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by

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This paper is contributed for discussion in Sessions Six and Seven, at the SEAPOL International Workshop on "Challenges to Fishery Policy and Diplomacy in Southeast Asia", Rayong Province, Thailand, December 6-9, 1992.

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I: INTRODUCTION

It is the purpose of this brief paper to share some of the reflections on a number of evolving principles and guidelines which could serve the common interests of mankind in the context of global and regional fishery management.

Fishery management as a whole, whether on a global or regional or sub-regional scale, is vital to Thailand and her ASEAN partners as fishing nations. It is also significant as a means of ensuring continuation of one of the most important sources of supply of protein for human consumption as well as for animal feed. For other countries in the South-East Asian region as well as in the Pacific Rim, fishery management is no less essential to the continuing progressive implementation of their economic plans in furtherance of national policies and objectives in accordance with the law of nations.

Attention will in the main be focused on the need for meaningful and effective cooperation in fishery management rather than detailed articulation of rules and regulations that are appropriately contained in existing or future arrangements among the coastal States of a particular region or global arrangements intended to conserve certain endangered or protected species of marine life or international management of some highly migratory species.  

1) Living Resources of the Sea and the Common Heritage of Mankind

The principle that the "resources of the sea" constitute the "common heritage of mankind" was first enunciated in a public declaration by the President of the First UN Conference on the Law of the Sea on February 24, 1958. Little did the Prince realize then that the two phrases were to continue to befuddle succeeding generations of

1 "Recent Treaty Developments", for instance, are treated by William R. Edeson (FAO) on the topic "Regional Cooperative Arrangement for Foreign Fishing in the EEZ". The Seventh Session of the III Workshop is devoted to consideration of the "Trends and Prospects" of cooperative arrangements in South-East Asia.
publicists for decades to come. In an earlier report submitted to the League of Nations in 1927 by Professor José Léon Suarez, an alarm bell was already rung by the Argentine jurist on the exploitation of the riches of the sea.

In the current context, attention will be confined primarily to one kind of "resources of the sea", i.e., "the living resources" of the sea, which are subject to further classification, division, categorization and subdivision, not only in biological terms of species and stocks, but more realistically in terms of geographical distribution of marine species which recognize no maritime boundaries between coastal States nor the frontiers circumscribing the water-column beyond national jurisdiction.

It is therefore necessary to clarify with precision the two notions which have led to the unending search for rules of international law to regulate the conservation and management of fisheries to ensure optimum utilization of the living resources of the sea in relative perpetuity for the common benefit of mankind.

2) Intertemporal Nature of Evolving Rules and Principles of International Law

To this end, the evolution of rules of conventional and customary international law must continue to proceed relentlessly and ever unceasingly. This evolutionary process provides in effect a clear illustration of the intertemporal character of the relevant rules of international law in this particular regard.

It is convenient at this stage to emphasize one salient fact. Whatever be the prevailing view regarding the comprehensiveness of the Law of the Sea Convention of 1982 as a package of the new international ocean law, the codification convention is necessarily incomplete and in several areas non-self-executing. Thus, in its preambular paragraphs, especially the penultimate one, affirming that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law", have left no room for any doubt as to the intertemporal and evolutionary nature of pre-existing, emerging and future rules and principles of general

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2 Sir Kenneth Baily wrote: "The international customary law of the sea took for its starting point and foundation, the idea that the sea, and all its sources, were the common heritage of mankind". Australia and Geneva Conventions, in International Law in Australia 229 (1965).

3 Suarez also wrote that "the resources of the sea constituted the common heritage of mankind", and that it was necessary to formulate new law taking into account the relevant and economic data. League of Nations, Doc. C. 196, M. 70, 1927 (C.P.D.I. 95 (20)).
international law, and this applies equally to matters now fully or partially covered by the Convention. International ocean law is not thereby being frozen even by the entry into force of the 1982 Convention.

The Convention itself contains several provisions which not only permit a wide measure of discretion on the part of coastal States such as the power to determine the allowable catch of the living resources within its exclusive economic zone (Article 61, paragraph 1), but also contemplates subsequent arrangements with other States concerned through competent international organizations, whether sub-regional, regional or global, not only regarding contribution and exchange of available scientific information, catch and fishing effort statistics, but also other data relevant to the conservation of fish stocks. The provisions of Articles 61 through 71 presuppose the existence or formulation of international agreements regarding generally accepted minimum standards of measures designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield. All relevant environmental and economic factors, including the economic needs of coastal fishing communities and the requirements of developing States which must be taken into account including fishing patterns and the interdependence of stocks seem to point to the need for all interested States to cooperate with the view to making necessary fishery management arrangements for the benefit of the sub-region, the region or the world community as a whole.

II: EVOLVING PRINCIPLES OF INTERNATIONAL LAW RELATING TO THE UTILIZATION OF THE LIVING RESOURCES OF THE SEA

Consequently, the living resources of the sea, constituting as such the common heritage of mankind, are clearly meant to be shared ultimately in equitable portions by all members of the international community. That such common resources are to be justly apportioned is beyond controversy. The difficulty lies in the detailed application of the principles governing the sharing of resources. To be precise, the question is raised as to which States should be entitled to harvest, and if so, to what extent or portions of the stocks found within or without the 200-miles exclusive economic zones of a coastal State. A closer analysis of the above provisions of the 1982 Convention reveals some practical guidance as to the criteria and factors to be taken into consideration in the determination of the questions at issue.

1) The Principle of Consent of the Coastal State

Consent of the coastal State is needed to permit the sharing of such resources within its jurisdiction whenever a surplus is ascertained by it. Such consent may be express or implied from past conduct giving rise to possible historic right or title to
fish in waters that are now deemed to be within the exclusive economic zone of another State. Nationals of foreign States may be allowed to fish, but only to the extent consistent with the conservation measures and in compliance with the terms and conditions established by the laws and regulations of the coastal State (Article 62, paragraph 4). In this way, the coastal States retain a large measure of discretion within their national jurisdiction which is prescriptive, adjudicative and also enforcement. An example of legislative enactments adopted by an advanced coastal State is furnished by the Magnuson fishery Conservation and Management Act of 1976, 16 U.S.C. ss. 1801-1882 (1982), and amendment of 1978, as amended by the American Fisheries Promotion Act 1980, Pub. L. No. 96-561, Title II, 94 stat. 3287 (1980).

2) The Duties to Cooperate, to Take Measures for Fisheries Conservation and Management and to Negotiate Agreements in Good Faith

Many circumstances dictate certain duties on the part of States. For instance, where stocks occur within the exclusive economic zones of two or more coastal States or both within the exclusive economic zones and in an area beyond and adjacent to it, the coastal States are required to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks (Article 63) also in the adjacent area. It is imperative that the duty to cooperate imports the duty to negotiate in good faith and inevitably to agree on terms and conditions dictated by available scientific data through the good offices of an international, regional or sub-regional organizations.

Other types of fish, namely, Highly Migratory species (Article 64), Marine Mammals and cetaceans (Article 65), Anadromous stocks (Article 60), Catadromous species (Article 67) and sedentary species (Articles 69 and 77) deserve special consideration. The conservation, management and harvest of each of the above species and stocks are subject in turn to special régimes contemplated by the 1982 Convention, with particular responsibilities assigned to the coastal States concerned in each case in cooperation with the competent international, regional or sub-regional agency specialized in the field.

Without any exception, coastal States are under an obligation to cooperate through competent international organizations, sub-regional, regional or global, with other interested States. Thus, even before entry into force of the 1982 Convention, States have concluded arrangements and reached agreements, either on the basis of reciprocity or otherwise, either bilateral, sub-regional, regional or universal in relation to specified species in regard to the measures necessary to implement the provisions of the Convention.
States are required to cooperate with each other in the conservation and management of living resources in the areas of the high seas (Articles 117, 118 and 119).

The duty to cooperate on the part of coastal States is at least two-fold. A coastal State is required to cooperate with the sub-regional, regional and global organization or institution specialized in the field of fishery management and conservation, and at the same time with other adjacent coastal States as well as other interested distant States with the view to reaching an agreement bilaterally or multilaterally within the sub-region, the region or the entire global community.

3) Emergence of International Agreements regulating Conservation and Management of the Living Resources of the Sea

The earth is composed of areas of which two-thirds are covered with water. The living resources of the sea, large and small, gigantic and minute can swim freely in the oceans, and up the estuarine waters, recognizing no artificial or man-made boundaries, national, international or regional. Some species originate in fresh water, or breed in brackish water, and return to the sea or to the head waters for spawning. The species of marine life are innumerable and scientific studies are still far from exhausting new findings and new discoveries of hitherto unknown or little known marine life.

In the absence of a unified international control or a simple international management centre for all species, States have resorted to a number of practical options and approaches.

a. Bilateral Arrangements

One popular choice has been for adjacent coastal States to conclude bilateral arrangements permitting reciprocal allocations of limited fishing in each other’s waters or exclusive economic zones as in the case of former U.S.S.R. and Japan with

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4A representative of Lesotho once suggested the creation of a world-wide international authority under the auspices of the UN with comprehensive jurisdiction over all resources of the sea area beyond exclusive economic zones with the mandate of ensuring equitable distribution of these resources. A representative of Guyana once expressed the view that the proposed International Sea-Bed Authority should also have the power to manage all the resources of the sea contained in the water column beyond national jurisdiction. Such proposals have not received sufficient support to initiate new rules. FAO Doc. COFI/24/Inf.12, Oct. 1974, Statements and Proposals on Fisheries made at UNCLOS III, Caracas, June 20 - August 29, 1974, p. 42.
comparable tonnage of annual catches and allocations across each other's common maritime boundaries. The Japanese-U.S.S.R. fisheries relationship in the decade following the extended jurisdiction in 1975 was interesting in that it combined stability with several great dislocative effects, with a sharp decline for Japan in the salmon and herring fleets (555 salmon vessels and 205 herring vessels had to be retired from Japanese fishing industry). By 1985, extended coastal State jurisdiction resulted in a total reduction of 1,810 fishing licences in Japan with 1,500 of those accounted for by the U.S.A., former U.S.S.R. and Canada.

Another type of bilateral arrangements is furnished by the U.S.-Soviet Agreement, whereby the United States allows access to fishing grounds within its exclusive economic zone to Soviet fishing vessels subject to annual allocations of fishery resources.

b. Arrangements according to Species

Different arrangements have been concluded for some important species, such as salmon, herring, halibut and fur seal. For instance, the International Convention for the High Seas Fisheries of the North Pacific Ocean, with annex and Protocol, 1952 adopted the "abstention principle", which provided for Japanese abstention from fishing stocks of halibut, herring and salmon in areas specified in the Annex and in the protocol. The Convention provisionally adopted the line of meridian 175 degree W. longitude to be a salmon abstention line. No Japanese high seas fishing for salmon would be permitted east of 175 degree W. In 1956, the Japan-Soviet Convention for


9 May 9, 1952, Committee on Commerce, U.S. Senate, Treaties and other International Agreements on Fisheries, Oceanographic Resources and Wildlife to which the United States is a party, 93rd Congress, 2nd Session, December 31, 1974, pp. 231-243.
the Northwest Pacific Fisheries for salmon of Soviet origin, made the line of 175 degree W. Its eastern boundary.

took a firm position

By 1975, the United States and Canada, aligning with Article 54 of the Single Negotiating Text, later to become Article 66 of the 1982 Law of the Sea Convention, assigning to the coastal States of origin the power to establish total allowable catches of anadromous stocks and other regulatory approaches, and permitting fishing only landward from outer limits of the EEZ. Enforcement of such regulations shall be by agreement between the coastal State or States of origin and other States concerned. Implementation of these provisions may be made through international organizations where appropriate.

Thus, Japanese fishing of salmon stocks, Asian or North America, has been curbed within the Soviet, United States and Canadian EEZs, and also confined on the high seas to a very small percentage of the areas outside the EEZs. The bilateral United States/Canada salmon concerns have been far-reaching, and are not focused exclusively on the sockeye and pink salmon runs of the Frazer River and their reciprocal interception.

Apart from anadromous species like salmon, other species such as halibut, herring, fur seal, tuna and other highly migratory species have been the subject of sub-regional, regional and international conservation and management agreements. As will be seen below, regional and sub-regional commissions have been formed to deal more specifically with each important species.

c. Evolution of Regional Bodies

Article 118 of the 1982 Convention envisages the establishment by States of sub-regional or regional fisheries organizations for the conservation and management of living resources of the sea. A great many such regional bodies have been set up well before or in anticipation of the entry into force of the UN Convention of 1982.

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11Article 66: Anadromous Stocks, Paragraphs 1-5.

12See E.L. Miles, cited in Note 5 above, at pp. 150-155.

Thus, in the North West Pacific alone five regional commissions have been functioning, of which two are multilatered: the International North Pacific Fisheries (INPFC) and the North Pacific Fur Seal Commission (NPFSC). Three others are bilateral: the International Pacific Halibut Commission (IPHC), the International Salmon Fisheries Commission (IPSFC) and the Russo-Japanese Northwest Pacific Fisheries Commission. The prospect of the new ocean law has exerted considerable influence on the need for further adjustments of existing regional bodies with tighter control and greater restrictions in conservation measures and management of the species regulated.

Similarly, other regions have created their commissions. Thus, in 1966 the International Commission for the Conservation of Atlantic Tunas (ICCAT) was set up, based on preparatory work done within FAO.

The First Indian Ocean Marine Affairs Conference (IOMAC-I) was convened in 1987, without India’s participation, and adopted the Final Document, confirming the status of IOMAC itself as the consultative forum, being at the centre of a network of institutions forming an essential feature of the modalities of regional cooperation.

Another international organization called INFOFISH was adopted in Kuala Lumpur, Malaysia, in 1985, for Marketing Information and Technical Advisory Services for Fishery Products in Asia and Pacific Regions. The Agreement came into force in 1987 as between Bangladesh, India, North Korea, Malaysia, Maldives, Solomon Islands and Sri Lanka.

The South Pacific Forum at its seventh meeting in 1976 decided to set up the South Pacific Forum Fisheries Agency (FFA) to foster precisely the kind of regional cooperation envisaged in Article 64 of the new UN Convention of 1982 to conserve marine resources and to undertake joint actions in matters of surveillance and policy. Current members of the FFA are Australia, Cook Islands, Federal States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Kingdom of Tonga, Tuvalu, Vanuatu and Western Samoa (sixteen in all). The members of FFA managed to convince the United States to conclude with them the “Fisheries Treaty with Certain Pacific island States” 1987 (100th Congress, First Session, Senate, Treaty Doc. 100-5) thereby adopting a less hostile attitude towards defenseless South Pacific island nations.  

Without in any way purporting to exhaust the list of regional and sub-regional organizations in the field of fisheries management, it is noteworthy that ASEAN States have adopted a declaration at Singapore on October 22, 1983, confirming their consensus on taking necessary actions toward closer cooperation in such areas of fisheries as the management and conservation of the fisheries resources of the EEZ in the ASEAN region, the sharing and transfer of technology, all aspects of aquaculture to increase production and income of fish farmers, all aspects of post-harvest technology in support of production and marketing efforts, and working towards a common stand and understanding on regional and international matters in fisheries.\footnote{See ASEAN Documents Series 1967-1988, 3rd Edition, ASEAN Secretariat, Jakarta, No. 84, pp. 243-244.}

III. STATES AND MANKIND AS BENEFICIARIES OF EVOLVING RULES AND PRINCIPLES OF INTERNATIONAL LAW

The notion of common heritage of mankind as applied to the resources of the sea has been generally accepted without opposition. However, not unlike the "Area and its resources" declared by Article 136 of the 1982 Convention to be the "common heritage of mankind", the optimum utilization of the living resources of the sea has not been fully implemented.

For the "Area and its resources", there may be even at this time and age one or two States that have long accepted the principle of "common heritage of mankind" in international law, and yet persist in actual practice to destroy the object and purpose of the 1982 Convention by unilaterally enacting legislation purporting to grant licences for corporations to explore and exploit the resources of the Area forming part of the common heritage of mankind pending the establishment of an international authority to enforce the Convention.

The situation is much more precarious and less stable with regard to the living resources of the sea which move from one national jurisdiction to another and in and out of the high-seas. The Convention of 1982 or any subsequent codification of the new ocean law will still leave several gaps to be filled by separate special agreements among coastal States of the region or sub-region or in respect of certain species. A number of rules and principles of international law governing the conduct of States in this connection appear to have emerged more prominently which require our attentive examination. Practical application of such principles should be encouraged. A delicate balance of inconsistent and conflicting interests has to be struck and maintained.
1. The Benefit of Mankind

Equitable principles have been invoked to ensure fair and proportionate sharing of the living resources of the sea by mankind as a whole, and not for the benefit of some sectors of humanity to the exclusion of others. Account will be taken of all the factors and elements listed as relevant in the apportionment of such shares. Mankind forms part of States. It is therefore necessary to examine the different types of classification of States which might account for some inconsistency in their attitude.

For the purpose of benefit-sharing of the living resources of the sea, it is necessary to note that a State may have more than one functions to perform in this connection.

2. The Coastal State and Distant-Water Fishing

A coastal State has an interest in and specific responsibility for the conservation and management of all living resources within its exclusive economic zone, as well as in the adjoining zones belonging to its neighbours and in the immediate vicinity of the high-seas. Yet nationals of the same coastal States may be engaged in distant-water fishing on the high-seas much further away as well as off the exclusive economic zones of other coastal States. Thus, the self-contradictory position of the United States before April 2, 1987 would have been tenable only if general international law were to develop in such a way as to recognize the position of the United States on exclusive economic zone which has led the United States to adopt a liberal and even generous attitude towards foreign fishing, exempting highly migratory species from United States jurisdiction, and requiring other coastal States in the South and Southwest Pacific to conform to the United States proclamation by likewise allowing U.S. tuna fleets access to their combined exclusive economic zones without having to obtain prior permission or licence and regardless of prevailing regional or sub-regional regulations.16

On the other hand, not unlike the United States, Thailand is probably not quite the converse case of the United States, being a coastal State with nearly depleted stocks compelling Thai fishing fleets to fish in distant waters.

3. Developing Food-Exporting States

Developing countries are not all importers of food. In fact, there are very few developing countries which have food surplus to the extent that they are regularly net-

16See Note 14 above.
exporters of food. For example, countries like Thailand and several other ASEAN Partners such as Indonesia and the Philippines are developing countries whose economic development depends on the export trade of sea-food product. Their activities include the harvest of various species, fisheries management and conservation, processing, canning and distribution of fish product in the world market. Cooperation through international organizations with other States is imperative for their survival.

4. **Archipelagic States and Foreign Fishing**

Archipelagic States like Indonesia and the Philippines are endowed with greater expanses of water and broader areas of archipelagic sea or waters in which to conserve and manage marine fish. It is not likely for such States to overfish their archipelagic seas and adjacent exclusive economic zones. More often than not, they are able to grant licences to foreign vessels to engage in fishing in their waters, subject to national regulations.

For the South Pacific Forum, in particular, a major sources of national income of nearly all of these island nations is derived from the collection of licence fees payable by foreign fishing vessels.

5. **Land-Locked States and Geographically disadvantaged States**

For the Asian Pacific region, outer Mongolia, Laos and Nepal are likely candidates for land-locked countries, while Singapore belongs to a category of its own. Bangladesh might be unique for some aspects of extended base lines. These countries deserve special consideration and allowance for access to the surplus in their neighbours' zones as indeed in regard to distant-water fishing.

**IV. CONCLUDING OBSERVATIONS**

It is important in the light of evolving rules and principles of international law that States maintain a more consistent attitude towards the overall problem of conservation and management of declining stocks of the living resources of the sea. Scientific research in aqua-culture and recycling of marine life could help restore and sustain endangered species and diminishing stocks for the benefit of all nations.

The principle of unilateral abstention is by itself inadequate in that it could be misconstrued by other fishing nations far and near, thereby encouraging excessive fishing activities to the detriment of certain stocks. For certain species, such as Spanish mackerel in the North Sea, which are on the decline due to overfishing,
concerted actions by the competent regional organization and affected States are needed.

The principles of good neighbourliness enunciated in the Bandung Declaration in 1955 are to be pursued in the practice of States, especially in regard to the duty to cooperate, the duty to negotiate in good faith, and the duty to reach international agreement on conservation measures in the fisheries management of the region.

The task of the international workshop is principally therefore to underscore the urgent need for cooperation and collection of relevant scientific data which could provide a sound basis for the formulation of evolving international rules and principles to guide and to govern the conduct of States in matters of practical importance to the welfare of every region.

We are still a long way from attaining equitable results in the implementation of the notion of fairness and justice in the sharing of the living resources of the sea for the benefit of mankind of which these resources constitute "Common Heritage". Ultimately, States must learn to "give and take". The Challenge is encountered. It is yet to be met by our collective response.

Sompong Sucharitkul, D.C.L.
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