

The Future of International Fisheries Management

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EDITED BY H. GARY KNIGHT

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INTRODUCTION

The future management of the living resources of the sea is one of the most crucial issues being examined at the United Nations Conference on the Law of the Sea, the first session of which has recently concluded in Caracas, Venezuela. This conference, which has been in planning since 1967, has examined a large number of important issues dealing with the future status of the oceans and their resources. In the course of the preparations for the Conference, the question of the sound future management of the living resources of the sea has at times been treated as less important than some of the other issues. It is not any less important.

The American Society of International Law, a non-profit scholarly organization in Washington, D. C., established in June of 1973 an interdisciplinary expert Working Group of its Panel on the Law of the Sea to explore the issues dealing with living marine resources which the Conference would address. The group also articulated the ways in which the living resources of the sea could effectively be managed. The group held four two-day meetings during which it discussed the number of subject areas in the law of international fisheries management which, it believed, had received insufficient attention. It was felt that these areas have a bearing on a future fisheries regime. During these meetings the Working Group considered a number of papers prepared by members. These papers constitute the greater part of this volume and serve to elucidate various background issues on the management of the living resources of the sea.

H. Gary Knight's paper sets the background against which the other papers should be considered. After briefly tracing the history of the law of the sea and international fisheries management as they have developed, Professor Knight identifies and examines possible objectives of fish-

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ery management, as well as the issues associated with the conservation and allocation aspects of fishery management. The author then analyzes the positions of the U. S., Japan, Russia and their coastal states in the fisheries question and, finally, discusses various procedural aspects of developing a fishery policy.

In his paper "Future Fisheries Technology and the Third Law of the Sea Conference," Jon Jacobson focuses on new fisheries technology and its implications for the Third Conference. Anticipated developments in fisheries technology in the four phases of commercial fishing are listing along with their corresponding "legal implications". Professor Jacobson also deals with more general law of the sea implications of fishing technology and examines what he considers to be desiderata for an optimum fisheries regime. Unless such a management regime takes account of developing technology, it cannot long survive the inevitable conflicts and rivalries which would occur as a result of some nations possessing vastly more significant technology than others.

My own brief paper on multinational investment in fisheries indicates that developing trends in transnational fishing activities, particularly the flow of capital from developed to developing countries and activities of international corporations in fish harvesting and processing give rise to important indications, some unexpected, for future international agreements on living marine resources. The brevity of this paper in part indicates the nature of the problem: private interests involved in these undertakings hold this information so confidentially, even from their own governments, that accurate data is almost impossible to acquire. It would seem that private corporate interests as well as governments should be required to divulge such data to inter-governmental agencies if accurate developments in this area are to be understood and woven into the fabric of a global fisheries regime.

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Douglas Johnston's paper on treaty law aspects of a fishing convention deals with the technical application of international treaty law, and problems arising therefrom, to a future fisheries management regime. Mr. Johnston examines the impact of the Vienna Convention on Treaties on a future international fishing convention as well as possible consequences which a future international fishing convention could have on regional treaties. Obviously, any satisfactory fisheries management regime will have to stand the test of applicable international law in terms of a number of areas such as binding contractual obligations and reservations.

Lee Anderson's exposition of three criteria for maximum economic yield of an internationally managed fishery subjects the traditional concept of maximum sustainable yield to new vision and politico-economic interpretation, focusing particularly upon optimal economic objectives for international exploitation. Should the states of the world decide to use maximum economic yield as a management objective and meet the necessary criteria, all resources (fishery and otherwise) would be allocated properly, assuming the absence of other market imperfections. Whether such a decision is made on the part of the world community remains to be seen. Nonetheless, Mr. Anderson's economic analysis provides the reader with a means of assessing the economic merit of different countries' stand on fisheries management at the Third Conference, as well as enabling him to gauge just how much is given up before a final agreement, if indeed there is one, is to be reached.

In Robert Goldberg's paper the role of enforcement in a global fisheries regime, clearly a most important area of concern if a fishing convention is to be meaningful and lasting, is considered. The author suggests that part of today's discontent with the status quo results from enforcement problems. In view of the importance of the role of enforcement in the fisheries regulation process, enforcement must determine in part the success of any regulatory agreement.

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Mr. Goldberg examines the factors which influence and enhance the enforcement process. He also considers various issues which the enforcement of fisheries arrangements present and the possible resolution of these issues.

A set of "Principles for a Global Fisheries Management Regime" appear as Part VII in this volume. They are a product of the Working Group whose intention it was to devise a set of principles which, taken together, would form the basis of an optimum global fisheries management policy. They have been published separately by the American Society of International Law as number 4 of the series **Studies in Transnational Legal Policy**.

The Working Group recognized at the outset that it was unlikely that an optimum global fisheries management regime would be susceptible to widespread agreement at the Law of the Sea Conference. On the contrary, the Group's goal was not to produce a document or suggestions which would be generally acceptable, but rather the outline of a regime intended to maximize the efficient use of living marine resources. In this context, the Working Group was concerned with principles realizing optimum production, conservation of resources, and international cooperation, while minimizing sources of conflict and duplication of effort. As the reader will see, these principles reflect the very problems raised in the individual papers.

During the period between Caracas and the next session of the Law of the Sea Conference scheduled for spring 1975 in Geneva, much thought will have to go into the formulation of final provisions governing the use of living marine resources. It is the hope of the Working Group that these papers and the principles which are attached to them will be useful to a wide variety of individuals, engaged in this process, both within and outside governments.

I would like to thank the members of the Working Group for their diligent and thoughtful work. More particularly, I want to extend special thanks to Professor H. Gary

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Knight, Rapporteur of the Working Group, who carried a major burden in the drafting of the principles and in the editing of this volume. The American Society of International Law, under whose auspices the Working Group operated, was assisted by a grant from the National Science Foundation's Research Applied to National Needs Directorate, for which the Society is deeply appreciative. The facilities made available by the Society and the participation in the group's deliberations by John Lawrence Hargrove, Acting Executive Director, and Robert E. Stein, Acting Director of Studies of the Society, have greatly facilitated our work. Elizabeth Scheetz, a Society research assistant also helped with the final preparation of the manuscript for publication. The views expressed in the chapters of this volume are those of the individual authors, while the principles reflect the consensus of the members of the Working Group whose names are appended to the principles. They do not represent the views of the American Society of International Law which, as a Society, does not take positions on such matters of public concern.

Robert H. Neuman

Chairman

Working Group on

Living Marine Resources

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I. INTERNATIONAL FISHERIES MANAGEMENT: A BACKGROUND PAPER

*H. Gary Knight**

A. HISTORY.

1. Pre-1958.

a. *Freedom of the High Seas and Open Access.*¹

The international law principle of freedom of the high seas emerged during the sixteenth, seventeenth, and eighteenth centuries from the competitive struggle among Western European nations for access to the lands and resources of the newly discovered continents of North and South America, Africa, and Asia. The principle was based on the dual premises that the navigational capacity and resources of the high seas were inexhaustible, and that it was not possible for nations or individuals to subject areas of the high seas to their control. Although the concept of the territorial sea—a relatively narrow band of ocean adjacent to a nation's coast over which it had nearly absolute territorial jurisdiction—emerged contemporaneously with this

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¹ T. Fulton, *The Sovereignty of the Sea* (1911); P. Potter, *The Freedom of the Sea In History, Law and Politics* (1924).

The authorities cited for this and subsequent sections constitute general references for further reading on the particular topic and are not necessarily cited as specific authority for the propositions advanced in the paper.

principle, no serious impositions were made on the principle of freedom of the high seas prior to the latter part of the nineteenth and early part of the twentieth centuries.

The fundamental effect of the principle of freedom of the high seas is that living resources situated in the high seas are considered as *res nullius*—the property of no one—and therefore subject to ownership by him who first reduces the resources to his possession. Under such a regime, no restrictions could exist on access to the high seas or to the resources thereof, and thus the international law rule concerning the exploitation of fishery resources on the high seas became one of unregulated competition among nations and fishermen. So long as the demand for fishery products remained at a level which did not warrant the exploitation of a given stock at or much above its maximum sustainable yield, this legal system did not pose a significant threat to the continued enjoyment of the species by men. However, from an early date, the demand for particular species, coupled with conditions favorable to an intensive fishing effort in particular areas, placed in doubt the capacity of some stocks to return the subsequent season in sufficient quantity to permit a similar take or catch.

Although there were isolated instances of stock depletion due to overfishing prior to the latter part of the nineteenth century, it was not until then that the problem reached significant proportions. At that time, with respect to selected species, it became clear that continued unregulated exploitation of fishery resources would lead to reduction of stocks to a point where their availability as food for man would cease. As a result, measures were initiated to reduce the undesirable effects of the open access character of the international law principle of freedom of the high seas.

These measures, to be discussed in subsequent sections, constituted new infringements on the basis concept of freedom of the high seas. It should be noted parenthetically,

however, that the advance of technology, coupled with increasing world population and the concomitant increase in demand for resources, also worked to erode the principle. For example, the development of technology for the extraction of fossil fuels from beneath the continental shelf coupled with the rising demand for petroleum products, resulted in the evolution of the doctrine of the continental shelf which recognized the right of coastal states to place fixed structures in the high seas, an obvious conflict with the right of free navigation. Thus, although this article is concerned exclusively with fisheries, the reader should realize that parallel developments concerning the exploitation of ocean resources and the use of ocean space brought about by the need for allocation of resources were simultaneously taking place in other fields.

b. *Contractual Limitations on Freedom of the High Seas.*²

One perceived solution to the problem of unrestricted access and undesirable competition in a fishery was for nations to assert exclusive competence in adjacent maritime areas with respect to the exploitation of living resources. Given exclusive jurisdiction, the coastal state could then exclude nonnationals from the fishery and was possessed of the requisite jurisdictional authority to impose restrictions on its own nationals, or others if not excluded. Although this practice was utilized from an early date, discussion of it will be postponed because its impact was minimal until the mid-twentieth century.

The other approach designed to alleviate problems of congestion and overfishing, as well as international conflict

² F. Christy and A. Scott, *The Common Wealth in Ocean Fisheries: Some Problems of Growth and Economic Allocation* 192-214 (1965); Fisheries and Agriculture Organization of the United Nations, *Report on Regulatory Fishery Bodies* (F.A.O. Fisheries Circular No. 138, U.N.Doc.A/AC.138/64 (1972); A. Koers, *International Regulation of Marine Fisheries: A Study of Regional Fisheries Organizations* (1973).

generated by fishing disputes, was for nations to enter into international agreements concerning fishing activities. This approach to problem solving was necessitated by the fact that there existed no legal authority above nation-states which could assert or be vested with the requisite jurisdiction to engage in regulation of high seas resources. Thus the essential actors were the nation-states, with their attendant territorial imperatives, and that fact has determined the fate of high seas fisheries management systems to this date.

International fishery agreements were utilized as early as the eighteenth century, though their use to create management mechanisms proliferated only in the twentieth century, particularly after 1950. These later agreements created two basic types of institutions—research and management. The former, of which the International Council for the Exploration of the Sea (1902) and the Indo-Pacific Fisheries Council (1948) are examples, engaged only in the gathering and dissemination of scientific information which formed the data base for rational fisheries management.

Management (or regulatory) fishery organizations, of which there are now more than twenty, possess a wide range of powers and functions. A few are species oriented (for example, with respect to tuna and whales) while most cover selected fishery resources within a designated area. Some species-oriented bodies are also limited in geographical area.

All fishery regulatory organizations have as their basic task the gathering and analysis of scientific data on fishery stocks in order to promote more rational management. However, the regulatory powers of such entities vary greatly. Most have only the authority to make recommendations to their member states concerning appropriate conservation action which may include the establishment of seasons, restrictions on the use of gear, and the like. A few