



# **Conservation issues in coastal waters: state sovereignty, indigenous peoples and international obligations**

*By Maxim Zadorin*

*Small Master's Thesis  
Masters of Laws in Law of the Sea  
University of Tromsø  
Faculty of Law  
Fall 2011*

## Contents

<b>Chapter 1. Introduction</b>	iii
1.1 Background and aim of the Master's thesis	iii
1.2 Delimitations and method	iv
1.3 Abbreviations and acronyms	v
1.4 List of legal sources	vi
<b>Chapter 2. States' obligations for conserving coastal waters</b>	1
2.1 States' 'sovereignty and jurisdiction' over territorial waters	1
2.1.1 'Conservation' definition and basic reasons for it	2
2.1.2 General types of fish species for coastal conservation	3
2.1.2.1 'Anadromous species'	4
2.1.2.2 'Catadromous species' and 'coastal species'	4
2.2 States' obligations to protect the environment in territorial waters	5
2.2.1 UNCLOS, Part XII: interpretation marks	6
2.2.2 CBD and 'precautionary approach'	6
2.2.3 Interaction between UNCLOS and CBD norms, CBD novels und updates	7
2.3 Opportunities and offers vis-à-vis fishery and neighboring states	9
2.3.1 'MPA' instrument	9
2.4 An illustration on how Russia has interpreted the international obligations on sustainable development	11
2.4.1 Environmental protection of territorial waters	11
2.4.2 Protection and management of fish resources	12
<b>Chapter 3. Indigenous peoples' rights to fishery</b>	15
3.1 Human and collective rights and a state's sovereignty: contradiction or consent?	15
3.2 International legal framework on indigenous peoples' fishery rights	16
3.2.1 Substantial rights: ICCPR, CERD Rec.26, ECHR, ILO 169	16
3.2.2 Procedural rights: CBD etc	18
3.2.3 Non-legally binding instruments: UNDRIP, FAO Code, Draft Nordic Sámi Convention	21
3.2.4 Russian acts on indigenous peoples rights: specificity and legal gaps	24
3.3 Indigenous 'traditional knowledge' and 'sustainable development': theory and international practice (cases)	26
<b>Chapter 4. Conclusion</b>	30
4.1 Summary of the major findings with respect to the issues	30
<b>References</b>	34

## Chapter 1. Introduction

### 1.1 Background and aim of the Master's thesis

The small master thesis is dedicated to the problem of coastal states' jurisdiction over their marine biological resources, the challenge of ratio between states' sovereignty and international obligations on conservation management and human rights (collective indigenous peoples' rights to fishery) and a sustainable use of marine living resources. The basic reason for the conservation policy is the environmental destruction. Fishing methods are often highly dangerous, and paradoxically the viability of some stocks is threatened by certain conservation restrictions, where targeting only larger fish alters the genetic diversity, which means the variability among living organisms from all sources, of the stocks and results eventually in smaller fish, and 'industrial fishing', where fish are not taken for human consumption but are processed into meal for use as cattle or poultry feed or as fertilizer can make reductions in seabird colonies<sup>1</sup>.

The first doctrinal and political claim to the special rights on fishery was stated in the Middle Ages, where the famous Dutch commentator, Hugo Grotius, as the counsel to the East India Company, opposed the Portuguese claim that the Indian Ocean should be closed to trade by foreign vessels and attempted to justify the freedom of the sea. His work "Mare Liberum" presented this argument<sup>2</sup>. The opposition to Hugo treatise was "Mare Clausum" by Selden<sup>3</sup>, who concluded that "the private possession of the sea had been a widely recognized fact of life"<sup>4</sup>.

At first impression, Grotius' "Mare Liberum" and Selden's "Mare Clausum" appear completely contradictory in their content. In fact, however, Selden did not deal with the open oceans; while the freedom of the sea which Grotius advocated did not pertain to the sea areas close to land. The claim to the possession of seas near the coast has become the basis of the present regime of the territorial sea. On the other hand, the concept of freedom of the seas has provided the foundations of the regime of the high seas. Thus, it can be seen that the division of the ocean into the high seas and the territorial seas has a most respectable historical base. The existence of two disparate regimes, namely exploitation under the full control of the

<sup>1</sup> Birnie et al., *'International Law and the Environment'* (2009) p. 703.

<sup>2</sup> Grotius, H., *'The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the Eastern Indian Trade (translated by Magoffin, 1916)'*, Carnegie Endowment for International Peace.

<sup>3</sup> Selden, J., *'The Right and Dominion of the Sea (translated by James Howell, 1668)'*.

<sup>4</sup> Shigeru Oda, *'International Law of the Resources of the Sea'*, Sijthoff & Noordhof, 1979, p. 3.

coastal State and exploitation of sea resources free from interference by any country, is a fundamental presumption underlying the exploitation of sea resources<sup>5</sup>.

The master thesis is based on the legal analytical works of scholars as Shigeru Oda, Eric Molenaar, Brownlie, Hubold, Burke, Birnie, Stokke, Kaye, Jakobsen, Stacy, Bederman, Ilyasov, Guculyak, Hamilton and etc.

The aim of this thesis is threefold. Firstly, it analyzes and discusses in what manner international law limits state sovereignty with respect to nature conservation and fishery in the territorial waters. Secondly, it analyses state obligations due to international standards vis-à-vis indigenous peoples' fishing rights. This includes both rights to fish and procedural aspects related to the management of fisheries and traditional knowledge. Thirdly, the thesis illustrates how these recognized international obligations have been interpreted by domestic law by briefly describe relevant aspects of Russian law.

## 1.2 Delimitations and method

In avoiding unnecessary theoretical and historical factors this work is dedicated of more legal aspects on a coastal fishery of states. The main example of domestic law will be the Russian Federation, as one of the largest marine and fishing state. The work is divided into 2 parts.

The first part (2<sup>nd</sup> Chapter) raises the question of coastal states' jurisdiction and sovereignty on marine biological resources inside their territorial waters and the issue of conservation approaches under international agreements. The distinction among fish species is also very important, hence this part doesn't consider 'highly-migratory' and 'transboundary' species, habitats of EEZ and High Seas, but mostly 'anadromous' and 'catadromous' species of coastal waters. Further the application of UNCLOS and CBD is presented, showing the novelties of biological diversity convention. The issue of vis-à-vis fishery among neighboring states and MPAs regime explains the complexity of coastal fishery norms. The final section demonstrates on the example of Russia the differences between domestic legislation and international norms on fishery and environmental protection.

The second part (3<sup>rd</sup> Chapter) concentrates attention on indigenous fishery rights, raising the question of coastal states' sovereignty prevailing over collective indigenous rights for fishing, and about bucking the trend. Henceforth international legal framework on indigenous peoples' rights on fishery is performed, beginning from substantial and procedural

---

<sup>5</sup> Shigeru Oda, *ibid*, p. 4.

rights, ending with declarative norms at whole and specifically. Russia appears in this section as an example of inconsistent legislation on the issue. The final section organically leads to the ‘traditional knowledge’ of indigenous peoples as the instrument for ‘sustainable development’.

The method is based on an analysis of foremost international treaties and scholarly literature, to some extent international case law. The domestic Russian law has been translated by me, with the exception of the official English translation of the Russian Constitution. The specific problems are vague provisions, scarcity of literature and the challenge with the interpretation of the UNCLOS and the CBD.

### 1.3 Abbreviations and acronyms

CBD – Convention on Biological Diversity

CERD – Committee on the Elimination of Racial Discrimination

DNSC – Draft Nordic Sámi Convention

ECHR – European Convention on Human Rights

EEZ – Exclusive Economic Zone

FAO – Food and Agriculture Organization

FL – Federal Law

ICCPR – International Covenant on Civil and Political Rights

ILO – International Labor Organization

ICJ – International Court of Justice

ICSU - International Council for Science

MPA – Marine Protected Area

UNCLOS – United Nations Convention on the Law of the Sea

UNDRIP – United Nations Declaration on the Rights of Indigenous Peoples

UNESCO - United Nations Educational, Scientific and Cultural Organization

UNFSA – United Nations Fish Stocks Agreement

TAC – Total Allowable Catch

TTP – Territories of Traditional Use

WCED - World Commission on Environment and Development

#### 1.4 List of the most important legal sources

1. 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, 1995. Folkerettslig tekstsamling, 1883-2007, 4.utgave, Cappelen Akademisk Forlag, 2008.
2. Convention on Biological Diversity, 1992. The Secretariat of the Convention on Biological Diversity (SCBD), URL: <<http://www.cbd.int/convention/text/>>.
3. C169 Indigenous and Tribal Peoples Convention, 1989, URL: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>>.
4. International Covenant on Civil and Political Rights, URL: <<http://www2.ohchr.org/english/law/ccpr.htm>>.
5. United Nations Convention on the Law of the Sea, 1982. Global and European Treaties, 2007, Editors Ole Kristian Fauchald and Bård Sverre Tuseth. Published with Support from the University of Oslo and Selmer Advokatfirma.
6. UN Declaration on the Rights of Indigenous Peoples, 2007, URL: <<http://www.un.org/esa/socdev/unpfii/en/drip.html>>.
7. Rio Declaration on Environment and Development, 1992, URL: <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>>
8. The Draft Nordic Sámi Convention, URL: <[http://www.galdu.org/govat/doc/samekoneng\\_nett.pdf](http://www.galdu.org/govat/doc/samekoneng_nett.pdf)>.
9. The Constitution of the Russian Federation, Article 69, "Russian Newspaper", N 7, 21.01.2009.
10. Tax Code of the Russian Federation (Part II) dated August 5, 2000, N 117-FZ, "Russian Newspaper", N 153-154, 10.08.2000.
11. Federal Law of 20.12.2004 N 166-FZ "On Fishing and Conservation of Aquatic Biological Resources", "Russian Newspaper", N 3661, 23.12. 2004.
12. Federal Law of 30.04.1999 N 82-FZ "On Guarantees of the Rights of Indigenous Numerically Small Peoples of the Russian Federation", "Russian Newspaper", N 90, 12.05.1999.
13. Federal Law of 07.05.2001 N 49-FZ "On territories of traditional nature of Indigenous Numerically Small Peoples of the North, Siberia and the Far East of the Russian Federation", "Russian Newspaper", N 88, 11.05.2001.
14. Federal Law of 07.02.2003 N21-FZ "On temporary measures to ensure the representation of Indigenous Numerically Small Peoples of the Russian Federation,

legislative (representative) bodies of constituent entities of the Russian Federation”, “Russian Newspaper”, N 26, 11.02.2003.

15. The Law of the Russian Federation from 19.02.1993 N 4520-1 (amended on 24.07.2009) “On state guarantees and compensation for those working and living in the Far North and similar areas”, “Russian Newspaper”, N 73, 16.04.1993.
16. The Charter of Murmansk Region, Article 21, Newsletter Bulletin “Statements of the Murmansk Regional Duma”, N 25, 14.01.2003.
17. The Unified List of Indigenous Numerically Small Peoples of the Russian Federation (RF Government Regulation of 13.10.2008 N 760 from 18.05.2010 N 352, from 7.06.2010 N 453 from 02.09.2010 N 669), The Ministry of the National Policy of Udmurt Republic website: <<http://www.minnac.ru/minnac/info/13884.html>>

## Chapter 2. States' obligations for conserving coastal waters

### 2.1 States' 'sovereignty and jurisdiction' over territorial waters

The UNCLOS was the first wide scale treaty which provided the detailed scheme of the maritime zones with specific characteristics and juridical scopes. It was really important novel, because for centuries, customary law and not treaties governed the maritime zones and the law of the sea at whole. As was mentioned by Schiffman early state practice on the breadth of the territorial sea was quite inconsistent and often employed vague criteria<sup>6</sup>. Over and above Churchill expresses the existing fisheries law was unsatisfactory to developing states concerned about access to fishery resources near their own shorelines, where the distant water fishing vessels of developed states were permitted to catch fish on the high seas close to their coast<sup>7</sup>. Hence the international cooperation for resolving such conflicts was one of the important recipes among other complexities. From the point of view of Tommy T.B. Koh, the president of UNCLOS III, the Law of the Sea Convention is 'a constitution for the oceans'<sup>8</sup>. One of the best achievements of the UNCLOS is the establishment of the territorial sea breadth and definition.

'Territorial sea' is defined in the UNCLOS 1982 as an adjacent sea belt beyond coastal states' land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, where the sovereignty of a coastal State extends<sup>9</sup>. The breadth of the territorial sea should not exceed 12<sup>10</sup> nautical miles, measured from baselines<sup>11</sup>.

'The sovereignty' under the legal doctrine is a supreme dominion or authority, the total and supreme power of an independent state on the concrete territory<sup>12</sup>, or in case of territorial waters: the air space over it as well as to its bed and subsoil<sup>13</sup>. An authority could be exercised within the limits or territory of national jurisdiction<sup>14</sup>, where restrictions upon

<sup>6</sup> Howard S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservations and Vetoes*, Martinus Nijhoff Publishers, Leiden/London, 2008, p. 11.

<sup>7</sup> Churchill and Lowe, *The Law of the Sea*, 3<sup>rd</sup> ed. Manchester: Juris, 1999, p. 287-288.

<sup>8</sup> Remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, reprinted in, United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea, U.N. Sales No. E.83.V.5(1983) (remarks delivered on Dec. 6 and 11, 1982 at the final session of the Conference at Montego Bay, Jamaica).

<sup>9</sup> UNCLOS, Article 2(1).

<sup>10</sup> UNCLOS, Article 3.

<sup>11</sup> Ibid. Article 5, 7.

<sup>12</sup> "Sovereignty – Definition from the Webster's New World Law Dictionary", URL: <<http://law.yourdictionary.com/sovereignty/>> (accessed: 01.06.2011).

<sup>13</sup> UNCLOS, Article 2(2).

<sup>14</sup> "Jurisdiction – Definition from the Merriam-Webster Online Dictionary", URL: <<http://www.merriam-webster.com/dictionary/jurisdiction>> (accessed: 01.06.2011).