Introduction

The principles and rules governing high seas fisheries have long been a matter of debate under international law. The freedom of fishing in the high seas is generally considered one of the fundamental principles underlying the regime of the oceans beyond the limits of national jurisdiction, a principle indeed embodied both in customary international law and in the major codification conventions on the law of the sea. Evolving economic realities and technological developments led, however, to increasing pressures on the resources of the oceans which in turn gave place to competing interests between various groups of states.

For a good number of decades this competition for fisheries took on the form of a conflict of interests between long-distant fishing nations and coastal states. The expansion of maritime areas under national jurisdiction, with particular reference to the enactment of exclusive economic zones and exclusive fisheries zones, was the outcome of this period, a situation largely consolidated under the 1982 Convention on the Law of the Sea and related developments. The implications of this extension of national jurisdiction in the international legal system have been well studied and will not be discussed in the context of this work.

The issue of high seas fisheries, however, was not entirely put to rest because of the above developments. In respect of this matter, the Convention on the Law of the Sea contained only some very general principles while providing some guiding rules about given species, such as straddling stocks, highly migratory species, marine mammals, anadromous species and others. Basic rules on international cooperation were also built into the Convention. Although the aggregate of these provisions meant an important step in the clarification of the law and the accommodation of interests, they were not sufficient to support a new and standing regime for high seas fisheries.

The issues posed in this context were no longer solely related to the competition between coastal states and distant-water fishing nations, which continued to play an important role, but also to other dimensions that had been emerging parallel to the negotiations leading to the Convention on the Law of the Sea and particularly in the years following its signature. These new dimensions referred in essence to environmental concerns and the implications that the continued depletion of ocean resources had in the overall condition of broad ecosystems. Early expressions of concern about the conservation of fisheries for the purpose of economic performance of the industry and the availability of resources gave place to additional concerns about conservation in relation to environmental standards and management and its broader outlook, in the context of which both the national interests and the economic performance acquired a different meaning.

As these developments began to unfold, international law, however much it had already changed, was subject to added pressures to accommodate the new dimensions. The trends for change became evident in the frame of both international negotiations and national legislation and practice. The former have led to innovative regional and global conventions and arrangements while national developments have revealed differing approaches to the question of conservation in the high seas.

This work discusses the changes taking place in international law in connection with high seas fisheries in terms of both the shaping of a new international regime on this matter and the manner in which the issues posed by related developments in national legislation and practice are being accommodated. Particular emphasis is placed on the changes introduced by recently adopted global and regional fisheries regimes as they relate partly to the principle of freedom of fishing in the high seas and its relationship to the introduction of conservation standards and measures, and partly to the international arrangements governing global and regional cooperation in this field, including difficult questions of enforcement and settlement of disputes.

The discussion that follows highlights the essential role of international law in guiding the required accommodation of interests and the emerging new dimensions, a role that makes the difference between the development of an orderly regime under the aegis of international cooperation and the search for solutions to the existing problems solely under individual domestic action of each state or group of states concerned.

1 The evolving principles and concepts of international law in high seas fishing

Freedom of fishing in the high seas in a historical setting

The contemporary law of the sea has attained an important degree of elaboration during its evolution, as evidenced in particular by the detailed provisions of the 1982 United Nations Convention on the Law of the Sea.[1] Notwithstanding this significant legal progress, many of its underlying principles and concepts are still strongly influenced by ancient rules of customary international law. Most notable among these rules is the principle of the freedom of fishing in the high seas. Many of the changes experienced in the context of this international legal process during the twentieth century have been founded not so much in the creation of new principles and concepts as in the interpretation and reformulation of traditional rules of international law. Historical linkages have thus kept their influence in the shaping of contemporary international law, combining traditional values with the needs of modernization of legal rules and structures.

The problem that has prompted most of the disagreements characterizing this evolution has been that the interpretation and reformulation of traditional legal rules has not always been faithful to their true meaning and extent, or having so been has not always drawn the full set of legal implications and consequences of the change envisaged. The different interests of states have of course played a major role in this changing legal context.

All modern developments on the law of the sea have been closely connected to the principle of the freedom of the high seas. New concepts,

[1] United Nations Convention on the Law of the Sea, 10 December 1982, UN Doc. A/CONF. 62/122, *International Legal Materials*, Vol. 21, 1982, 1261. Hereinafter cited as Convention on the Law of the Sea.

such as state jurisdiction over the contiguous zone or later over the continental shelf and the exclusive economic zone, had to be made compatible with the freedom of the high seas to a given extent if they were to become admitted into the body of international law. This is of course quite natural because classic international law had been structured on the existence of only two broad types of maritime areas: the territorial sea and the high seas.[2]

The manner in which that compatibility could be attained depended in essence on the content attributed to the principle of the freedom of the high seas. As evidenced by the very evolution of international law the meaning and extent of such a principle can change with the different economic, political, and scientific perceptions prevailing at a given moment in the community of nations. It follows that the principle is not a fixed dogma and that it may be subject to a process of adaptation according to the realities characterizing significant historical periods.

The principle of the freedom of the high seas emerged as a reaction to the pretension of subjecting the high seas to the territorial sovereignty of some naval powers in the fourteenth and fifteenth centuries.[3] The original meaning of the principle was in essence a negative one since it only sought to prohibit the interference of states in the high seas. Two consequences would follow from this formulation: on the positive side one result was the freedom of utilization of the high seas; but on the negative side there were also ''les désordres, les destructions, les gaspillages.''[4] These negative aspects are at the very heart of the evolution that the principle has been experiencing along its historical evolution.

Grotius' conception of the principle of the freedom of the high seas was founded, as is well known, on two basic premises: the impossibility of the sea being subject to effective occupation and the inexhaustible nature of marine resources.[5] The latter aspect, however, should be carefully examined in his fundamental work on *The Freedom of the Seas*.[6] In point of fact,

[2] F. V. Garcia Amador, *La Utilización y Conservación de las Riquezas del Mar*, 1956, at 3; also published as *The Exploitation and Conservation of the Resources of the Sea*, 1959.

[3] United Nations, ''Memorandum on the Regime of the High Seas, prepared by the Secretariat,'' Doc. A/CN. 4/32, 14 July 1950, *Yearbook of the International Law Commission*, 1950, Vol. II, 69. The preparation of this memorandum is attributed to Gidel. H. Lauterpacht, ''Sovereignty over submarine areas,'' *British Yearbook of International Law*, 1950, at 408, note 1.

[4] United Nations, ''Memorandum,'' para. 11.

[5] Lauterpacht, ''Sovereignty,'' at 399. See also generally Pitman B. Potter, *The Freedom of the Seas in History, Law, and Politics*, 1924.

[6] Hugo Grotius, *The Freedom of the Seas*, edited with an introductory note by James Brown Scott, Oxford University Press, 1916.

Grotius indeed stated that the "same principle which applies to navigation applies also to fishing, namely, that it remains free and open to all,"[7] following closely on this point the writings of Vasquez who is quoted as justifying the right of nations over the sea on the ground that "the same primitive right of nations regarding fishing and navigation which existed in the earliest times, still today exists undiminished and always will, and because that right was never separated from the community right of all mankind, and attached to any person or group of persons."[8] But in so stating Grotius was also very clear that fish are exhaustible and drew on this point the fundamental difference between the freedom of fishing and the freedom of navigation: "And if it were possible to prohibit any of those things, say for example, fishing, for in a way it can be maintained that fish are exhaustible, still it would not be possible to prohibit navigation, for the sea is not exhausted by that use."[9]

The Grotian distinction was largely ignored and the sea as *res communis* came to be understood as the natural legal consequence of his writings.[10] However, as experience would demonstrate before long, the understanding that fishing was not exhaustible turned out not to be true. In any event the principle came to identify the freedom of navigation and the freedom of utilization of the resources of the sea, with particular reference to the freedom of fishing, as its main components. It then became firmly established as a rule of customary international law, where it has remained independently of the legal considerations present in its origins.[11] But this does not mean of course that changes and adaptations inspired in new circumstances were prevented from intervening.

It is noteworthy that Grotius himself was quite aware of the shortcomings that the concept of *res communis* entailed, for he also wrote in his work:

> If today the custom held of considering that everything pertaining to mankind also pertained to one's self, we should surely live in a much more peaceable world. For the presumptiveness of many would abate, and those who now neglect justice on the pretext of expediency would unlearn the lesson of injustice at their own expense.[12]

These are the very thoughts underlying today's discussions on the global commons and the need to introduce regulatory elements on high seas fishing, including eventually the question of privatization of fishing rights.

[7] *Ibid*., at 32. [8] *Ibid*., at 56–57. [9] *Ibid*., at 43.
[10] Garcia Amador, *La Utilización*, at 27–28 and the literature cited at note 16 thereof.
[11] Lauterpacht, "Sovereignty," at 399. [12] Grotius, *Freedom*, at 6.

When the negative implications of the principle came to be realized, various exceptions were introduced. The unrestricted extent of freedom of navigation was modified to exclude piracy and slave traffic, or more recently the shipment of narcotic drugs, and jurisdictional functional elements were correspondingly introduced in terms of the right of boarding and inspection, the right of hot pursuit and other expressions.[13]

Still more significant was the realization that some of the earlier understandings of Grotius' conceptions were no longer valid as time went by. Effective occupation of the high seas has indeed become possible considering technological developments, first in the minor form of occupation of pearl banks and other such exploitation, next by way of the exploitation of the continental shelf, and more recently by means of the exploitation of the deep seabed mineral resources. This reality had of course a major impact on the law, in terms of both the development of new maritime areas subject to national jurisdiction, notably the continental shelf, and the establishment of a new international legal regime governing the seabed mineral activities and related matters beyond the limits of national jurisdiction.

More profound were the implications of the scientific findings and empirical evidence gathered throughout the nineteenth and early twentieth centuries that the living resources of the sea were indeed exhaustible because of overexploitation. Although the problem came to be fully realized only in the late nineteenth century as evidenced by the discussion leading to the *Bering Sea Fur Seals Arbitration*,[14] earlier expressions were already available.[15]

Specific legal consequences followed as to the meaning of the principle of the freedom of fishing in the high seas. The latter would no longer be conceived in an absolute manner but subject to the right of other states and participants to undertake fishing activities. It should also be noted that, in the view of influential writers of international law, while the high seas were not subject to national appropriation, neither did they belong to the international community, as all states were equally entitled to its use.[16] Another important legal consequence was that gradually the right of coastal states to introduce conservation measures in the high seas was recognized, first, in relation to its nationals and, secondly, in a limited

[13] United Nations, "Memorandum," at 70–72.
[14] *Ibid.*, at 73–74.
[15] Gidel, *Le Droit International Public de la Mer*, 1932, Vol. I, at 438–439.
[16] See, for example, Fauchille, Bustamante, and François, as cited by Garcia Amador, *La utilización*, at 27.

manner, in relation to foreigners.[17] This was the central concept on which coastal states could later establish fishing zones of various kinds.

As this legal process evolved the original content of the principle of the freedom of the high seas also experienced significant conceptual changes. The high seas as *res communis* only differed from the concept of *res nullius* in that it did not allow for the exercise of national sovereignty, but it had no influence on the question of the abusive use of the oceans; this situation began gradually to change as the concept of the utilization in the interest of the international community came to be accepted in some respects. Under the latter approach, while the use of the oceans was open to all states, it would nonetheless be subject to some extent to the general interest and not exclusively to individual interests.[18] This assumed some definition of the general interest by the international community and the exercise of regulatory powers on its behalf. Although this approach has seldom been applied to fishing activities, except in limited circumstances or regional arrangements, it underlies many of the recent developments in high seas fishing and had been present in a number of early scholarly discussions. The interesting consequence of such changes was that the principle of the freedom of the high seas was subject, first, to some control of the abuse of rights and, secondly, to a test of compatibility with the general interest.

Most of the discussion that has taken place on the law of the sea has concentrated on the question of expanded coastal state jurisdiction. Given the influence of the new maritime areas on the traditional rules and standards this is quite natural. However, sight should not be lost of the fact that such a development is but one expression of the fundamental changes surrounding the principle of the freedom of fishing in the high seas since its inception. The search for the control of the abuse of rights and the common interest, which is only now becoming an open concern, is linked to the same process of conceptual changes described. In fact, as will be discussed further below, the very jurisdictional trends characteristic of the contemporary law of the sea can be seen not necessarily or exclusively as a selfish expression of national interest but also as the search for regulatory authority which has been lacking under traditional

[17] Gidel, *Le droit international*, at 437–441.

[18] United Nations, "Memorandum," at 73. See also the proposal made by Strupp at the Institut de Droit International emphasizing the interests of the international community, *Annuaire de l'Institut de Droit International*, Session de Paris, 1934, at 550, 712.

international law, the absence of which explains many of the problems of overexploitation and depletion of fishing resources.[19]

The issue was clearly stated by a distinguished Latin American scholar in the early nineteenth century:

> There is no reason which would legitimize the appropriation of the sea under the aspect now being considered [navigation] ... However, under another aspect, the sea is similar to the land. There are many marine exploitations that are restricted to certain areas; for just as all lands do not give the same fruits, neither do all oceans yield the same products. Coral, pearls, amber, whales, are not found but in limited areas of the ocean, which are impoverished daily and then depleted; and however generous nature may be in other species, it cannot be doubted that the competition of many peoples would render its fishing more difficult and less plentiful, and would end in their depletion, or at least in displacing them to other seas. Not being, therefore, inexhaustible, it seems that it would be licit for people to appropriate the areas where those species are found and which are not actually in the possession of others.[20]

The evolving legal concepts relating to high seas fishing

In the light of the historical setting described above legal concepts relating to high seas fishing correspondingly evolved as circumstances and interests changed. Three distinct periods can be identified in this regard. First, there was the conceptual development that led from unrestricted freedom of fishing to reasonable use, introducing a measure of restraint as justified by the equal interest of other participants in a given activity of exploitation of ocean resources. Just as happened historically with similar forms of organization of activities relating to common lands and areas, this approach had merit insofar as participants were few and technologies were of an artisan kind, but as soon as these conditions were surpassed the approach became largely ineffective and incapable of ensuring appropriate conservation of resources.[21]

When this situation became obvious in the context of fishing activities

[19] Francisco Orrego Vicuña, "De Vitoria a las nuevas políticas de conservación y aprovechamiento de los recursos vivos del mar," in Araceli Mangas Martín, *La Escuela de Salamanca y el Derecho Internacional en América. Del Pasado al Futuro*, 1993, 139–153, at 153.

[20] Andrés Bello, *Principios de Derecho de Jentes*, Santiago, 1832, Complete Works, 1886, Vol. X, at 50. Translation by the author.

[21] Francisco Orrego Vicuña, "The 'Presential Sea': defining coastal states' special interests in high seas fisheries and other activities," *German Yearbook of International Law*, Vol. 35, 1993, 264–292, at 292.

the need for regulation opened a second major conceptual period.[22] This was first identified with the development of national claims to maritime areas, a trend which in part reflected the interest of coastal states in gaining exclusive access to given resources or activities to the exclusion of third parties.[23] But it was also the means to introduce conservation authority in areas that had been until then subject to growing depletion of resources because of the lack of regulatory authority under international law as understood at the time.[24] It should be noted in this regard that all major initiatives relating to enlarged claims to maritime areas were associated with problems of conservation in view of the unrestricted activities of high seas fishing vessels. Such claims were legitimate and they brought the interest of coastal states in line with the interest of distant-water fishing nations. Until then the latter nations and not the international community as a whole were the sole beneficiaries of the freedom of fishing in the high seas as understood under traditional concepts.

The need for regulatory authority was not only expressed in terms of national claims to maritime areas. As mentioned above, it also found expression in the concept of exploitation of ocean resources in the general interest of the international community and not exclusively in the interest of individual nations, thus opening the third and latest period in the conceptual changes discussed. While this concept has not been well defined, it has nevertheless permeated many of the solutions found under international law to the competing interests of coastal states and distant water-fishing states. This is indeed the case with the regime of the exclusive economic zone in which the exclusive rights of the coastal state are combined with the right of access of other states to a part of the total allowable catch not exploited by the former.[25]

Similarly, this concept also underlies a number of developments relating specifically to fishing in the high seas. Regulatory authority entrusted to fishing commissions and other types of institutions or arrangements is an example of this other trend, which has become paramount in recent regional developments and global agreements on

[22] Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment*, 1992, at 425.
[23] *Ibid*., at 507.
[24] William T. Burke, *The New International Law of Fisheries*, 1994, at 95.
[25] On the regime of the exclusive economic zone see generally David Attard, *The Exclusive Economic Zone in International Law*, 1987; Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, 1989; Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law*, 1989.

high seas fisheries. Conservation is again the driving force behind these developments while at the same time maintaining a balance of interests between coastal states and distant-water fishing states.

Occasionally, the concept of the general interest or other similar formulations have been identified with that of the common heritage of mankind. In fact specific proposals were made during the Third United Nations Conference on the Law of the Sea to apply the common heritage concept to the waters overlying the seabed beyond the limits of national jurisdiction,[26] and distinguished writers of international law have expressed their concern that such a concept might be made applicable to high seas fisheries.[27]

Despite the fact that the Convention on the Law of the Sea makes specific reference to the intrinsic unity of ocean space,[28] there are important differences between the general or common interest of the international community and the common heritage of mankind. The latter was a concept devised specifically in the context of particular international regimes, most notably the 1979 Moon Treaty[29] and the regime for seabed mineral exploitation embodied in Part XI of the Convention on the Law of the Sea and later accommodations thereto,[30] and cannot be extended beyond these regimes unless there is an express agreement to that effect. This has certainly not happened in relation to high seas fisheries and it is not likely to happen in the future, as it has not happened in the context of the long debate about the Antarctic Treaty System in the United Nations and elsewhere.[31] On the other hand, the common heritage concept, while sharing with the high seas regime the purpose of nonappropriation, requires some additional elements that are not given in the case of other high-seas-related regimes, such as an international administration that might be able in certain respects to undertake exploitation on behalf of mankind and the sharing and distribution of benefits in a very broad context.

[26] See, for example, the statement by Lebanon in the Seabed Committee as to the collective organization of high seas fisheries, Doc. A/AC. 138/SC. 1/SR. 17, 9 August 1971; and by Mexico as to the establishment of an international authority for high seas fisheries, Doc. A/AC. 138/ SC. II/SR. 30, 29 March 1972.

[27] Shigeru Oda, *International Control of Sea Resources*, reprint with a new introduction, 1989, at xxvi.

[28] Convention on the Law of the Sea, preamble, para. 3.

[29] Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 1979, *International Legal Materials*, Vol. 18, 1979, 1434.

[30] Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea, 29 July 1994.

[31] Francisco Orrego Vicuña, *Antarctic Mineral Exploitation*, 1988, 483–497.