Fisheries and the Law of the Sea: A Common Heritage Approach

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ABSTRACT

In essence, the Revised Single Negotiating Text drafted at the Third United Nations Conference on the Law of the Sea says that, with respect to fishing, coastal-state interests are to prevail for all but the migratory species. Despite the intensifying difficulties in fisheries production, distribution, and conservation, however, the proposals embodied in the Text do not begin to meet the needs for the management of fisheries on a global scale.

The 200-mile economic zones in which coastal states would have jurisdiction over fishing would help to create a kind of orderliness, but these zones would fail to meet the problems of achieving efficient production, of obtaining equitable distribution of the benefits from fishing, and of assuring that fisheries operations would be ecologically sound. The economic zone concept fails to meet these problems at their source.

The structural character of these problems requires that the old, anarchic principle of the freedom to fish be replaced with a system of positive management. The common heritage principle, formulated primarily in reference to sea-bed resources, could be broadened to provide the needed conceptual foundation. Positive management based on common heritage principles can provide the basis for reconciling private and public values in resource management, whether within or beyond national jurisdictions.

THE CONTEXT

The international law of fisheries now in effect, in 1977, was codified in one of the four conventions produced at the First United Nations Conference on the Law of the Sea, held in Geneva in 1958. This Convention on Fishing and Conservation of the Living Resources of the High Seas obtained enough signatures to come into force in March 1966. It affirmed the generally accepted pattern whereby coastal states had full jurisdiction over the
fisheries resources of their territorial seas, and all states had free access to fishing on the high seas, beyond those coastal jurisdictions. For a comprehensive analysis see Johnston (1965).

The Second United Nations Conference on the Law of the Sea, held in 1960, again in Geneva, tried but failed to reach agreement on a standard width for the territorial seas of coastal states. As a result there has been a great deal of variation in claims, with some states, such as the United States, claiming territorial seas of only three miles width and other states, particularly Latin American states, claiming territorial seas of up to 200 miles width.

Other variations have been introduced by some states claiming jurisdiction for special purposes beyond their territorial seas. Several states have claimed special conservation or pollution control zones. Several have made claims to exclusive fishery zones beyond their territorial seas. The United States, for example, passed a law in 1966 (P.L. 89–658, 80 Stat. 908) establishing a contiguous fishery zone out to a distance of 12 miles from the United States’ coasts.

The preparatory work for the Third United Nations Conference on the Law of the Sea was undertaken by the UN General Assembly’s Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, commonly known as the Sea-Bed Committee. Its Sub-Committee II outlined the major concerns with respect to “fisheries and conservation of the living resources of the sea beyond the territorial sea”.

These concerns were:

- rational utilization of such resources because of their importance in ensuring man’s nutrition;
- the situation of states dependent upon their coastal fisheries for their livelihood or economic development;

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the interests of other states, particularly land-locked and shelf-locked
countries;
developed states with local or geographically isolated populations heav-
ily dependent on fisheries and states dependent on long-distant-water
fisheries;
the different types of fisheries and fishery exploitation, including
coastal fisheries and traditional or historic fisheries in coastal waters;
the problems deriving from over-exploitation or under-utilization of
resources;
coastal fishery resources as a part of the natural resources of the coastal
state;
measures for conservation and development of the living resources of
the sea and its protection against pollution and other hazard having
harmful effect;
the relationship between the protection of the marine environment as a
whole and the conservation and management of the living resources of
the sea;
the distinction and the relationship between conservation and utiliza-
tion of the living resources of the sea;
the need for more precise rules, on a world-wide or regional basis, with
respect to regulation, allocation, management, control, and conserva-
tion of fisheries beyond the territorial sea . . .

Draft articles proposing particular regimes for fishing were offered by
several different states. These were succinctly characterized in Sub-Committee
II's report as follows:

an example of an approach based on the concept of the "exclusive
economic zone" . . . was contained in the draft articles submitted by
Kenya;
an example of an approach based on the principle of the freedom of
fishing in the high seas subject to preferential rights of developing
coastal states in the area directly adjacent to their territorial seas . . .
was contained in the draft article submitted by the Union of Soviet
Socialist Republics;
an example of a functional approach under which the coastal state
would have the exclusive management and regulatory jurisdiction of
coastal fisheries (coastal and anadromous species) as a custodian, under
internationally agreed principles and rules . . . was contained in the
working paper submitted by Canada;
an example of a species approach under which the coastal state would
regulate and have preferential rights to coastal and anadromous
resources to the limits of their migratory range . . . while recognizing
that the unique nature of highly migratory oceanic species was such
that only international organizations could properly perform the
management function, was contained in the revised draft article sub-
mitted by the United States of America;
an example of a zonal approach under which the coastal state would
have exclusive jurisdiction over the living resources of the sea with cer-
tain exceptions . . . was contained in the working paper submitted by
Australia and New Zealand;
an example of an approach concerning preferential rights for protection
of coastal fisheries . . . was contained in the proposals submitted by
Japan;
a zonal approach under which there would be international management of ocean fisheries, together with exclusive jurisdiction of the coastal state over living resources within a 200-mile economic zone... was contained in the draft ocean space treaty submitted by Malta. *

The draft treaty submitted by Malta differed radically from the others submitted to the Sea-Bed Committee in that it called for a new kind of comprehensive management of ocean space. It was introduced as being:

... based on the postulate that the principles of laissez-faire freedom underlying the present regimes governing activities in ocean space beyond national jurisdiction is largely obsolescent and increasingly inadequate...

Malta’s proposal argued that “a new international order for ocean space” must be constructed.

After years of preparatory work by the Sea-Bed Committee, the first session of the Third United Nations Conference on the Law of the Sea was held in New York in December 1973. A series of additional sessions was held in different cities through the following years. The Conference’s mandate was “to adopt a convention dealing with all matters relating to the law of the sea,” that is, to formulate a wholly new framework for the management of the world’s oceans, replacing that codified in 1958.

The range of the issues was indicated by the way the agenda was divided among the three major working committees. Committee I was charged with working out a new regime for governing the seabed out beyond national jurisdictions. Committee II was to delimit and to work out the rights and responsibilities of states and other parties in different zones of the sea. Committee III’s main task was to develop the rules governing protection of the ocean environment, scientific research and transfer of technology. The primary responsibility for dealing with fishing was thus lodged with Committee II.

There are three broad areas of consensus emerging from this Third Conference: (1) there will be a territorial sea of up to 12 miles width for all coastal states; (2) there will be a 200-mile exclusive economic zone in which coastal states will have jurisdiction over the economic resources; and (3) a new International Sea-Bed Authority will be created to manage the exploitation of the resources of the sea floor out beyond national jurisdictions. There is still a

great deal of disagreement within this framework, however, as in the disputes
over the exact structure and powers of the new Authority, or in the question
of what should be the rights of states other than the coastal states within the
200-mile exclusive economic zones.

The areas of consensus are clear in the Single Negotiating Text produced
at the Geneva meeting in 1975 and in the Revised Single Negotiating Text
produced at the first of the two conference sessions held in New York in
1976. This Revised Text is not a negotiated draft, but only a basis for nego-
tiations prepared by the chairmen of the three committees. Nevertheless, it
provides the best available indication of the shape of the agreement that is
likely — if any agreement is to be reached at all.

Much of the hard negotiations with respect to fisheries management took
place in the Sea-Bed Committee, even before the Third Law of the Sea
Conference began. As a result, the positions taken at the outset of the Con-
ference, voiced at the opening substantive session in Caracas in 1974, were
very close to one another, and corresponded with the outlines which
emerged in the Revised Text.

The basic framework for the management of fishing proposed by Commit-
tee II, found in Part II of the Revised Single Negotiating Text, is described in
the following section.*

THE TEXT

According to this draft text, the exclusive rights of coastal states to fish in
their adjacent territorial seas would remain total and unqualified by virtue of
their sovereignty over those waters (Article 1). Under the new treaty all
states would have territorial seas with a standard limit of up to 12 miles in
width (Article 2).

The rights of all states to fish on the high seas would remain essentially as
they are now (Article 104). States are asked to adopt measures to assure that
their nationals work toward the conservation of the living resources of the
high seas (Article 105), and a gesture toward international management is
made in the assertion that “states shall cooperate with each other in the

* United Nations Document A/Conf.62/WP.8/Rev.1/Part II. The work of the Conference
as a whole is documented in the Official Records entitled: Third United Nations Con-
ference on the Law of the Sea. The three-section Revised Single Negotiating Text and
the later, fourth section on dispute settlement may be found on pp. 125—201 of Vol-
ume V. The new Informal Composite Negotiating Text which replaced the Revised Sin-
gle Negotiating Text in July 1977 shows no substantial changes in the proposals for the
management of fishing.
For analyses based on earlier stages of the conference, see Johnson (1975), Kury (1975)
and Shyam (1976).
management and conservation of living resources in the areas of the high seas . . . .” (Articles 106 and 107).

The most highly disputed fishing rights are those proposed for the area between the territorial seas and the high seas, the exclusive economic zone, extending out to 200 miles from shore. In this area the coastal state would have “sovereign rights” over the living resources, but that sovereignty would be tempered by the requirement that “the coastal State shall have due regard to the rights and duties of other States” (Article 44).

The rights of states other than the coastal state to fish in the economic zone are indicated in Articles 51, 58 and 59, but the predominance of the rights of the coastal state is clearly established in the “conservation” provisions of Article 50: “The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.”

According to Article 51, “where the coastal State does not have the capacity to harvest the entire allowable catch, it shall . . . give other States access to the surplus of the allowable catch.” In providing access to others the coastal state is asked to take into account such things as the significance of the fishery to its own economy and its other national interests, the requirements of developing countries in the region, and the need to “minimize economic dislocation in States whose nationals have habitually fished in the zone . . . .”

Article 58 gives special attention to land-locked states, saying they “shall have the right to participate in the exploitation of the living resources of the exclusive economic zone of adjoining coastal States on an equitable basis, taking into account the relevant economic and geographical circumstances of all the States concerned.” The meaning of this, and the specific terms of participation, are to be determined by agreement among the concerned parties. The application of this Article to developed land-locked states is limited in that they may exercise their rights only within the economic zones of adjoining developed coastal states.

Article 59 is concerned with developing coastal states which either: (1) depend on fishing in the exclusive economic zones of neighboring states for the fulfillment of their nutritional needs; or (2) can claim no exclusive economic zones of their own. Such states “shall have the right to participate, on an equitable basis, in the exploitation of living resources in the exclusive economic zone of other States in a subregion or region.” Unlike the provision for the land-locked states, this right is not limited to the economic zones of adjoining states. The terms and conditions for the participation of these special groups of developing coastal states in the economic zones of other coastal states are to be determined by agreement among the concerned parties.

In addition to the general rules governing who may fish where, there are
also special provisions proposed for the management of different species. For tunas and other highly migratory species, the concerned states

... shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objectives of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone.

Moreover...

in regions where no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work. (Article 53)

Article 54, on marine mammals, says only that, "Nothing in the present Convention restricts the right of a coastal State or international organization, as appropriate, to prohibit, regulate and limit the exploitation of marine mammals."

Anadromous fish are those which swim up rivers and streams to spawn, but live out the major portion of their lives in the open ocean. Salmon is the most common example. The basic regulatory principle proposed in Article 55 is that "States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks." Fishing for anadromous stocks would not be conducted in the high seas, but only in the economic zones and territorial seas of coastal states. An exception would be made for cases in which this would result in "economic dislocation" for a state other than the state of origin.

Catadromous species spawn on the high seas but spend much of their lives inland in fresh water streams and rivers. Some eels are catadromous. Article 56 says that "A coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species ...." They are to be harvested only in the waters of those responsible coastal states. If they migrate through the waters of another state, harvesting is to be regulated by agreement among the states concerned.

Article 65 specifies that sedentary species are included as part of the natural resources of the continental shelf over which the coastal states exercise sovereign rights for the purpose of exploitation. Sedentary species are defined in the Article as "organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or subsoil."
EXTENDED JURISDICTION

The major response of the Law of the Sea Conference to the problems of fisheries management has been to propose the extension of coastal state jurisdiction out to 200 miles. Many developing countries have argued that this would help them to develop economically and would help to slow the widening of the gap between rich and poor. The representative from Barbados, for example, said that the existing law of the sea “reflected the interests of the great maritime Powers” and “served merely to widen the gap between the developed and the developing countries.” He argued that “economic necessity justified the principle that a coastal State could unilaterally extend its jurisdiction and control . . .” over coastal resources out to 200 miles. *

The urge to extend control is largely due to the recognition that some 90% of the ocean fish that are caught are caught near coasts. Because of the concentration of fish there and because of their easier accessibility, jurisdiction over areas near coasts is far more valuable than jurisdiction over areas of equal size in mid-ocean. Of course, the extremely valuable offshore oil, found in the continental shelves, is concentrated along the coasts as well.

While developing countries like Barbados would gain something, it is now clear that the extension of coastal jurisdictions would be of greatest benefit to the physically large countries, most of which are developed. With its many outlying possessions (Alaska, Hawaii) and its long continental coasts, the United States would gain most of all, 2,222,000 square miles. The next largest gains would be by Australia (2,043,300 square miles), Indonesia (1,577,300 square miles), New Zealand (1,409,500 square miles), and Canada (1,370,000 square miles) (Osgood et al., 1976). The area gained by the United States alone would have “an annual potential production of at least 18 billion pounds of fish for food and recreation, or about 10 percent of the total estimated world production,” thus constituting “the largest fisheries resources of any nation in the world”. (National Marine Fisheries Service, 1976.)

Among the developed countries, Japan would be an exceptionally great loser, since nearly half of its fisheries production has been from near the coasts of other nations.

The developed countries would be able to draw far more benefit from each square mile of extended jurisdiction than the developing countries, for a variety of reasons.

As things stand now, many poor countries are not able to make full use even of their narrow territorial seas. Often limited to operations with very

small boats, the extension of their legal jurisdictions would have no real impact. In contrast, the developed countries, with more capital and advanced technology at their disposal, would be able to take greater advantage of their increased jurisdiction.

Developing countries could invite developed countries to provide capital and technology for exploitation of their resources through joint ventures or licensing or other arrangements. Of course, the developing countries would then be obligated to share the benefits with the developed countries. Because of their greater bargaining power, the joint ventures or other contractual agreements are likely to be of greater benefit to the developed nations.

Where coastal developing countries do increase their participation in the production of fish, they are not likely to enjoy a proportionate increase in consumption. The decline in long-distance fishing will be met by an increase in international trade. For example, where Japan used to send out its own nationals to fish off the coasts of other nations, Japan will, in effect, hire the people of the coastal nations to do their fishing for them by importing from those nations. The pattern of the poor fishing for the rich will continue (Kent, 1976).

It should also be noticed that most of the land-locked countries are poor, developing countries. Having no coasts, they obviously have no jurisdictions to extend. In the draft text, the rights granted to the land-locked states in the economic zones of other states are very weak. Since the land-locked states would be losing the legally unencumbered right to fish in the wide, resource-rich, and nearby area which they had enjoyed when that area was regarded as part of the high seas, the land-locked states would be made worse off by the extensions of coastal state jurisdictions out to 200 miles.

There are also extreme differences in the capabilities of the developed and the developing states to patrol and generally administer the new extended jurisdictions. The United States Coast Guard, Navy, National Marine Fisheries Service, and other agencies have been planning for years in anticipation of their new responsibilities, and they are spending a great deal of money for new facilities to patrol the area. Many small nations, in contrast, are barely capable of patrolling their narrow territorial waters. They often experience incursions into their waters by foreign fishing vessels, but they have little capacity to do anything about it. Thus, the developing states are far more likely to suffer from violations of their extended jurisdictions than the developed states. If they do undertake the great costs of preventing and prosecuting violations, that cost might well exceed their gains from having jurisdiction over a wider area.

The problem of continuing inequities in the world cannot be met by rearranging the geography of jurisdictions. At best, that could only be a
temporary corrective, in the same way that a one-time gift of resources from the rich to the poor would only temporarily alter the balance. It is obvious that the skew in the distribution of the world's wealth is not due primarily to the fact that some nations are better endowed with natural resources than others. If it were, Japan and England would be desperately poor, and Latin Americans would count themselves among the most comfortable.

While direct control over natural resources is certainly a cause of inequalities, it is greatly overshadowed by the role of social structures, and particularly the structure of trade relationships. Thus, changing starting points with a one-time grant of enlarged jurisdictions would not help in the long run because it would not alter the major structural source of the problem.

Extending jurisdictions also fails to meet the problem of threats to the integrity of the environment, whether through pollution or through depletion of resources. Reading Garrett Hardin's (1968) metaphor of the "tragedy of the commons," many observers have come to believe that the major source of economic inefficiency and of environmental problems is the fact that many people have uncontrolled access to a common resource. * One remedy, supposedly, is to fence off or somehow partition that common resource into separate, closed jurisdictions.

The analysis is misleading on several counts. One major difficulty is that partitioning is different from containment; with partitioning, the negative effects of one's actions can still spill over to hurt one's neighbors. A nation's coastal pollution is likely to hurt its neighboring nation, just as a nation's overfishing is likely to hurt its neighbor.

Another difficulty is that there may be problems of controlling access even within the jurisdiction of a single nation. The decimation of the Californian sardine and many other similar cases show very clearly that the "tragedy of the commons" may arise not only among nations but also within nations.

If the economic conditions are right for it, over-exploitation even of privately controlled pastures may be economically rational. That is, even under single management, there may be strong motivations to exploit renewable resources at rates which exceed the maximum sustainable yield. The fisherman might be better off economically if he were to fish out the entire stock for immediate profit, and place his proceeds in a bank to earn interest. Thus, it cannot be assumed that fish stocks will be conserved just because they are placed under the jurisdiction of single nations. Economic rationality can be reconciled with environmental rationality, but only with more deliberate institutional interventions than fence-building (see Fife, 1971).

* For applications of the idea to fisheries management, see for example D'Amato and Hargrove (1974), or Smith (1974). The ways in which free access can lead to economic inefficiency are described in Sweeney et al. (1974).
Perhaps most seriously, Hardin’s (1968) metaphor ignores the problem of inequalities in the powers of the parties. In the real world, some people are more capable of shunting the costs of pollution and of over-exploitation onto others. The excessive whaling by Japan and the Soviet Union, for example, represents the exercise of oligopolistic power more than it represents a tragedy of unlimited access by large numbers of more or less equal competitors. As suggested earlier in this section, partitioning is of little help in dealing with the problem of inequities in the distribution of benefits from the use of the sea.

The lesson which ought to be drawn from the tragedy of commons is the necessity for positive management at the global level. Hardin (1973) himself recognizes the need:

> It is doubtful if we can create territories in the ocean by fencing. If not, we must—if we have the will to do it—adopt the other alternative and socialize the oceans: create an international agency with teeth.

A central authority is needed to systematically alter the structure of incentives in order to reduce the motivation to over-exploit both nature and humankind.

**ASSESSMENT**

Beyond the misplaced faith in extending jurisdictions, the major failing of the fisheries articles of the Revised Single Negotiating Text is that, rather than coming to grips with the problems that need to be resolved, they put them off, offering only the bland hope that they will be addressed in negotiations among the concerned parties at some unspecified time in the future. For example, rather than saying what constitutes “equitable” participation for land-locked states, Article 58 only says that: “The terms and conditions of participations shall be determined by the States concerned through bilateral, subregional, or regional agreements.”

One of the major arguments advanced for giving other states the right to fish in the exclusive economic zone of coastal states has been that, where the coastal state has limited fishing capacity, the “surplus” beyond that taken by the coastal state should not be allowed to go to waste. It should be recognized, however, that even if a state has full and exclusive rights over fishing in a given area, fish not taken by that state will not necessarily die of old age. They need not go to waste; fishermen of other nations may be admitted to harvest that surplus, not as a matter of right, but through negotiated agreement with the coastal state.

To the extent that other states can demand entry as a matter of right, however, the coastal state cannot demand payment for entry. Thus, to the extent that the doctrine of full utilization requires admission of non-coastal
states, it works to the disadvantage of underdeveloped coastal states, and to
the advantage of nations able to send out fishing fleets.

This would be a concern, except for the fact that in the Revised Text
there are no clear rights granted to the land-locked states or to "certain
developing coastal States" for access to the exclusive economic zones of
other states. That could be accomplished only through a specification of
what those states could claim as rightfully theirs in the absence of agreement
between them. That specification is needed to clarify their positions, for it
is what a state can command in the absence of agreement that establishes its
bargaining power in negotiations. As the draft stands, non-coastal states have
very weak rights, and only a weak basis for claiming those rights. So long as
future arrangements are left to ordinary political negotiations, with no clear
new rights granted to the land-locked or the developing states, those states
will remain at a great disadvantage.

Thus, apart from the delaying tactics, there is also an intolerable ambigu-
ity with respect to rights and obligations. With provisions as fuzzy as those
in Article 58, it is no wonder that the land-locked states, together with the
other geographically disadvantaged states, protested that the first Single
Negotiating Text "did not take account of the legitimate rights and interests
of the Group," and that in the Revised Text "no noticeable progress has
been achieved". What is the purpose of these arduous negotiations if so
much is to be left to future negotiations?

The 1958 Law of the Sea Conventions did not stand largely because they
were ambiguous on critical points. Some slack in interpretations in inter-
national agreements is generally needed to accommodate different perspec-
tives, but when the lack of clarity goes too far, the life of the agreement is
endangered. At some points, phrasing known to be a source of difficulty in
the 1958 Conventions has been retained in the current draft. Article 65's
definitions of sedentary species, for example, is the same definition used in
the 1958 Geneva Convention on the Continental Shelf. Oysters, clams and
other kinds of mollusks are clearly included, but the new text does nothing
to resolve the disagreements over whether crustaceans such as crab, lobsters
and shrimp should be regarded as sedentary species.

The Soviets, for example, have argued that crabs walk on their continental
shelf, and thus are Soviet property, while the Japanese have argued that
crab swim, and thus are free to be taken by any nation.

That some of the articles in the Revised Text were inadequate as they
stood was recognized by the Chairman of Committee II in his introduction
to the document. As expected, the issues remaining in dispute were negoti-
ated further in the session of the Conference following the release of the
Revised Text.

At that meeting in New York in the late summer of 1976, Committee II
divided the task of reviewing the Text among five working groups. Negotiating Group 1 dealt with the legal status of the exclusive economic zone and the rights and duties of states within the zone and thus was especially concerned with issues relating to fishing.

With respect to Article 56, on catadromous species, agreement was readily reached on a new draft of the second paragraph limiting the harvesting of such species to “water landward of the outer limits of the exclusive economic zone”.

Far greater difficulties were encountered in relation to Article 53, on highly migratory species. Some states wanted these species to be controlled in the economic zone through regional regulations (that is, through regional international organizations), while others wanted to strengthen coastal state control over the highly migratory species. No clear conclusions were reached.

Discussions were expected to continue within the official Conference structure.

Twenty-one of the concerned states formed a special consultative group outside of the framework of the Committee to deal with the question of the rights and duties of states with respect to the living resources of the exclusive economic zone. Again, no consensus emerged during that second 1976 session of the Conference.

The fisheries articles of the Revised Single Negotiating Text and the revisions agreed to since its release reflect a mixture of ad-hoc accommodations to particular interests, especially to the interests of the major maritime powers. The provisions on anadromous species, for example, reflect an accommodation between the United States and Japan who, in the past, have been in serious conflict over salmon fishing in the Pacific. Article 54 on marine mammals offers only a disclaimer of responsibility, leaving the control of whaling in the ineffectual hands of the International Whaling Commission — as if no improved management structure were needed. The provisions on fishing show no clear bases in principle for allocating rights and responsibilities among the concerned parties. They show no serious appreciation of the gravity of the problems of fisheries management.

Broadly, the Revised Single Negotiating Text says that coastal state interests are to prevail for all but migratory species. Many issues of detail remain unresolved. More significantly, however, the major response — extending state jurisdictions — is inherently inadequate. Despite the fact that the problems of production, conservation and allocation of fisheries resources are so much more intense now than they have ever been in the past, the proposals embodied in the Text do not begin to meet these urgent problems of fisheries management on a global scale.
Traditionally, all oceanic resources have been understood as either *res nullius* or *res communis*. *Res nullius* resources are understood to be no one's, and subject to appropriation. *Res communis* resources are understood as being anyone's, and not subject to appropriation. They are equally accessible to all, available for anyone's use. Under *res communis*, resources belong to those who first use or take them. Fish taken on the high seas, have traditionally been *res communis* resources. They are public goods, like the air, or like highways or parks or open pastures which anyone may use freely. Both *res nullius* and *res communis* are very different from the common heritage idea, by which some resources should be regarded as everyone's, and subject to their joint management.

The common heritage principle, providing a wholly new understanding of the nature of property rights, was first placed before the United Nations General Assembly in 1967 by Ambassador Arvid Pardo of Malta. In accordance with his proposal, in 1970 the General Assembly passed a resolution, the “Declaration of Principles Governing the Sea-Bed and Ocean Floor and the Subsoil Thereof, Beyond the Limits of Nations Jurisdictions” (Res. 2749, XXV), in support of the common heritage principle.

The principle is being interpreted at the Law of the Sea Conference as applying only to the resources of the sea floor beyond national jurisdictions, which in effect means it is to apply only to the exploitation of manganese nodules out beyond 200 miles from the coasts of nations. However, it could conceivably be applied to fisheries or to any other kind of resources. It is useful, therefore, to describe the idea at a sufficiently high level of abstraction so that it could be applied to many different kinds of resources.

The irreducible essence of the common heritage idea appears to be that resources regarded as part of the common heritage of mankind are to be governed in accordance with these major principles.

1. **Peacefulness.** The resource should be used only for peaceful purposes.
2. **Equity.** The benefits derived from the use of the resource should be distributed equitably. This in turn means that...
   2a) As a common heritage, everyone is entitled to share in some measure in the benefits from the use of the resource. This necessarily implies non-appropriability, such that no individual, corporation, or government has the right to claim the resource for its own exclusive benefit.
   2b) A greater share of the benefits should go to the poor.
3. **Environmental integrity.** As the heritage of the future as well as the present, users of the resources should show respect for the environment, limiting both depletion and pollution.
4. **Common management.** To give effect to these principles, a
governing agency responsible for their implementation must be estab-
lished. That agency, acting in behalf of all humankind, should provide
for participation by all affected parties in the making of its decisions. *

This common heritage idea should be understood as a wholly new concept
of property rights, a modern alternative to the traditional ideas of exclusive
ownership or of free and unlimited access. In earlier times, the laissez-faire
doctrine helped to meet the problems of speeding the extraction of needed
resources and accelerating industrial development. The older, essentially
anarchic property concepts served good purposes in an era of relatively small
clashes, expanding resource frontiers, and modest environmental impacts.
But now that the limits of natural and human exploitation have been
approached, the old ideas fail us.

New and different modes of management are needed. The common heri-
tage idea, anticipating a wholly new kind of resource management, can
provide the basis for that new order.

RECOMMENDATIONS

The thought that the common heritage principle should be extended to all
of the ocean space has already been articulated, most prominently in the
draft ocean space treaty presented by Malta to the Sea-bed Committee, and
in Mann Borgese, 1972. Constructive ideas have also been developed in the
Resources for the Future, Inc.'s Program of International Studies of Fishery
Arrangements, and by the American Society of International Law. **

The difficulty is that those with political power have not taken these
proposals very seriously. Their time has not yet come. But that is only part
of the problem. Advocates should not assume that these ideas have been
ignored only because of the obstinacy and irrationality of those in power.
The evidence is that the arguments have not been persuasive, and that is
partly an observation on the arguments themselves.

They can be improved. Earlier proposals for the creation of some sort of
global authority for the management of fishing ought to be restudied, and
the reactions to them ought to be carefully reviewed. The lessons from these

* In Pardo and Mann Borgese's (1976) very similar formulation, the basic principles are
that the common heritage cannot be appropriated, it requires a system of management,
it implies an active sharing of benefits, it implies reservation for peaceful uses, and it
implies reservation for future generations. A fuller treatment of the concept is provided
in Pardo, 1975.

** The Resources for the Future, Inc., studies are summarized in Christy, 1974. See also
American Society of International Law, 1974. For a derisive view of the idea that
fisheries might be treated as part of the common heritage see Burke, 1972.
experiences can be used to guide the formulation of new proposals, proposals which are more sensitively attuned to the major actors and their concerns.

Can we discover, for example, why it is that the developing countries have not been more ardent in advocating the common heritage idea?

Some observers suggest that the developing countries simply failed to understand their own true interests. Danzig (1975) found their position to be "amazing" and "stupid":

> With a choice of placing the resources described above in a common pot for the benefit of all mankind but primarily for the benefit of the developing countries, or alternatively, each country appropriating for itself as much as possible, one would expect the developing countries to opt for the common pot. Unfortunately, the opposite has turned out to be true. The developing countries have joined a stampede to divide the best part of the ocean treasure colonial style.

How can we understand this new "Third World colonialism"? Danzig seems to favor his explanation that it is due to a conflict of interest among the developing states themselves (e.g., some have wide and some have narrow continental shelves), and to dismiss the problems of "the developing countries distrust of anything proposed by an imperial power".

I think Danzig underestimates their distrust. The Third World fears that any new international organization will very likely be captured by the powerful nations of the world and turned to serve their interests. There is strong evidence for this in the history of the United Nations and its more specialized arms such as the Food and Agriculture Organization, and the International Whaling Commission, and many fisheries commissions. The distrust is greatly reinforced by their observation of the behavior of the more powerful nations in the negotiations over the constitution of the International Sea-Bed Authority, the authority which is to administer whatever is left of the common heritage when the Law of the Sea Conference concludes.

Apart from the suspicions by the weak that it would be turned to favor the strong, all nations fear that any new authority might gain too much power. Through the usual processes of accretion of power to the center, sooner or later the agency might impose unwarranted constraints on the freedom of action of the separate nations.

To meet those problems of fear and distrust, it is useful to distinguish between comprehensive management and positive management. An agency with comprehensive authority would have responsibilities over the full range of activities, with nothing excluded from its purview. This question of its scope, however, is separate from the question of the degree to which the agency exercises power. It may be comprehensive but weak, if the authority is only allowed to offer guidelines and recommendations with respect to a broad range of activities. Having positive management power would mean
that the authority would be able to act decisively with respect to some issues, whether those issues are narrowly specified or cover the entire range.

Surely, what is needed is an international organization with teeth. One of the major reasons for the failure of the International Whaling Commission is that it has not had the power to impose effective restrictions on each of its members without each member's consent. The nations of the world must come to see that accepting restrictions on their freedoms can be in their own best interests.

At the same time, however, it should be acknowledged that only certain teeth are necessary. Past proposals may have suggested vesting too much power, over too broad a range, in the central authority. To allay the legitimate fears, the positive functions of the central authority ought to be limited to a very narrow range. It should have clear and strong powers, but only in precisely specified areas, with all residual powers clearly retained by the separate nations. The constitution of the new authority should also include safeguards to prevent unwarranted and uncontrolled expansions of its jurisdiction. Remedies of this sort can help to meet the well justified distrust which is ordinarily aroused by proposals for creating new central agencies.

One example of a narrowly specified function for a central authority is dispute settlement. Careful statements of how the agency is to undertake this work could be outlined in its constitution, with clear indications of the limits beyond which it may not go. A good model is provided in Part IV of the Negotiating Text.

Another example would be the surveillance of fishing fleets to help prevent violations of coastal state jurisdictions. The global authority could be given powers to prevent or to punish such violations, or more narrowly, it could be limited to the task of monitoring ship traffic and informing nations when their waters appear to be violated. This would permit a broad sharing in the benefits of advanced technology such as satellite surveillance systems. Through services of this kind, the apparent centralization of power could actually enhance the control of individual nations within their jurisdictions, much as the institution of police within residential communities enhances each citizen's freedom to act without interference from others. Central authority can protect interests.

Conservation would be another arena in which the central authority could be given precisely limited functions. Coastal states might be granted the primary authority to manage the fish stocks off their shores, but the central agency might be authorized to intervene if the coastal state permitted serious and sustained over-exploitation of the fish stocks or otherwise abused the resource.

This policing function need not be tyrannical. As Hardin argues, what is
needed is mutual coercion, mutually agreed upon. If the coastal states participated in deciding the bases on which the central agency was to act, the constraints on their freedom to over-exploit would be collectively self-imposed. Through this kind of action, nations acting jointly, in their own interests, can take the radical step of abolishing the unconstrained freedom to fish, whether within or beyond national jurisdictions.

For those with faith in the common heritage idea, there is much more work to be done. The major failings of the existing and anticipated non-management of fisheries need to be documented more convincingly. There must be a better and clearer design of the institutional arrangements which can give effect to common heritage principles. More attention needs to be given to the design of transition strategies to achieve the implementation of those new arrangements.

It must be kept in mind that the proposals are to be addressed to skeptics, not just to the faithful. It should be possible to show that the proposed new methods of management would actually meet the major problems of concern, and would accomplish that without incurring excessive costs. The most demanding challenge, perhaps, is the need to show, through analysis of the data, that most nations would in fact be better off, in material or other terms, with the proposed system of positive global management. Despite our wishes, lofty and abstract humanitarian and environmental goals are not enough to sway political decisions. Whether the major benefits are supposed to be material or of other kinds, the bases for the promises need to be persuasively demonstrated.

In some important ways, the agenda for the Law of the Sea Conference has been too narrow, making it impossible to deal with the essential structural sources of major problems. For example, the question of equity in fishing has been viewed entirely in terms of production: who may catch fish and where. Because of the patterns of trade, however, the inequalities in consumption are even more striking than they are in production. To broaden perspectives, Pardo and Borgese (1976), and others, are trying to show how the Law of the Sea issues should be understood as an essential element in the pursuit of a New International Economic Order. These connections between problems of ocean management and the more general organization of world order need to be explored more thoroughly. (Pardo and Mann Borgese, 1976; an abridged statement of their views may be found in Tinbergen et al., 1976; another perspective is provided in Friedheim and Durch, 1976.)

If the Third Law of the Sea Conference concludes with nothing more to propose for fisheries management than those elements embodied in the Revised Text, we must conclude that the problems remain on the world's unfinished agenda. The issues must be taken up again.

If a global authority for the positive management of fisheries is too much
to hope for in the short run, it may be possible to move toward that objective in particular sectors. A model management structure might be created, for example, for tuna in the South Pacific, a problem which has only recently been recognized as being in need of attention.

Merely redrawing lines on maps to say who may fish where would redistribute the initial stakes, but the game would remain the same. The remedy would still be essentially anarchic, and thus would still tend to serve the interests of the powerful. If the social forces at work remain the same, the same old rules of power politics will prevail, and the long-run trends will remain the same. The major problems of fisheries management such as those of over-fishing and of the skewed distribution of benefits have not yet been attacked at their source. They can be solved only with new global structures for the positive management of the world’s fisheries for the benefit of all humankind.

REFERENCES


