

Freedom of Fishing on the High Seas, and the Relevance of Regional Fisheries Management Organisations (RFMOs)

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Introduction

International law significantly limits the right of States to authorise their nationals to engage in fishing on the high seas. This right is subject to conditions such as setting appropriate conservation and management measures and cooperating with other relevant States. Management of high seas fisheries is in many areas done through competent regional fisheries management organisations (RFMOs), who thereby play a key role in high seas fisheries and whose measures are relevant for all States, including non-members.

Nevertheless, there is not a full understanding of this among those who take part in discussions, and write reports, on ocean issues. It is too common to hear and see claims that a near absolute freedom to fish on the high seas constitutes a severe problem, and that RFMOs cannot be a sufficiently effective tool to deal with this problem as their measures are only relevant for the States that are formal members of the relevant RFMO.

This short overview is intended to explain the legal reality in a not-too-technical manner, in an attempt to improve the general understanding of these issues. It presents a summary with clear conclusions in this regard.

UN Fish Stocks Agreement

The UN Fish Stocks Agreement² (UNFSA) is the international legal instrument that most explicitly establishes the rule that conservation and management measures established by RFMOs are relevant for all States, not only the members of the relevant RFMO. Article 8(3) reads in part: “Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement.”

Article 8(4) of UNFSA gives teeth to this provision: “Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.” This makes it

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² The 1995 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.

absolutely explicit that States that do not fulfil either of these two conditions do not have a freedom to fish on the high seas.

Furthermore, article 8(5) provides that where there is no RFMO to establish conservation and management measures for a particular straddling fish stock or highly migratory fish stock, relevant coastal States and States fishing on the high seas for the stock in the subregion or region shall cooperate to establish such an organization or enter into other appropriate arrangements to ensure conservation and management of such stock and shall participate in the work of the organization or arrangement.

UNFSA now has more than 80 Parties³, which include most of the world's major fishing States. There has been an average of three new Parties per year over the past decade, following a surge of new Parties prior to that. Suggestions that UNFSA's relevance is limited due to a lack of Parties are therefore not appropriate. Consequently, suggestions that measures adopted by RFMOs have a limited relevance for those States that are not members of the relevant RFMO are not appropriate either.

The provisions of UNFSA quoted above are as clear as they can be. Where an RFMO has competence, States that intend to authorise fishing shall become members of the RFMO or agree to apply the measures the RFMO establishes. Otherwise they are not fulfilling their obligations and do not have a right to authorise their nationals to fish. The relevance of RFMOs for non-members could hardly be greater: States that are not members of a relevant RFMO are legally obliged to apply the measures it establishes.

The simplicity and clarity of this provision makes it almost superfluous to say anything more on the subject. Noting the clarity of this provision and the number of Parties to UNFSA should really be sufficient to correct anyone who makes claims regarding the right to fish on the high seas being almost without limits and the measures established by RFMOs being relevant only for its members.

UNFSA includes further limits to the freedom of the high seas. This involves issues such as the precautionary approach and the compatibility of conservation and management measures. This overview will not go into the details of these, as it is not necessary to demonstrate the fact that UNFSA clearly limits the freedom of the high seas, and makes RFMOs relevant for non-members. It should nevertheless be noted that the limits that UNFSA sets on the freedom to fish on the high seas are actually greater than those that are covered in this overview.

However, while acceptance of UNFSA is widespread and continues to grow, it is not universal. It may therefore be useful to demonstrate also the limitations of the right to fish in the high seas, and the relevance of RFMOs for non-members, for those States that have not accepted UNFSA. The fact is that while UNFSA is more explicit in this context, the generally accepted international law of the sea also significantly limits the right to fish in the high seas and makes RFMOs relevant for non-members.

³ Correct as of 30 January 2014

UN Convention on the Law of the Sea

The 1982 UN Convention on the Law of the Sea (UNCLOS) is as close as it is possible to get to have a generally accepted set of laws that apply to fisheries related issues. The Convention has 166 Parties⁴, and the States that are not Parties generally accept the parts relating to fisheries as customary international law. The UNCLOS provisions relating to fisheries therefore constitute generally accepted international law to an extent that is very uncommon for international agreements.

The following parts of this overview will go through the relevant provisions of UNCLOS, item by item. References to particular articles will be references to articles of UNCLOS, unless otherwise stated.

Freedom of the high seas

The freedom of the high seas is one of the important principles of UNCLOS. However, it is very important to note that this freedom is not absolute. In fact, it has significant limitations. The freedom of the high seas is set out in article 87.

<p><i>Article 87</i> <i>Freedom of the high seas</i></p> <ol style="list-style-type: none">1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:<ol style="list-style-type: none">a) freedom of navigation;b) freedom of overflight;c) freedom to lay submarine cables and pipelines, subject to Part VI;d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;e) freedom of fishing, subject to the conditions laid down in section 2;f) freedom of scientific research, subject to Parts VI and XIII.2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.
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Paragraph 2 sets out a general limitation regarding affecting the rights of others. This could on its own be of great significance for fisheries as they are the utilisation of limited resources which affect all other users of the resource. However, the other limitations relevant to fisheries are quite explicit, and there is therefore no need in this overview to go into a discussion on possible interpretations of this general obligation to take account of the rights of others.

The wording of the sub-items in paragraph 1 is of two different types. One type states that there is freedom for a specific activity (e.g. navigation), and says nothing more. Therefore, only the general limitation applies. The other type explicitly states that the freedom of the high seas is subject to specific limitations that are set out in other parts of the Convention. The freedom of fishing on the high seas is among the activities that are clearly limited in this manner. UNCLOS states that while there is such a thing as the freedom of fishing on the high

⁴ Correct as of 30 January 2014.

seas, it is “subject to the conditions laid down in section 2”, and thereby clearly not absolute but limited.

The obvious next step is then to examine what limitations this refers to. Article 87 is in section 1 of Part VII of UNCLOS. The statement that the freedom of fishing in the high seas is subject to the conditions laid down in section 2 therefore refers to section 2 of Part VII, which contains articles 116-120.

Limitations of the freedom to fish on the high seas

Article 116 explicitly establishes that the right of States to authorise their nationals to fish on the high seas is subject to specific limitations. This means that States simply do not have the right to authorise their nationals to fish on the high seas unless they fulfil the conditions.

Article 116
Right to fish on the high seas

All States have the right for their nationals to engage in fishing on the high seas subject to:

- a) their treaty obligations;
- b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and
- c) the provisions of this section.

It is important to note in particular the use of the words “subject to”. This means that the right to fish is only effective if the conditions in the sub-paragraphs are met. This is fundamentally different from an obligation to “take account of”, “note” or any other softer language. High seas fishing by vessels flying the flag of a State that does not fulfil the conditions in the sub-paragraphs of article 116 is simply illegal fishing according to generally accepted international law.

Before summarising, one should examine each of the conditions set out in article 116, to conclude on exactly what conditions a State must fulfil before it can legally authorise its nationals to engage in fishing on the high seas.

“their treaty obligations” (article 116(a))

Any obligation undertaken by a State can be relevant in this context. This can include any treaty obligation, including obligations relating to membership of an RFMO. However, this limitation is only relevant for the States that are parties to the relevant treaty and this overview will therefore not examine this provision in any further detail.

“the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67” (article 116(b))

This wording is unusual in treaty law, as it refers not only to rights and duties but also to interests, which can be more difficult to define. Furthermore, while there is a reference to articles 63-67, the phrase “inter alia” makes it clear that the reference does not constitute an exhaustive list. This overview will not go into a discussion regarding what rights, duties and

interests of coastal States are relevant, or regarding how interests should be defined in this context. It will make do with considering only the provisions that are explicitly referred to, and the rights and duties they establish. However, it is worth noting that this can be considered to be a minimalistic approach, as the wording refers to further limitations than the ones looked at here.

Article 63(2)

Article 63(2) establishes the general rule that where a stock occurs both in areas within and beyond national jurisdiction, all coastal States and States fishing for the stock in the high seas shall seek to agree on conservation and management measures. This principle is generally known as the duty to cooperate, and it means that a State that has not sought to reach an agreement on the management of a stock does not have the right under international law to authorise its nationals to fish for it in the high seas.

It should also be noted that the provision explicitly mentions that efforts to reach agreement on management should be “either directly or through appropriate subregional or regional organizations”. It follows from this that in cases where an RFMO has competence to set management measures for a fish stock, it is natural for these consultations to take place through that RFMO.

The conclusion is that where an RFMO has competence to set management measures for a stock that occurs both in areas within and outside national jurisdiction, no State can legally authorise its nationals to fish for the relevant fish stock without approaching the RFMO and seeking to reach an agreement through it. It would presumably also be consistent with international law to approach each member of the RFMO individually on a bilateral basis, but going through the RFMO would seem to be a more natural way to proceed. High seas fishing for a stock that occurs both in areas within and outside national jurisdiction by vessels flying the flag of a State that has not sought agreement through a relevant RFMO, or through a series of bilateral initiatives with all the members of the RFMO, is simply illegal fishing according to generally accepted international law.

This makes measures set by a competent RFMO very relevant for non-members, either directly in their cooperation with the RFMO or indirectly through their bilateral cooperation with the members of the RFMO, where the measures would inevitably form a basis.

Articles 64-67

Articles 64-67 relate to specific types of species: highly migratory species, marine mammals, anadromous stocks and catadromous species. Rather than establishing general rules, they contain provisions that apply explicitly to the relevant type of species. For the purposes of this overview, there is not a need to go into detail regarding these articles. However, it should be noted that they do not in any way undermine the duty to cooperate or the rule of using international organisations as a tool to give effect to that duty. On the contrary, they can be seen as strengthening the view that international organisations such as RFMOs are the appropriate tool for giving effect to the duty to cooperate.

“the provisions of this section” (article 116(c))

Paragraph (c) of article 116 establishes that the right of States to authorise their nationals to fish in the high seas is subject to the other provisions of section 2 of Part VII, i.e. articles 117-

120. This means that a State that does not fulfil the obligations established in articles 117-120 does not have the legal right to authorise its nationals to fish on the high seas. It is therefore worthwhile to look individually at each of these provisions.

Article 117

Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas

All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

This article creates an explicit obligation to set conservation measures. High seas fishing by vessels flying the flag of a State that has not taken, or cooperated with others in taking, the appropriate conservation measures is simply illegal fishing according to generally accepted international law.

Directly related to this is the limitation in article 119, which elaborates further on the conservation of the living resources of the high seas. Due to the phrase “subject to” in article 116, one can again conclude that States may only authorise high seas fishing if the conservation measures they take are consistent with article 119. This explicitly includes setting allowed catch levels on the basis of the best scientific evidence available, contributing and exchanging scientific and fisheries data through competent international organisations, and taking account not only of the target species but also species associated with or dependent upon them. High seas fishing by vessels flying the flag of a State that has not taken such measures is simply illegal fishing according to generally accepted international law.

A common way of meeting the obligations under articles 117 and 119 is to work within RFMOs. RFMOs are not necessarily the only option in this context and other arrangements can also be valid. However, in areas where an RFMO has competence to set the appropriate measures, it can be seen as the natural forum for meeting these obligations.

Article 120 establishes that the provisions on marine mammals in article 65 also apply in the high seas. This is not relevant for this overview, so the details will not be examined here.

Article 118 is the last provision that is explicitly referred to in article 116 as a limitation to the right to fish in the high seas. This article is very important for this overview.

Article 118

Cooperation of States in the conservation and management of living resources

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

This article establishes the so-called duty to cooperate, which was already mentioned in the context of article 63(2). While article 63(2) applies to stocks that occur both within areas

under national jurisdiction and in the high seas, article 118 applies to all high seas fishing and ensures that the duty to cooperate applies to all living resources that occur on the high seas.

Again, due to the wording “subject to” in article 116, States that do not fulfil the provisions of article 118 do not have a right to authorise their nationals to fish on the high seas. This means that high seas fishing by vessels flying the flag of a State that does not cooperate with other relevant States in conservation and management is simply illegal fishing according to generally accepted international law.

Of crucial importance for the purposes of this overview, and for the relevance of RFMOs, is that article 118 explicitly mentions as relevant States in this context all States who fish for the same resources or different resources “in the same area”. This means that States intending to authorise high seas fishing must not only consult those who conduct the same activity as they intend to conduct, and the States within whose jurisdiction the resources occur, but also all those who engage in fishing in that area. In areas where an RFMO has competence, this generally means for practical purposes that they must cooperate in conservation and management with all the members of that RFMO.

Article 118 also provides that States fishing in the high seas shall, as appropriate, cooperate to establish subregional or regional organisations to conduct this conservation and management. However, it does not explicitly state that States must take part in such organisations where they exist to be considered as having fulfilled their duty to cooperate. In this regard, one can say that article 8(3) of UNFSA, discussed above, goes further. However, it may be a natural reading of the text that where relevant States have established an organisation as explicitly called for in article 118, this organisation be considered the appropriate forum for fulfilling the duty to cooperate.

In any case, article 118 is very clear in making it a condition for allowing high seas fishing that the relevant State cooperates with not only those who fish for the same resources, but all States whose nationals conduct fishing in the same area. Leaving aside the question of legal obligation to cooperate with an RFMO, the most straight forward way to achieve this cooperation is through the relevant RFMO. The duty to cooperate is explicitly there in article 118 and non-membership of an RFMO does not absolve any State of this explicit condition for allowing nationals to engage in high seas fishing.

In areas where there is a competent RFMO, the participating States fulfil their duty to cooperate through it. One can hypothetically argue that the duty can be fulfilled without cooperating with the RFMO, through a series of bilateral cooperation with all the relevant States. However, to do this in practice would be far from simple.

Measures set by RFMOs are clearly very relevant for non-members in either case. Such measures will either be the basis of their cooperation with the relevant RFMO or the basis of their bilateral cooperation with the members of the RFMO.

The conclusion of the examination of article 118 is that high seas fishing in an area where a relevant RFMO has competence, by vessels flying the flag of a State that neither cooperates in conservation and management with the RFMO nor on a bilateral level with all members of that RFMO, is simply illegal fishing according to generally accepted international law.

Conclusion

The conclusion of this overview is that the right of States to authorise high seas fishing is significantly limited by international law and that the conservation and management measures established by RFMOs are relevant for all States, including those that are not members of the relevant RFMO.

The main points can be summarised as follows:

- UNFSA establishes very explicitly that States shall either join competent RFMOs or, if they are not members, apply the measures that the relevant RFMO sets.
- UNFSA further provides that only those States which fulfil either of these conditions shall have access to the relevant fishery resources.
- UNFSA includes further limits to the freedom of the high seas. This involves issues such as the precautionary approach and the compatibility of conservation and management measures.
- UNFSA is widely accepted, with more than 80 Parties that include most major fishing States. Criticism based on it not being sufficiently widely accepted to be looked at as a major source of international law for high seas fishing is therefore unfounded.
- Even without taking account of UNFSA, the conclusion still stands that under international law the freedom of high seas fishing is significantly limited and RFMO measures are relevant for all States.
- The parts of UNCLOS that relate to fishing are generally accepted as customary international law and are therefore binding on all States.
- Article 87 of UNCLOS explicitly limits the freedom of fishing on the high seas. High seas fishing by vessels flying the flag of a State that does not fulfil the conditions set in UNCLOS is simply illegal fishing.
- UNCLOS establishes that States may not authorise their nationals to engage in fishing on the high seas unless they take the appropriate conservation measures.
- UNCLOS establishes that States must cooperate in conservation and management with those which are involved in fishing in the same area, regardless of whether they fish for the same resources or not.
- In areas where a RFMO has competence, the measures it adopts affect non-members either directly in their cooperation with the RFMO or indirectly as the basis for cooperation at a bilateral level with the members of the RFMO.