The Law Governing High Seas Fisheries: In Search of New Principles

Francisco Orrego Vicuña
University of Chile Law School and Institute of International Studies, Santiago, Chile

INTRODUCTION

The exploitation of ocean resources has long been the subject of an increasing conflict of interest. Competing users in closely related geographical areas were at first the basic element of this conflict. Long-distance fishing versus the interests of coastal States later became an added element of this equation. While geographical aspects were of course present in this later context, the dispute had turned mostly to a question of competing economic interests and power.

Various forms of accommodation took place among users or States in order to cope with a problem that had turned into a situation menacing the orderly conduct of international relations. Bilateral treaties, followed by major international conventions, gave rise to a number of arrangements in the field. Decisions by international tribunals helped to clarify the legal and practical implications of some disputes. These developments, however, did not suffice to put an end to the progression of conflict. Exploitation versus conservation became more recently a new kind of conflict characterizing the international community in connection with ocean resources. Again, some treaty and practical developments have purported to accommodate this other kind of conflict. Principles have been laid down, but strong differences of opinions as to their meaning and implementation persist.

The question this contribution seeks to address is, what is the basic principle governing the fisheries activities on the high seas today? Historical patterns are clear, as is the evidence of past accommodation. However, there is no certainty or clarity about the state of the law at this stage. Will the approach to a long-term solution be an all-powerful and encompassing central regulatory scheme as some believe and propose, or should it be an entirely decentralized mechanism giving place to market mechanisms where the basic role will be performed by the individual interest?

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AN ISSUE LACKING CLEAR RESPONSE

What is the legal principle governing high seas fisheries today? This rather simple question does not seem to find an adequate response on the part of governments, nor in respect of the procedures for the settlement of disputes that have been undertaken in this matter at various points in time.

In each of the central periods marking the evolution of the law of the sea, there has been one basic principle serving as the reference point for fishing activities, a principle that many times finds expression in or arises from the decisions of international tribunals intervening in disputes of this kind, as happens only too frequently. At the time of unrestricted freedom of fishing on the high seas, the governing principle was the prohibition for States to interfere with such activities. But as Georges Scelle explained in the illuminating memorandum prepared by the Secretariat of the United Nations in anticipation of the codification of the law of the sea undertaken in 1950, this negative principle resulted in “les désordres, les destructions, les gaspillages.”

The reasonable exploitation of living resources was the first organized response by the community of States to put an end to a situation that was evidently leading toward unacceptable consequences. However, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas that embodied that principle finally failed as a regulatory mechanism.

COOPERATION IN RATIONAL EXPLOITATION: A ROLE FOR THE COASTAL STATE

A second approach was then devised by coastal States. This was the time of the large national maritime claims that in the long-term led to the adoption of the Exclusive Economic Zone (EEZ). Unnecessarily, this approach pursued only the interest of the coastal State, as it was also the means for introducing a regulatory authority on the high seas capable of bringing into effect the conservation measures that otherwise were ignored by States. It is on this basis that the EEZ purported to take into account both the interests of the coastal State and those of long-distance fishermen.