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8/18/95
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Troubled International Waters: Bringing the State(system) Back In

Abstract for the Fifth Conference of the International Association for the Study of Common Property, 24-28 May 1995, Bodø, Norway,

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Garrett Hardin's famous 1968 article, the Tragedy of the Commons, sought to explain the degradation of resources held in common. The simplicity of the model combined with its seeming predictive success quickly made it the prevailing model among academicians, managers and users alike. In recent years, however, there has been widespread critique of the model and its applications as being historically incorrect and ideologically biased in favor of private property.

This paper examines fisheries in international waters and argues that the four resource management regimes identified by those working in the field of common property, State Property Regimes, Private Property Regimes, Common Property Regimes, and Nonproperty Regimes, fail to capture the essence of these fisheries. Just as Hardin is criticized for being historically inaccurate, these models also fail to capture key aspects of high seas fisheries. This paper proposes that these fisheries are best understood for most of the period (1945-present) as operating according to principles generated by specific interstate and international economic relations rather than as constituting management regimes in themselves. Furthermore, viewing the problem of international fisheries from this perspective tends to bias the consideration of solutions to the very real problems of overfishing in favor of the extension of coastal state authority. This paper further argues that the problems of the fisheries of international waters are not best solved by extending coastal state jurisdiction to these waters and that the attempt to do so raises some very serious questions of international distributive justice.

TROUBLED INTERNATIONAL WATERS: BRINGING THE STATE(SYSTEM) BACK IN¹

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Garrett Hardin's famous 1968 article, the Tragedy of the Commons, sought to explain the degradation of commonly owned resources. It quickly became the favorite model of academicians, managers and users alike. In recent years, however, critique of Hardin's model has become widespread, with most critics agreeing with Daniel Bromley's assessment that "the Hardin metaphor is not only socially and culturally simplistic, it is historically false" (Bromley 1991:22; McCay 1990). In the wake of widespread agreement that the Hardin model has hindered understanding more than it has helped, the search has been on for models that accurately reflect the dynamics of resource utilization. One area of focus has been on resource management regimes understood as structures of "rights and duties characterizing the relationship of individuals to one another with respect to that particular environmental resource (Bromley 1991: 22)." Four resource management regimes have been identified: State Property Regimes, Private Property Regimes, Common Property Regimes, and Open Access Regimes.

This paper presents the main points of an analysis now being developed. It examines fishing in international waters in light of these four property regimes and argues that none of these categories adequately captures the past or present dynamics of the exploitation of resources in international waters. In other words, with respect to international waters, these four descriptions--and Hardin's model--are historically, culturally, and socially simplistic. Instead, relations on the high seas are better understood by studying the stateless international (anarchical) society which has been generated by the complex power relationships and economic among states. Any sense of property in international waters or of rights reflects a relationship among states, not individuals. This adds a significant factor: The dynamics of

¹A paper prepared for the Fifth Common Property Conference, "Reinventing the Commons" (The International Association for the Study of Common Property), 24-28 May 1995, Bodø, Norway. This is a work in progress and is not for attribution.

relationships among states are influenced by considerations far beyond those dictated by the management of any single resource. From this perspective, we must bring into consideration the uses that fisheries in international waters have had from the perspective of the state.

The analysis leads to the proposition that the regime for the management for high seas fisheries has not failed, it has simply not yet been constructed. It is certainly not clear that extending the jurisdiction of coastal states will improve management.

1. CRITIQUE

This section offers a brief theoretical critique of the five models identified above: Hardin's Tragedy of the Commons, and the four common-property models of open access, common property, private property, and state property. In doing so, it lays out certain claims about the nature of high seas fisheries that are more substantially discussed in the next section.

1.1. Hardin and Property Regimes

Garrett Hardin's *Tragedy of the Commons* article set forth a model of interaction that led to degradation of what he termed "the commons". Viewing his work simply as a model largely invalidates many of the criticisms leveled against it: models and theories aren't reality, they are not true or false, nor are they more or less historically accurate. Models and theories are of use in explaining some restricted slice of reality. However, Hardin's model has been far too frequently embraced as if it were a description of reality. This unconscious embrace of Hardin's model is the reason that critiques of it have been of great value rather than methodologically misguided: decisionmakers who base policy on Hardin's model may be trying to solve the wrong problem. In this sense, the critique that Hardin's model consciously or unconsciously promotes private property as a solution to the problem of the commons, i.e., that it is ideologically biased in favor of a capitalistic solution, is on the mark.

For all of the problems of Hardin's approach, he has succeeded in focusing attention on "the commons" as the arena in which resources are often exploited. Hardin's commons are common grazing lands: each user has the incentive to add one extra cow to the commons even when the it is apparently over-grazed. The incentive is rooted in the distribution of the harm produced by the addition of the extra cow among all users through the harm inflicted on their cows while the advantage accruing from the additional cow (even an underweight cow) is held exclusively by the owner of the additional cow.

The central objection to Hardin's scenario is that he fundamentally misunderstands the nature of historical or present-day commons. Daniel Bromley (1991) criticizes Hardin and

Hardinesque approaches for equating "the commons" with equal access property regimes and outlines four ideal-types of resource management regimes. McCay and Acheson (1990) add the critique that a commons, like any property relationship, is a social institution which is rooted in a broader social context. In other words, the behavior of the users of a common resource is governed by the much broader social significance of the resource. All three point out the ideological consequences of adopting the simplistic Hardin model as a basis for policy making: it suggests that resource management is best done either through the introduction of a system of private property or by the intervention of a strong central authority (a Leviathan, usually the state).

This paper argues that the same sort of questions should be applied to high seas fisheries. What are the characteristics of these fisheries--are they best understood through their analysis as a resource management regime and sets of property rights? In what broader social context are they embedded? This paper applies these questions to the post-war period. It argues that for most of the post-war period, no international resource management regime for high-sea fisheries existed and that state behavior with reference to these fisheries is better understood by examining the international social systems in which they were embedded. Finally, it argues that the attempt to grasp the dynamics of the high-seas fisheries by focusing principally on the rules specifically governing the use and extraction of these resources supports the questionable tactic on the part of states to enclose them.

Bromely defines a resource management regime as "a structure of rights and duties characterizing the relationship of individuals to one another with respect to that particular environmental resource" (1991:22). He specifies four types of resource management regimes: state property regimes, private property regimes, common property regimes and nonproperty regimes. Note that rights exist only when "there is some authority system that agrees to defend a right holder's interest in a particular outcome", in his formulation, the state (1991:15). It is also important to note that he conceptualizes property not as the resource itself, but the benefit stream that derives from the resource. In a state property regime, individuals and groups are able to use the resource only with the permission of the state which owns the resource. Under a private property regime, property is owned by individuals (including corporate individuals) who can decide the use of the resource within certain limits. Under a common property regime, property is in a sense corporate group property from which non-owners are excluded. The nonproperty or open access regime is one in which there is no defined group of owners and the benefit stream is available to anyone. Because his open-access system has no defined group of owners, it seems to differ from Hardin's conceptualization which holds the user group constant and focuses on the incentive structure that influence the decisionmaking of these individuals.

Which of these property management regimes describes the high seas fisheries? It might appear that the state property regime fits because individuals (private and corporate) gain access to the high seas only because they are citizens of states which collectively own the high seas. This runs into the problem that no single state owns the high seas. What rights and duties exist on the high seas have been the rights and duties of states with respect to each other. This might suggest that the high seas fisheries are best understood as a commons owned jointly by those corporate individuals, the states. While this seems to fit, there are two objections to it. First, to the extent to which any regime existed on the high seas it has focused more on the rights not to be excluded from them and much less upon on positive rules or duties governing their use. Thus the high seas might constitute some sort of global commons but it is doubtful whether it is useful to characterize the operation of high seas fisheries as a property management regime. Second, this was a self-help system, lacking a collective authority with the legitimacy to enforce rights. Under this condition, rights slowly come to be recognized as rights in the interstate system because states assert and enforce certain claims. Only much later, if at all, are they defended by states because they are rights (especially if defense of the rights of some other state is the issue). The distribution of power among the participants (states) becomes a key aspect of the establishment and protection of rights. As John Locke put it, freedom (in this case the freedom to participate) requires not just in the will to act but also the ability. This is also a problem with Hardin's model in application to states: his actors are equal not just in relationship to their incentive to add an additional animal but also in their ability to add an additional animal. These points will be discussed more thoroughly in the second part of the paper. Finally, for many of the reasons given above, the high seas cannot be described as a private property regime.

Are the high-seas fisheries then best described as a system of open access? Bromely describes a nonproperty or open access regime as a situation in which "there is no property" and suggests that this non-regime is found where authority has broken down or where the resource is new one which has not yet come under control of a regulated social system. This certainly fits in one sense: the expansion of fisheries on the high seas after World War II is largely the story of more and more resources becoming accessible and exploitable through ever greater improvements in technology. The problem here is that while there was no legal authority to exclude states from access to these resources, the states did possess the authority to regulate the entry of their citizens and corporations. State decisions are in turn based upon many grounds: the management of any particular resource may easily be eclipsed by other considerations, compelling or trivial. Another factor is that the conduct of these citizens and corporations on the high seas may be motivated by the desire to influence state behavior, possibly with respect to issues that have little to do with fishing. Analyzing the operation of

states from the perspective of the property regime and characteristic of the living marine resources themselves may consequently be misleading.

Finally, while the high seas have theoretically been open to all, in practice many have in fact been excluded. As discussed above, this has much to do with the varying capability and resources of the actors. It is also rooted in the order that has been generated on the high seas through the interaction of states on matters unrelated to fisheries. In other words, the interstate and the international economic systems have mediated the open access nature of the high seas fisheries.

This critique can be summarized in the following way: the common property approach is a public policy approach and its formulations presuppose that the resource in question exists within the confines of a state. This is obviously not the situation on the high seas and, not surprisingly, a public policy approach to high seas fisheries fails to adequately capture its essence. I would argue too that examining the question from this perspective tends to support the post-war enclosure of the high seas in as much as it suggests that management can only be carried out within states and under some system of property rights which a single authority (the state) can enforce. The result has been the generation of a great deal of literature focusing on the "best" construction of property rights and on its enforcement. By enforcement, it is important to note, is meant not just ensuring that users of the resource obey the rules but also assuring the users that non-owners will be kept out. In other words, the emphasis is on the progressive narrowing of access to the resource not just by fishers but other states (competing authorities) as well. The unique feature of high seas fishing is that access to them is controlled by states and is in part decided through interaction with similar states. State decisions on access may have little to do with the fisheries resources themselves.

1.2 .The International Context

What is the social system within which high seas fisheries take place? First, they take place in a physical context with a specific characteristic: stretches of waters over which no single state has jurisdiction. Second, they take place within a world economy. That is to say, the social system that exists among states and the broad international economic context must form an important part of the analysis.

The absence of an a single enforcement authority is a condition of anarchy, but few theorists of international relations would characterize the complex relations among states and other actors as lacking some sort of order. Instead the focus is on understanding the rise and operation of order in the absence of central authorities. Within the field of International Relations, the realists and regime theorists have been most concerned with these questions. This analysis incorporates both, arguing that each has use for particular aspects of state

behavior but that neither is adequate in itself. It suggest further that the explanatory power each varies issue by issue and over time.

Realists such as Healdy Bull (1977) and Kenneth Waltz (1979) focus on the order generated by the interplay of states without losing sight of the specter of war. The advantage to this approach is that it focuses attention on the characteristics of states themselves including, but certainly not limited to, power. It also focuses attention on the existence of and importance of order *per se* within the interstate system. Finally, it allows us to focus on states as institutions for which questions of security and international competition have been peculiar and often dominating among their wide range of interests and concerns. As Stephen Krasner (1978:11) put it, states are "a set of roles and institutions having particular drives, compulsions, and aims of their own that are separate and distinct from the interests of any particular societal group."

Bull postulates the existence of an international order or "a pattern or disposition of international activity that sustains those goals of the society of states that are elementary, primary or universal" Those goals are the preservation of the system and society of states itself, the maintenance of the independence or external sovereignty of individual states, peace (i.e., the general absence of war and the common goals of all social life (limitation of violence resulting in death or bodily harm, the keeping of promises, and the stabilization of possession by rules of property, i.e., sovereignty and jurisdiction) (1977:16-18).

Waltz's approach is much more mechanistic in its focus on the number of states in the system as a key variable in explaining the operation of the system. Yet Waltz also forces us to examine states as institutions which undergo a socialization process through which they "learn" proper behavior. The ability to "learn" is a factor that contributes to their change of survival. A part of that learning must be the ability to recognize threats and respond to them. Kissinger points out that learning limitations on state behavior is also critical: "revolutionary" states are dealt with harshly by the interstate system.

The key points to be drawn from the realist approach to international politics are that power and power disparities do matter and that states have particular interests the importance of which are reinforced by their interaction with other states.

Within regime theory, the prevailing vision of international interaction posits the existence of something more than the mere existence of order: governance without governments. In one popular definition, governance is "order plus intentionality" (Rosenau 1992:5). International governance is thus more a conscious construction than the unconscious result generated by the billiard-ball-like interaction among states. It arises out of "voluntary agreements to play by a set of rules which are binding in the sense that they create convergent expectations and govern behavior" (Mayer, Rittberger and Zürn 1995:393). The rules are not

enforced by a government but are instead generally complied with because of the wide-spread recognition of the legitimacy of the rules and the norms the rules are based upon (Mayer, Rittberger and Zürn 1995:393). Consequently, within regime theory, many focus on precisely this sense of legitimacy through a focus on the normative institutions created by states and other international actors, usually by examining one issue area in-depth. While the complexity and formality of regimes vary greatly, the focus generally seems to be on interaction with a great deal of positive content, i.e., complex rule structures with specific goals.

The strength of regime theory is its focus on the complex interactions among states in sometimes very complex areas of behavior where the international power distribution is mostly a backdrop to the action. Insights drawn from regime theory also provide clues as to just how these institutions known as states configure their "national interest" and how (or if) learning occurs. It suggests, for example, that parts of the state bureaucracy become socialized in different ways through interaction on different issues. Different parts of the bureaucracy thus have different constituencies and resources both at home and abroad. The major powers now seem to be engaged in dramatic reassessments of their national interests. This would seem to open the door to shifts in the power structures within state bureaucracies, giving different aspects of it a chance to press their specific agendas. By shifting the focus away from power, regime theory also allows non-state actors a much more important role, an important consideration today given the wide-spread assessment that the foundations of the state have been severely undermined. Finally, regime theory directs attention to the process of formation of patterns of behavior. Regime theory does seem to share with realism the assumption that order has value in an of itself.

Indeed, having said all this, the problem remains that such legitimate norms would appear to have been lacking in the area of international fisheries in as much as resources the world over have been reduced to a state of crisis. This, however is a misreading of the situation. It is more accurate to say that the norms in operation were not specific to the management of high seas fisheries (and certainly not the preservation) of the stocks: international fisheries were conducted according to legitimizing norms that either excluded the importance or possibility of overfishing or which simply gave priority to other norms. These norms reflected the dominance of two international orders: the interstate system and the international economic system.

The general framework established for managing fisheries thus has its origins in the evolution of rules designed to manage conflict among states and the slow movement towards genuine fisheries management has occurred principally within an economic system geared for economic growth, development and modernization. Rules governing marine fisheries were governed by rules and norms that were particularized versions of those governing these

international order which embodied the intentions of these two orders (Young 1989:22). The management of marine fisheries was from this perspective the management of an set of interactions by key international actors which could come into conflict as they competed for resources, not the management of the use of the resource itself. It is possible, however, that a genuine international regime for fisheries is now developing based on values, principals and intentionality specific to the resources to which they are to be applied.

The realists contribute the idea that when the interests of states change, the order generated by the interaction may change as well. This is reflected by current attempts to redefine the National Interest in terms of threats produced by global environmental degradation, over-population, and resource scarcity (Homer-Dixon 1991). These reassessments not only concern the nature of threats to the state: they include some recognition of the environmental cost of warfare itself. The focus of the realists on international conflict contributes to the consideration of international order with respect to fisheries by viewing them as possible flashpoints for international conflict and as destructive to the broader relations among states. It also highlights the possibilities for new forms of transboundary interaction presented by differing inter-state orders.

2. THE NONREGIME FOR HIGH SEAS FISHERIES

The argument here is that no regime for high seas fisheries existed after World War II but that the current fisheries clashes on the high seas indicates that it is now in the process of being constructed. This point will be discussed with respect to three post-war periods: 1945 to 1977/8, when security concerns of the interstate system dominated; 1977/8 to 1991, a transitional period which saw the dominance of the interstate system loose ground to the international economic system; and 1991 to the present, an even more fluid period in which both have been challenged. The time periods are approximate: the 1977/8 dividing line is selected because of the adoption of 200nm EEZs around that time by many coastal states. The second timepoint, 1991, marks the dissolution of the Soviet Union and thus the definitive end of the Cold War. The 1991 date has an arbitrary quality to it: the fabric of the Cold War began to unravel in the last third of the 1980s. The intent, however, is to focus on the importance of the international security order on the operation of fisheries. The general question of the existence of a regime will be examined by looking the formal institutions and rules creation to govern high seas fisheries and at practice which should indicate the presence of informal rules. It should be stressed again that the following more of a research agenda.

2.1. 1945 to 1977/8

Oran Young (1989:51) has decribed the traditional regime for fisheries (prior to the development of modern technologies) as "open-to-entry common-property regimes." The introduction of new technology also introduced "radical instability" that led to a move to transform marine fisheries on the high seas to restricted common-property regimes through the introduction of regional fisheries organizations. The central assertion here is that the general adoption of 200nm EEZs at the end of the 1970s was also the wide-spread acknowledgement that neither a high seas fishings regime in general nor regional high seas fishing regimes had been achieved.

The right of nations to fish freely on the high seas developed as a part of the general concept of "freedom of the seas." While the general concept has roots as far back as Grotius's *Mare Librum* of 1604, von Glahn argues that it was not "achieved" until the nineteenth century when states generally abandoned claims to large stretches of ocean. The basis of the concept was "the common recognition of the desirability of preventing one state, or a group of states, from asserting a legal right to bar other members of the community of nations from the use of any portion of the high seas" (von Glahn 1976:323).

As an part of freedom of the seas, the right to fish on the high seas clearly developed as a part of order generated as the modern interstate system developed. Freedom of fishing, along with the other freedoms mentioned, first and foremost grew out of compromises among states as the nature and limits of sovereignty were established: it was an artifact of the denial of the right of any state to extend sovereignty over the high seas. In practice, marine fisheries were both the tools and objects of state power, prestige and conflict. Innes (1954), for example, has documented how the fisheries of the northwest Atlantic were a driving force for the settlement of North America and the thus creation of the first British empire. His work also shows the importance of the fisheries themselves as integral parts of the triangle trade that financed the British empire and the colonization of North America, as the repository of experienced seamen that could be dragooned into the service of contesting naval forces, as generators of protein for the navies and the population back home, and as sources of conflict among states. Marine fishies created a presence which serve as the basis of extening state power as well as a pretext for extending state power. Given these origins, whatever order that developed would seem to be more the management of state-to-state relations in the interest of avoiding conflict rather than the management of a resource (which must in many cases have seemed unlimited--particularly off the coast of Canada).

It is certainly the case that rudimentary regional regimes began developing before the turn of this century. Heavily-fished European waters are one example. The English Channel Convention of 1837 created a commissssion to issue fishing regulations. Underdal (1980:45-

7) describes the North Sea Convention of 1882, signed by Belgium, Denmark, France, Great Britain, and Germany, "the first comprehensive international agreement concerning rules of conduct in the Northeast Atlantic." These and a host of other international agreements generally advanced the notion that freedom of the seas did not mean freedom to do just anything: it was limited by the notion that the rights of other states were not to be violated. International agreements among states with respect to fishing on the high seas had the effect of limiting the conflict that might arise from competing claims to fishings rights by states. While these developments contributed to the trend towards establishing a marine fisheries regime on the high seas, this paper suggests, they were themselves far too limited to constitute one.

2.1.1 Post-War International Law and Organizations

The story of international law since the end of World War II has been one of the steady expansion and ever-greater precision. With respect to fisheries, a increasing number of international treaties were signed and regional and other fisheries organizations founded. Within the United Nations, the Food and Agriculture Organization concerned itself with marine fishing. The creation of the United Nations Environmental Program (UNEP) in wake of the 1972 Stockholm Conference was an important development. Of key importance were the three Law of the Sea Conferences (Geneva 1958, Geneva 1969, and Caracas 1974 which began the process that produced the 1982 Law of the Sea Treaty). The key point is that these events represent steps towards the creation of a high-seas management regime but do not in themselves constitute regimes.

The 1958 Convention, which entered into force in 1962, confirmed that all nations, coastal or landlocked, had a right to access to the high seas. Activities accepted as a part of freedom of the seas included the freedoms of navigation, fishing, laying submarine cables and pipelines, and overflying. Significantly, the convention also recognized the concept of contiguous zones, which could be no longer than 12 nm from the baselines from which national waters were measured, within which a state could "exercise protective as well as preventative control." However, it denied that states had exclusive or special fisheries rights within these zones. In practice, however, several states, including the United States, had already begun to unilaterally establish contiguous conservation zones (von Glahn 1976:333).

More limitations were embodied in the 1958 Convention on Fishing and the Conservation of the Living Resources of the High Seas. Here the rights of coastal states are advanced somewhat because the right to fish on the high seas is subject to the "interests and rights" of coastal states. This convention was not widely adopted but its Article II, which says that states have the duty to cooperate with other states in adopting measures "as may be

necessary for the conservation of the living resources of the high seas" is considered a part of customary law (Burke 1990). The growing recognition of the need for conservation of living marine resources on the high seas and the growing presumption that states had the obligation to regulate the activities of their nationals was confirmed in the International Court of Justice ruling with respect to the fisheries war between Iceland and Great Britain.

Three points are important here. First, while the recognition of the duty of states to work for the conservation of the resource does begin to add positive content to the mere right not to be excluded, the rights and duties of states as set down in these written examples of international law are far too vague to qualify as a management regime. Second, along with the growing recognition of the need to conserve living marine resources on the high seas there was a growing movement on the part of coastal states to extend their jurisdiction over such resources, i.e., to end the condition of anarchy rather than to manage or govern it. Third, although the goal of the conservation of stocks remains vague it does represent movement towards a genuine resource management goal.

2.1.2. Fisheries Organizations

It is reasonable to argue that texts such as the Law of the Sea Convention of 1958 are meant to establish general principles rather than management regimes and that the existence of such regimes are better sought by examining the regional fisheries that developed on the high seas. In doing so, the examination of regional fisheries organizations and treaties is important.

The post-war period saw the establishment of a series of regional and international fisheries organizations. The International Whaling Commission was established by the International Convention for the Regulation of Whaling which entered into force in 1948. It was somewhat unusual in its early establishment and in having an area of competence of "all waters in which whaling is prosecuted by factory ships, land stations and whale catchers under the jurisdiction of the Contracting governments." Most organizations were regional with respect to area of competence, but most were open to membership by any state that desired to join. The International Commission for Northwest Atlantic (ICNAF), which was established on the basis of a treaty signed in 1949, is an early example. Several regional or international commissions were established in the 1960 and 1970s. Fisheries the North East Atlantic Fisheries Commission (NEAFC) was established in 1963, The Western Central Atlantic Fisheries Commission (WECAFC) in 1973, the Regional Fisheries Advisory Commission for the South West Atlantic (CARPAS) in 1961, the International Commission for the Conservation of Atlantic Tunas (ICCAT)--a 1991 FAO publication lists 22 of them (plus the International Council for the Exploration of the Sea, ICES, a scientific body) (Savini 1991)

My preliminary investigation of these regional organizations suggests a general low level of agreement on management principles and objectives, even among states that have a long history of fisheries negotiations, agreements and conflicts. The experience of regulation and management within the IWC, NAFO, NEAFC and ICCAT seems to suggest that the creation of regulations has been tough, time consuming and limited.² While some gear and time and effort restrictions were achieved, regulations which place significant constraints upon fleets were seldom (if ever) adopted before the resource in question declined precipitously. Work by Peterson (1992), Haas (1991) and Underdal (1980) suggests a cluster of factors that might account for the general lack of success in these cases: lack of knowledge about the resource, the political role of scientific uncertainty, the relatively small size of the secretariats of the organizations, the lack of a sense of crisis, lack of engagement by other parts of the state bureaucracy, and the role of non-governmental organizations.

Much has been made of the fact that these organizations were unable to impose and enforce decisions upon unwilling members who were able to escape unwelcome decisions by lodging objections to them. This critique seems misguided: these organizations were (and are) principally governmental organizations focused on international waters. It is just this feature that gives high seas fisheries the distinctive character that sets them apart from many other cases of resource management. The delegation of rights to enforce and manage to such an organization would in fact diminish sovereignty, which brings a host of non-fisheries related issues into play. States must agree and willingly enforce provisions on their nationals or the possibility exists that they will become the shelter for rogue operations and vessels reflagged to evade regulations.

2.1.3. Practice

The real test of the presence of an international regime would seem to be evidence of the operation of rules and institutions supporting specific values relating to resource management--the conservation of stocks and thus a sustained fishery. Aggregate statistics and anecdotal evidences suggests that no such value has been incorporated into state behavior. While states have often expressed the desire to stabilize international fisheries, they seldom acted decisively in this period to do so.

The aggregate statistics, i.e., the aggregation of all all the world's catches show a

²Underdal (1980: 52-3) credits NEAFC for making significant progress beginning in 1969 but also notes that the slow rate of progress prompted several states to make agreements outside the organization. By the time the Commission was adopted (July 1974 to June 1975), whatever momentum the NEAFC had achieved was then disipated by the knowledge that states were about to create 200 nm EEZ. He notes that NEAFC's performance "amounted to less than a convincing defense fot its contined operation" (1980:55).

rising total throughout the post war period, with particular increases coming in the 1950s and 1960s. Breaking down the statistics by region, it is clear that the greatest proportional increases in catches took place outside the North Atlantic, particularly in the South east and North west pacific (Coull/FAO 108). While fishing did not expand significantly in the North East Atlantic, that region was the site of serious examples of overfishing, those of the Atlanto-Scandinavian and North Sea stocks of herring: The rise and fall of the Peruvian anchovy fishery in the 1960s is another commonly cited example from this period.

It is hardly necessary to spend much time proving that stock conservation was not the operative principle guiding high seas fishing between 1945 and 1978, even if it seems clear that this principle was growing in importance. The real question is whether any principles guided them at all, and if so, which ones?

This paper hypothesizes that high seas fisheries were "managed" as adjuncts of the inter-state system of the international economy. From the perspective of the inter-state system, the principles governing fisheries international under development within international law were those which would enable states to avoid conflict. In practice questions of sovereignty, jurisdiction, and conflict management came into play. From the perspective of the world economy, high seas fisheries were economic activities to be managed. The rooting of fisheries management regimes in these perspectives has had important consequences. First, protecting a state's access to marine fisheries could have implications with respect to the extent of its sovereignty. Thus, in at least some instances, the defense of fishing rights and the presence of a state's nationals could have less to do with fishing than with interstate politics. The Cod Wars between Iceland and Great Britain (1958, 1972-73, 1975-76) were as much about Iceland's defense of its economy and way of life and Britain's obligation to defend its citizens and, in consequence, its prestige as about fish. Significantly, Iceland was quick to drag NATO into the equation putting allies in a position of choosing between principals of international law and questions of security. The U.S. supported the rights of its fishermen to fish in some disputed waters through the Fisherman's Protective Act which compensated fishermen for losses suffered there.

Second, where states specifically decoupled fishing from issues of sovereignty, they became just another realm of economic activity into which the productive capacity of their nationals could be channeled. If this perspective is correct, then the development of high seas fisheries was in many cases a part of the general development strategy developed by states following World War II and had little to do with fisheries as such. This would mean that approaches that focus on the resource, its characteristics, and the rules governing its exploitation (such as the property regime) are inappropriate for this period.

Future research in this area will focus on the place of high seas fisheries within the

national development strategies of individual states. One example here is that in the early 1950s, the Labor government in Norway put forth a plan for the development of Northern Norway, an area considered to be underdeveloped and non-competitive. A key component of the plan was the rationalization of the cod fishery through the introduction of larger boats and better technology and the development of new products (Nordhaug 1992:47). The present economies of Iceland and the Faeroe Islands were built upon fisheries often conducted far from home. Greenland's non-traditional fishery was a part of a development strategy encouraged by the Danish government. The fish meal industry developed in the west fed the poultry industry. The Soviet approach appears to have focused on securing additional protein for populations in the context of over-all development plans.

Another avenue of research is to examine the nature of those vessels actually fishing the high seas. This would include whether they tend to be vessels owned by large private industry, especially if such vessels comprise only one part of a series of investments by the company, if the vessels operating on the high seas were heavily subsidized by states, and if the fishing industries had strong influence on decisions taken by the responsible authorities (for example, within fisheries ministries) at the national level. Examination of the Soviet system will require a separate approach but a similar logic: what is the social context of state decisions about fisheries? With respect to the "west", I argue that driven by the logic of profit and loss and the need to recoupe investments, the specific nature of the resource itself was overlooked until overfishing eroded profits. In this context, the adoption of the goal of conservation was likely adopted with goal of conserving the industries that fished the resource than the resource itself. A glance at the present environmental conditions within the former Soviet Union suggests that these resource were unlikely to have fared conceptually better under the Marxist drive to subjugate nature.

Finally, it must be pointed out that the effective management of fisheries requires a good deal of information about the resources. This information was largely been lacking with respect to specific stocks. Multi-species management, a more wholistic approach which attempts to take the relationships among species into account was not developed. The lack of data has given scientific assessments a degree of unreliability and uncertainty. Where uncertainty exists, it is difficult to build a political consensus within states as to the need to take dramatic action which will hurt domestic actors in the short run. The shortcomings of scientists and the resulting political and socio-economic impact has been most spectacularly demonstrated with respect to Atlantic Canadian fisheries. Peter Haas (1991) has demonstrated just how important agreement among an epistemic community can be in convincing governments to take decisions that hurt.

2.2. 1977-1991

It was assumed that the wide-spread adoption of 200 nm EEZs would place approximately 90% of marine fisheries within the national jurisdiction of states. The adoption of these EEZs generally followed the wide-spread agreement on this principal within the third Law of the Sea Conference. While the Convention did not officially enter into force in this period, its provisions regarding fisheries were widely accepted as authoritative. Several points are of importance in this period.

Despite the extensions of EEZs, high seas fisheries remained important. In fact, they increased the importance of fisheries farther out to sea by displacing vessels from exclusive economic zones. This would eventually make the issue of fishing on straddling stocks (stocks that are found in both national and international waters) of great importance. Whales, tunas, squids, salmon, sharks, ocean horse mackerel, oceanic turtles, Alaskan pollack are among the important species that have been taken on the remaining high seas.³

The 1977-1991 period was an important era of transition in the interstate system. At the beginning of the period, the Cold War became a shade colder as the Soviet Union invaded Afghanistan. However, there was a noticeable thaw towards the end of the period. The Cold War may have "ended" with the destruction of the Berlin Wall in 1989--it was unraveling still earlier. Several U.S. international fisheries policies dating from this era suggest the importance of non-fisheries related elements in deciding fishing policy. The US Fisheries Management and Conservation Act (FMCA) was in part designed to Americanize fishing within the new US EEZ⁴. President Carter barred Soviet Fishing within the US EEZ from 1980 to 1984 as one response to the invasion of Afghanistan. Third World states that supported the creation of 200 nm EEZs did so for reasons of national prestige as well as to take charge of their economic development by taking control over the fish of their shores.

If factors unrelated to fisheries management had influenced fisheries management decisions, it was also the case that changes in the interstate environment allowed some progress to be made in fisheries management. Gorbachev's 1987 speech in Murmansk, for example, marked the beginning the general improvement in east-west relations in the Arctic

³The International Whaling Commission (IWC) adopted a temporary ban on whaling which when into effect in 1986. Some whaling did continue after that, however, under research programs of scientific whaling, permitted under the category of aboriginal whaling, by states that registered objections to the IWC resolution, and by states outside the IWC. Some whales were taken as by-catch. The IWC moratorium is still in effect although Iceland had now withdrawn from it and Norway has decided to resume issuing permits to take minke whales.

⁴The question of the nationality of the fishers seems to be an issue quite distinct from questions of how many fish are taken when, where, and with what type of gear.

that allowed greater fisheries cooperation between the Soviet Union and Norway to evolve. Given the important role of the Soviet Union in distant water fishing in the post-war period, conditions that would contribute to improving effective monitoring of the Soviet fleet were important.

This perspective tends to suggest that the creation of 200 nm EEZs also occurred for reasons other than the management of fisheries. Certainly the growing prospects of oil drilling and seabed mining on the continental shelves played important roles. It does seem clear that growing fears that high seas fisheries were being over-exploited were an important factor. However, it seems equally clear that states sought to shift the benefits from the exploitation of these resources to their own nationals. Thus one research question is whether the adoption of these EEZ changed the pattern of fishing or just the nationality of the fishers. What did states trade for granting access to their zones? What sorts of fees were charged and how significant were they for development plans? Canada, for example granted access to its fisheries as a reward for gaining access to foreign markets (Miles and Burke 1989:344). Such considerations need not conflict with resource management but they easily can.

As immediate security concerns ebbed along with the decade of the 1980s, other developmental trends gathered speed. This was a period of steadily increasing international trade and the development of trading bloc meant to strengthen that trend (NAFTA, EC/EU). The progressive economic and political weakening of the socialist bloc and of other socialist-oriented countries (and even the Nordic welfare states) suggest the strengthening of the capitalistic ethic and a reinforcement of the drive to compete internationally. Competitiveness was the watch word of the late 1980s. Embedded economic liberalism lost ground to a rawer version. It is unlikely that marine fisheries were untouched by this change.

However, the emerging triumph of the capitalist ethic was accompanied by growing concern for the environment which at least challenged it. The 1972 UN Conference on the Human Environment was an important milestone marking the arrival of concern for the environment on the international agenda and left behind it the United Nations Environmental Program (UNEP) to carry on the work. A host of global environmental concerns developed: the greenhouse effect, the ozone hole, and the destruction of the rain forest provided images of global destruction on a scale previously reserved for nuclear war.

Finally, the technological and scientific revolution relentlessly transformed industry, communications and the very nature of power itself. While science and technology on the one hand fueled competition, it also provided the growing environmental movement with weighty confirmation of some of their fears and the means to organize across borders.

All these developments contribute to the undermining of the position of the state itself in international society, including its key aspect of sovereignty.

2.2.1. International Law

The shifting nature of the international context was quite understandably reflected in the landmark 1982 Law of the Sea Convention (CLOS). The CLOS recognized the rise of concern for resources themselves by adopting the principal of "conservation" but still focused on the importance of the rights of states rather than on positive management duties of states. Even the duties of states conducting high seas fisheries were principally towards the coastal state, not towards the resource. This is still a tool for conflict management not resource management.

Although the CLOS did not formally enter into effect in this period, the portions of it treating fishing--the recognition of 200 nm EEZs, the rights and duties of coastal states within EEZs, rights and duties of states on the high seas, and passages dealing with highly migratory species, marine mammals, anadromous stocks, catadromous species, sedentary species, shared stocks and straddling stocks--were widely regarded as reflecting customary international law. The significant points here are that the rights of coastal states are greatly expanded (they decide how living marine resources within their zones will be exploited), the freedom of states with regard to high seas fisheries has been reduced (they now have a duty to cooperate with coastal states when fishing shared stocks and anadromous stocks⁵), and conservation and environmental aspects are strengthened. As Burke puts it, "Parts V and VII make it abundantly clear that high seas fishing on straddling stocks can no longer be conducted in disregard of the rights, duties, and interests of the coastal state concerned." However, he also notes that the principles embodied in the UNCLOS are vague and general and suffer from a "lack of specific guidance in particular contexts." Moreover, at the time he wrote, 1990, the general principles had not been applied in concrete disputes nor had coastal states undertaken unilateral action to deal with problems resulting from unrestricted fishing on the high seas.

The U.S. actions regarding the large scale pelagic driftnetting on the high seas are important in this context both because of the legacy of the subsequent agreements with Japan,

⁵Burke (1990:310) writes that "Article 66 provides that in the absence of agreement with the state of origin of anadromous species there shall be no fishing for such species on the high seas, i.e., beyond an exclusive economic zone." While Article 66 does not seem that categorical from my own reading, it certainly gives "states of origin" the "primary interest in and responsibility for" such stocks. In practice, the most important high seas fishery, that conducted by Japan in the Northern Pacific, has been regulated for many years through the International Convention for the High Seas Fisheries of the North Pacific Region. The long-term management of this fishery and the acceptance of the rights of the states of origin by all the states of the region, gives the rights of states of origin the force of customary international law.

Taiwan and South Korea and because of UN agreements on the driftnet issue. Driven by environmental organizations backed by the Congress in the form of laws and hearings, the U.S. pressed Japan, Taiwan and South Korea into agreements designed to monitor the fisheries and scientifically investigate their impact on marine life, specifically marine mammals. By the provisions of the Pelly Amendment to the Fisherman's Protective Act, the U.S. Commerce Department threatened to certify and in some cases did certify these countries to push them into the agreements (certification raised the possibilities of economic sanctions). The data yielded by the monitoring proved persuasive enough to pressure these countries into ending the fisheries. The U.S. also pressed other nations to modify their marine fishing practices with regard to the by-catch of marine mammals in Pacific tuna fisheries and shrimp fisheries. In all of these cases, environmental NGOs (and domestic U.S. fishing interests) played important roles in raising the issues, pressing Congress for laws, and maintaining pressure. The U.S. did not resort to economic sanctions in the driftnet case but has barred the import of tuna from countries that don't meet U.S. requirements with respect to dolphin by-catch.

Several points are important here. First, the driftnet agreements seem to represent an important extension of coastal state prerogative. Second, the apparent willingness of the U.S. to elevate the issue to economic sanctions significantly raised the visibility of the issue and brought in governmental actors far beyond the area of fisheries. Third, the role of the NGOs was important in mobilizing Congress--although they were not the only important actors. Fourth, it was also clear that the shrimp/turtle and tuna/dolphin issues were also about the actions required by those operating outside of U.S. waters that would support conservation and management decisions affecting fishing practices within U.S. waters (i.e., maintaining the competitiveness of U.S. fisheries). Fifth, it seems clear that a general loosening up of the international security climate has played a role in the U.S. threat of trade sanctions with respect to fisheries issues: it seems unlikely that such threats would have been believable at the high of the cold war against such countries as South Korea, Japan and Taiwan.

The UN resolutions on driftnetting are of interest because they place the burden of demonstrating the soundness of driftnet fishing on those states conducting the fishing rather than charging the U.S. and other anti-driftnetting states with proving the destructive character of them. This in turn seems to indicate a growing global embrace of the principle of taking the health of the resource into account, another shift in focus away from managing the fisheries strictly on the basis of the impact on those fishing on them. UN resolutions, it must be noted, do not have the force of international law.

2.2.2. Regional/International Fisheries Organizations

Organizations such as ICNAF and NEAFC were disabled by the creation of EEZs which dramatically reduced the area of their jurisdiction (the high seas). However, they were soon reborn as the Northwest Atlantic Fisheries Commission (ICNAF without U.S. membership) and NEAFC (II). These and other organizations were redesigned or created in recognition that the CLOS did not solve a series of problems, particularly straddling stock problems. These potential problems became more concrete through the 1980s as fishing on the international side of high seas boundaries increased. By 1989, the most important conflicts were in the Northwest Atlantic (the NAFO area, groundfish), the East Central Pacific (the IATTC⁶ area, tuna/dolphin), Southeast Pacific and Southwest Atlantic (the CPPS area⁷, jack mackerel, Spanish sardine, souther blue whiting, poutassou), and Northeast Pacific/Bering Sea (the Doughnut Hole, pollock) (Miles and Burke 1989).

In the 1980s there was a renewed effort made within these organization to adopt improved management techniques. Debates were, however, marred by disagreements in management philosophy ($F_{0.1}$ versus F_{max} in NAFO, categorization of highly migratory species in the IATTC) and scientific uncertainty about stock levels. There was also the problem of new entrants in to what remained, after all, international waters. Superpower politics also played a role here: while the U.S. and Soviet Union managed a degree of cooperation in the Central Bering Sea, Miles and Burke (1989) point out that both had to be careful in the approaches they adopted to solving the problem not to disturb the delicate balance of of the CLOS which served many purposes beyond fisheries.

Several points seem relevant here. First, the operation of these organizations made it clear that significant regions of the formally high seas were no longer freely open to entry. States could insist upon entry, even possibly organizations to award a quota through the threat of unregulated fishing, but at a cost (which would presumably vary with the non-fisheries related power of the states involved). Even relative proximity and a not-too distant historical fishery did not give the U.S. greater legitimacy among other members when it began to seriously consider joining NAFO in the early 1990s⁸. Flag of convenience countries were placed under increasing pressure to actively monitor the actions of their fleets. Second, states were under increasing pressure to make agreements and stick to them. Third, fisheries

⁶Inter-American Tropical Tuna Commission

⁷Comision Permanente del Pacific Sur.

⁸There was virtually no U.S. fishing in the critical NAFO areas at the time membership was contemplated which gave the U.S. little incentive to press the matter. Membership, however, would have given the U.S. government greater ability to control fishing in the area.

biology has made greater and greater strides through out the period: these improvements and the all too observable decline of key stocks has increased the importance of scientists.

The case of whaling has been important and merits more attention than it can be given here. In short, the adoption of the moratorium in 1982, which was to take effect in 1986, came at a point at which the profitability of commercial whaling had dramatically declined for most participants. The history of the regulation of whaling seems to be one of international attempts to regulate the business of whaling rather than the whales themselves. Little significant action was taken until many stocks (principally the largest whales) had declined to dangerously low levels. Whaling is another issue on which the U.S. has threatened economic sanctions: both Norway and the Soviet Union have been certified but not sanctioned. While the whaling moratorium was achieved because of a general misperception that all whale stocks were highly endangered, it was officially to allow a scientific assessment of stocks to be made. In short, the moratorium was officially designed and accepted as evolution towards implementing genuine stock management.

It is interesting to note in this context that the impact of certification and possible sanctions on the NATO relationship between the U.S. and Norway was assessed on the part of the U.S. government when the certification question was weighed. Peterson (1992:181) claims that Norway invoked the NATO relationship during the negotiations.

2.2.3. Practice on the High Seas

The world catch of fish may have peaked in 1989. Marine stocks were generally over-fished or fully exploited by the close of the period, but the total high-seas fleet (defined as vessels over 500 Gross Registered Tonnage-GRT and support vessels) continued to grow throughout the period, from 11.3 million GRT in 1975 to 15.2 GRT in 1991. The greatest growth in high seas fishing occurred in the Pacific, where the 1980s marked the emergence of China as the single greatest marine fishing nation of the world (4.9 mt landed in 1982 compared to 13.1 mt landed in 1991), others also maintained or expanded their distant water fleets throughout this period. The total GRT of Western European (EC/EU and non EC/EU) high seas vessels stood at 715.3 thousand GRT in and 933.1 thousand in 1991 (NMFS

In short, while the the creation of EEZs may have been in part stimulated by fears of growing pressure on stocks, there seems to have been little discernable change in the behavior of states with regard to marine stocks. Indeed, many of the resources most depleted lie substantially within EEZs. Much of the blame rests with the coastal states even if there was substantial fishing on straddling stocks just outside their border. Key questions here remain what role fisheries play in economic development strategies and the interplay between national management strategies and international fisheries strategies.

2.3. 1991 to the Present

The most notable aspect of marine fisheries in the post 1991 period is their general state of crisis, the result of trends apparent in the previous period. Conflict in the North Atlantic is growing among NATO allies, with Norway shooting "cold grenades" at an Icelandic-owned but Belize-registered fishing vessel and Canada confiscating a Spanish vessels outside its territorial waters. Tensions were high in 1994 as clashed broke out between Spanish fishermen and French and British fishermen in the Bay of Biscay. Iceland has been as tenacious in asserting its right to fish in waters it considers to be international as it was previously in insisting that the British had no right to fish in waters that Iceland unilaterally claimed. In all cases, fishermen have appealed to their home navies for support but the conflict has stopped short of armed hostility among navies.

2.3.1. International Law

Within international law, there have been a series of important developments in the first half of the 1990s. The FAO has finalized the "Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas" which is now open for signature. The agreement supports the activities of regional and international fishing organizations by urging non-members to join or come to an understanding with them and for all states to exercise effective jurisdiction over their flag vessels. It is intended to become a part of the FAO Code of Conduct for Responsible Fisheries, which is far along in the drafting process but awaits the outcome of the UN Conference on dealing with straddling stocks and highly migratory species. The "Draft 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."

While it is too early to tell just what the effect of these agreements will be, they are clearly attempt to give substantial content to the vague goal of conservation. The draft UN Agreement indicates that it builds on the CLOS and responds to the problems identified in Agenda 21, Chapter 17 (inadequate management of many high seas resources, over-utilization of these resources, unregulated fisheries, over-capitalization, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States). The FAO code builds on the 1982 LOS Convention, The 1992 Declaration of Canc-n, the 1992 Rio Declaration and the provisions of Agenda 21 of UNCED the conclusions and recommendations of the 1992 FAO Technical consultation on High Seas Fishing, the Strategy endorsed by the 1984 FAO World

Conference on Fisheries Management and Development and will take into account the outcome of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. These agreements come closer, perhaps as close as possible in such broad documents, to specifying management goals that previous formulations (see Article 5 and Annex 2⁹ in the UN draft and Article 5 in the FAO Draft Code). They collectively further limit the freedom of high seas fishing and reflect a further advance in the development of principles designed for fisheries management in particular rather than applications of general principles intended to manage conflicts of interests among states.

It is clear that the adoption of the UN and FAO documents will be a major step in the management of fisheries on the high seas. They mark, on paper, the evolution of a fisheries management regime in its own right. They also further limit the power of states on the high seas and perhaps also the rights of coastal states within their EEZs. The level of commitment, monitoring, surveillance--indeed this level of concern for the resource--seems unthinkable in a system of nation-states narrowly focused on the protection of national sovereignty and in the marine waters that had become the focus of the Cold War through the development of the nuclear submarine fleets. It also represents the recognition of substantial limits that the resources themselves place on what has been called a "productionist" attitude towards fisheries.

The UN agreement is said to be substantially agreed except for its enforcement provisions. This is a substantial problem, however. The enforcement problem begins to encroach upon questions of sovereignty. Even where joint enforcement schemes are in effect, states must enforce them. Here we see the lingering birthmarks of the interstate system. While this on the one hand might seem to be the remnants of hinderances to effective management, it seems equally reasonable to look at this international process which is generating pressure on coastal states to implement better management schemes within their EEZs. The duty of high seas fishing states to cooperate with coastal states in management presupposes that the

⁹Annex 2 lists 7 "Guidelines for Application of Precautionary Reference Points in Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" calls for the development of "precautionary reference points" (an estimated value derived through an agreed scientific procedure, which corresponds to the state of the resource and of the fishery) and the adoption of management strategies that "shall seek to maintain or restore populations of harvested stocks, and where necessary associated or dependent species, at levels consistent with previously agreed precautionary reference points. Such reference points shall be used to trigger pre-agreed conservation and management action. Management strategies shall include measures which can be implemented when precautionary reference points are approached." It adopts maximum sustainable yield (MSY) as a minimum standard for stocks above that level and a rebuilding target for over fished stocks.

coastal state has a management plan that is reasonable enough to encourage compliance by high seas fleets. The point is often made that activities outside EEZs have an impact on conservation measures within EEZ: it is often forgotten that the pressure generated from this region may force coastal states to put management schemes into place. Given the record of coastal state management to date, this may be a significant achievement in its own right.

2.3.2. Regional/International Organizations

Over the last few decades, regional and international fisheries organizations have slowly built up records of participants in fisheries, one way of documenting the "historical" fishing rights states have in particular areas. Non-members fishing in the area have come under increasing pressure to join the organization or leave the area. As fora for coordinating state actions on the high seas, regional and international fisheries organizations have provided a focal point for a growing sense of "ownership" of these waters. While they have often provided a show case for the disagreements among their members, most members have agreed on the importance of keeping new entrants out. The trend towards pressure on non-member states described previously has presumably grown since, particularly as stocks have declined. The new UN and FAO documents support this trend and support the role of these international bodies. In other words, the barriers to entry into these areas are growing. The emphasis on the freedom to fish in international waters is being again cut back by the growth of duties towards other states and towards the resource and by the slow evolution of something that is beginning to approach a property rights system.

It is equally likely that pressure for the accommodation of non-member states on the part of member states has also grown. A certain amount of fishing by non-member states has always occurred. If the high seas are to be further enclosed, then some concessions will have to be made to bring them into the evolving management regime. The apportionment of quotas among states will have to be fluid because the fishing industries within states are dynamic and subject to change.

A final point should be made here. One of the lines of argument being developed here is that the "intent" of states with respect to the high seas is changing. One source of that change has been the growing recognition of the environmental limitations on economic growth. One aspect of this change is surely the growth of the environmental movement. Earlier it was noted that the IWC was moving towards a management regime. This movement seems to have been slowed of late. Best scientific estimates are that limited commercial whaling on the the North Atlantic minke whale stock can take place without threatening the viability of the stock, but the IWC has yet to agree to lift the moratorium. This seems to indicate the rise of competing philosophies that stress the conservation of

stocks over principals of economic competitiveness.

2.3.3. Practice

Regimes do not exist because there are rules set down in documents. Actual practice is the test. Practice on the high seas seems to be undergoing change, with Canada challenging the EU in the Northwest Atlantic and Norway squaring off against Iceland and others in the Northeast Atlantic. International law evolves in response to the changing needs of states and it is quite likely that these disputes are being managed quite consciously with an eye to the on-going UN Conference. The general feeling of certainty that regulation will be imposed in key areas of international waters has certainly led individual fishermen to (perhaps encouraged by state authorities) to increase their catches there in order to establish a catch record in preparation for the imposition of quotas.

3. CONCLUSION

This paper opened by asking about the international society in which the high seas "commons" was embedded. It argued that the operation of fisheries on the high seas is best understood by reference to the two international orders in which the high seas commons were embedded: the interstate security order and the international economic order. Viewing the high seas as a particular case of a property regime shifts the focus away from what have been driving forces of high seas fisheries. It further argues that only now is a regime for the management of high seas fisheries emerging. The high seas management regime for fisheries has therefore not failed, it has failed to exist.

Despite the lack of a management regime, per se, a kind of order did prevail on the high seas. There were several sources of this order: the interstate security order generated sovereignty and rights and duties for state behavior and the international economic order provided as set of principals that led to the use of marine resources as a part of developing internationally competitive economies. The interstate order preserved the right of access to the high seas while the international economic order provided a general set of principals for their exploitation that applied equally well to widgets.

Recent developments, among them the declining dominance of the interstate system, the broad recognition of the limits of the "productionist" ethic, the decline of fish stocks, the general growing recognition of threats to the environment, may now permit the generation of a management regime.

The high seas has often been thought of as an open-to-entry property regime. While this may have been an adequate description of international law governing the high seas, actual fisheries access was dependent upon a host of factors, among them the level of development

of the country, the ability of countries to defend their vessels on the high seas, access to adequate technology, access to markets for the sale of the resources available, power differentials among states, and the natural fluctuations in the size and location of stocks. Actors on the high seas were never equal at the state level or at the level of corporate and private individuals. Those states and individuals able to competitively access the high seas were often able to do so because of state policies encouraging and protecting this activity. What drove these policies?

The current tendency of conceptualizing commons problems in terms of best way of constructing property regimes seems to be inappropriate for the high seas because it does not incorporate the interplay among states and among states, individuals, NGOs, and other actors. It assumes a certain stability of political regime and culture and the presence of a central authority, even if the goal often is to reduce the involvement of the state by maximizing the private incentives for individuals to obey the rules. Consideration of these problems vis a vis the high seas leads one to ask whether this approach suffers in general from a lack of appreciation of the difficulties involved in creating the necessary political institutions and consensus within states.

Finally, I would argue that while the rush is on to declare the death or irrelevance of the state, I would argue that the state has and will continue to play an important role in the evolution of the high seas management regime for fisheries. The record of coastal state management is generally poor, of course. While states evolve their own interest, in democratic societies, state to some degree mirror the dominant interests in their societies. Poor management regimes are quite likely compromise regimes that reflect a lack of consensus on how to manage which often reflects disagreements within the various sectors of the fishing industry. The state remains a forum which has the potential to mediate among these conflicting groups as well as considering the rights of other groups within its boundaries. It also remains a source of the funding for the science necessary for proper fisheries management--and a conduit through which resources can flow into the industry from other sectors of the economy when times are bad.

The state also supports the international fora that have begun to codify the new marine management regime. Recent development suggest that state behavior is undergoing a general learning process of which high seas fisheries are beneficiaries. This is occurring by the twin processes of a reconceptualization of the old "national interest" to include environmental and resource issues and through bureaucratic evolution and the consolidation of epistemic regimes. The state is a better place to lodge lessons than many: it has had a degree of permanence that other institutions have not.

The growing popularity of the idea of locking other countries out of the resources now

found on the steadily diminishing high seas raises some very troubling questions of distributive justice. Neither fish nor fishing capacity are equally distributed and arrangements that freeze access to resources on the assumption that they are cannot endure. Rich coastal states such as Canada, the United States, and Norway, which are incrementally extending their jurisdiction beyond the generous¹⁰ 200 nm EEZ they have already granted themselves, must address the question of whether the goal of preserving their fisheries, which affects a relatively small percentage of the population of their relatively rich states, can justify the control of so many resources. Here we see the clash of values in the post war-world: sustainable development for the relatively rich north versus international redistribution.

Finally, despite the obvious flaws of national maritime fisheries management on the part of states, the state remains an important political juncture within the national and world communities. It is a janus-faced entity: from the perspective of what used to be thought of as domestic politics, it is the meeting point of a myriad of conflicting groups and interests existing at a variety of levels. From the "international" perspective, it is the nexus which connects the national to the international: it mediates to some extent between those living in different national political jurisdictions. The problems of state management of fisheries are more political than they are institutional. That is, fisheries management problems are very much those of the distribution of values on a series of levels. Rearranging the institutions in which such decisions take place will not obviate the need to make them.

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¹⁰Norway's adoption of its exclusive economic zone gave it control over an ocean area three times the size of its land territory.

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