

## IS 'FREEDOM OF FISHING' STILL A FREEDOM?

Sk. Tariq Ezaz\*

### Abstract

*Fishing was regarded as freedom since mankind learnt this art. For navigation and fishing in the high sea, custom was the only law up until the first half of the past century. Accelerated exploitation of the living resources sought for regulatory regime in the high sea. Since then numerous multilateral instruments were adopted as well as extension of coastal states exclusive jurisdiction into the high seas has transformed freedom of fishing into limited rights. This essay would briefly discuss the evolution of regulatory regime of the fishing in the high sea, enumerate the relevant provisions of the Law of the Sea Convention, which proclaims freedom of fishing but subtly diminishes the freedom in its following part, discuss the precautionary approach as well as the cooperation, conservation and compliance mechanism of the Fish Stock Agreement, emphasize how the non-members of the Regional Fisheries Management Organization are obligated by the conservation and cooperation mechanism and demonstrate how the freedom of fishing has turned into a mere conditional right at present.*

**Keywords:** Freedom of Fishing, Unregulated Fishing, Right of Fishing, UNCLOS

### INTRODUCTION

The conceptualization of freedom of the seas including freedom of fishing and freedom of navigation dates back to fifteenth century when the sea and its living marine resources had not been subjected to occupation and it had been regarded as subject to exclusive rights of all, for navigation as well as for fisheries.<sup>1</sup> Since the last century, customary law had been prevalent for the law of the high seas. Fundamental concepts of freedom and exclusive flag State jurisdiction over ships on the high seas had been practiced over the years till the first half of the last century.<sup>2</sup> However, this concept freedom of fishing in the high seas has shrunken over the past century and especially, over the last three decades to such extent that it cannot be regarded as freedom anymore. Fishing in the high seas can merely be regarded as a right now a days which is subject to numerous multilateral instruments. The reasons behind this freedom of fishing transformed into limited rights are extension of coastal states exclusive jurisdiction into the

---

\* **Sk. Tariq Ezaz**, Joint District and Sessions Judge, Dhaka.

<sup>1</sup> Hugo Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (Oxford University Press, 1916)

<sup>2</sup> Hugo Caminos, *Law of the Sea*, The Library of Essays in International Law (Aldershot ; Burlington, VT : Ashgate/Dartmouth, c2001., 2001).

high seas as well as regulations of different regional fisheries management organizations into the high seas. Since the nineteenth century, regulation over the high sea fishing had first taken place. In the last century, numerous multilateral instruments were adopted which agreed upon extension of exclusive jurisdiction of the contiguous high sea of the coastal states. The reason behind the regulatory regime of the high seas is supposedly twofold: one is the accelerated exploitation of the living resources of the oceans and the other is the exploitation of the seabed minerals. The total catch of the fish had been increased significantly since the World War II.<sup>3</sup> Statistics indicates that the number of total catch grew from seventeen million metric tons in 1948<sup>4</sup> to sixty-eight million metric tons in 1968.<sup>5</sup> In the 1970s, it was estimated that the total catch would rise to 100 million metric tons in 1980 and world demand for fish by the year 2000 will be approximately 400 million metric ton.<sup>6</sup> However, the demand of fish did not increase as expected due to some reasons. Statistics of Food and Agriculture Organization of the United Nations indicates that the total number of fish captures in 2016 was 171 million tons.<sup>7</sup> These statistics had given rise to the concern of regulated fishing regime even in the high sea and since 1970, the high sea fishing became subject to numerous regulations. The major instrument guiding the provision of the law of the seas in respect of fishing in the high sea was the Law of the Sea Convention<sup>8</sup> (adopted in 1982, came into force in 1994). Within the ambit of the Convention, Fish Stock Agreement<sup>9</sup> (for straddling and highly migratory fish stocks) was adopted on August 4, 1995 and it entered into force on December 11, 2001. With these two major instruments, there are some non-binding instruments for the high sea fishing as well as there are different regional fisheries

<sup>3</sup> Robert Eisenbud, 'Understanding the International Fisheries Debate' (1971) 4(1) *Natural Resources Lawyer* 19.

<sup>4</sup> Lewis M. Alexander, 'New Approaches to Control of Ocean Resources' (1974) (//) *International Relations and the future of ocean space* 67.

<sup>5</sup> Robert Eisenbud, 'Understanding the International Fisheries Debate' (1971) 4(1) *Natural Resources Lawyer* 19.

<sup>6</sup> Lewis M. Alexander, *The Law of the Sea : Needs and Interests of Developing Countries : Proceedings of the Seventh Annual Conference of the Law of the Sea Institute, June 26-29, 1972, at the University of Rhode Island, Kingston, Rhode Island / Sponsored by the Graduate School of Oceanography and the Department of Geography, University of Rhode Island ; Edited by Lewis M. Alexander* (Kingston : The University, 1973., 1973).

<sup>7</sup> Food and Agriculture Organization of the United Nations, *The State of World Fisheries and Aquaculture, Meeting the Sustainable Development Goal* [2018] <<http://www.fao.org/3/I9540EN/i9540en.pdf>>

<sup>8</sup> *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, entered into force 16 November 1994, 1833 U.N.T.S. 397.

<sup>9</sup> *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, adopted 4 August 1995, entered into force 11 December 2001, 2167 U.N.T.S. 3.

management organization regulating fisheries in some specific area. Under the Regional Fisheries Management Organizations (hereinafter mentioned as RFMO), only signatories of the respective treaties are legally bound to abide by the provisions of the treaty. Nevertheless, some assert that RFMO nonmembers have obligations with respect to established fisheries which is subject to RFMO regulation.<sup>10</sup> Again, there are still some high sea areas uncovered by RFMOs.<sup>11</sup> Those legally and the non-legally binding instruments make an effect on the freedom of fishing under the Law of the Sea Convention and in general international law.<sup>12</sup>

Freedom of fishing in the high sea cannot be sought for without any regulation in place. The living marine resources in the high sea is not unlimited or infinite. Unregulated fishing in the high sea can extinct the living marine resources. Therefore, there was necessity of regulation for the management of fishing. Freedom of fishing in the high sea has adapted to the developing social conditions and new scientific knowledge. Scientific proven research outcome demonstrated the necessity of regulation in the law of the sea regime. Therefore, the freedom had not been static in nature in respect of fishing in the high sea. During the past century, the freedom of fishing has undergone frequent and extensive changes; both in terms of substance and application. One of earliest attempt to regulate the fishing in the high sea through multilateral instrument was the 1882 North Sea Policing Convention, which was formulated with the object of regulating the policing of fisheries in the North Sea outside territorial water.<sup>13</sup> Since then, numerous multilateral regulatory instruments had been adopted over the past decades. In the 1970s, the extension coastal state fisheries jurisdiction by the introduction of the 200-nautical-mile exclusive economic zone (EEZ) reduced the area of high seas open to all states. This extension of national jurisdiction over the high sea and adoption of multilateral convention and treaties narrowed down the freedom of fishing in the high sea.<sup>14</sup> Under the United Nations Convention on Law of the Sea (UNCLOS), the term freedom has been explicitly used with regard

---

<sup>10</sup> Tore Henriksen, 'Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations' (2009) 40(1) *Ocean Development & International Law* 80.

<sup>11</sup> Erik Jaap Molenaar, 'Addressing Regulatory Gaps in High Seas Fisheries' (2005) *International Journal of Marine and Coastal Law* 20 540.

<sup>12</sup> Tore Henriksen, 'Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations' (2009) 40(1) *Ocean Development & International Law* 80.

<sup>13</sup> Yoshinobu Takei, *Filling Regulatory Gaps in High Seas Fisheries. [Electronic Resource] : Discrete High Seas Fish Stocks, Deep-Sea Fisheries and Vulnerable Marine Ecosystems*, Publications on Ocean Development (Leiden : BRILL, 2013., 2013).

<sup>14</sup> Tore Henriksen, 'Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations' (2009) 40(1) *Ocean Development & International Law* 80.