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# The High Seas Lowdown: An Introduction to the Issue

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# THE HIGH SEAS LOWDOWN: AN INTRODUCTION TO THE ISSUE

PAUL STANTON KIBEL\*

Beyond each coastal nation's 200 mile exclusive economic zone (hereinafter "EEZ") lies the international high seas. The high seas are not subject to the jurisdiction of any nation, and are often referred to as a "global commons." This begs the question, however, as to exactly what about, on, in or beneath the high seas is held "in common" by the international community.

Until recently, nations' common interest in the fisheries of the high seas focused on the right to fish without interference beyond coastal waters. This notion of common interest, initially expressed as part of the "freedom of the seas" doctrine proposed by Dutch legal scholar Hugo Grotius in the 1600s, amounted to a prohibition on high seas fisheries regulation except where such regulation was necessary to prevent interference with the unlimited right of all to fish.<sup>1</sup> The doctrine set forth the only fisheries law governing the high seas in its era, which essentially entitled everyone to as much fish as they wanted, wherever they wanted, and whenever they wanted.

The fishery aspect of Grotius' "freedom of the seas" doctrine was rooted in the assumption that the oceans' fishery resources were inexhaustible. In the Twentieth Century, technological advances in the ability to catch ocean fish stocks began to prove this assumption faulty. In the period from 1950 to 1990, there was a 600% increase in the global volume of fish

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<sup>1</sup> Hugo Grotius, *Mare Liberum*, 22-28 (Oxford University Press 1916) (1618).

caught.<sup>2</sup> The results of this trend were predictable. In the 1940's and 1950's, the sardine fishery off the California coast collapsed. In the 1970's and 1980's, the North Atlantic cod fishery plummeted. In the 1990's, the bluefin tuna, Patagonia toothfish and swordfish fisheries in the South Pacific suffered steep declines. By 2000, the United Nations Food and Agricultural Organization (hereinafter "FAO") was reporting that more than seventy five percent of the world oceans fisheries were in peril.<sup>3</sup>

Mark Kurlansky offered the following account of the collapse of Eastern Canada's groundfish stocks in his 1997 book, Cod: A Biography of the Fish that Changed the World:

In July 1992, the Canadian government closed Newfoundland waters, the Grand Banks, and most of the Gulf of St. Lawrence to groundfishing. Groundfish, of which the most sought after is cod, are those that live in the bottom layers of the ocean's water. By the time the moratorium was announced, the fisherman of Petty Harbour [in Newfoundland, Canada], seeing the rapid decline of their once prolific catch, had been demanding it for years. They had claimed, and it is now acknowledged, that the off-shore trawlers were taking nearly every last cod. In the 1980's, government scientists had ignored the cry of inshore fishermen that the cod were disappearing. This deafness proved costly."<sup>4</sup>

Kurlansky's account of the fate of the North Atlantic cod fishery is sadly indicative of high seas fisheries worldwide. Despite clear evidence for several decades that freedom of the seas is failing to preserve ocean fisheries, international law has been slow to respond. Grotius' legal grip on perceptions of the high seas has proved difficult to dislodge. More specifically, to date there has been limited success in creating international institutions with the authority to effectively prevent overfishing of the oceans. This result is explained in large part by the

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<sup>2</sup> See *The State of the World Fisheries and Aquaculture*, 1996, FAO Fisheries Department, available at [www.fao.org/DOCREP/003/W3265E/w3265e07.jpg](http://www.fao.org/DOCREP/003/W3265E/w3265e07.jpg) (last visited February 1, 2004).

<sup>3</sup> See *The State of the World Fisheries and Aquaculture*, 2000, FAO Fisheries Department, available at [www.fao.org/DOCREP/003/X8002E/x8002e06.htm#P12](http://www.fao.org/DOCREP/003/X8002E/x8002e06.htm#P12) (last visited February 1, 2004).

<sup>4</sup> Mark Kurlansky, *Cod: A Biography of the Fish that Changed the World*, 3-4 (Penguin Books 1997).

fact that while globally there is a long-term interest in sustainable fisheries management, this global interest often does not align with the short-term interest of particular fisher stakeholders (be they nations or corporations or vessels). If a stakeholder can move easily to different target catches or to different areas of ocean space, then this stakeholder does not have an economic interest in the sustainable management of a particular fish species or area of ocean space. If one species or area is exhausted, it can simply move on to another.

The 1995 United Nations Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter "U.N. Fish Stocks Treaty") represents international law's most ambitious effort to date to address the problem of high seas overfishing.<sup>5</sup> The main aim of the U.N. Fish Stocks Treaty, which applies to fish stocks that migrate between (or straddle) national EEZs and the high seas, is to bolster the legal standing and strengthen the effectiveness of regional fishery management organizations (hereinafter "RFMOs") around the world. Although the U.N. Fish Stocks Treaty has made some positive strides in this direction, it has also left many critical high seas fishery conservation questions unanswered. These questions include how to regulate the fishing vessels registered to nations that refuse to join RFMOs and become a party to the UN Fish Stocks Treaty, how to ensure that RFMO members adopt appropriate fishery conservation measures within their own EEZs, and the extent to which RFMO enforcement actions are consistent with World Trade Organization (hereinafter "WTO") rules concerning the import and export of fish products.

This special symposium edition of the Golden Gate University Law Review, entitled *Empty Seas: Our Overfished Oceans*, takes as its starting point these unresolved questions regarding the international regulation of high seas fisheries. Although all of the symposium articles consider topics unfolding against the backdrop of the U.N. Fish Stocks Treaty, the articles cover a diverse range of issues, forums and agreements.

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<sup>5</sup> *The United Nations 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*, U.N. Doc/A/CONF.164/37 (1995), signed September 8, 1995, reprinted in 34 I.L.M. 152 (1995).

The first article is by Marcos Orellana, an attorney with the Center for International Environmental Law in Washington D.C. and Adjunct Professor of Ocean Law at American University's Washington College of Law. Orellana's piece attempts to evaluate the recent fishery jurisprudence of the International Tribunal for the Law of the Sea (hereinafter "ITLOS") in a larger ocean policy context. ITLOS, created pursuant to the 1982 United Nations Convention on the Law of the Sea, has recently been involved in a series of high profile cases involving the conservation of southern bluefin tuna and swordfish stocks, and the right to detain foreign vessels fishing illegally. Orellana offers a critical appraisal of the role that ITLOS has played and might play in improving ocean fisheries management.

Sonja Fordham and Coby Dolan of the Ocean Conservancy assess the application of the 1972 Conventional on the International Trade in Endangered Species (hereinafter "CITES") to global shark conservation efforts. Although CITES is more than three decades old, its primary focus to date has been on non-marine species. In their respective positions at the Ocean Conservancy as Director of International Programs and Staff Attorney, Fordham and Dolan are working to reorient CITES towards threatened ocean species. Their article provides a case study of CITES' evolving and potential contribution to protecting the spiny dogfish species of shark.

Tim Eichenberg (formerly a Senior Advisor with Oceana and an Adjunct Professor at Vermont Law School) and Mitchell Shapson (attorney for Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources), report on fishery conversation developments at the 2002 World Summit on Sustainable Development (hereinafter "WSSD") in Johannesburg, South Africa. Although environmentalists generally consider the WSSD a disappointment, one of the few areas of WSSD progress appears to be in the area of ocean fisheries. Eichenberg attended the Johannesburg Summit, and along with Shapson offers a comprehensive analysis of the WSSD's fishery outputs and how these outputs fit into other ongoing international ocean law and policy initiatives.

Dierdre Warner-Kramer presents an update on efforts to crackdown on the registration of fishing vessels with nations that refuse to abide by international fishery conservation rules and standards. This registration controversy is often referred

to as the “flags of convenience” problem in that many fishing vessels chose to register with nations that are not parties to the UN Fish Stocks Treaty and relevant RFMOs to avoid the fishery conservation measures these regimes impose. As an attorney with the U.S. State Department’s Office of Marine Conservation, Warner-Kramer has been actively involved in global negotiations concerning the flags of convenience problem, including the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing<sup>6</sup> adopted in 2001 by the FAO.

Turning to trade matters, Alice Mattice, Director for Trade and Environment Policy Planning at the Office of the United States Trade Representative, discusses the destructive role that national fishery subsidies have played in the promotion of fishing overcapacity. As the 2000 report *Net Gains: Linking Fisheries Management, International Trade and Sustainable Development* by the International Union for the Conservation of Nature noted, “Government subsidies have been apportioned much of the blame for the fact that the capacity of the global fishing fleet is at least thirty percent -- some argue as much as 100 percent -- larger than is needed for efficient harvesting.” In her current position, Mattice has participated directly in WTO meetings and negotiations regarding whether and to what extent WTO provisions impose restrictions on fishery subsidies. In the context of widespread environmental dissatisfaction with the environmental provisions and performance of the WTO, Mattice’s article is particularly noteworthy in that it reveals one of the rare instances when conservation objectives and existing trade rules appear to be aligned.

The last article, by Monserrat Gorina-Ysern, steps back to offer the big perspective on high seas fisheries governance. In 2003, Conservation International and other foundations and marine conservation groups convened the *Defying Ocean’s End* conference in Los Cabos, Mexico. Among other things, the *Defying Ocean’s End* conference sought to articulate a new set of

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<sup>6</sup> See *The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU-IPOA)*, 2001, FAO Fisheries Department, available at <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM> (last visited February 1, 2004).

<sup>7</sup> Carolyn Deere, *Net Gains: Linking Fisheries Management, International Trade and Sustainable Development* 21 (IUCN 2000).

policy objectives and action items based on the concept of a "World Ocean Public Trust."<sup>8</sup> Gorina-Ysern, an ocean policy consultant and Adjunct Professor at American University's School of International Service, participated in the 2003 Los Cabos conference and since then has continued to work with Conservation International on marine fishery issues. Using the emerging World Ocean Public Trust concept as a focal point, Gorina-Ysern discusses the struggle to develop a new "ocean ethos" to replace Grotius' freedom of the seas.

In many respects, ocean fisheries may represent the best opportunity to strengthen the institutions and rules of international environmental law. As a global commons, high seas fisheries do not present many of the thorny national sovereignty issues that often arise in connection with proposed international regulation of land-based resources. Additionally, the inherently transboundary nature of ocean fish stocks, which often migrate between multiple EEZs and the high seas, suggest that internationally-coordinated regulation is likely the only viable conservation strategy.

Notwithstanding these considerations, the pace of progress in the field of high seas fishery conservation law has been slow. Given the consensus on the dire condition of the world's ocean fisheries, we hope that the articles in this *Empty Seas* edition of the law review can help expedite and focus progress going forward.

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<sup>8</sup> Executive Summary, *Defying Ocean's End: An Agenda for Action* (Conservation International 2003), p. 12 (on file with author).