

Fishing in the Commons

Michael Earle¹



Who has the right to fish? That is the essential question when discussing fishing in the commons. Linked to that is a second, hidden question - who *decides* who has the right to fish?

Until relatively recently, fishermen could go more or less wherever they wished, except for a narrow coastal zone. Anything beyond the coastal zone did not "belong" to anybody and so what was there was open access to everybody, including fish, whales and other resources. That famous "freedom of the seas" may have made for good stories about pirates but it was not very good for conservation, as exemplified so eloquently by the tragic history of whaling.

Over the past half century or so that freedom of the seas has been increasingly curtailed as States became more assertive about extending their jurisdiction at sea. The idea of extended jurisdiction was first declared by US (Truman Proclamation of 1945) and various Latin American countries (mostly Chile, Peru and Ecuador) in the late 1940s and early 1950s. Also crucial to that story were a series of so-called "cod wars" fought between Iceland and the UK. In 1958, Iceland declared that its jurisdiction was extended from a breadth of 4 nautical miles to 12 miles. The UK initially refused to recognize this extension but, after several armed confrontations and vessel rammings, an agreement was reached. Similar disputes erupted each time Iceland unilaterally extended its jurisdiction - in 1972 to 50 nautical miles and in 1975 to 200 miles. The fundamental disagreement was whether Iceland had the right to keep British cod fishermen out of these waters; the situation was so serious that NATO got involved when Iceland threatened to close an important naval base.

In the end, the international community agreed with Iceland and by the late 1970s, most States had declared Exclusive Economic Zones (EEZs) out to 200 nautical miles from the coast. This was formally codified by the UN Convention on the Law of the Sea (UNCLOS) which was adopted, after a long negotiation, in 1982 and entered into force in 1994.

Under the UNCLOS, the closer to shore, the greater the right of the coastal State to restrict the activities of other States. Out to 12 nautical miles lies the territorial sea, over which the coastal State has sovereignty, including for fisheries management. It can prevent vessels from any other country doing anything at all other than "innocent passage", i.e. simply steaming across. Beyond the territorial sea, the coastal State also has the right to exclude other vessels and manage fisheries in its EEZ (out to 200 nautical miles). UNCLOS imposes certain responsibilities as well. For instance, it must prevent over-exploitation of fish stocks and requires States to cooperate with their neighbours if the same fish stock is found in both EEZs.

Part of the justification for the extension of this jurisdiction was for States to gain control over resources in "their" waters, claiming that they would do a better job of conserving fish stocks than the freedom of the seas doctrine had done. Since 90% of the world's fish stocks lie within 200 miles of the coast, the vast majority of the world's fish stocks were suddenly no longer available to all, but rather under the legal jurisdiction of individual States. There were a few important exceptions such as tuna and whales, which often occur on the high seas.

The next step was for States to decide who was able to fish in their waters and with what other

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restrictions. The general pattern was to begin by awarding the individual right to fish by licensing fishermen or fishing vessels. When that proved insufficient to prevent over-exploitation and depletion of stocks, further restrictions were imposed on how much fish could be caught, what gear could be used, etc.

Many States have been unable to manage fisheries any better than an open-access regime to the high seas has done. As a matter of fact, at a global level, less than a quarter of the world's fish stocks are being fished at the limits of what can be considered sustainable and many of them have collapsed. While some countries do a better job than others, overall the picture is bleak and the wholesale nationalization of fisheries has not conserved fish stocks.

That brings us back, again, to the high seas, the vast area of the oceans that are beyond the jurisdiction of any State. Even there, though, freedom of action is not total. Vessels on the high seas are subject to the authority of the State whose flag they fly, so that it is Canada which decides what can, or cannot, be done by Canadian vessels. Many countries do not fulfil their obligations as flag States, the most notorious examples being the so-called flags of convenience, many of them in Latin America (e.g. Panama, Belize, Honduras).

Before UNCLoS was developed, there were examples of States forming international organizations to manage fisheries, the earliest one being in 1923 for halibut in the North Pacific, then a few after the Second World War to manage exploitation of whales and tunas primarily. Since the Law of the Sea requires States to cooperate when fishing on the high seas, several other organizations were established during the 1980s. Their number continues to grow². Known as Regional Fisheries Management Organizations, they adopt rules to limit fishing in various ways, primarily by means of quotas and restrictions on fishing gears that are allowed, but occasionally by limiting the number of vessels that can fish. States are thus trying to impose the same sort of rules internationally that they have applied to their own waters, presumably in an attempt to prevent overfishing. However, they only apply to vessels from countries that have joined the organization, so that vessels from other countries essentially still enjoy the freedom of the high seas. This poses an enormous problem for conservation of fish stocks but the steps being taken to resolve that are beyond the scope of this note.

At both the national and international level, with some exceptions, simply imposing limits on the number of fishermen who can fish, often combined with restrictions on the amount of fish they can catch, have conserved neither fish stocks nor the livelihoods of fishermen in the coastal communities who exploit them. So, another approach was sought, which turned out to be the privatization of fish stocks.

Beginning in the 1980s in New Zealand, several governments began the practice of allocating rights to specific quotas of fish in New Zealand waters to individuals or companies. Usually, these individual quotas are expressed in terms of a fixed percentage of the total quota, so the amount of fish involved can increase or decrease depending on the size of the overall quota. Sometimes these rights are tradeable, or sellable, so that individuals can amass rights over significant portions of the overall quota. Such developments, whereby national management authorities promote the privatization of access to what are perceived to be publicly-owned resources, has met much opposition in the fishing communities, except from those who benefit

² Ones of particular interest to Latin America are the Inter-American Tropical Tuna Commission, the International Commission for the Conservation of Atlantic Tunas, the Permanent Commission for the South Pacific and OLDEPESCA, the Latin American Organization for Fisheries Development. See overviews at <http://www.fao.org/fi/website/FISearch.do?dom=rfb>

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from it! But this debate is beyond the scope of this short note.³

There is a similar move in regional organizations as well. In instances where quotas are established for certain species such as tuna, parts of that quota may be allocated to individual States. Allocation is usually based on historical catches⁴, the track record in the fishery, not necessarily on any notion of sustainability. Countries which have fished more are thus allowed to continue fishing more. Apart from the fact that this tends to reward countries that have contributed to overfishing, it is also prejudicial to States that want to enter the fishery for the first time, as, in theory, they have the same right as others to fish in the global commons. Many of these aspiring entrants are developing countries, and trying to accommodate their wishes to develop their fishery has caused considerable friction in some cases.

To answer the question posed above, States have given themselves the right to decide who can fish by creating their EEZ and reserving it essentially for their own fishermen or charging fishermen from other countries for the privilege of fishing there. In some cases, they have then given, or sold, that right to individuals or to large companies.

The reasons for failure of each of these approaches are multiple but a major factor is the global aspect of modern fisheries. The commons – i.e. the ocean and the fish stocks available all over the world – is global. But everybody wants access to it: local fishermen as well as national fishery industries and transnational corporations. More fish enters international trade than any other food commodity. The capital behind the fishing companies is global. The major means of production are global, since fishing vessels regularly move from one ocean to another within a matter of months. At the end of the day and despite of all attempts for regulation, fish stocks continue to be over-exploited.

Even if it seems impossible to agree and implement a programme for the management of global fisheries, the principles of this management remain obvious: If we want to continue fishing in the global commons, fisheries management must be done on a cooperative and global basis, *partiendo del principio de sustentabilidad para conservar el recurso como tal.*

³ Interested readers should explore the literature on what is often called "rights-based management" and "individual transferable quotas" (ITQ)

⁴ Cabe destacar que en el Sistema de Comercio Europeo de Emisiones, los derechos (certificados) de emisión fueron adjudicados gratuitamente sobre la base de las "emisiones históricas generadas" a los grandes contaminadores. Véase también: HAAS, Jörg; BARNES, Peter: La atmósfera como bien común Acerca del futuro del comercio europeo de emisiones en este mismo libro.