japanese JFC is the substantial venue in order to steadily discuss [resource management in the zone south of 27° north latitude]”³⁶⁰. The second case is realised within those joint fishing zones which envisage a ‘strong’ regime, *i.e.*, the Southern Japanese-Korean ‘Provisional Zone’ (Art. XII (5) of the relative agreement, referring to Art. IX (2)), the Sino-Japanese ‘Provisional Measures Zone’ (Art. 11 (2) (b), through the operation of Art. 7 (2)), and the Sino-Korean ‘Provisional Measures’ and ‘Transitional’ Zones (Art. 13 (2) (3), entrusting the JFC with decisional powers on issues related, *inter alia*, to Arts. 7 (2) and 8 (3)).

From this initial analysis it may be found that the three agreements do actually recognise some space for action by the JFCs, which, especially acting in their geographically unrestricted

³⁵⁹ See JFA, 9 November 2011 (in Japanese). The only measure hitherto taken with respect to the ‘Intermediate Zone’, by direct involvement of the contracting governments, appears thus to be the quantitative limitation on the number of vessels admitted every year, referred to at n. 214 above.

³⁶⁰ JHR, 12 April 2013: 11 (in Japanese, own translation). The reported statement was made by Mr. Yamanouchi Kanji, Counsellor at the Asian and Oceanian Affairs Bureau of the Japanese Ministry of Foreign Affairs, in response to a question on the possibility of enforcing the Japanese law on Chinese vessels within the ‘Untitled Provisional Zone’.

‘recommendatory’ capacity, could well function in order to further the objective of “compatibility” set forth in Art. 7.3.2 of the *FAO Code of Conduct*. Since, functioning as bilateral organisms, the JFCs are most likely to have even their formally non-binding ‘recommendations’ implemented by the contracting governments, some degree of intervention in the decisions taken by coastal States within their ‘EEZ-like areas’ would also serve to render them less ‘unilateral’ and closer to the constructive ‘leading role’ apparently conferred to such States by Arts. 61 of the *LOSC* and 7 (2) (a) of the *Fish Stocks Agreement*. Even though only a rough indicator, the number of vessels yearly admitted by the parties into each other’s ‘EEZ-like areas’ could be taken as a trend of increasing uniformity in the reciprocal fishing conditions, with positive effects also on the management of the joint fishing zones established in between due to the semi-enclosed nature of the Northeast Asian seas³⁶¹. In this sense, it would become possible to recognise a key role in the implementation of the agreements to the activity of the JFCs, as actually envisaged by the provisions of the treaties defining the objectives of ‘recommendations’ issued by each Commission³⁶². The critical issue, in this respect, is constituted by the fact that the areas where the JFCs are to exercise their mandates, if possibly functional from the point of view of avoiding delimitation-related disputes and ensuring access to

³⁶¹ For such consideration, linking ‘compatibility’ of measures within and outside national jurisdiction with the peculiar situation found in enclosed and semi-enclosed seas, see the discussion at p. 82 above. Data indicating a progressive convergence in the number of vessels admitted to fish in the ‘EEZ-like areas’ from the entry into force of each treaty have been obtained from JFA, 17 December 2007 and *Id.*, 24 June 2013 for the *Japan – ROK Fisheries Agreement*; *Id.*, August 2013 and VALENCIA & AMAE, 2003: 195 for the *Japan – PRC Fisheries Agreement*; KIM, 2003: 102, n. 20 and KATAOKA, 2004: 62 for the *ROK – PRC Fisheries Agreement*.

³⁶² Art. XII (4) (6) of the *Japan – ROK Fisheries Agreement*; Art. 11 (2) (d) of the *Japan – PRC Fisheries Agreement*; Art. 13 (2) (4) of the *ROK – PRC Fisheries Agreement*. The fundamental role of the JFCs in “produc[ing] mutually acceptable resolutions and [...] put[ting] pressure on governments to coordinate their respective policies” has been underscored by XUE, 2005: 186. Taking account of the differences between the types of fora envisaged in the two cases, a parallel may also be drawn with the “coordination of relevant rules of treaties through the Conference of the Parties” (TANAKA, 2008: 20) as one aspect of the implementation-related dimension in the development of an ‘integrated management approach’.

shared resources, have not been specifically designed in order to take into account environmental factors or stock-unity. Thus, for instance, the Yamatotai fishing ground was split up between the Japanese ‘EEZ-like area’ and the Northern Japanese-Korean ‘Provisional Zone’, while the potentially mitigating effect of the JFC’s recommendations for its management appeared to be more a matter of ensuring equal access to living resources than an attempt to implement an effective stock-based management regime³⁶³. Moreover, most areas established under each bilateral agreement show a relevant degree of overlap with those envisaged by other arrangements including a third party, therefore warranting a closer consideration of the legal and operational consequences, which will form the object of the following part of this section.

THE OVERLAP OF DIFFERENT ‘AGREED AREAS’

As will be recalled from *Section I*, a strong rationale for negotiating and implementing regional management regimes on a comprehensive scale may be advocated both as a matter of functional correspondence between the pooling of resources and of sovereign rights thereby

³⁶³ On the vicissitudes of the measures initially asked by Japan with respect to the Northern Japanese-Korean ‘Provisional Zone’, see p. 43 above.

envisaged, and as an issue of compliance³⁶⁴ with legal instruments reflecting such principle³⁶⁵. Notwithstanding the tri-lateral dimension of most maritime delimitation disputes in the East China Sea, the three provisional arrangements have been negotiated separately, thus in principle ignoring the possibility of third-party claims on the same maritime areas, as a consequence of the position upheld by each contracting government to be the only legitimate sovereign in the EEZ portion so regulated. The situation is further complicated by the geographical characteristics of the Northeast Asian seas as semi-enclosed basins, where distance between coastal States at every point is less than 400 NM. This practically means that one State actor may often be party at the same time to two agreements which are intended to apply to an identical sea area, hence possibly involving an issue of consistency between obligations arising from different treaty provisions – equally binding upon parties pursuant to Art. 26 of the *VCLT* – as well as more general questions about the law to be adopted and enforced for the management of those zones. Since, as discussed in *Section II* of *Chapter 1*, the legal nature of ‘agreed areas’ and the extent of residual jurisdiction by coastal States therein differ according to the particular agreement and zone considered, it is firstly necessary to

³⁶⁴ Considering that compliance procedures of agreements regulating resource management and environmental matters “tend to be quasi-political and don’t make bright line distinctions between violations of hard and soft law provisions” (BODANSKY, 2010: 100), the term ‘compliance’, though perhaps slightly misleading, is used here to generally indicate conformation to international norms, regardless of their binding or non-binding nature. Thus, with reference to the provisions of *Agenda 21*, discussed in *Section I*, EVANS, 2014: 160 observes that compliance mechanisms have been created also with respect to non-binding norms “in a manner that mimics, if it does not duplicate the mechanisms utilized in treaties”. It may be also recalled from *Section II* of *Chapter 1* (see p. 40 above) that the term ‘compliance’ is actually found in Art. 3 (2) of Annex I to the *Japan – ROK Fisheries Agreement* with reference to the binding ‘decisions’ of the JFC. However, ‘respect’ for the ‘recommendations’ mandated by Arts. III (2) and XII (4) of the same treaty, as well as by Art. 2 (2) of Annex I, renders such distinction more blurred on practical grounds.

³⁶⁵ See for instance the discussion on the implementation of Art. 61 of the *LOSC* at pp. 77 ff. above, as well as Arts. 7.1.4 and 7.3.1 of the *FAO Code of Conduct*, requiring the involvement in regional arrangements of all “representatives from States which have a real interest in the fisheries” and stock-based management over the “entire area of distribution” of the resource in question.

investigate the consequences of their overlap by taking into account such variances. Based on the representation that may be usefully found in Map 4 reported in appendix to this section³⁶⁶, three fundamental typologies have consequently been individuated, distinguishing between the cases of ‘strong’ regimes and ‘unregulated zones’³⁶⁷, overlapping with each other or with other areas possessing the same nature.

Accordingly, the first instance reviewed here will concern the overlap of areas regulated by ‘strong’ joint regimes with ‘unregulated zones’. Such is, specifically, the type of situation arising from the conflict of the Sino-Japanese ‘Intermediate Zone’ with the Southern Japanese-Korean ‘Provisional Zone’ and with the Eastern Sino-Korean ‘Transitional Zone’³⁶⁸, as well as of the Southern Sino-Korean ‘Current Fishing Pattern Zone’ with the Sino-Japanese ‘Provisional Measures Zone’. In the three situations pertaining to this category, the jurisdictional issue may be considered as avoided *prima facie* by recalling the distinct characteristics of the ‘Intermediate’ and ‘Current Fishing Pattern’ zones, which are limited to exclude the possibility that permits or regulations issued

³⁶⁶ Reference may also be made to Maps 1 and 2 in appendix to *Section II of Chapter I*. Regardless of the denominations used in the geographical representations here reported, ‘agreed areas’ will continue to be designated in this section with the terms firstly used in the explanation of the issue at pp. 45 ff. above.

³⁶⁷ As observed in the discussion about the scope of action of the JFCs in the first part of this section, with the partial exception of the Sino-Japanese ‘Intermediate Zone’, the bilateral commissions do actually enjoy a recommendatory power that is geographically unlimited within the agreement area. The designation of ‘unregulated areas’ as such, utilised also in *Chapter I*, is therefore to be intended as implying that fishing in these zones is not subordinated to the issuance of specific permits, nor to any form of compulsory international regulation.

³⁶⁸ The author was not able to find a geographical representation comprehensively giving account of the extension of the two above-mentioned areas. The situation, however, may be understood through a comparison of Map 2, reporting the ‘Intermediate Zone’ north of the Sino-Japanese ‘Provisional Measures Zone’, and Maps 1 or 4, showing the Eastern ‘Transitional Zone’. As will be recalled from n. 209 above, the former area is established in “the portion of the East China Sea north of 30° 40’ north latitude”, while the latter reaches on the Korean side 32° 11’ north latitude (Art. 8 (1) (A), Pts. K5 and K6). A schematic outline, however without geographical coordinates, is found in KIM, 2004: 278 (reproduced here as Map 5).

by one contracting government be applied to the other party³⁶⁹. As contended in the first part of *Section I*, neither these areas nor the joint fishing zones with which they partially overlap, can be considered as ‘high seas’, since they formally belong to EEZs claimed on the basis of (conflicting) national legislations already adopted by the relevant coastal States. Nevertheless, the ‘negative’ formulation of the provisions envisaging the establishment of ‘unregulated zones’ qualify them as a functionally different entity from the ‘EEZ-like areas’, where fishing by foreign nationals is instead allowed as a ‘right’ pursuant to Art. 62 (2) of the *LOSC* and consequently regulated by a system of TAC-quotas respecting the consultations held in the JFCs. This difference, hardly understood by the rigid application of a ‘zonal’ interpretation of ocean spaces, appears to be more acceptable from the perspective of a functional diversification of regimes for the purposes of maritime management in disputed areas³⁷⁰.

Taking as an example the overlap between the Sino-Japanese ‘Provisional Measures Zone’ (a ‘strong’ joint regime) with the Southern Sino-Korean ‘Current Fishing Pattern Zone’ (an ‘unregulated zone’), it seems therefore correct to assume that the area may be part of the claimed EEZ of all three States, which have in turn sought to regulate it through different sets of bilateral provisions. In this sense, the commitment of one State – in the situation considered, either Japan or the People’s Republic of China – not to apply its relevant laws and regulations to nationals of the counterpart within the ‘unregulated zone’ could just be regarded as a matter of compliance with an international duty, or conversely as the exercise of a right. Namely, if it were the case that such area originally belonged to the EEZ of the counterpart, or of the third-party claimant (*i.e.*, the Republic of Korea), one of two latter States would enjoy “sovereign rights for the purposes of [...] managing

³⁶⁹ See n. 220 above on the provisions of Para. 2 of the *Record of Agreed Matters* attached to the *Japan – PRC Fisheries Agreement* and of Art. 9 of the *ROK – PRC Fisheries Agreement*. Caution is to be observed in identifying the task accomplished by States through the establishment of these areas, which are at best interpreted as ‘negative’ provisions mandating restraint in the exercise of national jurisdiction, rather than positively conferring a ‘right’ to fish upon any of the contracting parties.

³⁷⁰ GAVOUNELI, 2007: 59 similarly underscores the need to preserve the flexibility of the balance of jurisdiction achieved in the *LOSC*, allowing it “to reconcile emerging new trends with [its] solid legal basis”.

the natural resources” of the zone pursuant to Art. 56 (1) (a) of the *LOSC*, thus excluding the existence of the same possibility for the first party. If, on the contrary, the overlapping area were found to be part of the first State’s EEZ, to pledge to leave free access to the nationals and vessels of another entity would firstly be a discretionary right of such State. Attention should, however, be paid in this case to the fact that the right in question would not be an ‘absolute’ one, since, pursuant to Art. 62 (2) of the *LOSC*, access would still be subordinated to “the terms, conditions, laws and regulations referred to in paragraph 4”. The paragraph referred to in Art. 62 (2) of the Convention mandates in turn that the laws and regulations adopted by the coastal State shall be consistent with the treaty, thus specifying from the point of view of legislative jurisdiction the obligation of Art. 56 (2) on the exercise of rights and duties in the EEZ “in a manner compatible” with it. It appears therefore that the State granting access should actually ask that some minimum standards be respected by the nationals of its counterpart, so as to ensure the achievement of the basic management objectives set forth in Arts. 63 – 67 of the Convention. Needless to say, on the other hand, that such option would be problematic and actually unacceptable for any third-party claimants, which may explain why the ‘unregulated zones’ were initially devised as not requiring any treaty-sanctioned management scheme to be in place.

Quite interestingly, even if these areas were to be considered part of the high seas – which, as previously noted, is actually not the case – agreement on applicable regulations should anyway be reached pursuant to the requirements of Art. 118 of the *LOSC*. Such result would moreover be in furtherance of the concerns over ‘compatibility’ of measures and management according to the ‘biological unity’ of stocks, expressed by the current best practice reviewed in *Section I*. Were the State granting access to the ‘unregulated zone’ also a party to the *Fish Stocks Agreement* (as it is the case for Japan and the Republic of Korea), it could also be questioned whether its decision to leave a ‘loophole’ in the joint fishing zone established under another bilateral agreement would be consistent with Art. 17 (3), casting on members of regional arrangements the obligation to ask non-party “fishing entities” to “cooperate fully with such organisation or arrangement in implementing the conservation and management measures it has established”. Considering the initial example of

the Sino-Japanese ‘Provisional Measures Zone’ (and tentatively maintaining as valid the parallel drawn with a hypothetical high-seas regime), it would moreover result that the Republic of Korea should fulfil the duty established under Art. 17 (2) of the *Fish Stocks Agreement* “not [to] authorize vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks” managed under a regional arrangement. This would therefore imply the renunciation by the Republic of Korea to the right of accessing the part of Southern Sino-Korean ‘Current Fishing Pattern Zone’ overlapping with the area jointly administered by China and Japan. None of such provisions can actually regulate the three cases considered under this typology, since, as observed in *Section I*, the *Fish Stocks Agreement* is not intended to be applied between EEZs. It is nevertheless noteworthy that the overlap of ‘unregulated zones’ with joint fishing areas, if possibly unproblematic from the internal point of view of the regime established by the agreements, would appear dysfunctional, and actually undesirable, under any other circumstances – included, after the adoption of the *Fish Stocks Agreement*, in the traditionally ‘free’ high-seas areas.

A part from the issue created by the margin for ‘free’ access left by the existence of ‘unregulated zones’, it has been noted how the possibility for one State, after establishing such areas, “to exercise its enforcement jurisdiction over the vessels of a third party which engage without permission in activities therein [...] involves a general question of international law”³⁷¹. It is

³⁷¹ SAKAMOTO, 2000: 16, n. 20 (own translation). The Author made such observation referring specifically to the waters ‘deemed as’ each contracting party’s EEZ under Art. VII (1) of the *Japan – ROK Fisheries Agreement*, but the general issue at its basis may hold true for every area regulated by the three arrangements, “as they are all bi-lateral agreements regulating two contracting parties” (KANG, 2003: 122), thus leaving open the question of enforcement on third parties. See also the similar positions expressed by PARK H.-K., 2000: 74 and VALENCIA & AMAE, 2003: 196 (remarking that, if it were not the case for joint fishing zones to be considered part of the high seas, “then a third State would need permission from the coastal States claiming the area as their EEZ”). SAKAMOTO, 2000: 14, n. 11 actually advances a doubt on the possibility of enforcing on third parties Art. 8 of the Japanese Law No. 76/1996 (mandating a permit by the Ministry of Agriculture, Forestry and Fisheries for the “harvest of aquatic animals and plants in the Exclusive Economic Zone for test and research” by foreign nationals) within the Southern Japanese-Korean ‘Provisional Zone’. *Ib.*: 8 comes however to the conclusion that “what is yet to be accomplished in those areas is just the final delimitation of

interesting, in this regard, that arrangements concluded in different geographical areas, such as Art. 9 (3) of the *US – Canada Reciprocal Fisheries Agreement*³⁷², provided for enforcement by the two contracting parties against third-State nationals fishing in the agreed area. Such measure was made possible, however, as a form of ‘mutual restraint’ pending final delimitation by the fact that, unlike in the situation of the East China Sea, no third party was actually claiming that area as part of its own EEZ. Again, in the case of the relation between two parties to the *Fish Stocks Agreement* in an area including the high seas, Art. 21 (1) would enable the State member of a regional fisheries management organisation to exercise its enforcement jurisdiction over the other non-member³⁷³. The peculiar situation arising from the disputed status of the involved EEZs could conversely be interpreted as warranting that the laws and regulations adopted by each State having established a joint fishing zone not be enforced on third-party claimants, both as a point of good faith in negotiations³⁷⁴ and as an obligation deriving from the provision of Art. 74 (3) of the *LOSC* “not to hamper the reaching of the final agreement”. Concretely, in the case referred to in the first example, a partial solution was found through the acceptance on part of the People’s Republic of China of the limit claimed for the ‘Current Fishing Pattern Zone’ by the Republic of Korea, on condition that Korean vessels would respect the seasonal limitations observed by Chinese fishers in the area³⁷⁵. As such limitations are in turn to be adjusted pursuant to the consultations and decisions reached within the Sino-Japanese JFC, it seems reasonable to assume that this request had the effect of at least

a boundary, whereas there are no changes as to their being subject to the sovereignty of one of the two concerned States” (own translation).

³⁷² Formally, the *Reciprocal Fisheries Agreement between the United States of America and Canada*, signed at Washington on 24 February 1977. The observation is due to KIM, 2004: 59.

³⁷³ At the very least, in the case that only one of the States were party to the *Fish Stocks Agreement*, there would still be a residual obligation for that government under Art. 17 (3) to seek cooperation from any other involved State actor “with a view to having such measures applied de facto as extensively as possible to fishing activities in the relevant area”.

³⁷⁴ See KIM, 2004: 57, quoted at notes 90 and 249 above with reference to the discussion on the unilateral suspension of the ‘Autonomous Fishing Operations Regulatory Measures’ by the Republic of Korea in 1998.

³⁷⁵ KIM, 2004: 272, 304, n. 101.

partially ensuring coordination in the “conservation and development” of stocks occurring within the EEZs of more States, pursuant to Art. 63 (1) of the *LOSC*. Even though the provisions of the *Fish Stocks Agreement* on ‘compatibility’ of measures were not directly relevant, the practical result of the Sino-Korean negotiations was to give effect to their functional requirements, leaving a margin for indirect consideration of the Sino-Japanese JFC’s management activity in the policy adopted by the third-party claimant within the overlapping area.

No similar compromise has instead been reached for the overlap of the Sino-Japanese ‘Intermediate Zone’ with the Eastern Sino-Korean ‘Transitional Zone’ and the Southern Japanese-Korean ‘Provisional Zone’, unless one were to regard as such Para. 2 of the *Agreed Minute* attached to the *Japan – ROK Fisheries Agreement*. The paragraph in question namely stipulates, with reference to “the maritime zones that have been defined in the provisions of paragraph 2 of article IX of the Agreement” (*i.e.*, the Southern ‘Provisional Zone’), that their establishment shall be “without prejudice to the relations that Japan has established with third countries in the fisheries sector”³⁷⁶. Since Japan consistently appears to consider the *Agreed Minute* as a ‘recognition’ of the existence of the ‘Intermediate Zone’ on part of the Republic of Korea³⁷⁷, it may have existed a concern that openly endorsing the newly created joint regime would have defeated the object and purpose of the previously signed *Japan – PRC Fisheries Agreement*, in the meaning of Art. 18 of the *VCLT*³⁷⁸. Such observation should, however, be weighed against the circumstances that lead to

³⁷⁶ The disclaimer clause is further completed by the provision that the establishment of the joint fisheries regime shall also be “without prejudice to the position of the Republic of Korea vis-à-vis the fisheries agreements concluded between Japan and those third countries”.

³⁷⁷ See KIM, 2004: 300, n. 54.

³⁷⁸ Art. 18 (a) of the Convention namely stipulates that signatories of a treaty are “obliged to refrain from acts which would defeat [its] object and purpose”. Such provision has been in turn interpreted as the obligation for the signatory State “not to do anything which would affect its *ability* fully to comply with the treaty once it has entered into force” (AUST, 2000: 94 – emphasis in the original). As recalled from *Chapter 1* (see notes 146 and 147 above), the *Japan – PRC Fisheries Agreement*, whose *Record of Agreed Matters* provided for the establishment of the ‘Intermediate Zone’, had already been signed when the *Japan – ROK Fisheries*

the overlap of the ‘Intermediate Zone’ with one of the Sino-Korean ‘Transitional Zones’. In that case, the agreement at the origin of the latter area had been both signed and ratified *after* the one establishing the ‘Intermediate Zone’, moreover explicitly envisaging the reversion of the ‘Transitional Zones’ to fully fledged ‘EEZ-like areas’ in four years. In other terms, both parties to the *ROK – PRC Fisheries Agreement* were necessarily informed of the existence of the Sino-Japanese ‘Intermediate Zone’ by the time the subsequent arrangement was concluded. Unless it were supposed that China, as party to both agreements, consciously decided to accept contrasting provisions³⁷⁹, such evidence should thus confirm the initial observation that the overlap of joint fishing zones with ‘unregulated’ ones need not be deemed as contradictory within the narrow analytical framework of compatibility between bilateral agreements. As already remarked, either interpretation nonetheless takes the issue back to the ground of ‘zonal’ concerns, and should not conceal the interference that the existence of ‘unregulated zones’ may actually create with respect to the effectiveness of regulatory actions taken by the JFCs.

The second typology of overlap to be considered is that of ‘strong’ joint fishing regimes with each other, which has been concretely produced only in the case of the Southern Japanese-Korean ‘Provisional Zone’ with respect to the Sino-Japanese ‘Provisional Measures Zone’. Unlike in the situations previously discussed, there are rather univocal indications that the involved States, if disagreeing on the extent to which such areas overlap, share a common understanding on their mutual incompatibility, given the binding decisional powers attributed to the bilateral JFCs in both instances. On one hand, in fact, the conclusion of the *Japan – ROK Fisheries Agreement* has been

Agreement was adopted and entered into force, even though it became binding on the parties following its entry into force only one year after the latter.

³⁷⁹ Pursuant to application of Art. 30 (4) of the *VCLT*, this would in turn mean that the People’s Republic of China could find itself in the position to “seek to amend one or other of the treaties, or risk being in breach of one of them” (AUST, 2000: 174). Both possibilities have not, however, been invoked so far with respect to the case in question.

received from the Chinese side as an infringement upon its sovereign rights³⁸⁰, arguably because of the potential overlap with the waters regulated under the *Japan – PRC Fisheries Agreement*, which the People’s Republic of China considers, at least in part, constituting its EEZ. Such overlap is, however, only ‘potential’, since Art. IX (2) of the *Japan – ROK Agreement* carefully avoids making explicit reference to the geographical coordinates delimiting the southern boundary of the ‘Provisional Zone’³⁸¹, which is actually construed by Japan as coinciding with that of the ‘Provisional Measures Zone’ at 30° 40’ north latitude³⁸². On its side, the Republic of Korea justifies the overlapping of the two areas by claiming that the “fisheries sector” where it bears the obligation not to “prejudice [...] the relations that Japan has established with third countries”, pursuant to the already mentioned Para. 2 of the *Agreed Minute*, was specifically intended to designate such zone³⁸³. Whereas Japan thus interprets the *Agreed Minute* as applying to the ‘Provisional Zone’ within the borders that it upholds, so as to infer the ‘acceptance’ by the Republic of Korea of the Sino-Japanese ‘Intermediate Zone’ and exclude a possible jurisdictional conflict with the ‘Provisional Measures Zone’, its counterpart admits instead an overlap at the southern end of the sector. Such situation appears nevertheless subordinated, in the Korean view, to some special kind of caution or restraint

³⁸⁰ See KEYUAN, 2003: 137 and XUE, 2005: 193. As in the case of the protests lodged by the People’s Republic of China upon conclusion of the 1974 *Japan – ROK Southern Continental Shelf Agreement* (see n. 97 above), the exact extent of the claimed infringement was however left unspecified.

³⁸¹ See n. 238 above on the formulation of the treaty provision here discussed. As already noted at n. 242 above, Map 2, coming from the Japanese Fisheries Agency, reproduces the Japanese interpretation of this issue, whereas the Korean position, upholding a southern boundary for the area drawn in correspondence of the 200-NM line from the island of Marado, is reflected in Maps 1, 4 and 5.

³⁸² SAKAMOTO, 1999: 17 speaks, for instance, of the “Sino-Japanese Provisional Measures Zone established [...] between 30° 40’ and 27° north latitude, to the south of the Southern Japanese-Korean Provisional Zone” (own translation, emphasis added).

³⁸³ See n. 376 above and KIM, 2004: 300, n. 54. The Author utilises the term “a certain area” when referring to what is designated in the English translation of the *Agreed Minute* as “the fisheries sector”; the equivalent Japanese and Korean terms employed in the authentic texts of the treaty (respectively “一部水域” and “일부 수역”) do not add any further geographical specificity to the meaning of this expression.

to be exercised in the critical area, lest the situation might become ‘prejudicial’ to the relations established between Japan and a third country therein.

As previously noted, the three treaties generally lack provisions allowing, or, as in the case of the *US – Canada Reciprocal Fisheries Agreement*, mandating enforcement on third parties in any of the areas that they establish and regulate. The critical issues would therefore be represented, on one hand, by the independent action of coastal States outside the framework of the provisional arrangements in waters that they consider to be their national EEZs, on the other, by the possible establishment of a ‘double standard’ through the mutually independent action of the two JFCs. The People’s Republic of China and the Republic of Korea would thus be bound to keep to the regulations decided by JFCs respectively established with Japan, without possibility of relying directly on the treaty provisions in order to apply and enforce such rules upon each other’s nationals and vessels in the overlapping area. To this general remark it must be added that Japan, not recognising the overlap between the ‘Provisional Zone’ and the ‘Provisional Measures Zone’, would likely prescribe to its nationals to respect the regulations adopted through the Japanese-Korean JFC down to 30° 40’ north latitude, and through the Sino-Japanese JFC immediately south of that line. It might therefore be the case for the Republic of Korea to consider Japan’s application of the possibly different standards endorsed by the Sino-Japanese JFC as a breach of the “decisions of the [Japanese-Korean] Commission [...] for the conservation of marine living resources and appropriate management” (Art. 3 (2) of Annex I to the *Japan – ROK Fisheries Agreement*). However, a conflict on enforcement jurisdiction would ultimately be avoided by the provisions of Arts. 3 (1) and 3 (5) of the same Annex, specifying that the only action available to the contracting government claiming a breach of the agreed regulations by the counterpart’s vessels is to notify the alleged violation(s) to it, in order to have “appropriate measures” taken by the flag State after “verif[ication of] the relevant facts in question”. Any such possibility has been nonetheless avoided so far given that, in light of the relative paucity of fishing activities conducted by Korean nationals in the ‘Provisional Zone’,

the Japanese-Korean JFC is still to adopt resource conservation and management measures for the whole area³⁸⁴.

Also in this case, the formal compatibility of the ways in which the three agreements have been concretely implemented, guaranteeing a superficially viable, if fragile, fisheries order in the East China Sea, should be assessed against the drawbacks from the point of view of their effective and complete implementation, which represents one of the functional rationales for their very existence. Furthering a tri-lateral cooperation in order to harmonise the standards adopted by the relevant JFCs would clearly be the ideal way to mitigate the issue, in line with the call for cooperation through regional and subregional fisheries commissions found in Chapter 17.120 (a) of *Agenda 21*, as well as with Arts. 7.1.4 and 7.3.2 of the *FAO Code of Conduct* discussed in *Section I*. Para. 4 of the *Agreed Minute* attached to the *Japan – ROK Fisheries Agreement*, establishing the intention of the parties to pursue consultations through “any similar commission established pursuant to the provisions of a fisheries agreement with a third country”, furthermore constitutes a direct basis thereof, even though possibly debatable from the point of view of its mandatory quality³⁸⁵. Such result could also be regarded as consistent with Para. 3 of the *Agreed Minute*, which

³⁸⁴ Such rationale for the substantial delay in the adoption of measures with respect to the Southern Japanese-Korean ‘Provisional Zone’ is offered by SAKAMOTO, 1999: 17 and *Id.*, 2000: 13, n. 10. The reports of the annual negotiations conducted within the bilateral commission, available online on the homepage of the Japanese Fisheries Agency – Sakaiminato Fisheries Coordination Office, consistently make no mention of the issue.

³⁸⁵ BODANSKY, 2010: 104 usefully draws a distinction between ‘binding’ rules – defined as such in relation to their formal source – and ‘mandatory’ ones – whose term of reference is the existence of the purpose to cast a positive requirement on actors. Having been concluded contextually to the *Japan – ROK Fisheries Agreement* and subsequently relied upon by the parties in order to uphold their respective positions, the *Agreed Minute* might namely qualify as legally ‘binding’. Such attribute is found in fact as ultimately dependent on “the nature of the act or transaction to which [it] gives expression [...] its actual terms and [...] the particular circumstances in which it was drawn” (*Aegean Sea Continental Shelf*. Judgment: para. 96; on the specific possibility that agreed minutes may constitute a valid agreement between States, see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*. Judgment:

stipulates the intention of the Japanese government to enter into negotiations with third countries in order to “allow the nationals and fishing vessels of the Republic of Korea to conduct certain fishing operations in the context of the fisheries relations that Japan has established with such third countries”. While the Japanese position has been to consider the provision as referred to “the whole of the Korean-Japanese joint fishing zone”³⁸⁶, the Korean Ministry of Foreign Affairs has tended to view it as a commitment to future Sino-Japanese negotiations in order to allow fishing by Korean nationals within the ‘Provisional Measures Zone’ at large³⁸⁷. Any interpretations confining the scope of Para. 3 to setting out a mechanism for inter-State coexistence within the overlapping area of the two zones would obviously be unacceptable for the Republic of Korea, since it would make dependent upon a future Sino-Japanese agreement a fishing right deemed by the first actor as already acquired³⁸⁸. Independently of the interpretation chosen for the *Agreed Minute*, the envisaged result

paras. 23, 25, 30 and CARREAU & MARRELLA, 2012: 148; similarly, GIULIANO, SCOVAZZI & TREVES, 1991: 282 and CONFORTI, 2002: 68). On the other hand, the ‘neutral’ language adopted in Para. 4, merely stating that the two governments “intend to consult each other” (what is referred to by BODANSKY, 2010: 309, n. 7 as the case of an “agreement purely factual in character”), would involve a diminution in the ‘mandatory’ character of the provision. To this extent, KIM, 2003: 101 actually characterises the document as a “*quid pro quo* non-binding undertaking”.

³⁸⁶ KIM, 2004: 301, n. 59. The term “*other* certain area of the East China Sea” (emphasis added) used by the Author appears actually to reflect the authentic Japanese and Korean texts (respectively, “東シナ海の他の一部水域” and “동중국해의 다른 일부 수역”) better than the English or French translations. Both translations, being limited to express “the context of the fisheries relations” (“le cadre des relations de pêche”), do not in fact fully clarify the point that such zone must be one “that does not belong to ‘a certain area’ where Korea is willing to co-operate with Japan in order not to damage fisheries relations between Japan and China” (*Id.*, 2003: 101).

³⁸⁷ See *Ib.*: 108, n. 17. Since the ‘other certain area’ mentioned in the authentic texts of Para. 3 must logically be different from the ‘certain area’ referred to in Para. 2, which the Republic of Korea in turn considers to be the critical sector of overlap between the two zones (see n. 383 above), what is left according to this interpretation could only be the remaining portion of the Sino-Japanese ‘Provisional Measures Zone’.

³⁸⁸ The Republic of Korea may namely claim to inherently enjoy such right on the basis of its EEZ proclamation, since the provisions of the agreement in general (Art. I) – and the one establishing the southern

should involve further negotiations with a view to enabling a third party to conduct fishing operations within the Sino-Japanese joint fishing zone, in a way somehow akin to the outcome of the Sino-Korean settlement on border of the Southern ‘Current Fishing Pattern Zone’ previously discussed. In this sense, the Korean stance on a ‘broad’ scope of application for Para. 3 would at least possess the additional value to activate substantial consultations on the fisheries regime over a more comprehensive portion of the East China Sea basin.

The last typology proposed here for consideration is that of the overlap of ‘unregulated zones’ with each other, which, as in the situation analysed above, has occurred in a single case – namely, between the Sino-Japanese ‘Intermediate Zone’ and the Southern Sino-Korean ‘Current Fishing Pattern Zone’³⁸⁹. It may be noticed at first that, if a legal issue were to arise from such circumstance, it would likely involve Japanese concerns for the activities of national fishers, who appear to be consistently engaged in the conduction of operations in the ‘Intermediate Zone’³⁹⁰. More specifically, the case might be made for the application of Korean law on Japanese vessels and nationals in the waters located beyond the western border of the Southern Japanese-Korean ‘Provisional Zone’, which, as recalled from above, is overlapped both by the Sino-Japanese ‘Intermediate Zone’ and by the Sino-Korean ‘Current Fishing Pattern Zone’. Since the ‘Provisional Zone’ was delimited taking into account the parties’ positions about the construction of the equidistance line³⁹¹, it is likely that

boundary of the ‘Provisional Zone’ in particular (Art. IX (2)) – are constructed on the premise of their being applied to the contracting parties’ EEZs.

³⁸⁹ Compare Map 2, reporting the ‘Intermediate Zone’ north of the Sino-Japanese ‘Provisional Measures Zone’, with Map 4, showing the Southern ‘Current Fishing Pattern Zone’. As reported at n. 209 above, the former area extends westwards up to 124° 45’ east longitude, while the latter is established, pursuant to Art. 9 of the *ROK – PRC Fisheries Agreement*, to the south of the ‘Provisional Measures’ and ‘Transitional’ Zones, which reach on the Korean side 127° 00’ east longitude (Art. 8 (1) (A), Pt. K7).

³⁹⁰ See KIM, 2004: 306, n. 125, quoted at n. 214 above.

³⁹¹ See *Ib.*: 258-259, noting that two versions of the equidistance line had been considered, respectively including and excluding geographical features possibly qualified as “rocks” in the meaning of Art. 121 (3) of the *LOSC*.

the Republic of Korea would consider, vis-à-vis Japan, the waters west of the border of the area to be on its side of such line and, pursuant to Art. 5 (2) of its 1996 *EEZ Act*, subject its sovereignty. For the same reason, it is quite unlikely that Japan would attempt to enforce its national laws and regulations on Korean vessels operating in the Sino-Japanese ‘Intermediate Zone’ west of the ‘Provisional Zone’, since it too adopts the principle of the equidistance line for the purposes of EEZ delimitation (Art. 1 (2) of the 1996 *EEZ and Continental Shelf Law*). As it should have been established by now, the enforcement of national legislation on third parties falls however outside the regulatory scope of the agreement. In particular, the only commitment taken by the parties with reference to the ‘unregulated zones’ is actually *not* to interfere with the traditional conduction of fishing operations by the counterpart. It might hence be sufficiently accurate to infer that the mere overlap of such areas does not *per se* produce any legal issues besides the question about their inclusion in the EEZ of one or more of the claimant coastal States.

Setting therefore aside matters which are not addressed nor resolved within the scope of the arrangements, it is still worth noting that Para. 2 of the *Record of Agreed Matters* attached to the *Japan – PRC Fisheries Agreement* could bear some relevance upon considering the advisability of the Chinese policy to allow ‘free’ fishing by Korean nationals in the area. Such paragraph namely mandates that both States shall take into account, *inter alia*, “the status of natural resources [...] in the above-mentioned waters” (*i.e.*, in the ‘Intermediate Zone’) when establishing fishing relationships with third parties³⁹². Its relevance is besides all the more increased in that, unlike the somehow similar non-prejudice provisions contained in Paras. 2 to 4 of the Japanese-Korean *Agreed*

³⁹² The English translation of the quoted passage of Para. 2 reads “take account of the traditional operations and the status of the natural resources *of the other Contracting Party*” (emphasis added). To attribute sovereignty on the “resources” to one of the parties within the ‘Intermediate Zone’ – thus arguably supposing some apportionment mechanism to be in place, which is actually not the case – appears however inaccurate and is not upheld by either of the authentic texts (“他方の国の伝統的操業及び当該水域の資源状況に配慮し” in Japanese and “考虑缔约另一方传统作业及该水域的资源情况” in Chinese). The French translation indeed correctly differentiates “activités traditionnelles *de chaque Partie*” from “l’état des ressources naturelles *de la zone littorale en question*” (emphasis added).

Minute, it makes explicit reference to the status of stocks as an item for consideration. Especially, in light of the initial attempts by the Sino-Japanese JFC to encourage the adoption of fisheries management measures within the ‘Intermediate Zone’³⁹³, the situation in the area could evolve towards the one analysed under the first typology, with a newly constituted ‘weak’ regime overlapped by a still ‘unregulated’ zone (the Sino-Korean ‘Current Fishing Pattern Zone’). One possibility in such case would be a further round of Sino-Korean negotiations – possibly within the bilateral JFC established by the agreement – with a view to having the Republic of Korea accept some limitations to the “current fisheries activities” referred to in Art. 9, insofar as they are conducted in the maritime sector overlapping with the ‘Intermediate Zone’. Those limitations could in turn be applied based on the principle of flag-State enforcement, so as not to challenge the provision of the same article on “refrain[ing] from applying [...] fisheries laws and regulations to the citizens and fishing vessels of the other Contracting Party”.

In this way, the People’s Republic of China would be able, on one hand, to take meaningfully into account “the status of natural resources” of the area, realising a coherent regime through the indirect involvement of the Republic of Korea into the regulatory framework eventually devised by the Sino-Japanese JFC. On the other hand, such a result would arguably be possible only if the Korean side showed the political will to accept limitations in waters that it considers part of its national EEZ. The choice to act in this way would be, however, fully supported by the provisions of the *LOSC*, which mandate cooperation with competent organisations as appropriate (Arts. 61 (2), 63 (1)) and consideration for international and regional minimum standards (Art. 61 (3)) in ensuring the conservation of EEZ living resources and transboundary stocks in particular. Conversely, it has

³⁹³ As discussed in the first part of this section (see p. 94 above), Art. 11 (2) (d) of the *Japan – PRC Fisheries Agreement*, giving the bilateral JFC the mandated to “study the implementation of the present Agreement and other issues relating to the Agreement” could be considered as the basis for the currently ongoing discussions for the adoption of measures with reference to the ‘Intermediate Zone’. Given that formally binding ‘decisions’, pursuant to Arts. 7 (2) and 11 (2) (b), are limited to the ‘Provisional Measures Zone’, the resulting measures would likely take the form of ‘recommendations’, as in the case of the ‘weak’ regimes described in *Section II* of *Chapter I* (see p. 47 above).

been remarked in *Section I* of this chapter how the compatibility of measures adopted with respect to any given area – especially, between waters within and outside the national EEZ – is part of the current ‘legal best practice’³⁹⁴. It would be consequently desirable that the ‘recommendations’ to be negotiated in the framework of the *ROK – PRC Fisheries Agreement* for the ‘Current Fishing Pattern Zone’ should take into account the regulations already adopted by the Republic of Korea in its ‘EEZ-like area’ and those possibly decided by the Japanese-Korean JFC with respect to the Southern ‘Provisional Zone’³⁹⁵. In other terms, if the Republic of Korea were to accept some limitations to the conduct of its nationals’ operations within the ‘Current Fishing Pattern Zone’, the entire process would be facilitated in case the Sino-Japanese JFC considered the above-mentioned regulations and decisions upon eventually adopting a management scheme for the ‘Intermediate Zone’.

This progressive harmonisation would not only mitigate the consequences of the overlap between the Southern Japanese-Korean ‘Provisional Zone’ and the Sino-Japanese ‘Intermediate Zone’, but it would also be susceptible of adoption by the Sino-Korean JFC as a possible regulatory standard for the entire ‘Current Fishing Pattern Zone’³⁹⁶, thus furthering the consistency of the

³⁹⁴ As already generally observed, reference to such instruments as the *Fish Stocks Agreement* is not to be taken as implying that the maritime areas covered by provisional arrangement should automatically become subject to the high seas regime. The parallel, also applied above in this section, appears however particularly significant as far as overlapping ‘unregulated zones’ are concerned, since their legal nature is arguably the one most resembling that of the areas beyond national jurisdiction (see p. 49 above).

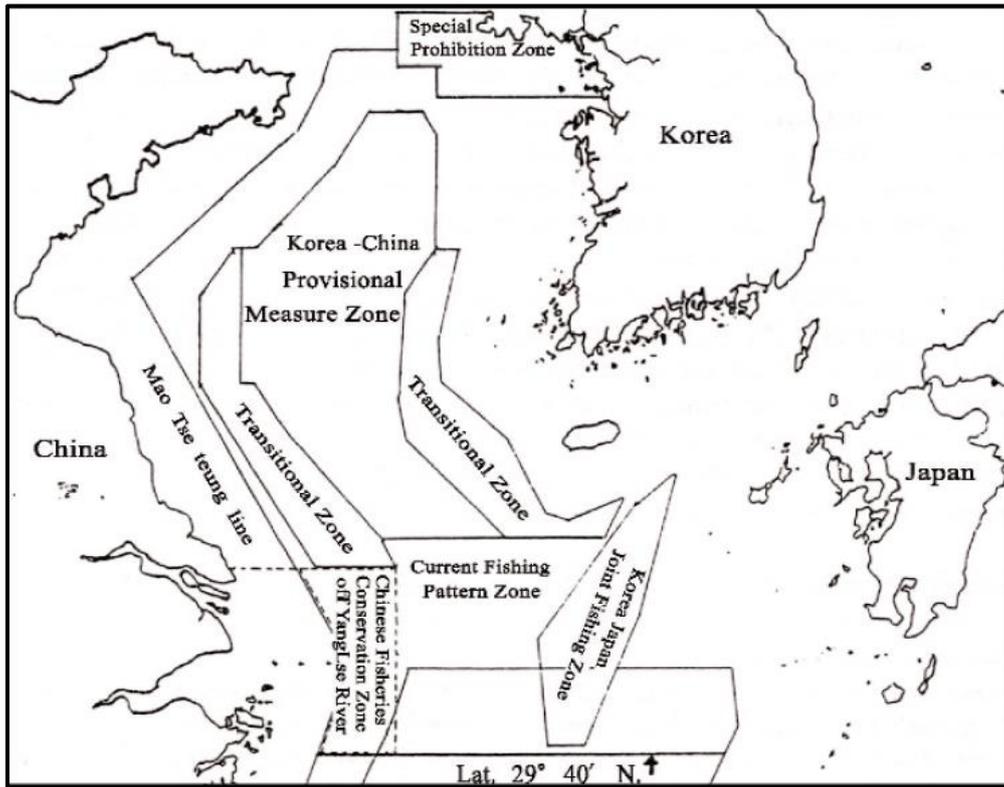
³⁹⁵ Since, namely, also the Southern Japanese-Korean ‘Provisional Zone’ overlaps with the ‘Intermediate Zone’, to consider measures possibly applied to the first area upon negotiating ‘recommendations’ for the second, and subsequently to seek consent from the Republic of Korea to voluntarily comply with them as a third party, would reflect, *mutatis mutandis*, the provision of Art. 7 (2) (b) of the *Fish Stocks Agreement* about “tak[ing] into account previously agreed measures established and applied for the high seas in accordance with the Convention in respect of the same stocks by relevant coastal States and States fishing on the high seas”.

³⁹⁶ Such development, beyond the more limited hypothesis of the Republic of Korea unilaterally choosing to comply with all or part of the regulatory measures adopted by the Sino-Japanese JFC in the ‘Intermediate Zone’, would be made possible through the ‘geographically unrestricted’ mandate of the Sino-Korean JFC to formulate ‘recommendations’ concerning every area covered by the agreement (see p. 94 above).

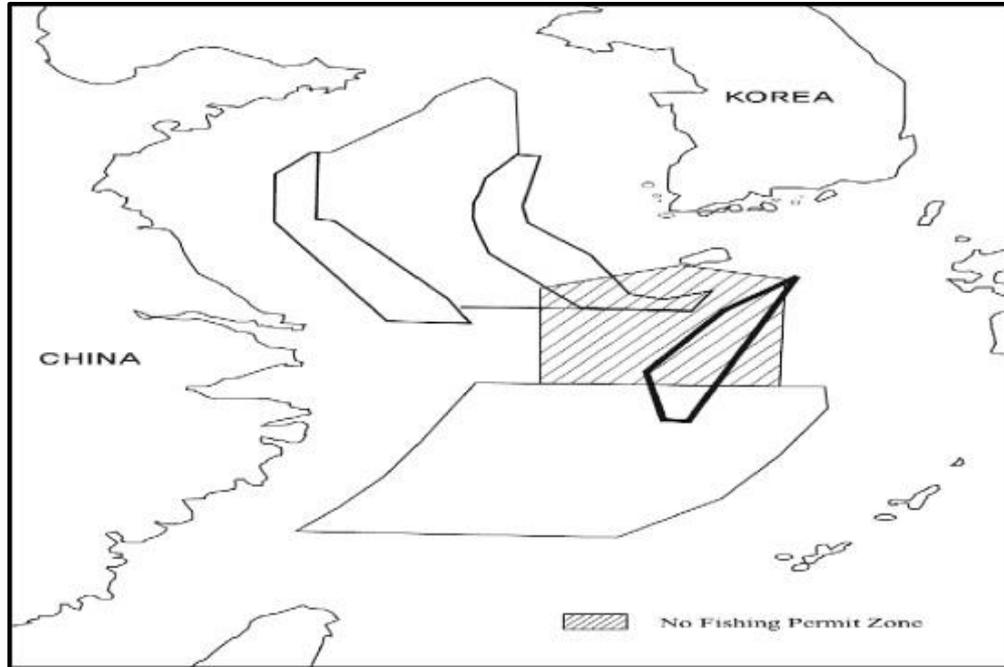
fisheries regime(s) in the East China Sea. Without underrating the deficiencies found in the current Northeast Asian provisional regime, especially if compared to the implementation mechanisms created by other arrangements³⁹⁷, the possibilities left open for a constructive use thereof, at least partially overcoming the ‘bilateral limitation’ of the three agreements, illustrate the positive aspects of institutionalising the approach to jurisdictional challenges at sea³⁹⁸.

³⁹⁷ Among all the possible measures listed by GAVOUNELI, 2007: 117, the three provisional arrangements here analysed only adopt a ‘white list system’ – if the licensing requirements established for some areas covered by the treaties were to be regarded as such (see Art. IV of the *Japan – ROK Fisheries Agreement*; Art. 2 (2) of the *Japan – PRC Fisheries Agreement* and its Annex I; Arts. 2 (2), 8 (4) of the *ROK – PRC Fisheries Agreement* and its Annex I) – beyond provisions on general information sharing (Art. X of the *Japan – ROK Fisheries Agreement*; Art. 12 of the *ROK – PRC Fisheries Agreement*) and (limited) surveillance by the counterpart (Arts. 2 (5), 3 (5) of Annex I to the *Japan – ROK Fisheries Agreement*; Art. 7 (3) of the *Japan – PRC Fisheries Agreement*; Arts. 7 (3), 8 (3) of the *ROK – PRC Fisheries Agreement*).

³⁹⁸ On the concept, see in general GAVOUNELI, 2007: 107-118. The diffused belief in the desirability of regimes, either upheld from the functionalistic point of view of extra-legal concerns that need be addressed in a formal way (as contended in *Section I* of this chapter), or critically described as substantively ‘empty’ and open-ended structures (see for instance KOSKENNIEMI & LEHTO, 1996: 552-555) may account for such position. As observed by VALENCIA & AMAE, 2003: 190, “[c]ommon recognition that even a weak regime is better than none compels nations to collaborate to the extent of developing a minimally satisfactory solution”.



Map 4 (KIM, 2004: 269)



Map 5 (KIM, 2004: 278)

Conclusions of Chapter 2

Section I of this chapter has been introduced with the basic purpose to set forth the rationales for assessing the three provisional arrangements on the basis of broader standards than those merely prescribing efficiency in avoiding conflicts as a product of delimitation disputes and ensuring inter-State coexistence on a ‘minimum common denominator’ basis. Accordingly, both general literature on the law of the sea and the positions of authors supportive of a functionalistic approach to the foundation of international regimes have been relied upon in order to trace the ‘obligation to cooperate’, as formulated in the relevant provisions of the *LOSC*, back to its material sources³⁹⁹. The first objective was therefore to provide a theoretical foundation to the subsequent mention of a number of sources showing a distinct preference for the analysis of provisional agreements as resource-management mechanisms, thus also underscoring the practical merits of such understanding of the issue. In this respect, it is perhaps worth recalling what observed in *Section I* about the 2008 *Principled Consensus*, which arguably was, among the arrangements investigated in this research, the one most influenced in its drafting history by the necessity of rapidly reaching a non-prejudicial solution on the minimum basis acceptable for both parties⁴⁰⁰. This ‘minimum’

³⁹⁹ BODANSKY, 2010: 97 is one of the authors drawing attention to the difference between ‘formal’ and ‘material’ sources of international agreements. In the case of provisional fisheries arrangements, for instance, the ‘formal’ source would be the negotiating process, incorporating elements of Art. 74 of the *LOSC* and resulting in the conclusion of a treaty binding on its parties. The ‘material’ source would instead be represented by the complex host of factual circumstances providing an incentive for States to engage in negotiations. ‘Material’ sources would be found, for instance, in the alarming level reached by fish stocks (see notes 80 and 348 above), coupled to the limited guidance directly found in the *LOSC* itself (see p. 84), whose drafters, when dealing with the regime of areas beyond firmly established national jurisdiction, “had shown their most recalcitrant and conservative face” (GAVOUNELI, 2007: 178).

⁴⁰⁰ See, in particular, the discussion at p. 69 above on the ‘limited’ scope of continental shelf-related agreements in Northeast Asia and, further, n. 339 on the declaration of the Japanese Minister of Foreign Affairs about the “distance of the principles” still dividing the two countries immediately after the announcement of the Wen-Fukuda *Common Understanding* preceding the 2008 *Consensus*.

compromise, however, did not prove capable of standing the test of cooperation, as it clearly appears from the fact that one of the critical issues in its implementation was the nature of the “participation” by Japanese companies in the development of the Chunxiao/Shirakaba field⁴⁰¹. A potential risk emerges therefore whenever the ‘double nature’ of provisional arrangements, as presented in *Section II of Chapter 1*, becomes too much upset towards ‘coexistence’, therefore losing sight of the rationale for accommodating collateral issues in a cooperative way⁴⁰² and possibly ending up to hamper even the most basic exploitation-oriented, ‘incentive’ approach. One may recall, with reference to this example, the legal definition of ‘consensus’ given by Nguyen Quoc Dinh and, figuratively applying it to the unfortunate evolution of the Sino-Japanese understanding, consider his warning about “the disadvantage of generalising a compromise on a disagreement”⁴⁰³.

The second objective – namely, to analyse in the form of a concrete case study some commonly criticised aspects of the Northeast Asian provisional arrangements with a view to assessing their appropriateness in light of the previously established standards – has been developed in *Section II*. From this point of view, it has been firstly contended that several elements found in the structure of the agreements, such as their declared object and purpose, their timeframe and the functional correspondence between the pooling of sovereign rights and of natural resources realised therein, make them a viable forum for discharging obligations in the field of resource management. It may be questioned, indeed, whether the peculiar features – and possible flaws – of the treaties are

⁴⁰¹ See n. 244 above, reporting the fundamental divergence between the Chinese and Japanese position on this point.

⁴⁰² This type of situation is referred to at n. 281 above as the pretension of ‘cooperation for its own sake’. It represents, in other terms, the calculation that bringing an issue into the ‘safe haven’ of international law (what SCHOFIELD, 2012: 159, quoted at n. 245 above, considers to be provisional arrangements as “last gasp solutions”) will be *per se* sufficient to prevent it from triggering further crises. While such hypothesis may hold true in the very short run, the case of the 2008 *Principled Consensus* well illustrates that it will not normally be a sustainable solution, unless the scope of the agreement is initially set so as to provide an ongoing rationale for cooperation.

⁴⁰³ NGUYEN, DAILLIER & PELLET, 1999: 621 (in French, own translation).

to be considered as just another example of “an effective by-passing of the [LOS] Convention in favour of more specific, regionally-centred [...] regulatory systems”⁴⁰⁴. Their explicit reliance on the principles of the Convention, as well as the commonality discerned in the construction of cooperative obligations as formulated in Arts. 74/83 – providing the immediate legal foundation of such agreements – and in Arts. 61 to 67 – broadening their scope to that of conservation and rational utilisation of living resources – would however suggest the opportunity of grounding them on the secure, yet flexible, bedrock of the general law of the sea. Admittedly, political will on part of the concerned States working together through the three JFCs is required if any forms of ‘integrated management’, taking into account such aspects as stock or ecosystem unity, are to ensue from the much more basic framework provided for in the treaties. The ‘recommendatory’ powers that the JFCs enjoy over a geographically ‘unlimited’ area, as far as the spatial scope of application of each arrangement is concerned, appear particularly relevant in this sense, since they could be used in order to bridge the gap in applicable regulations still found between the different typologies of ‘agreed areas’. The thorny issue of the negotiations on the implementation of a coherent regime between the Northern Japanese-Korean ‘Provisional Zone’ and the respective ‘EEZ-like areas’⁴⁰⁵ can be considered a good example of the difficulties, as well as of the potentialities, offered by the agreements.

On the other hand, the observation that even non-binding ‘recommendations’ would likely be complied with by the parties⁴⁰⁶, should invite reflection on their political value – affecting, in a sense, more the ‘stringency’ than the ‘strength’ of the resulting system. The two concepts have been

⁴⁰⁴ GAVOUNELI, 2007: 118.

⁴⁰⁵ See the discussion at pp. 43 and 97 above.

⁴⁰⁶ See n. 175 above. The caution and time invested by the Sino-Japanese JFC in negotiating future measures for the ‘Intermediate Zone’, which would arguably take the form of ‘recommendations’, well illustrate the seriousness of the commitment attached by each contracting party also to non-binding instruments. A part from the particular bilateral dynamic observed in the agreements reviewed here, it is also generally noticed that, if non-binding provisions were really nothing more than ‘cheap talk’, the effort often spent by State actors in their bargaining would not be justified at all (see RAUSTIALA, 2005: 608).

indeed defined by Daniel Bodansky respectively as the element “requir[ing] a state to deviate from what it would have done otherwise”⁴⁰⁷, thus influencing the expected costs of compliance, compared to “the intensity of a commitment”⁴⁰⁸, acting instead on the costs of non-compliance. Even though the legal form of a provision – *i.e.*, its binding or non-binding character – is regarded by the Author as one of the variables normally influencing the strength of an agreement, the little difference found on practical grounds in the implementation of ‘recommendations’ and ‘decisions’ adopted under the three provisional arrangements suggests a different type of consideration. Namely, it appears that the major concern of the parties in designating areas where the JFCs would not be formally entrusted with binding powers was to preserve their respective positions on sovereignty issues, as the ‘internal’ strategy of justification adopted by the Republic of Korea upon the establishment of the Northern ‘Provisional Zone’ well illustrates⁴⁰⁹. The result is that the differentiation between ‘recommendations’ and ‘decisions’ mainly addresses an issue of distance between the existing situation and the previous *status quo* of uncompromising attitudes on sovereignty (the ‘political’ cost of compliance), without substantially affecting the types of measures on which the parties may agree, or the effectiveness of their implementation. An alternative way to describe the regime emphasising the common features of its components would be to argue that, being the provisional arrangements cast as binding instruments, the different powers attributed to the JFCs should be better regarded as a matter of ‘substance’, rather than of ‘legality’, only demonstrating how “flexibility

⁴⁰⁷ BODANSKY, 2010: 160. This notion appears in turn derived from the definition of ‘depth’ provided by DOWNS, ROCKE & BARSOOM, 1996: 383 (“the extent to which [an agreement] requires states to depart from what they would have done in its absence”), which is referred to in such terms by RAUSTIALA, 2005: 584. Unlike the latter, however, Bodansky employs the concept of ‘depth’ itself as “a function of two variables – stringency and strength” (BODANSKY, 2010: 177), the former of which is arguably close to what Raustiala refers to as the ‘substance’ of an agreement.

⁴⁰⁸ *Ib.*: 178.

⁴⁰⁹ See the discussion of the topic at n. 192 above.

can be built into contracts in the drafting process”⁴¹⁰. Either way, it appears that the regime-building role of recommendations as sets of “decision making procedures”⁴¹¹ should not be easily dismissed by any study aiming to address the way through which the operation of bilateral JFCs is contributing to the progressive realisation of a maritime order in Northeast Asia.

The overlap between ‘agreed areas’ established under different treaties and the related third-State issue constitute, however, probably the most problematic aspect in the overall assessment of the fisheries arrangements. Such elements in fact point out an obvious limitation in considering the treaties as constituting a ‘regime’ for the Northeast Asian seas: namely, that those legal instruments were not devised with the specific intent of functioning in a complementary – or, at least, non-conflicting – way⁴¹². Even though some degree of attention was arguably paid in drafting the Japanese-Korean *Agreed Minute* and the Sino-Japanese *Record of Agreed Matters*, so as to preserve each contracting party’s position on how the issue of overlapping areas should be resolved, the drawback of formal compatibility⁴¹³ has been the existence of real ‘loopholes’ in the form of

⁴¹⁰ RAUSTIALA, 2005: 593. *Ib.*: 583-583 also introduces the terminology distinguishing binding “contracts” from non-binding “pledges” as an aspect affecting the “legality” of international agreements – to be dealt with separately from their substantial aspects. As observed at n. 407 above, the concept of “substance” is in turn directly linked by Raustiala to ‘depth’ as an index of compliance costs.

⁴¹¹ VALENCIA & AMAE, 2003: 189. The Authors, following Stephen Krasner, further define “decision-making procedures” as “prevailing practices for making and implementing collective choice *around which actor expectations converge*” (emphasis added).

⁴¹² Such consideration would obviously not deny, *per se*, that a regime *could* indeed arise from the separate exercise of national jurisdictions pursuant to agreement, provided that at least a common standard exists among the different treaties so as to ensure their harmonious and systematic implementation. Such possibility, with specific reference to the ‘port State control system’ envisaged in various IMO conventions, has been remarked by TANAKA, 2012: 12 as one model to achieve the safeguard of common interests through ocean governance.

⁴¹³ As noted in *Section II*, the only situation where the parties have consistently taken a position of non-recognition of the overlap between ‘agreed areas’ has been in the case of the ‘strong’ joint regimes (*i.e.*, the Southern Japanese-Korean ‘Provisional Zone’ with respect to the Sino-Japanese ‘Provisional Measures Zone’).

‘unregulated zones’. *Ad hoc* solutions might be provided on a case-by-case basis through bilateral negotiations with the concerned third party, as in the situation concerning the boundary of the Southern Sino-Korean ‘Current Fishing Pattern Zone’, or through adjustment of the variables considered by the JFCs in implementing measures to include those adopted in adjacent areas, as suggested for the Sino-Japanese ‘Intermediate Zone’. Progress in such sense has nevertheless been undeniably slow and further action is required, either in the form of direct tri-lateral cooperation among concerned States⁴¹⁴, or as a patient work of fine-tuning of bilateral and national measures in order to make them mutually acceptable within the existing treaty framework⁴¹⁵.

The ‘parallel’ drawn in several occasions between the high-seas regime and that of the joint fishing zones, constantly sidelined by a *caveat* on their heterogeneousness, finally highlights how the ‘zonal’ aspects of the three agreements – mainly considered with respect to resource access and jurisdictional issues – become increasingly blurred when assessed against the partially different objectives of the ‘integrated management’. Thus, within such zones States are not entitled, on the sole basis of the treaties, to unilaterally apply and enforce their national laws and regulations as in the EEZ, while not being either bound to apply the provisions of the *Fish Stocks Agreement* regulating, for example, the concrete forms of cooperation with regional commissions. On the other hand, reference to ‘soft’ instruments, like the *FAO Code of Conduct* or *Agenda 21*, which may contain less precise commitments, but also possess the merit of general applicability, has appeared useful in order to analyse the legal phenomenon of joint fishing zones as instruments for resource

⁴¹⁴ The challenge brought to exclusively bilateral agreements by shared stocks is remarked by XUE, 2005: 171; SCHOFIELD, 2012: 166 observes that, despite substantial lack of precedents, “this is not to say that it is impossible to apply maritime joint development to such multi-party issues”.

⁴¹⁵ This is, for instance, the position inferable from the statement made by the Japanese Minister of Foreign Affairs before the House of Representative in 1998: “I envisage further efforts towards the sustainable management of marine living resources starting from the establishment of a stable fisheries order based on the [existing] bilateral agreements” (JHR, 11 December 1998: 6 – own translation). The passage is also quoted in SAKAMOTO, 2000: 13, n. 10, noting that “a shift will arguably be required in the future from a bilateral to a regional approach” (own translation).

management. Having demonstrated how provisional agreements actually offer the rationales for being construed from both points of view – ‘zonal’ and ‘integrated’ – also attributing a different role to the delimitation task thereby accomplished, *Chapter 3* will then propose a way for organising such elements into an overall picture, which should give account of the peculiarities so far identified.

CHAPTER 3

A ‘DUAL PERSPECTIVE’ ON PROVISIONAL ARRANGEMENTS

Outline of the Argument

Having recourse to concrete examples from the case studies so far examined, this chapter moves towards the conclusion of the present research by taking up the issue of how the ‘zonal’ and ‘integrated management’ perspectives previously illustrated may provide assistance in conceptualising provisional arrangements within the existing theory of ocean spaces as codified in the *LOSC*. It is hence observed that an exclusively ‘zonal’ orientation, in its most basic formulation concerned with individuating spaces subject to specific rights of coastal States while maintaining other sea areas ‘free’ for all members of the international community, possibly incurs in contradictions when actors involved in specific negotiations differently conceive of its rationales. On one hand, namely, since the partition of ocean spaces does not constitute the basis of a *dominium* through ‘appropriation’ by States, the same seems more correctly understood of as realising a functional balance of rights and interests, thus requiring the coexistence of at least two regimes – the EEZ and the continental shelf – to deal with separate aspects of the matter. A first issue, as briefly examined in *Section II of Chapter 1*, arises therefore from the possibly diverging positions of States on the relationship between the two areas, which may spill over to the negotiations of provisional arrangements as well, given that they are originally devised *in lieu* of final delimitation of such zones. Moreover, even confining the analysis to only one functional regime, as that of the EEZ, it is argued that State actors may still choose to achieve a different balance of sovereignties from the one theoretically envisaged by the *LOSC*, consequently pointing to the complex host of material sources cloaked under the seemingly ‘neutral’ criteria of the treaty.

On the other hand, the provisions found in Arts. 74/83 of the *LOSC* – namely, to effect delimitation by agreement “in order to achieve an equitable solution” and, pending it, to enter into provisional arrangements “in a spirit of understanding and cooperation” – could appear as giving

little guidance and, indeed, attract arguments of the ‘indeterminacy’ of international law itself. While undoubtedly useful in affording flexibility to the delimitation process of areas that find their justification in the need to manage resources whose actual status may well vary on a case-by-case basis, the notion of ‘cooperation’ does not provide in itself a univocal term of reference, nor a comprehensive explanation of the several forms concretely assumed by provisional arrangements. Conversely, if ‘cooperation’ is to be fleshed out in content through reference to other obligations found within and outside the *LOSC* with respect to the management and conservation of natural resources, it might be questioned whether Arts. 74/83 and the ‘zonal’ concern of boundary delimitation still represent an adequate framework of analysis.

The second part of *Section I* seeks, therefore, to demonstrate how the two perspectives can – and indeed *should* – coexist at the same time in order to deal with provisional arrangements as an organic part of the ocean regime in disputed areas, rather than as a somehow annoying exception to be at best disposed of thanks to its temporary nature. The concept of ‘dual approach’ developed by Tanaka⁴¹⁶ is here employed, along with the doctrinal analysis of the ‘international public domain’, so as to overcome the limitations posed by a strictly spatial notion of jurisdiction. It will be therefore acknowledged how the law of the sea actually preserves a margin of ‘State individualism’ along with the specific sets of shared representations shaping the ‘common interest’ – or ‘concern’ – of the parties involved in negotiations, which further define and limit such exclusivism.

It is hoped that, in such way, not only will the agreements be finally seen as something more than the capricious product of an ‘indeterminate’ international law, at best to be used by negotiators to pursue constructive political agendas, but the flaws individuated therein will not either end up ‘justified’ by a deterministic framing of the issue. Giving due account of the actual possibility for negotiating actors to proactively shape the form of the ‘common interest’ in order to find convergence on a durable set of referents for cooperation, the *Concluding Remarks* will lastly

⁴¹⁶ See TANAKA, 2008: 21.

attempt to draw some practical lessons on the factors that have contributed to the meaningfulness or failure of provisional arrangements in Northeast Asia.

Section I

‘Agreed Areas’ Qua ‘International Public Domain’

PRESERVING FREEDOMS, MANAGING RESOURCES: ‘ZONAL’ AND ‘INTEGRATED’

RESPONSES

Having generally examined in *Chapter 1* the issue of how a ‘zonal’ understanding of the law of the sea may be seen reflected in the design of the provisional arrangements thereby analysed, the type of assessment proposed here requires a somehow more abstract consideration of the question. The basic intent might therefore be redefined as individuating the contribution of such an approach – mainly concerned with carving out areas where differentiated rights and interests are vested in States – to the management of resources and spaces constituting, as a matter of fact, a shared continuum between members of the international community⁴¹⁷. In this regard, it is noted that international law has been consistently accommodating a certain degree of ‘State individualism’ in the management of potentially common resources, which is in turn concretely realised through the recognition of variously defined rights intended to guarantee national interests over a specific geographical or material scope⁴¹⁸. Instruments such as the UNGA resolutions on *International*

⁴¹⁷ The point has indeed been made – and will be followed on in the second part of this section – that in such cases resources may well “remain subject to the traditional allocation of State jurisdiction, [...] but their management requires a holistic approach, which takes into account the general interest of humanity in their conservation” (GAVOUNELI, 2007: 139).

⁴¹⁸ In the first instance, the legal regime of the EEZ, where coastal States enjoy “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources” pursuant to Art. 56 (1) (a) of the *LOSC*, or the principle of State sovereignty over genetic resources located within national jurisdiction, as inferred from Arts. 4 (a) and 15 (1) of the *CBD*, may be regarded as examples. With reference to the second case – *i.e.*, the recognition of national interest over resources on a *ratione materiae* basis – it may be useful to recall Arts. 15 (7) and 19 (2) of the same Convention, creating the obligation to share with the country providing access to genetic resources the benefits arising from their utilisation, independently of where the actual process occurs (see SANDS & PEEL, 2012: 454).

Responsibility of States in Regard to the Environment (confirming Principles 21 and 22 of the *Stockholm Declaration*⁴¹⁹) and on *Co-Operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States*⁴²⁰, appear indeed premised on the firm establishment of sovereign rights, respectively defining the scope of application of the ‘no harm principle’ and providing the material basis for referring to some resources as to ‘shared’ ones. In a similar vein, Lagoni traced the rationale for pursuing the joint development of minerals in disputed maritime areas back to the risk that unilateral exploitation might constitute an infringement upon the sovereign rights of concerned coastal States pending the final establishment of the border⁴²¹.

The logical corollary flowing from the delimitation of ‘spheres’ of national sovereignty has consequently been the maintenance of areas where activities pursued by all States and their nationals have been subordinated to a substantial lesser amount of international obligations, or, so to speak, have been left ‘free’ from the most incisive manifestations of international law⁴²². Such understanding appears particularly fit to the first phase of the evolution of the law of the sea in the contemporary age, when the lack of ratification by most States of the 1958 *High Seas Fishing Convention* accounted for the maintenance of a “less-conditioned concept of freedom of fishing”, as found in the *High Seas Convention*⁴²³. The ‘zonal approach’ is thus, on one hand, undoubtedly useful in order to delimit the (geographical) extent within which distant sea users can agree on respecting

⁴¹⁹ Formally, the *Declaration of the United Nations Conference on the Human Environment*, adopted at the Twenty-First Plenary Meeting of the Conference in Stockholm on 16 June 1972.

⁴²⁰ For the exact reference to these two resolutions, see n. 24 above.

⁴²¹ See n. 254 above.

⁴²² LEANZA & SICO, 2001: 61-62, for instance, individuate the classic rationale for the regime of the high seas in the lack of “legal positions deserving exclusive protection outside the spaces subject to the coastal States’ governance” (own translation). Even in such case, however, the use of the term ‘freedom’ warrants caution, since such lesser constraint put on States by international law never appears as an unconditioned release from their obligations – at the very least from that of “reasonable regard to the interests of other States” (Art. 2 of the *High Seas Convention*).

⁴²³ HEWISON, 1999: 172. On the characterisation of such ‘freedom’, see however n. 422 above.

the management measures implemented by coastal sovereigns – in turn bound by the obligation to provide for optimal conservation and exploitation, as envisaged by Arts. 61 (1) and 62 (1) of the *LOSC*. Conversely, one risk posed by an exclusive application of such view is that, once determined that no specific interests exist which might be prejudiced by the conduct of one State in a particular case, the freedom recognised, for instance, on the high seas will revert to a ‘negative’ one, defined through subtraction and detrimental to the concept of management itself⁴²⁴.

A second eventuality, as sketched out in *Chapter 1*, is that actors involved in negotiations over the delimitation of different areas might not share an identical representation of the rationale for their coexistence, or, for any reasons, decide to depart from the *LOSC* model⁴²⁵, hence rendering the characterisation of the ‘new’ regime possibly ambiguous from a solely ‘zonal’ perspective. The first case, concerned with the confrontation of ‘separatist’ and ‘parallelist’ positions on the relationship between the EEZ and the continental shelf regimes, has been earlier mentioned in relation to the negotiations on the southern boundary of the Japanese-Korean ‘Provisional Zone’ in the East China Sea, as well as in the context of the Sino-Japanese *Principled Consensus*⁴²⁶. The second instance coming to relevance for the present research specifically regards the issue of the establishment of the EEZ – further limiting the margin for ‘free’ activities by creating an expanded area of State sovereignty – with respect to the position of developing countries and geographically disadvantaged States. In this regard, the point has usually been made that the evolution of the negotiations during UNCLOS III increasingly saw an identity being recognised between geographically disadvantaged States with distant-fishing ones, on one side, and coastal States with

⁴²⁴ See *Ib.*: 162-164.

⁴²⁵ It is indeed to be recalled that such possibility was originally envisaged by the *LOSC* itself, whose Art. 311 (3) recognises the right of two or more parties to “modify[] or suspend[] the operation of provisions of [the] Convention, applicable solely to the relations between them” and subject to the safeguard of the treaty’s object and purpose and of the positions of third parties, thus affording the overall system a form of “built-in flexibility” (GAVOUNELI, 2007: 132).

⁴²⁶ See the discussion at pp. 57 ff.

developing countries, on the other⁴²⁷. The result was, accordingly, the adoption of Paras. 3 to 5 of Art. 70 of the *LOSC*, safeguarding the “fishing communities or fishing industries of the coastal State” and differentiating between the rights of access enjoyed by the developed and by the developing geographically disadvantaged States in a way more favourable to the latter, as a means to protect the future interests of (developing) coastal States. Similarly, early proposals for ‘regional or sub-regional economic zones’ where all States would have been put on a formally equal footing⁴²⁸, did not succeed in gaining enough support in the Conference, despite their possible functionality in ensuring the harmonious management of local resources through the “regulation and supervision of activities” to be undertaken by the appropriate regional commission⁴²⁹.

The situation found in the Northeast Asian seas – where all relevant States could be described as geographically disadvantaged pursuant to Art. 70 (2) of the *LOSC*⁴³⁰ – is, however, more complex due to the coexistence of at least two developed countries (Japan and the Republic of Korea), which have traditionally engaged in fishing activities within each other’s waters⁴³¹, with the People’s Republic of China. The latter, though still officially considered a developing country⁴³²,

⁴²⁷ See CAFLISH, 1983: 35-37. The same result was acknowledged, immediately after the adoption of the *ICNT*, by HAFNER, 1978: 609, noting the distinct position of the group of coastal countries that “[b]ased on the experience to date, it would not follow that [the geographically disadvantaged States], despite formal equality with other coastal States, do not enjoy any equitable share of sea uses; rather they, mostly practicing distant fishing, would belong to those having to yield part of their present share in favour of the other coastal (especially developing) countries” (in German, own translation).

⁴²⁸ See n. 287 above on the proposal jointly submitted by Uganda and Zambia in 1973, whose Art. 4 (2) provided that “[f]isheries within the Regional or Sub-regional economic zones shall be reserved for the exclusive use, exploration and exploitation *by all the States* within the relevant Region or Sub-region” (emphasis added).

⁴²⁹ Art. 4 (4) of the joint proposal.

⁴³⁰ See n. 162 above about the application of the concept to the geographical situation of Northeast Asia.

⁴³¹ See the discussion on the conclusion of the first fisheries agreement between Japan and the Republic of Korea, at pp. 15 ff. above.

⁴³² See the data reported by THE WORLD BANK, 2013 and UNDESA, 2013.

does not seem to have ever invoked this characteristic in order to claim a particular ‘priority’ over other regional States in accessing the EEZs of the developed ones, as it would theoretically be entitled to do by virtue of Arts. 62 (2) and 70 (4) of the *LOSC*⁴³³. In fact, while the possibility for the Chinese fishers to have access to the Japanese and Korean EEZs might well be seen as the realisation of the preferential right of access of developing States under Art. 70 (4), as no ‘surplus’ in the meaning of Art. 62 (2) could reasonably be expected to exist therein, the point is not mentioned in literature, nor in the documents of the annual negotiations made available by the concerned governments – let alone in the texts of the relevant treaties. On the contrary, the analogous right for Japanese and Korean nationals to conduct fishing operations within the Chinese EEZ essentially on the basis of reciprocity⁴³⁴ does not appear to fit well with the provision of Art. 70 (5), limiting the preferential right of access of developed geographically disadvantaged States to the “exclusive economic zones of developed coastal States of the same subregion or region”. Consideration for the actual fishing capacity of each concerned State, relevant national provisions⁴³⁵, as well as difficulties in the precise individuation of the EEZ limits and the ‘common pool’ nature of the living resources

⁴³³ See on this point CAFLISH, 1983: 38 and DEL VECCHIO, 1984: 121. Ambassador Satya Nandan of Fiji, Chair of the Negotiating Group in charge with drafting the article, explained however upon its submission to the Plenary that the provision had been mainly conceived in order to address the developing States’ “apprehension that a coastal State through joint ventures with advanced fishing nations would harvest the entire allowable catch”, thus only regarding “a very special and limited situation” (NG4/9/Rev. 2, *Explanatory Memorandum on the Proposals*). Even setting aside the issue of how much the *travaux préparatoires* should condition the interpretation of Art. 70 (4), HUANG, 2010: 107 observes that, in light of the further restriction found in the sentence “as may be appropriate in the circumstances and on terms satisfactory to all parties”, the meaningfulness of this article for the developing geographically disadvantaged States would be at least dubious.

⁴³⁴ See n. 161 above.

⁴³⁵ See Art. 6 (2) of both the Japanese *Law on the Exercise of Sovereign Rights, Etc. Concerning Fishing Activities, Etc. in the Exclusive Economic Zone* and the Korean *Act on the Exercise of Sovereign Rights on Foreigners’ Fishing, Etc. within the Exclusive Economic Zone*, prescribing comprehensive consideration for, *inter alia*, the fishery situations of foreigners within the national EEZ and of nationals in the neighbouring foreign waters in determining the limit of allowable catch.

found in semi-enclosed seas, apparently made it more effective to allow for a different balance of jurisdictions to take the place of that envisaged in Art. 70 of the *LOSC*. In this sense, the position that – taking into account the uncertainties of the regime created for geographically disadvantaged States under Arts. 69 and 70 of the *LOSC* – considers an approach to the issue through regional arrangements to “be preferable and offer more rational solutions”⁴³⁶ in the long run, appears confirmed. In other terms, it may well be concluded that, though not denying the ‘zonal’ basis of the modern law of the sea – which could indeed be strengthened by mutual efforts at delimitation through provisional arrangements – the concerned States freely reinterpreted the rationale for some provisions establishing and regulating such areas as emerged from UNCLOS III. The fact that attention was arguably paid to the accommodation of elements not always corresponding to the original function envisaged for those areas in the *LOSC*, or allowing for different interpretations of their relation by the involved actors, all the more substantiates the theoretical need for an explanation of the provisional arrangements regime going beyond a strictly ‘zonal’ perspective.

Drawing on such premise, *Chapter 2* may be regarded as an attempt to include in the analytical scope those positive provisions of international law that, irrespectively of their ‘hard’ or ‘soft’ nature, address the management of living resources in maritime areas beyond national jurisdiction. The fundamental aim in examining how some of the traditional ‘negative freedoms’ of international spaces experienced a process of reconsideration through the *LOSC* and subsequent instruments has thus been to assess their possible contribution to the understanding of areas, such as those covered by provisional arrangements, where sovereignty is found at a ‘latent’, or at least contested, state⁴³⁷. In a mutually reinforcing way, it may therefore be noticed that, while being

⁴³⁶ HUANG, 2010: 123.

⁴³⁷ The lack of a complete identity between the regime of the ‘agreed areas’ and that of the high seas has been diffusely remarked throughout this research in relation to the issue of the applicable law (on which see, in general, the *Outline of the Argument of Chapter 2*). Moreover, consideration of this aspect from the point of view of how it is addressed by the *LOSC* – Parts V and VI of the treaty, wherein Arts. 74/83 are collocated, explicitly dealing with the establishment of national jurisdiction over the EEZ and the continental shelf – reinforces such conclusion. At the same time, the compromise represented by provisional arrangements,

geographically limited by the widespread acceptance of the EEZ and continental shelf regimes⁴³⁸, the ‘freedoms’ of the high seas have also been further qualified in content, to the extent that with respect, for example, to fishing activities, they are by now far better qualified as ‘rights’⁴³⁹. Conversely, the management obligations cast on States within their own EEZs by the *LOSC* are such that to consider those sovereign rights, even within the limited functional extent of exploration and exploitation of living resources, as anything similar to a form of ‘*dominium*’ would appear definitely inappropriate⁴⁴⁰.

affecting the concrete exercise of State prerogatives within such areas as a result of the disagreement over their delimitation, suggests that jurisdiction might be qualified as ‘latent’ – somehow accommodated at the bilateral level, yet promptly re-emerging whenever the third-party issue is considered.

⁴³⁸ On the ‘legal analogy’ between the two zones, derived from the limitation thereby posed to the customary ‘freedoms’ of the high seas, see IGUCHI, 1998: 74, discussed at n. 32 above. SAKAMOTO, 2000: 12, n. 8, linking the issue to the conclusion of the *Japan – ROK Fisheries Agreement*, finds worth quoting the late ITLOS judge Yamamoto Sōji, stating that “[i]t is unavoidable to move in the direction of establishing apposite rules for the conservation and distribution of marine resources, while adding public regulations to the uses of the sea for the development of international society as a whole. In this case, it cannot be denied that the traditional regime of the high seas is undergoing such a process of reform” (own translation).

⁴³⁹ Such is actually the conclusion textually inferable from the connotation of the high seas regime under Arts. 87 (1) (e) and 116 of the *LOSC*, retrieving the language of Art. 1 (1) of the *High Seas Fishing Convention*. The conditions to which the right to engage in fishing on the high seas is made subject cannot but be taken as indication of the plain fact that “the exercise of a right is more restricted than the exercise of a freedom” (HEWISON, 1999: 177). This was in turn functionally motivated by the observation, closely following the opening of the Caracas Conference, that the prospects for an extensive utilisation of sea areas “necessitate[d] recourse to new principles in the ultimate interests of all ‘users’ of the ocean space” (CONFORTI, 1975a: 6).

⁴⁴⁰ The whole host of conditions to which the exercise of such rights is subordinated has been remarked at n. 297 above. See also the discussion by LEANZA & SICO, 2001: 56-63 (quoted at n. 33 above) on the re-focusing of the doctrinal debate on the nature of the maritime spaces from the Roman law paradigm of ‘*dominium*’ exercised – or not exercised – by actors over a discreet ‘*res*’ (‘*nullius*’, ‘*communis*’, or ‘*extra commercium*’) to one grounded on the international law notion of a “functional balance of activities”. According to CONFORTI, 1975b: 645, the type of control historically claimed by coastal sovereigns on certain sea areas would have been in fact ‘functional’ from the origins, “the notion of ‘*dominium*’ invoked by States and jurists defending

The definition, in particular, of the EEZ as a fundamentally ‘functional’ area of jurisdiction – to which the geographical criterion of the 200 NM from the coastal State’s baselines is merely instrumental to the harmonisation with the pre-existing ‘zonal’ regime of ocean spaces – becomes further evident when the material and formal sources of its making are considered. On one hand, it is indeed recognised that the ‘de-territorialisation’ of the concept was decisive in making the position of the promoters of the EEZ regime – mainly African and Latin-American States – more widely acceptable during UNCLOS III⁴⁴¹. Moreover, the very formulation of its direct legal source – *i.e.*, Part V of the *LOSC* and Art. 56 (1) (a) to (c) in particular, individuating a precise set of activities over which the coastal State’s “sovereign rights” and “jurisdiction” are to extend – accounts for such ‘functional’ nature, to which the *ad hoc* solution for delimitation envisaged by Arts. 74 and 298 represents a rather appropriate corollary. Delimitation “in order to achieve an equitable solution” and provisional arrangements as an *interim* measure – judicial settlement of the dispute being only an option requiring the consent of all involved parties⁴⁴² – namely appears to fit better with the legal

the cause thereof [...] being only due to the fact that they ignored any representations of the power to govern – the ‘*imperium*’ – other than the territorial one” (in Italian, own translation).

⁴⁴¹ See n. 16 above on the declarations by Latin-American States, aiming from the 1950s at the extension of coastal jurisdiction beyond 6 NM (as the territorial sea had become to be generally characterised by then, though in the face of opposition mainly mounted by the USA and the UK: see LEANZA & SICO, 2001: 11 and CONFORTI, 1975c: 655 – in Italian). Pts. A (1) and C (6) of the 1973 *Declaration of the OAU on the Issues of the Law of the Sea* (on which, see n. 57 above), by clearly distinguishing the still thorny issue of the breadth of the territorial sea from the new EEZ concept, later succeeded in “mitigating the radical position of some Latin-American countries, which regarded the 200-NM area as part of the territorial sea” (IGUCHI, 1998: 97, n. 9 – own translation; see also CONFORTI, 1975a: 6, n. 4). On the increasing consensus existing around the desirability of such regime by the time the *LOSC* was adopted in 1982, see n. 288 above.

⁴⁴² As observed at n. 101 above, it would be indeed correctly assumed that “[c]ompulsory jurisdiction is the rule because, once a State has ratified the Convention or has acceded to it, there is no principle in the Convention that automatically excludes delimitation disputes from compulsory jurisdiction” (TREVES, 2006: 73). However, the possibility for contracting parties to formulate at any time a declaration under Art. 298 (1) (a) concretely operates in conjunction with Art. 298 (3) so that, unless no involved State has filed such

regime of a management-oriented space such as the EEZ, than the ‘objective’ criterion of the median line probably would⁴⁴³. The more critical view might alternatively be taken that a certain degree of ‘indeterminacy’ is indeed germane to international law whenever striving towards the ‘universal’ acceptance of a new regime, to the extent that its participants are allowed to engage in the apology of their positions within “an institutional setting geared towards partial, *ad hoc* resolutions of particular issues”⁴⁴⁴. The difference of the latter position resting, however, with the weight attributed to the antagonistic practice of States in the overall process that, “bringing through stages such different positions to the international plane, shapes it into a legal space”⁴⁴⁵, it has seemed reasonable to confine the practical purposes of the present research to the kind of assessment developed so far.

In light of the redefinition of the ‘freedom’ enjoyed by States in maritime areas beyond national jurisdiction and of the parallel emergence of zones characterised by ‘functional’ sovereignty, both sanctioned through the *LOSC*⁴⁴⁶, the notion of ‘cooperation’⁴⁴⁷ takes therefore centre stage in

declaration, or unless a separate agreement is reached, compulsory judicial settlement of the dispute will be excluded.

⁴⁴³ See, by contrast, Art. 15 of the *LOSC*, prescribing such criterion for the delimitation of the more ‘traditional’ concept of the territorial sea.

⁴⁴⁴ KOSKENNIEMI & LEHTO, 1996: 535.

⁴⁴⁵ SAKAI, 2002: 124 (in Japanese, own translation). See also *Ib.*: 135, n. 75, specifically developing the point on the issue of maritime delimitation with reference to “the evaluation of *actions undertaken by States*” (emphasis added).

⁴⁴⁶ The definition of the rights enjoyed by the coastal State over its continental shelf – to be exercised, pursuant to Art. 77 (1) of the *LOSC*, “for the purpose of exploring it and exploiting its natural resources” – equally allows for the qualification of such area as a primarily ‘functional’ one and is indeed the basis for the recognition of its ‘legal analogy’ with the EEZ, as observed at notes 32 and 438 above. It is actually worth recalling that Art. 1 of the 1958 *Geneva Convention on the Continental Shelf*, though increasingly considered by the 1980s as fostering “uncertainty about the precise extent of offshore claims depending upon the stage of technology” (ANAND, 1980: 154-155; see also CONFORTI, 1969: 117 and IGUCHI, 1998: 79), made of “exploitation of the natural resources of the said areas” a central criterion in the definition of the concept.

⁴⁴⁷ See the discussion at pp. 77 ff., on the incorporation of the concept within the *LOSC*, and at p. 84, on its operation, if to a more limited extent, in customary international law.

ensuring the viability of the resulting regime. Balancing between the two competing principles of sovereignty and freedom⁴⁴⁸, such concept appears indeed essential if an ongoing rationale for the desirability of provisional arrangements is to be established on any basis, since those agreements are precisely the element that enables States to perform the management obligations arising from their claims. Nevertheless, whatever the reasons invoked to substantiate the operation of provisional arrangements, their direct legal justification, provided for in relation to the specific issue of delimitation as making “in a spirit of understanding and cooperation [...] every effort” to reach a temporary settlement, remains rather vague – almost a ‘paraphrase’ of the customary “obligation to seek agreement in good faith”⁴⁴⁹. The agreements thereby concluded may thus take on, almost as a necessary consequence of such premise, a wide variety of forms and be more or less successful and effective in achieving their stated objectives depending on an array of factors peculiar to each situation, some of which have been examined in the first two chapters. If the concept of ‘cooperation’ does not appear capable to stand by itself as a univocal term of reference, while unfettered ‘State individualism’ in the management of shared resources is definitely no more actual, a final understanding of the ‘agreed areas’ as a specification of the ‘international public domain’ would therefore appear to best serve the purposes of this research.

SPACES AND CONCERNS ACROSS JURISDICTION: THE ‘INTERNATIONAL PUBLIC DOMAIN’

The usefulness of characterising the ocean spaces in general as part of an ‘international public domain’, which would be realistically described as ensuring the coexistence of both general and national interests, is recognised by Tanaka with respect to the need of reconciling the ‘zonal’ and ‘integrated’ perspectives on the law of the sea further elaborated upon in his work⁴⁵⁰. While part

⁴⁴⁸ See HEWISON, 1999: 162.

⁴⁴⁹ LAGONI, 1984: 355.

⁴⁵⁰ See in particular TANAKA, 2008: 12-13. An interesting indication of the possibility to apply the concept beyond doctrinal elaboration is also found at a relatively early stage in CONFORTI, 1958: 230. The Author, though rather critical towards the ‘extreme’ scellian formulation of the ‘international public domain’, still

of the doctrine referred to by the Author still appears influenced by the ‘*res nullius*’ versus ‘*res communis*’ debate⁴⁵¹, its value principally rests with its focus on the actual uses of those spaces and the benefits thereby offered to the international community, subject to the current status of technology and irrespectively of the actual allocation of State jurisdiction⁴⁵². In fact, whereas the French notion of ‘*domaine public*’ might be applied in a restrictive sense, basically confined to the description of the regime existing in peculiar spaces⁴⁵³, the definition itself of such areas as ‘*espaces*

considered such ideal realised in the connotation assumed by the high seas under the 1958 *High Seas Fishing Convention*. The treaty, namely, would have rendered “the various sectors of the free seas the object of a ‘trust’ in favour of the interested parties, limited by the purposes of the regime” (own translation).

⁴⁵¹ As in the case of Nguyen Quoc Dinh’s international law textbook: “the doctrine considers those spaces alternatively as ‘*res communis*’ (under a regime of collective appropriation – which could bring them close to the notion of public domain), or as ‘*res nullius*’ (where exploitation occurs at discretion of each State capable of ensuring it – thus differentiating therefrom)” (NGUYEN, DAILLIER & PELLET, 1999: 1087 – own translation). Such statement is, however, best understood against the background of the first edition of the work – where the concept of ‘*domaine public international*’ is actually developed – recognising the impossibility to completely qualify the regime of ocean spaces under either category (see NGUYEN, 1975: 538). KUWAHARA, 1987: 867 moreover observes how the work by Ōhira Zengo already in 1953 acknowledged the ongoing transition from the ‘*res*’-centred debate to the concept of ‘international public domain’. On the issue, see also SCOVAZZI, 2001: 63 and n. 440 above.

⁴⁵² Such appears to be, in particular, the conceptualisation found in Ruzié, considering the definition equally applicable to the high seas, as well as to the territorial sea, in light of their diffuse ‘openness’ to the international community for a variety of uses (most noticeably, at that time, navigation). The Author also mentions the further complexity added by the influence of available technology on the ‘balance’ of activities and corresponding rights accepted as appropriate by the concerned actors (see KUWAHARA, 1987: 870, TANAKA, 2008: 11 and *Id.*, 2012: 10).

⁴⁵³ The point was made by KUWAHARA, 1987: 874 that, when applied to the ‘international public goods’, the concept of ‘*domaine public*’ is often spatially characterised, thus justifying its understanding in close connection to the notion of ‘international public *space*’ (actually the literal meaning of “国際公域”, the translation used by the Author, referred to at n. 272 above).

d'intérêt international' – seemingly exerting a certain influence on Tanaka's coverage of the topic⁴⁵⁴ – should not be easily overlooked. Re-centring the reflection on the existence of 'international interests' which are less area-specific – since, as in Ruzié's doctrine, the concept used by Mme Bastid includes every kind of maritime space⁴⁵⁵ – opens namely the path to the more modern conceptualisation of the 'common concern of mankind', extending as such "beyond the jurisdiction of states and within the jurisdiction of individual states"⁴⁵⁶.

A use-centred view, so to speak, giving priority to consideration of the processes that might take place in any field of international concern, isolated or parallel to those conducted by other actors, appears consequently desirable for an understanding of the 'international public domain' moving "away from the question: *who is the regulator?* and, instead, concentrat[ing] on the question: *how are we to regulate?*"⁴⁵⁷. Interestingly enough, such position, not (primarily) depending upon a single sovereign entity for achieving the objective of the concerned regime⁴⁵⁸, had also been portrayed by

⁴⁵⁴ See TANAKA, 2008: 12, n. 50, mentioning Mme Bastid's elaboration on such doctrine (a similar reference is found also in the passage by Kuwahara, quoted in translation at n. 272 above).

⁴⁵⁵ See KUWAHARA, 1987: 873.

⁴⁵⁶ BRUNNÉE, 2007: 564. TANAKA, 2012: 11 subsequently identified the common ground of Ruzié, Nguyen Quoc Dinh and Mme Bastid in taking the position that "while acknowledging the division of spaces, the '*domaine public international*', or '*espace d'intérêt international*', at the same time understands them in their entirety as the place for realising the common interest of the international society" (own translation). It is significant, in this sense, that even when the concept of 'international public domain' is used by the contemporary doctrine in the narrower meaning of spaces not available for appropriation by States (see, for instance, CARREAU & MARRELLA, 2012: 374), subsequent reference is found to the principle that "[t]he territorial State shall indeed exercise its competences *in a manner consistent with the general norms of international law representing the fundamental interests of the international community as a whole*" (*Ib.*: 383 – own translation, emphasis in the original).

⁴⁵⁷ GAVOUNELI, 2007: 140 (emphasis in the original).

⁴⁵⁸ One example outside the field of the law of the sea may be found in Art. 4 (b) of the *CBD*, prescribing the application of the Convention with respect to "processes or activities" under jurisdiction or control of each party also "beyond the limits of national jurisdiction" (see BRUNNÉE: 2007: 565 and TANAKA, 2008: 146). Another instance is represented by Annex VI to the *Protocol on Environmental Protection to the Antarctic*

one delegate to the Caracas session of UNCLOS III, in an article published thereafter, as the only possibility to overcome the impasse on the appropriate regime for exploitation of the international seabed⁴⁵⁹. This premise – “the ‘harmony of interests’ as a controlling assumption of modern international functionalism”⁴⁶⁰ – has thus the merit of fostering the formation of international regimes while leaving unprejudiced the issue of sovereignty, which may, in each specific case, assume the form of the traditional allocation of jurisdiction, or of a system of free access to resources⁴⁶¹. The task accomplished by provisional arrangements, fine-tuning the rights of access to variously defined maritime areas⁴⁶² against the background of the general obligations to cooperate and ensure rationality in the exploitation of natural resources, precisely points to their nature of agreements shaping one possible realisation of the ‘international public domain’. Indeterminate as they may be in relation to the concrete functions that could result from the sole implementation of Arts. 74 (3) and 83 (3) of the *LOSC*⁴⁶³, they however share with the notion of ‘common concern’ the advantage of being ‘jurisdiction-neutral’ and providing, if well designed, a continuous rationale for cooperation in (management) burden-sharing⁴⁶⁴.

Treaty, which will constitute, upon entry into force, “the first complete legally binding environmental liability regime applicable to cases where both the cause and effect of an environmental incident occur *in a public space*” (SHIBATA, 2009: 347 – emphasis added).

⁴⁵⁹ See ADEDE, 1975: 35.

⁴⁶⁰ KOSKENNIEMI & LEHTO, 1996: 553, n. 81.

⁴⁶¹ See GAVOUNELI, 2007: 139, quoted at n. 417 above.

⁴⁶² See the discussion developed at pp. 35 ff. above (*Section II of Chapter I*).

⁴⁶³ An analysis of the concept of ‘common concern’ would similarly draw the conclusion that it “does not imply a specific rule for the conduct of States” (BRUNNÉE, 2007: 566). In the case of provisional arrangements, however, it is equally worth recalling that the more specific prescriptions on the management of maritime zones directly found in the *LOSC*, as well as in subsequent instruments, and examined in *Section I of Chapter 2*, contribute to flesh out their ideal content, albeit often in a *de contrahendo* form.

⁴⁶⁴ To focus on the sharing of burdens – an accomplishment more readily accepted by actors than in the case of the apportionment of benefits – appears indeed to be a peculiarity of the ‘common concern’ notion (*Ib.*). In this respect, the provisional arrangements reviewed in this research evidently provide also for the

True, the observer's attention might still be directly drawn to the habitual forms through which jurisdiction is exercised, wherever it appears established in a clear-cut way⁴⁶⁵. The coexistence of two systems – 'zonal' and 'integrated', or 'relational' and 'institutional'⁴⁶⁶ – in the organisational structure of the 'international public domain' becomes apparent, however, in the case of provisional arrangements⁴⁶⁷. The general claim that sovereignty, being spatially and functionally differentiated, "is indeed 'stronger' on the terrestrial and aerial, than on the maritime part [of the State's domain]"⁴⁶⁸ would thus receive further confirmation. Political difficulties in the implementation of the agreements, illustrating how the mere convergence of actors towards the establishment of a regime does not satisfactorily ensure its ongoing functioning absent some

apportionment of resources as the essence of their 'incentive approach': see, however, the *Conclusions* of Chapter 2 at pp. 116 ff. above on the risks posed by a 'minimum' compromise entirely grounded on the concept of exploitation-based 'coexistence'.

⁴⁶⁵ By contrast, n. 407 above might be recalled in noting how the limits posed to State jurisdiction in the context of the provisional arrangements here considered apparently act more on the side of their 'stringency' than on that of their 'strength', thus constituting a 'political' rather than a '(non-)compliance' cost. This is quite unlike the effect that casting commitments on the exercise of such jurisdiction would usually have.

⁴⁶⁶ The vocabulary of the 'relational' and 'institutional' orders characterising "international law in general as a dialectical legal system" is borrowed by Tanaka from R.-J. Dupuy's doctrine, further underpinning his own depiction of a 'dual approach' to ocean governance (TANAKA, 2008: 25, n. 106). See also LAGRANGE, 2011: 429, qualifying the two '*droits*' respectively as "satisf[y]ing needs when they appear" and as "presuppos[ing] the acknowledgment of common, stable interests entrusted to permanent institutions".

⁴⁶⁷ See in particular the discussion at p. 84 above on the need to consider, besides the passive element of 'coexistence', one of active 'cooperation' – in turn affected in its content by the status of resources and the technology available for their exploitation – in assessing the extent to which the formation of provisional arrangements could rely on customary international law. In a way resonating with the concepts of the 'zonal' and 'integrated' approaches LAGRANGE, 2011: 428 refers to a set of international norms "dedicated to sharing common goods and *alleviating common concerns* and costs", as against one "dedicated to *the rules of national appropriation and a strict delimitation* of the burden of responsibility" (emphasis added).

⁴⁶⁸ CARREAU & MARRELLA, 2012: 374 (own translation).

“mutually agreeable set of referents”⁴⁶⁹, could accordingly be seen, along R.-J. Dupuy’s thought, as one instance of “axiological antagonisms [...] embedded in positive juridical institutions”⁴⁷⁰. Admittedly, it may not always be the case to embrace the pessimistic view that States are prone to retreat into the realm of a ‘pure relational’ order along the path of “law as ideology”⁴⁷¹. Yet, it still appears sensible to seek a mitigation of such ‘embedded antagonisms’ acknowledging the potential for their actual coexistence within the realm of an ‘international public domain’ which is not anymore entirely interest-centric, while still being far from reaching a complete communitarian, concern-based dimension⁴⁷². To look for ‘agreeable sets of referents’ in the field of commitments relating to the management of resources which are by nature of general concern for States, though

⁴⁶⁹ FRIEDHEIM & DURCH, 1977: 384. The Authors employed the expression in relation to the stalemate in the negotiations for the International Seabed Authority during UNCLOS III, from a political science point of view (see, however, from a lawyer’s perspective, BODANKSKY, 2010: 203, using a similar concept of “meta-rules, which establish the context within which bargaining takes place to develop more specific norms”).

⁴⁷⁰ LAGRANGE, 2011: 436.

⁴⁷¹ KOSKENNIEMI & LEHTO, 1996: 554, reminding the latent risk posed by the availability of such “way of retreat”, were indeed dealing in their study with the highly politicised issue of the International Seabed Authority negotiations (moreover taking place, unlike the provisional arrangements examined in this research, in a multilateral context). ‘Ideology’ could, nonetheless, have a role to play in the field of resource management in the Northeast Asian seas as well, at least when it becomes linked to the unresolved issues of disputed islands. See, in this respect, VALENCIA & AMAE, 2003: 191, speculating on whether regional actors would have been using zones of potential friction “more like political frontiers than political boundaries”; n. 192 above, on the meaning of the establishment of the Northern Japanese-Korean ‘Provisional Zone’, may also be usefully recalled here.

⁴⁷² As R.-J. Dupuy himself later happened to comment on such doctrine, “institutions don’t necessarily have to replace relations. There’s a relational model and an institutional model. But in reality, both models are intertwined. One model is never expelled by the other. Society constantly integrates contradictory forces” (CASSESE, 2011: 30).

being “in no way a panacea to continued internal struggles and normative weakness”⁴⁷³, can help framing political discourses and shaping choices of interpretation and implementation of the ‘hard’ legal norms.

The position might indeed even be taken that the balance of (however defined) ‘interests’ and ‘freedoms’ has traditionally been ensured by the law of the sea as enshrined in Art. 2 of the 1958 *High Seas Convention*, from which the *LOSC* would differ only inasmuch as “the interests are differently configured, while there is an attempt at defining the balancing process and the factors to be incorporated therein”⁴⁷⁴. Clearly the issue – evidencing the theoretical usefulness of relying on the more flexible concept of ‘international public domain’ – is that, whereas in the ‘classical’ case of commonalities “states will typically find it difficult [...] to prove significant harm to their territories or trace it back to the conduct of specific states”⁴⁷⁵, in the case of disputed areas ‘significant harm’ occurring from (allegedly) unwarranted exploitation activities conducted by ‘specific States’ may well be demonstrated⁴⁷⁶, the difficulty residing in the claim that such conducts are actually affecting the interests of the concerned party⁴⁷⁷. To tolerate the unrestricted practice of

⁴⁷³ FRENCH, 2012: 54 (relying on the alternative definition of ‘contestable concepts’ as “principles and values [which] reflect a macro-understanding of the world” – *Ib.*: 61). On the parallel criticism of ‘last gasp’ provisional arrangements, see notes 245 and 402 above.

⁴⁷⁴ HAFNER, 1978: 612 (own translation); similarly, see CONFORTI, 1975b: 118.

⁴⁷⁵ BRUNNÉE, 2007: 553.

⁴⁷⁶ The alarming level reached by stocks of living resources in the Northeast Asian seas due to over- and IUU-fishing has been noticed at n. 348 above (see also KIM, 2004: 278). In the field of mineral resources, whose unilateral appropriation prejudicing the rights of other entitled States is obviously considered unacceptable, the *Aegean Sea Continental Shelf* and the more recent *Arbitration between Guyana and Suriname* cases have been respectively considered at notes 255 and 256 above.

⁴⁷⁷ The two phenomena could be gauged, in fact, from a unitary perspective by considering the impossibility, common to both situations, to ensure compliance of actors with their obligations through the mechanism of reciprocity. The latter being itself “a product of the decentralised nature of the international society and international law” (TANAKA, 2012: 9 – own translation), its application loses namely purpose whenever the

certain operations pending delimitation or provisional arrangements, as it has usually been the case with ‘traditional’ fishing activities⁴⁷⁸, if possibly not ‘hampering the reaching of the final agreement’, might however lead to depletion of resources and loss of biological diversity – indeed a declared ‘common concern’ of mankind⁴⁷⁹. On the other hand, completely refraining from other undertakings, as in the case of mining operations – be it the case of a conscious choice of restraint⁴⁸⁰, or a consequence of the ‘political paralysis’ possibly ensuing after the conclusion of an agreement – eliminates the incentive to carry out further research, whose conduct would instead lay the “foundation of ocean governance”⁴⁸¹. Moving beyond the conventional construction linking ‘interests’ to the spatial allocation of sovereignty, while addressing the substantial matters to which such allocation *should* theoretically provide a solution through delimitation⁴⁸², appears therefore worth the recognition of a ‘common concern’ approach to the ‘international public domain’, also extending to areas as the EEZ not necessarily part *in principle* of any ‘common’ regimes.

From the point of view of the formal sources through which provisional settlements are concluded pursuant to *ad hoc* agreements, thus accomplishing to frame the organisation of a distinct ‘public domain’, the dynamic element found in the dialectical forces constantly operating therein⁴⁸³

legal interests deserving protection, due to their intrinsically overarching nature, or to uncertainties regarding their attribution to one of the parties in a dispute, are not so readily allocated.

⁴⁷⁸ See in particular pp. 61 ff. above.

⁴⁷⁹ As affirmed in Para. 3 of the *Preamble* to the *CBD*, stating that “the conservation of biological diversity is a common concern of humankind” (see BRUNNÉE, 2007: 565).

⁴⁸⁰ See pp. 20 ff. above.

⁴⁸¹ Art. 243 of the *LOSC* stipulates in fact a further obligation to cooperate in order to “create favourable conditions for the conduct of marine scientific research in the marine environment” (see TANAKA, 2008: 209).

⁴⁸² The relevance of the ‘zonal approach’ – still dominating the law of the sea paradigm (*Ib.*: 25) – has been indeed remarked in the first two chapters with respect both to the incentive to resource exploitation and to the premise for inter-State cooperation (see notes 21 and 283 above).

⁴⁸³ Such aspect has been looked at in the first two chapters from the positive perspective of how provisional arrangements are negotiated and implemented – possibly incurring in the partial redefinition of their original function, as in the case of the Japanese-Korean Northern Provisional Zone, or even in a ‘paralysis’, like the

may equally provide a prism through which to gauge the *de contrahendo* nature of the ‘obligation to cooperate’. Even the most traditional understanding of ocean spaces, mainly concerned with achieving a balance of States’ rights and interests in terms of divided spaces, must in fact acknowledge that the overall regime has evolved several times since its first theorisations, adding further blocks for cooperation even after the codification achieved in UNCLOS III. Such ‘updating’ process, redefining the content itself of the rights and interests to be eventually balanced, has been constantly prompted by changes occurred in the socio-economic reality of the international community, as well as in the state of knowledge about the resources found in the sea and its subsoil⁴⁸⁴. The accommodation of this host of extra-legal factors may thus be interpreted as the element that still requires flexibility of the ocean regime towards the areas functionally demanding consideration, although not at all suggesting any sort of deterministic evolution thereof⁴⁸⁵. If, despite the difficulties

one currently faced by the Sino-Japanese *Principled Consensus*. It is moreover synthetically represented at the systemic level in a late interview by R.-J. Dupuy: “I believe my major contribution is the idea that the international community is a conflictual community, one riddled with contradictions. [...] For me, it’s an ‘open dialectic’ [...]. The ultimate outcome will only be known at the end of the history. *If it ends*. All this, of course, is a function of time” (CASSESE, 2011: 28 – emphasis in the original).

⁴⁸⁴ It is therefore observed how even Grotius, rather than being hastily classified as an all-out defender of the ‘freedom of the seas’, would be correctly understood as writing under the influence of the (then plausible) theory of inexhaustibility of ocean resources, thus just setting the balance of the ‘other interests’ to zero (see HEWISON, 1999: 165 and SCOVAZZI, 2001: 22).

⁴⁸⁵ Determinism would clearly be excluded by the more extreme stance, advanced by some critical scholars, that radically denies the separate and independent existence of the legal and social constructs, therefore refusing the notion of “normative ideas taken from some more or less fixed extralegal world” (KOSKENNIEMI, 2005: 571). SAKAI, 2002: 111 pertinently observes how “critical legal studies question the process itself that leads to consider the world view derived from the systems of modern knowledge as a ‘natural thing’, and set as an agenda the deconstruction of the ideology and discourse of law as a ‘system of beliefs’ framing such ‘natural’ representation of the world” (own translation). From this point of view, it may be concluded that no ‘extra-legal’ realities exist as such, from which any guidance for the ‘legal’ world might be obtained (moreover, in the concrete case of provisional arrangements, the direct rationale of delimiting a boundary based on a set of abstract criteria does not appear *per se* ‘extra-legal’ at all). It is worth noting, however, how also other

implicit in the route of inter-State relations towards the adoption of a legal instrument for the management of *materially* shared resources, the diplomatic agenda is to be realistically oriented to the recognition that “ideals can be inscribed in positive institutions”⁴⁸⁶, it must be thanks to the dynamism intrinsic to the concept itself of ‘international public domain’. Such notion – which Nguyen Quoc Dinh, starting from the third edition of his textbook, began to explain in the more neutral terms of ‘*régime international des espaces*’ – was still found by the Author to be “largely dependent on [...] the dominant legal concept of ‘public interest’ prevailing in every age”⁴⁸⁷. The *ad hoc* source of provisional arrangements, perhaps inducing doubts on their theoretical possibility of performing a systemic role within the framework of the *LOSC*, is thus usefully understood in the holistic perspective of the ‘international public domain’, hence avoiding to rely on them as a ‘panacea’, but also to stumble against the issue of ‘international law as indeterminacy’.

Having hereby provided, at a somehow abstract level – though drawing whenever possible on the previously developed case studies – an interpretation of the overall function of maritime areas regulated through provisional arrangement, it is hoped that the contradictions of the two approaches separately analysed in *Chapters 1* and *2* have come at least to a partial solution. Without intending to make any statements of absolute validity, or to predict in a deterministic manner the outcome of maritime negotiations in Northeast Asia, the *Concluding Remarks* will synthetically review some elements that appear significant in assessing the vitality – and, ultimately, the desirability – of the regime(s) currently in place. In doing so, the purpose should be to remark how an understanding of provisional arrangements as part of a dialectic order, constantly mediating between ‘zonal’ and

scholars, finding instead a value in exploring the relation between the ‘legal’ and the ‘social’ dimensions, do not necessarily come to a deterministic resolution of the issue (see notes 472 and 483 above).

⁴⁸⁶ LAGRANGE, 2011: 435.

⁴⁸⁷ NGUYEN, DAILLIER & PELLET, 1999: 1087 (own translation). The Author subsequently moved on to provide some instances of ‘public interest concerns’ which might move along the scale to ‘dominance’ according to the situation considered. Examples thereof would be the protection of the environment, scientific research, the optimal development of natural resources and security of communications (see also KUWAHARA, 1987: 876, n. 12).

‘integrated’ concerns, does not imply a passive acceptance, or ‘apology’ paid to the object of the research⁴⁸⁸, but may indeed be used to engage in a critical evaluation thereof.

⁴⁸⁸ Expressed in different terms, this might be the type of criticism found in LAGRANGE, 2011: 438, when describing R.-J. Dupuy’s dialectic as limited to the description of juridical phenomena through the discourses of involved actors and, at a second stage, through related phenomena, without finally “question[ing] the very notion of emerging regimes (such as the protection of the environment) he passionately studied”.

CONCLUDING REMARKS:

THE POSITIVE REALISATION

OF THE ‘INTERNATIONAL PUBLIC DOMAIN’

To claim that provisional arrangements are one means whereby the ‘international public domain’ is framed, incorporating both ‘zonal’ and ‘integrated management’ concerns, is to invoke, as observed in the previous section, an ‘open dialectic’, which is however subject at the same time to the control represented by the dominant concept of ‘public interest’ in each specific age and situation. Several elements, such as the incentive of the national mining or fishing industry, the conservation of living resources, the safe conduct of operations in highly trafficked waters, or the impact on national prestige arising from the issue of disputed territories, may indeed play a role in the negotiations and thereafter, often influencing also the effectiveness of the final treaty regime. Nevertheless, once those perspectives have been consolidated and reflected in an agreement – with some typical purposes and provisions that were the object of the previous chapters – the latter and the vision of common interest enshrined therein realistically become the basis for all subsequent evolutions until delimitation. Repeating, in a sense, on small scale the dynamic of the *LOSC*, “solid enough to reinforce security of law and subtle enough to accommodate the evolving and divergent needs of [...] the world community at large”⁴⁸⁹, the dialectic between State actors is not eliminated by the treaty: rather it is channelled in a preferential – yet, again, not entirely determined – direction. Thus, if the Republic of Korea and Japan may disagree as to the nature of the Northern ‘Provisional Zone’, or the implications of the *Agreed Minute* for the limits of the Southern one⁴⁹⁰, it is a fact that recommendatory powers were finally delegated to the bilateral JFC with respect to the former and that a direct ‘clash of obligations’ appears to have been avoided in the latter⁴⁹¹. Similarly, even after

⁴⁸⁹ GAVOUNELI, 2007: 178.

⁴⁹⁰ See, respectively, n. 192 and pp. 104 ff. above.

⁴⁹¹ See, respectively, pp. 43 and 107 ff. above.

the practical difficulties encountered by Japan and the People's Republic of China in building upon the 2008 *Principled Consensus*, it should have become clear that the conduct of restraint observed by the parties pursuant to Art. 83 (3) of the *LOSC* cannot constitute a basis for invoking the estoppel principle⁴⁹².

A second observation is, however, perhaps in order: namely, that the concept of 'public interest', though linked by Nguyen Quoc Dinh to a particular 'age' as an established datum, is actually also open to (re-)interpretation by negotiating actors, who can transfer to it their views on what constitutes an ongoing rationale for cooperation. To recall one of the previous examples, it is arguable that Japan's intention in establishing the Northern 'Provisional Zone' with the Republic of Korea was not primarily to include within the agreed area a consistent part of valuable fishing grounds as the Yamatotai, on whose exclusive jurisdiction it could have insisted based on the equidistance principle from Dokdo/Takeshima⁴⁹³. Nonetheless, once such result proved impossible, Japan was able to leverage the acceptance at least of joint regulatory measures in the 'Provisional Zone' by trading them against the issuance of access permits to its 'EEZ-like area', thus making of joint management – an objective initially not considered by the Republic of Korea⁴⁹⁴ – an important aspect of bilateral cooperation in the zone. In order to recognise a proactive role to actors in the construction of a vital 'international public domain' it seems that one need not necessarily embrace the radical criticism on the indeterminacy of international law⁴⁹⁵. While, in fact, a certain degree of ambiguity is connatural and even beneficial to the dynamism of political dialogue⁴⁹⁶, "[t]he system,

⁴⁹² See pp. 31 ff. above.

⁴⁹³ See n. 205 above.

⁴⁹⁴ See the account given by the Director of the Asian Affairs Bureau of the Japanese Minister of Foreign Affairs in 1998, reported at n. 228 above.

⁴⁹⁵ This is, instead, the position upheld by Koskenniemi in the 2005 *Epilogue of From Apology to Utopia*, introducing the new concept of 'structural biases' against the general background of indeterminacy, which actors can exploit "to widen the opportunity of political contestation of an always already legalized world" (KOSKENNIEMI, 2005: 615; see also CRAWFORD, 2014: 166-167).

⁴⁹⁶ See FRENCH, 2010: 61.

for all its exacerbated linguistic indeterminacy, works, and decision-makers clearly conceive of it as possessing meaning and relevance⁴⁹⁷.

In examining at the general level the material rationales for engaging in the joint regulation of an area through provisional arrangements, three main objectives have been suggested which reflect concerns more or less widely shared by involved members of the international community⁴⁹⁸. Of these, to grant resource access appears to be connected to the ‘incentive’ aspect of the ‘zonal approach’ as emerged during the negotiations for Arts. 74/83 at UNCLOS III⁴⁹⁹, since it is concerned with such issues as allowing for activities which could otherwise infringe upon State sovereignty and separately dealing with areas of cooperation. To fulfil obligations of protection and preservation pending on States with respect to the management of living resources falls instead outside of the immediate term of reference provided by Art. 74 (3) and invites to a broader range of considerations as explored in *Chapter 2*. Finally, the removal of the risks of conflict is better considered as an overarching issue of international peace and security, to which the agreements examined in this research, if implemented on satisfactory terms for all parties and not exacerbating frictions with non-parties, could provide a valuable contribution. On the basis of the analysis conducted so far, it could be therefore argued that fisheries agreements, though conditioned by the limitations discussed in *Section II of Chapter 2*, have generally been able to provide a viable forum for progressing towards both the first two objectives⁵⁰⁰ – any assessment of the third being temporally restricted and somehow unpredictable. On the other hand, the relatively poor performance of joint development agreements concluded in Northeast Asia in the field of mineral resources might suggest that concentrating exclusively on the ‘zonal’ (jurisdiction- and exploitation-related) aspects of the matter

⁴⁹⁷ CRAWFORD, 2014: 152.

⁴⁹⁸ See TOWNSEND-GAULT, 2012b: 133.

⁴⁹⁹ See pp. 26 ff. above.

⁵⁰⁰ The purposes individuated by KANG, 2003: 122 in the three fisheries agreements (namely, the maintenance of fishing order, the promotion of fisheries cooperation and the desirable utilisation of marine living resources in accordance with the *LOSC*, on which see also n. 330 above) appear, in fact, reflecting such concerns.

could set an unnecessarily narrow functional scope for cooperation, with potentially negative effects also for the third objective.

It goes without saying that this is not to argue in general the unsuitability of provisional arrangements focusing mainly on resource exploitation to mitigate the issues created by undelimited maritime boundaries: as far as such element in itself represents a satisfactory form of ‘public interest’ shared by the involved parties, this could indeed be an optimal solution⁵⁰¹. The Anglo-Norwegian agreement on the Frigg gas field – the first international cross-boundary reservoir discovered in 1971 – although operating in the partially different field of ‘deposit unitisation’⁵⁰² – may be regarded as a good example thereof, however also “requir[ing] peerless expertise in many fields and continuing political will and realism”⁵⁰³. Whenever, therefore, the basis for setting up an effective regime in the sphere of the ‘international public domain’ is not already found in the framework of excellent political relations between concerned State actors, implementing provisional arrangements with a functional scope broad enough to allow ‘institutional’ considerations to emerge alongside the ‘relational’ ones would firstly appear a wise option. Secondly, and critically for the current status of fisheries agreements in Northeast Asia as reviewed in *Chapter 2*, once management-related concerns are included in the relevant legal instrument, consistency is required so as to avoid that ‘unregulated’ areas, if temporarily helpful in circumventing the third-State issue, might undermine the functional

⁵⁰¹ More fundamentally, a liberal critique could well cast a doubt on whether governments engage in negotiations “not primarily in hopes of solving functional problems but in response to demands of domestic constituencies” (RAUSTIALA, 2005: 595). Not being primarily concerned with the domestic policy aspects of treaty-making, this research does not directly address the last topic. Leaving to further studies consideration of the matter, it might be worth noting that, even from the liberal perspective, a broad functional scope for cooperation could serve the purpose of getting different constituencies involved in the decisional process, hence mitigating the ‘collective action’ dynamic of political power resulting from overly concentrated benefits and diffuse harms (see *Ib.*: 602).

⁵⁰² On the difference between ‘unitisation’ (implying, *inter alia*, a basic agreement on the delimitation of the maritime boundary already in place) and ‘intergovernmental joint development’, see p. 25 above.

⁵⁰³ TOWNSEND-GAULT, 2012a: 19.

significance of the regime. Furthermore, whereas long-term perspectives on securing the best negotiating position for future delimitation may play a ‘preventive’ role in the way provisional arrangements are conceptualised⁵⁰⁴, those regulatory aspects deriving their *raison d’être* from provisions of the *LOSC* other than Arts. 74/83 may indeed survive even final delimitation and underpin, in the *interim* period, the time and efforts invested in negotiations⁵⁰⁵. Finally, it would be desirable that, in the context of fisheries agreements, adequate publicity were provided to the initiatives and the rationales guiding the bilateral JFCs, whose operation represents the proactive commitment of actors to define the content of the common interest shaping the ‘international public domain’. Such development might well be described as broadening the ‘mutual acceptability’ of the resolutions that are to initiate the process of inter-State policy coordination⁵⁰⁶.

These observations, originating from the empirical analysis of the typologies and operation of provisional arrangements currently in force in Northeast Asia, have been developed in order to contribute to situate in the overall framework of international law what would otherwise just appear as a “challenge to coastal State sovereignty, sovereign rights and national interests with respect to access to resources”⁵⁰⁷. While this might be true from the ‘zonal’ point of view of determining the conditions for resource access based on undisputed State jurisdiction, the ‘dual perspective’ applied in this research through the inclusion of such concepts as the ‘international public domain’ and the ‘common concern’ of involved actors is intended to demonstrate that it need not necessarily be so. If, admittedly, the joint management of resources – nominally arising out of the necessity to find a temporary settlement for conflicting sovereignty claims – does not represent the “optimal solution

⁵⁰⁴ See pp. 59 ff. above.

⁵⁰⁵ Such aspect has thus been considered in *Section I of Chapter 2* among the elements for analysing provisional arrangements in an ‘integrated’ manner (see p. 88 above). On the (allegedly) opposite attitude of the Japanese government with respect to the continental shelf joint development zone established pursuant to agreement with the Republic of Korea, possibly attempting to take advantage from the limited temporal duration of the arrangement, see instead n. 264 above.

⁵⁰⁶ See XUE, 2005: 186 (quoted at n. 362 above).

⁵⁰⁷ SCHOFIELD, 2012: 307.

to the problem of territorial disputes”⁵⁰⁸, it may be asked in turn whether, in a wider perspective, a boundary would *per se* and always constitute a ‘solution’ at all. For, recognising that a boundary “is only a confirmation of possession, cooperation should be the desired solution to protect resources, and sustainable use is the ultimate goal”⁵⁰⁹, there may well be cases whereby the same organisational function would be better performed by different means.

⁵⁰⁸ GAO, 1998: 123.

⁵⁰⁹ XUE, 2005: 169.

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