Does the Freedom of the Seas Still Exist?

Gerhard Hafner

1 Introduction

It is a great pleasure to contribute to this book in honor of Professor Djamchid Momtaz whom I have known and with whom I have long cooperated, starting with our work on the third Law of the Sea Conference. Many common discussions have followed in various fora, in particular in the United Nations, in the most differing fields of international negotiation. Although the spectrum of Professor Momtaz’ scholarly work now addresses almost all fields of international law, I would like to return to the origin of our cooperation, the law of the sea.

2 The Freedom of the Seas

Instead of giving an introduction to the present problems relating to the freedoms of the high seas, I briefly recall the historical correlation between the intensity of exploitation and the freedom of the seas, insofar as the exploitation of living resources is concerned. According to Grotius the freedom of the seas resulted from the practical inexhaustibility of the oceans assumed in his time. Grotius quotes Vasquius for the proposition that ‘it is generally agreed that, if a great many persons hunt or fish upon some wooded tract of land or in some stream, that wood or stream will probably be emptied of wild animals or fish, an objection which is not applicable to the sea.’ Yet Grotius slightly qualifies this idea by accepting the theoretical possibility that the supply of fish could be exhausted: ‘Yet again, even if it were possible to prohibit some particular act of this kind, such as fishing (for it may be maintained that the supply of fish is, in a sense, exhaustible), it would in any case be impossible to prohibit navigation, through which the sea loses nothing.’ (see R. Feenstra (ed), Hugo Grotius Mare Librum 1609–2009: Original Latin Text and English Translation, Brill, 2009, pp. 93 and 121). See for an interpretation of Grotius’ position, R. Gail Rayfuse, Non-Flag State Enforcement in High Seas Fisheries, Martinus Nijhoff, 2004, p. 19. See also R. J. Baird, ‘Legal Factors Contributing to the Development of IUU Fishing,’ in R. Baird (ed), Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean Springer, 2006, pp. 37–39.

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1 My particular thanks go to Mr. Gregor Novak for his valuable assistance in the preparation of this contribution.

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Vattel. In contrast, writers like Welwood and especially Selden challenged this freedom in view of the exhaustibility of maritime resources and the increased exploitation by Dutch fishermen, but those writers’ views found no general recognition in a time of liberalism, where this freedom came to full growth. This freedom, however, applied to the high seas, and thus maritime areas where the competition for exploitation was not yet very intensive. But already at that time, this freedom did not apply in areas where fisheries were involved in stark competition and exhaustibility was already sensed; the best example from this time was the competition between Dutch and English fisheries in the first half of the seventeenth century due to the introduction of new fishery techniques. This intensive exploitation and competition resulted

3 Noting that ‘[i]t is manifest that the use of the open sea, which consists in navigation and fishing, is innocent and inexhaustible; that is to say—he who navigates or fishes in the open sea does no injury to any one, and the sea, in these two respects, is sufficient for all mankind.’ E. Vattel & E. D. Ingraham (eds), The Law of Nations, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, T. & J. W. Johnson, 1854, p. 125.


5 Selden notes in Chapter XXII of Mare Clausum that ‘[l]astly […] the vast abundance of the sea, and its inexhaustible abundance, is of very little weight here. […] [T]he plentie of such seas is lessened every hour, no otherwise than that of Mines of Metal, Quarries of Stone, or of Gardens, when their Treasures and Fruits are taken away.’ (J. Selden, Mare clausum: the right and dominion of the sea in two books, London, 1663, p. 141). See also R. Prakash Anand, Origin and Development of the Law of the Sea: History of International Law Revisited, Brill, 1983, pp. 106–107.

6 R. Feenstra, ‘Epilogue’, in supra, note 2, p. xxviii (noting that ‘[s]ince Hugo Grotius’ Mare liberum the leading idea has been that the open sea is free by nature, that it cannot be taken in possession through occupation and that it can never be under the sovereignty of any State. Nevertheless, during the twentieth century, in particular after the Second World War, rights over the continental shelves exacted by coastal States and the establishment of economic zones up to 200 miles wide have set in motion a continuous limitation process of the freedom of the seas.’).

7 See on the history of fisheries across the world, e.g., D. Sahrhage & J. Lundbeck, A History of Fishing, Springer, 2012; M. Barnard, D. J. Starkey & P. Holm, Oceans Past: Management Insights from the History of Marine Animal Populations, Earthscan, 2012; R. Hilborn, Overfishing: What Everyone Needs to Know, Oxford University Press, 2012; L. Sicking & D. Abreu-Ferreira, Beyond the Catch: Fisheries of the North Atlantic, the North Sea and the Baltic, 900–1850, Brill, 2009. One author, Poulson, points to the massive increase in catch levels from the 18th to the 21st century by references to North Sea herring fishing, noting that ‘[e]ven with the very high catch level of 150,000 tonnes in the 1790s, herring catches in the period under review are still a far cry from the North Sea herring TAC of more than 500,000 tonnes in the early 21st century.’