COASTAL STATES' CONTROL OVER DRIFTNET FISHING IN THE SOUTH PACIFIC AND THE FREEDOM OF FISHING ON THE HIGH SEAS

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INTRODUCTION

Few regional affairs that have united the South Pacific island nations as solidly as has the controversial driftnet fishery. A regional ban on driftnet fishing has spontaneously been supported by coastal states, some of whom have already banned driftnet fishing in their Exclusive Economic Zone (EEZ).[1] The 'Tarawa Declaration' of the 20th South Pacific Forum meeting in Kiribati in July 1989 calls for a "driftnet-free zone" in the South Pacific to save regional fisheries and marine life.[2] A special meeting of the South Pacific Ministers in Honiara has reaffirmed their determination to outlaw driftnet fishing in the region and pledged the 'urgent implementation of the 'Tarawa Declaration'.[3] The Law Reform Commission of Papua New Guinea has constituted a Committee to study the legal implications of driftnetting and to suggest legislation prohibiting driftnet fishing and vessels in its territorial water.[4] A regional meeting of legal, fisheries, and diplomatic experts has been scheduled to be held in New Zealand in November 1989 to iron out differences, if any, in drafting a convention on the proposed "driftnet-free zone" both in the EEZs and on the high seas of the South Pacific.[5]

The international awareness of uncontrolled and massive driftnet fisheries and their consequences on marine life and environment is now widespread. The US and Canadian coastal fishermen have consistently been seeking a ban on driftnetting in the North Pacific for several years.[6] The US has already forced, under its trade sanctions, Japan and Taiwan to conclude agreements enforcing control on driftnet fishing vessels in the North Pacific.[7] A US-Canadian Conference has been sponsored to be held in Vancouver to devise additional restrictions on driftnet fishing in their region.[8] Hawaii is in the process

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1. Australia banned in 1986 and the remainder followed in 1989, *Pacific Islands Monthly*, July 1989, p.8; the *Islands Business*, Aug. 1989, p.17; *Post Courier*, PNG, 20 Sept. 1989, p.7.

2. The "Tarawa Declaration" of the SPF meeting on 10-11 July 1989, para. 3; also *Niugini Nius*, PNG, 25 July 1989, p.8.

3. See *Pacific Report*, vol.2, no.18, 28 Sept. 1989, p.3.

4. See *Post Courier*, PNG, 11 Oct. 1989, p.2; also PNG Minister for Fisheries and Marine Resources made a statement to this effect, see the *South Sea Digest*, Sydney, No.8, vol.9, 7 July 1989, p.1.

5. See *Pacific Report*, vol.2, no.13, 20 July 1989, p.1; also *Pacific Islands Monthly*, Aug. 1989, p.12; *Post Courier*, PNG, 21 Sept. 1989, p.11.

6. See the *Christian Sc. Monitor*, vol.81, no.169, 27 July-2 Aug. 1989, p.10B.

7 These agreements allow for high seas broading of driftnet vessels and require satellite transponders placed on such vessel so that the US can keep track of them, see the *South Sea Digest*, No.8, vol.9, 7 July 1989, p.1; the *Dominion*, 1 July 1989, p.1; *Pacific Islands Monthly*, July 1989, p.8.

8 See above note 6.

of enacting a new law forbidding driftnet boats from entering its ports.[9] The South Pacific coastal states' bid for a complete ban on driftnet fishing in the South Pacific finds favour with major powers with regional interests.[10] A UN resolution has recommended immediate action to reduce large-scale high seas driftnet fishing in the South Pacific, with a call for moratoria on all such fishing by 30 June 1992.[11] Recently the Joint Communique issued at the conclusion of the Commonwealth Heads of Government meeting in Kuala Lumpur in late October 1989 also calls for a ban on driftnet fishery.

The proposed "driftnet-free zone" in the EEZ hardly presents any problem. For the Third UN Convention on the Law of the Sea (LOS Convention) confers on the coastal state sovereign right over all economic resources, both living and non-living, of the sea within its 200-mile EEZ. However, it is the prohibition of driftnet fishing on the high seas of the South Pacific that seemingly ignores, or comes into conflict with, the right of other states to the freedom of fishing on the high seas. This article examines whether a ban on driftnet fishing on the high seas of the South Pacific will abridge or take away the right of the freedom of fishing on the high seas. It is observed that a ban or control over driftnet fishing on the high seas of the South Pacific does not encroach on the permissible extent of the freedom of fishing on the high seas. Being detrimental to the rational conservation and efficient management of certain protected species of common fish stocks, the operation of driftnet fishing on the high seas of the South Pacific cannot legitimately be subsumed under the freedom of fishing on the high seas.

DRIFTNET FISHERY

The driftnet fishing technique involves the deployment of flat nets made of fine mono or multi-filament nylon mesh laying in straight lines to hang vertically in the water like curtains. The operation is controlled through the adjustment of the buoyancy of the nets with its floats on the surface and its bottom weights under the water. It can be anchored to fish at one place or left to drift with wind and current overnight and then retrieved. It is a passive fishing device capable of entangling bodies of fish and other marine creatures that swim into it. It is also called "gillnet" as the mesh entraps victims behind the gills. Since it is visually and acoustically invisible and nearly unbreakable, virtually nothing larger than the size of the mesh can pass through its path. A driftnet can be as much as 15 meters deep and 60 kilometres long.[12]

In fact, there is no functional or fundamental difference between a driftnet and a gillnet. However, an arbitrary distinction in terms of their length and geographical utilisation has been drawn to identify the two types of fishing gear. Driftnet refers to those nets in excess of two miles in length and are used beyond coastal areas, whilst gillnet refers to those nets less than two miles in length and are used in coastal waters.

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9. See the *South Sea Digest*, No.13, vol.9, 15 Sept. 1989. p.1.

10. In the main these powers include: the US, Canada, the UK and France. See *Pacific News Bulletin*, NSW, Australia, vol.4, no.8, Aug. 1989, p.3; *Post Courier*, PNG, 15 Aug. 1989, p.3; *Niugini Nius*, PNG, 15 Aug. 1989, p.3; the *Christian Sc. Monitor*, vol.81, no.169, 27 July-2 Aug. 1989, p.10B.

11. The resolution was adopted by the General Assembly in Dec. 1989 pending conservation measures for albacore tuna and to prevent unacceptable effects of driftnet fishing on marine life and environment, see *Post Courier*, PNG, 14 Dec. 1989, p.7

12. For the background, technicalities and economics of driftnetting, see Samuel LaBudde, *Stripmining the Seas. A Global Perspective on Driftnet Fisheries*, a report and documentary prepared by Earthtrust, Honolulu, Hawaii, 1988, pp.6-10.

By its nature, driftnet as a fishing device is remarkably effective which distinguishes it from other types of fishing gear. The latter are capable of targeting and selectively catching only desired species with a minimal amount of bycatch and relatively infrequent mortalities to marine wildlife. A driftnet cannot selectively target species on the basis of their desirability but catches every creature that moves into its vicinity. The over-fishing of target species, if any, and the incidental killing and waste of non-target species of fish, marine mammals and seabirds are inevitable, causing their commercial or biological extinction.[13] Entire driftnet or large fragments are lost, abandoned or thrown away at sea every year. Being non-biodegradable, these nets with their surface floats and bottom weights maintain buoyancy, drift unseen and untended to entrap and kill marine creatures for several years until they sink with the weight of victims or wash ashore. These 'ghost nets' are also hazardous to safe navigation, as the ships' propellers and shafts are likely to been tangled.[14]

THE FREEDOM OF FISHING ON THE HIGH SEAS: A BRIEF BACKGROUND

The right to the freedoms of the high seas justifies any use of the open sea by any state. Being one of these freedoms, the freedom of fishing implies that no state can validly claim control over the fishery resources of the sea beyond its three-mile territorial sea. The legal regime governing the fishing on the high seas is the law of capture or possession of fish resources. All states, including land-locked and geographically disadvantaged states, are entitled to the freedom of fishing on the high seas. Since the coastal state lacks ownership right on areas of the sea beyond its territorial sea, fishing on that areas is regarded a legitimate exercise of the freedom of fishing. Any interference with the fishing activities on the open seas is tantamount to an infringement of the right to the freedom of fishing. This freedom is absolute in the sense that there is no limitations whatsoever on the number of fishermen and vessels engaged in fishing, the method and gear of fishing, and the size and quantity of fish to be caught.

The freedom of fishing on the high seas warrants comments in order to afford an insight into how the right, devised in the 17th century, still finds favour in the 20th century world which has already undergone profound transformations. Hugo Grotius, a Dutch jurist, formulated and recommended the freedom of the high seas in 1609 to defend the right of his country to navigate and fish in the Indian Ocean over which both Spain and Portugal had navigational monopoly and political domination. He relied exclusively on the assumptions that oceans were vast and unappropriable and that their resources inexhaustible. He argued:

> The sea is common to all, because it is so limitless that it cannot become a possession of anyone, and because it is adopted for the use of all, whether we consider it from the point of view of navigation or fishing.[15]

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13. THe effects of driftnetting on the marine environment and ecology have received considerable scientific attention. A synthesis of them may be found in R. Eisenbud, 'Problems and Prospects for the Pelagic Driftnet', (1985)12 *Environmental Affairs*, 474, 478, 480; also see the sources cited in note 31.

14 For an examination of the effects of a lost driftnet, see DeGange and Newby, 'Mortality of Seabirds and Fish in a Lost Salmon Driftnet', (1980)11 *Marine Poll Bull.*, 322-23; also LaBudde, *op.cit.* 37; and Eisenbud, *op.cit.* 479-80.

15 Hugo Grotius, *The Freedom of the Sea or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (translated by Ralph Van Deman Magoffin, NY: Oxford U. Press, 1916), 28.

Initially, several European countries including the UK were not prepared to adhere to the freedom of the seas. In order to protect its fisheries from Dutch exploitation, the British claimed sovereignty over the unspecified British seas and prohibited all foreign fishing activities along its coasts in 1609. The British and several other European coastal states vehemently argued against the freedom of the seas which was totally rejected in formulating their maritime law.[16]

However, the British accepted the freedom of the seas and influenced, if not pressurised, other sates of the continent to accept the principle in the early 19th century when the former emerged as the supreme maritime power and fishing nation in the world following the Napoleonic war. The reason for the adoption of the freedom of the seas is not too far to seek. The freedom of navigation especially served as a handy means of communication which was essential and useful in the wake of the British Industrial Revolution.[17]

Technological advancement in the 19th century revolutionarised the fishing technique and increased the quantity of catch. Smaller and developing coastal states became exceedingly concerned about the inadequacy of the three-mile territorial sea for the protection of their coastal and traditional fisheries. Their fishermen were indeed no match with the mechanised fishing methods of the developed fishing states which invaded and exploited the traditional fishing areas of the former. Several developing coastal states, in particular the European, asserted and attempted in vain to enforce wider territorial sea for the protection of their fisheries. The British persistently insisted on its fisheries jurisdiction on the high seas beyond the three-mile limit of the territorial sea. This posture of the British resulted in the failure to develop at the 1930 Hague Condification Conference an agreed upon generally applicable maximum breath of the territorial sea. In fact, the British 'spared no efforts to prevent certain states from extending their fishing limits'.[18]

Following the widespread mechanised fishing in the late 19th century, fishery resources of the sea were no longer found inexhaustible but came under the threat to extinction. Consequently, the freedom of fishing on the high seas came under pressure and challenge with the rapid emergence of the idea of extended fisheries jurisdiction of the coastal sate in areas of the high seas adjacent to the territorial sea. A wave of unilateral claim to exclusive fishing rights on the high seas contiguous to the territorial sea was advanced by developing coastal states. Norway, for example, redrew its straight baselines joining outermost islands off its broken coastline which included vast bodies of waters, bays and innumerable areas of the sea within its territorial sea. The International Court of Justice (ICJ) endorsed the Norwegian act in the *Anglo-Norwegian Fisheries Case*.[19]

Although the big maritime powers, notably the UK, the US, and France, favoured the freedom of the high seas, it is the US which made a headway for smaller coastal states to extend their territorial sea limits. In 1945, to protect the Alaskan salmon fisheries from Japanese exploitation, the US claimed a right to establish fishery conservation zones for the protection of its coastal fisheries in areas of the high seas contiguous to its territorial

16. See T.W., Fulton, *The Sovereignty of the Sea* (London: William Blackwood & Sons, 1911), 9-10-, 374.

17. See *Id.* 334.

18. See "Memorandum on the High Seas" prepared by the UN Secretariat, UN Doc. A/CN.4/32, 14 July 1950, 42-43.

19 See ICJ Rep. 1951, 132

sea.[20] Following this proclamation, numerous developing coastal states claimed wider fishing jurisdiction to save their coastal fisheries threatened by distant-water fishing states.[21] But the changed political climate after the Second World War was not favourable enough for the big maritime powers, especially the UK, to persuade or force the developing coastal states to withdraw their claims.

It is quite evident that the freedom of the sea was contrived to serve the vested interest of the Dutch who regarded the sea a principal source of food, wealth and power. It received further boost and sustenance from the British and other big maritime powers for identical reasons. With their technological superiority and ability to detect and harvest fish on the high and deep seas, these powers engaged in massive over-fishing and thus endangered fishing resources of the high seas near the coasts of other states under the protective garb of the freedom of fishing. The process of decolonisation following the Second World War witnessed the emergence of many independent states who became alarmed at the actual and potential effects of foreign fishing activities on high seas areas off their coasts.[22] Comprising the majority, these newly born developing states gained momentum in their bid to extend fishing jurisdiction. The legal validity of these claims was uncertain though, the freedom of fishing on the high seas encountered organised opposition and resistance during the period immediately after the Second World War.

THE FREEDOM OF FISHING ON THE HIGH SEAS AND THE 1958 GENEVA CONVENTION

The concerted attack on the freedom of fishing on the high seas was launched at the 1958 Geneva Conference of the UN on the Law of the Sea. Small and developing coastal states contended that the freedom of fishing benefited only those states with necessary capital and technology to invest in the fishing industry. Lacking capital and technology, the former were deprived of making any use of the freedom of fishing. However, in view of the state of affairs created by the over-exploitation of fishery resources through modern techniques, the need for a reappraisal of the freedom of fishing became pressing and paramount in the Conference.

The 1958 Geneva Conference dealt with the issue of the freedom of fishing on the high seas under two separate conventions: the Convention on the High Seas, and the Convention on Fishing and Conservation of the Living Resources of the High Seas. The freedom of fishing is one of the four freedoms of the high seas which has been made conditional in that the freedoms may only be exercised with 'reasonable regard to the interests of other states in their exercise of the freedom of the high seas'.[23] In other words, no state can exert this freedom in any manner irrespective of its impacts on the same right of other states. Similarly, the Fishing and Conservation Convention afforded protection for the living resources of the high seas against over-exploitation - a striking limitation on the freedom of fishing. Quite apart from treaty obligations, if any, a state

20. A statement to this effect was issued on 28 Sept. 1945 by President Truman. For the text, see Whiteman, (1965) 4 *Dig. I.L*, 954-55.

21. For example, Argentina and Panama claimed in 1946, see *Id.* 792-93; Chile in 1947, see *Id.* 795-96; Costa Rica, Peru, El Salvador, Honduras and Ecuador may also be cited in a similar vein, see *Id.* 797-98, 808-10, and 1089-90. Claims to wider jurisdiction by Iceland and the new states of Asia and Africa are discussed in A.H. Dean, 'The Second Conference on the Law of the Sea: The Fight for Freedom of the Seas', (1960)54 *Am. J.I.L.* 761-62; F.V.G. Amador, *The Exploitation and Conservation of the Respirces of the Sea* (Leyden: Sijthoff, 1863), 72-73.

22. See Dean, *loc.cit.*

23. Art.2 of the High Seas Convention adopted by the 1958 UN Conference on the Law of the Sea.

engaged in high seas fishing was required to respect the interest and rights of the coastal state, and the provisions on the conservation of the living resources (Art.1). The 'special interest' of the coastal state in the sustenance of productivity of the living resources on the high seas adjacent to its territorial seas was recognised (Art.6). In order to maintain this productivity, a coastal state was authorised to adopt unilateral conservation measures for any stock of fish (Art.7.)

An urgent need for the conservation of the living resources of the high seas was envisaged in the Convention in order to save them from extinction. The Convention however did not specify any measures to be introduced for conservation. Instead, it prescribed a flexible framework for detailed local measures to be negotiated and worked out .The reason for this flexibility may easily be appreciated. The economic, biological and environmental factors of various segments of the same sea, not to speak of different seas, vary so much that what is suitable for conservation of one species in any area may not be feasible of adoption in another area even for the same species. Many local conservation arrangements subsequent to the 1958 Convention testifies to this assertion. Under these measures, coastal states mutually established closed seasons, prohibited fishing in spawning zones, fine-mesh fishing nets, the catch of young fish, and imposed total catch limit or national quotas. These measures were also conditionally applicable to all foreign fishing vessels on the high seas.[24] These measures not only served the purpose of conservation of the living resources of the high seas, but also curtailed, in one way or another, the freedom of fishing on the high seas.

It is discernible that the freedom of fishing on the high seas was not supreme under the 1958 Convention. It was tempered by a duty to recognize the special right and interest of the coastal state in the conservation and management of the living resources of the high seas adjacent to territorial seas. In practice however, this duty was not respected. Flagrant abuses and misuses of the freedom of fishing were rampant. Technologically disadvantaged coastal states witnessed the widespread over-exploitation of their fishery resources by developed countries. Confronted with such a situation, the Convention lost its usefulness. The developing coastal states did not ratify the Convention considering it as inimical to their vital economic interest. The developed states also discarded the Convention as being too radical. Nonetheless, the 1958 Conference served as a formal forum for the developing coastal states to consolidate further their attack on the freedom of fishing on the high seas.

THE FREEDOM OF FISHING AND THE 1982 LAW OF THE SEA CONVENTION

The growth and development of the concept of EEZ after the 1958 Geneva Conference contributed significantly to the coastal state's claim to fishing right beyond the territorial seas. The period 1960-74 experienced the conclusion of a convincing number of regional agreements endorsing this claim.[25] The ICJ held in the *Fisheries Jurisdiction Case* (the UK v. Iceland) in 1974 that the 12-mile Exclusive Fisheries Zone had become an established rule of customary international law. It also recognised a 'referential right' of

24. The conditions are that the adoption of measures must be based on scientific findings and that the existing knowledge of fishery must call for an urgent application of these measures, which must be non-discriminatory, see Art.7(2) of the Convention on Fishing and Conservation of the Living Resources of the High Seas adopted by the 1958 UN Conference on the Law of the Sea.

25. For a chronological list of these agreements, see M. Dahmani, *The Fisheries Region of the EEZ* (Dordrecht: Martinus Nijhoff, 1987, 8-12.

the coastal state over fish on the high seas adjacent to its 12-mile territorial sea limit, particularly when the coastal state was economically dependent on local fisheries.[26]

During the LOS Convention negotiations, it became apparent that a consensus on the EEZ was fast emerging and that the forthcoming Convention on the Law of the Sea would approve a 200-mile EEZ.[27] The Convention that came into being in 1982 confers on the coastal state sovereign rights over all economic resources of the sea including fish within its 200-mile EEZ (Art.56). This sovereign right entitles the coastal state to explore, exploit, conserve and manage the living resources of the EEZ (Arts.56 and 57). State practice claiming exclusive fishing right within the EEZ was so ample that the ICJ was of the opinion in 1982 that 'the concept of EEZ may be regarded as part of modern international law' and in 1985 that the EEZ could extend up to 200 mils.[28] The coastal state retains its full control over the exploitation, conservation and management of the living resources within its EEZ. No other state can exploit them without a formal consent of the coastal state and a consent for access to surplus is attainable not as a matter of right but in exchange of returns. The coastal state is solely authorised to maintain its EEZ fish stocks at levels of Maximum Sustainable Yields (MSY), to determine their Total Allowable Catch (TAC), to select who may gain access to surplus and under what conditions (Arts.61 and 62).

Given these powers, there can hardly be any practical restriction on the coastal state in exercising exclusive fishing right in its EEZ. The development of the 200 mile EEZ in the LOS Convention has made a deep inroad on the freedom of fishing on the high seas which has been narrowed down even further.

However, the right of other states to the freedom of fishing on the high seas has been conceded in Article 116 of the LOS Convention. This right is not absolute but subject to, *inter alia,* 'the rights and duties as well as the interests of coastal state provided for' in Articles 63-67. These Articles deal with common fish stocks occurring both within the EEZ and on the high seas.

COMMON FISH STOCKS: ARTICLES 63-67 OF THE LOS CONVENTION

There are certain species of fish stocks which are very migratory in nature. Species like anadromous, catadromous, tuna, reptiles and marine mammals do not remain in the EEZ of one coastal state throughout their entire live cycle. They often spend some of their life outside the EEZ of one coastal state in the EEZ of another neighbouring coastal state or on the adjacent high seas, or both. It is indeed impossible for a single coastal state to bring under control the whole stock of these species in its EEZ. The conservation and management of these stocks necessarily comprehends all portions of the stocks both within the EEZ of coastal states and on the adjacent high seas. These species are common fish stocks in the sense that they migrate frequently between more than one EEZ and beyond to the high seas and are exploited by more than one state. As a result, a different legal regime governs their conservation and management. The LOS Convention requires all states engaged in fishing the same stocks occurring both within the EEZ of coastal states and on the adjacent high seas to maintain or restore these stocks at levels of MSY. In other words, over-fishing is forbidden (Art.63).

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26. See ICJ Rep. 1974, 23-26; also R. Churchill, 'The Fisheries Jurisdiction Case: The Contribution of the ICJ to the Debate on Coastal States' Fisheries Rights', (1975)24 *ICLQ*, 82-105.

27. For an analysis on the genesis and development of the EEZ, see Dahmani, *op.cit.* 14-29.

28. See the proceedings and judgment of the Case Concerning the Continental Shelf, ICJ Reports 1982, pp.18, 74-75 and 1985, pp.13, 35; also R.P. Anand, 'The Politics of a New Legal Order for Fisheries', (1982)11 *Ocean Dev. & I.L.*, 282-83.

Anadromous species spawn in fresh or estuarine waters, move out of these waters to live on the high seas for most of their mature life. The states in whose coastal waters these species originate shall have 'the primary interest in, and, responsibility for such stocks', thereby giving the state of origin the maximum control over the conservation, management, and allocation of these species (Art.66.1). This implies that the coastal state, being the state of origin, enjoys a preferential right outside its EEZ in the migration areas of anadromous species. It is the duty of the coastal state of origin to maintain or restore these species at levels of MSY. Where these species migrate into the EEZ of another neighbouring coastal state or onto the high seas, the neighbouring coastal state or any other third state interested in harvesting these species is required to cooperate with the coastal state of origin for the conservation and management of such stocks (Art.66.4). This means that even though the species happen to be in the EEZ of another coastal state, it cannot unilaterally exploit these species. It must cooperate with the state of origin which possesses the primary interest in, and responsibility for, such stocks.

Fishing for anadromous species on the high seas is conditionally permissible. The right of a state to high seas fishing for such species may be exercised to avoid its economic dislocation. The coastal state of origin is obliged to cooperated in minimising the economic dislocation of other fishing states 'taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred' (Art.66.3.b). This right of other state to high seas fishing of such stocks does not seem to be a continuing one. It dissipates once the economy is stable and otherwise insulated. High seas fishing states must participate 'by agreement with the state of origin in measures to renew anadromous stocks' (Art.66.3.c). Hence the conservation and management responsibility of such species on the high seas appears to be a joint duty of all states concerned. Nonetheless, the coastal state of origin remains in a pre-eminent position. Measures to be promulgated for the conservation and management of such stock by concerned states should give 'due regard to the conservation requirements and the needs of the state of origin in respect of these stocks' (Art.66.3.a). This tends to indicate that even when anadromous species are on the high seas, the coastal state of origin has an upper hand and wields a greater authority to ascertain the level of catch and fishing efforts. Moreover, high seas fishing of these species 'shall be by agreement between the state of origin and other state concerned' (Art.566.3.d). The wording of this requirement imparts that the latter is obliged to enter into an agreement with the former on regulations for fishing, conservation and management of these stocks.

Catadromous species spawn in the open sea and swim into fresh or coastal water where they spend the greater part of their life cycle. The coastal state in whose water such species spend the greater part of their life cycle shall have the responsibility for their conservation and management (Art.67.1). High seas fishing for these stocks is prohibited (Art.67.2). Where these species, whether juvenile or mature, migrate through the EEZ of another coastal state, their management and harvesting shall be regulated by agreement between the coastal state in whose water they spend the bulk of their life cycle and other interested states, taking into consideration the responsibility of the former for the maintenance of these species (Art.67.3). This Article thus bestows on the coastal state in whose water catadromous species spend the greater part of their life cycle the primary responsibility for their conservation and management.

Due to their highly migratory habit, tuna and tuna-like fishes range over large areas of the sea covering both the EEZ and the high seas. The coastal state and any third state engaged in fishing such stocks are under an obligation to cooperate with each other with a view to ensuring conservation and promotion of optimum use of these stocks throughout the region. This cooperation may be attained directly by the states involved or through appropriate international organisation (Art.64). This requirement of cooperation for optimum use essentially conveys that the determination of mutually agreed upon levels of MSY and TAC is a pre-condition for the exploitation of these species.

One of their biological characteristics is that marine mammals, whales and seals, cannot reproduce themselves rapidly on a massive scale. As such, these species can be fast depleted in the absence of a strictly controlled exploitation procedure. In the past decades, the world public opinion intensified against the killing of marine mammals. The UN resolution adopted at the Stockholm Conference on the Human Environment in 1972 called for a ten year moratorium on commercial whaling as a matter of urgency.[29] The ban by the International Whaling Commission on commercial whaling may be cited to the same effect.[30] In a similar vein, the LOS Convention envisages that a single and uniform conservation and management measure for marine mammals be adopted and applied both in the EEZ and on the high seas. And the coastal state is empowered to formulate and execute stricter measures prohibiting, limiting or regulating the exploitation of marine mammals (Arts.65 and 120).

A close reading of Articles 63-67 referred to purports to divulge a common understanding that the coastal state has been accorded a predominant status in the management and conservation of highly migratory species, marine mammals, anadromous and catadromous stocks both in the EEZ and on the high seas. The albacore tuna, bill fish and other tuna-like fishes of the South Pacific are the principal target of driftnetters. The South Pacific coastal states are entitled under Article 64 to devise some form of international management of these stocks, determine their TAC to maintain or restore these species at levels of MSY both in the EEZ and on the high seas. They may require other fishing states, who are enjoined to fish these stocks even on the high seas without conservation measures, to follow these arrangements.

Whilst the tuna is the primary target, by-catches of non-target species and wildlife are unacceptably high and wasteful.[31] The South Pacific coastal states may cooperate and impose any stringent measures under Articles 65 and 120, including a regional ban on driftnetting for the conservation and further protection of South Pacific mammals. Relying on the characteristics and definition of anadromous stocks,[32] it is possible to classify South Pacific turtles, estuarial crocodiles, dugong and penguins as anadromous. These species depend for their breeding on the nutrient-rich coastal soil and shallow waters and move out to the open seas in their harvestable cycles. Being 'the states of origin', the South Pacific coastal states have, under Article 66, the 'primary interest in, and responsibility for, such stocks' and may require other fishing states to adhere to certain specified measures for the conservation and management of these stocks. Similarly, the South Pacific coastal states possess a greater right under Article 67 on the

29. See the Report of the UN Conference on the Human Environment Recommendation 33, (1972)11 *Int'l. Leg Mat.*, 1416-34; also J.A.R. Nafziger, 'Global Conservation and Management of Marine Mammals', (1980)17 *San Diego L. Rev.*, 606-13.

30. The 1979 (29th) Report of the Commission; also for a discussion on the role of the Commission, see R. Gambell, 'Whale Conservation: The Role of the International Whaling Commission', (1977) *Marine Policy*, 301-10.

31. For an account of these effects, see Christensen and Lear, 'By Catches in Salmon Driftnets at West Greenland', (1972)5 (205) *Medd. Greenland*, 1-29; also for a detail report on Salmon interception by driftnetters in the North Pacific, see above note 12, pp.26-27; T.F. Chen, 'High-Sea Gill Net Fisheries of Taiwan' and Y. Gong, 'Distribution and Abundance of Flying Squid Caught By Korean Gill Nets in the North Pacific', working papers of a workshop on the Fate and Impact of Marine Debris, Honolulu, Hawaii, Nov. 1984; also Eisenbud, *op.cit.* 476-78.

32. Dealing with these species, Art.66 does not provide any definition though, these species refer to all species of fish that spawn in fresh or estuarine waters of the coastal state and migrate to the oceans. Section 102 of the US Fishery Conservation and Management Act 1976 contains a definition to this effect.

high seas fishing and preservation of catadromous species, such as fresh water eels, which spend a substantial period of their adult life in coastal waters.

The combined effect of these Articles suggests that the South Pacific coastal states are competent to adopt and implement measures for the conservation and management of these common stocks occurring both within and outside their EEZs. Such measures would not undermine or take away the right of other fishing states to the freedom of fishing on the high seas of the South Pacific. The freedom of fishing on the high seas is contingent upon the fulfilment of the objective of conservation and management of the living resources of the sea. It is inconceivable that the drafters and participants of the LOS Convention who were so much concerned about the rational conservation and efficient management of common fishery stocks have admitted an unqualified right to the freedom of fishing on the high seas to frustrate their goal. In order to dispel any doubts on the competence and interest of coastal states in stocks occurring within the EEZ and in an area beyond and adjacent to it, the freedom of fishing on the high seas in Article 116 has explicitly been made subject to, *inter alia,* Articles 63-67. This means that the prohibition or restriction on the fishing of joint stocks on the high seas embodied in Articles 63-67 supersedes the right to the freedom of fishing on the high seas in Article 116. If the driftnetting of tuna and other common stocks in the South Pacific is based solely on the freedom of fishing on the high seas, the act infringes not only Articles 63-67 but also Article 116 of the LOS Convention.

CONCLUSION

Originating from erroneously conceived premises, the freedom of fishing on the high seas was blessed and buttressed by major maritime powers to shield their self-interests. The Grotian notion of inaccessibility and inexhaustibility of the sea resources is no longer tenable if it ever was. It was therefore quite logical, indeed in order, that the freedom subsequently came under attack by those who found it illusory. In consequence, the right to the freedom of fishing on the high seas has successively been made conditional on the duty of conservation and management of the living resources of the sea under the 1958 and 1982 conventions.

Under the 1982 Convention, the South Pacific coastal states' control over the fishery resources on the high seas is not exclusive but shared with other fishing states. Nevertheless, being the state of origin, the former have been accorded a preferential right to, and greater responsibility for, the conservation and management of certain specified species under Articles 64-67. The right of other states to the freedom of fishing of these species even on the high seas of the South Pacific has overtly been rendered inoperative under Article 116. These provisions and their associated requirement of conservation and management of common stocks in turn furnish some degree of strength and sanction that may be invoked to impose vigourous control, or a ban, over the driftnet fishing of these species on the high seas of the South Pacific. Since such a control or ban purports to foster the conservation and management of the living resources of the sea, it comes well within the purview of, and derives legal validity directly from the, LOC Convention.

Given the economic realities of the overwhelming majority of the developing coastal states, the complete freedom of use of the sea as a source of wealth is destined to be counter productive. However, in view of the necessity and bulk of international trade, the freedom of the sea as a means of communication may not be gainsaid. Due to the informed thinking on the need for their economic emancipation and the availability of international assistance for the modernisation of their fisheries, the developing coastal states have significantly augmented their fishing competence. This process in effect has resulted in a corresponding depreciation in the freedom of fishing on the high seas. It is noticeable that this freedom is much narrower today than before - a trend which is likely to continue with the coastal state's claim to extended fishing jurisdiction beyond, and adjacent to, the EEZ.

Modern science has exposed the vast areas of the high seas to unprecedented levels of commercial exploitation. The introduction of driftnet fishery has but accelerated the persisting process of over-fishing, thereby posing an imminent threat to extinction of fishery resources. Many members of the international community are exploring strategies and mounting challenges to prevent driftnetting following an appreciation of its serious adverse impacts on marine life and environment. Pursuant to this rapidly emerging trend, the wisdom of high seas driftnet fishing under the cloak of the freedom of fishing on the high seas perhaps now deserves the most searching reappraisal.