

## **Losing the Commons in the Name of Saving It: Rules of Relevancy and Commons Governance**

Catherine Adcock Admay  
Duke University School of Law

5<sup>th</sup> Annual Colloquium on Environmental Law & Institutions  
Duke University

April 27-28, 2000

### EXECUTIVE SUMMARY:

[para. 1] The Straddling Stock Agreement (SSA) of 1995 creates a framework for governance of the high seas (more particularly certain fisheries that straddle the high seas and sovereign waters of coastal states) that is neither in keeping with the pre-existing law of the high seas, nor faithful to the legal fiction of a global commons. This Paper argues that the rule of relevancy embedded in the very language of the legal instrument (a *de jure* rule)--the rule that confers governance status only on relevant coastal states and on states having a “real interest in the fisheries concerned”--represents a significant sub silentio departure from the Law of the Sea Treaty’s legal baseline (where all states have a right and possibly a duty to participate in governing the commons) and, more importantly, threatens to sacrifice essential elements of the “commons” for reasons that demand more thoroughgoing justification than heretofore offered.

[para. 2] The rule of relevancy operates as a powerful exclusionary rule. It reduces the number of states that must come to agreement on how to conserve and distribute the fruits (here the fish!) of the commons by excluding states deemed “not relevant” according to a standard of “real interest” as decided by coastal states local to the high seas fisheries and the distant water fishing nations (DWFN’s) with which these coastal states have already contracted. No justification for changing the standard of relevancy (from inherent interest to “real interest”) is given in the Agreement itself. Those who herald the agreement (there appears to be no specific dissent in political or academic circles) embrace the exclusionary rule as a means to reduce the number of parties who must come to agreement on how to save the high seas fisheries. They offer familiar functional arguments, the strongest of which is that some fisheries will be wiped out, possibly forever, if enforceable measures aren’t taken now by those actually fishing for the fish. In other words, Rome will burn while some 200 Neros fiddle. The functionalists treat this conservation imperative as self-evidently decisive: what good is it to worry about the framework for saving the fish, if, in the meantime, you lose what you’re proposing to save?

[para. 3] This Paper argues that more than fish is at stake in this rush to “save the commons.” Indeed, very basic ideas about who counts in the global community, what sorts of interests have to be proffered in order to count, and the possibility for more soundly constructed legal fictions to hold out against the real-world opportunism of states seeking to confer on themselves trumping status, ought to be examined before signing off on the functionalist line.

[para. 4] What is there to save--and for whom--is the starting point of a critique of the array of functionalist justifications. This starting point demands that a different kind of justification be given in a context like this one, where everyone agrees the global commons is at stake. I argue that for the commons to have the requisite "commons-ness," it cannot be saved exclusively for a subset of the states and peoples who make up the global community. If the high seas fisheries are to be saved at the cost of transferring all conservation and distribution control to some subset of states, we should be clear that the fisheries are no longer a commons: they are, contra to the Law of the Sea rules on the high seas, objects of sovereign control exercised collectively by the members of the regional fisheries organizations (RFO's) authorized by the Straddling Stock Agreement. Thus, institutions that purport to be saving the commons are instead arrogating control of the commons (including its physical survival and its economic value) to their regional club of members. In other words, whatever its merits for saving fish, the SSA is no fine precedent for commons governance.

[para. 5] This Paper probes an array of functionalist arguments (numbered 1 through 4) in terms that reveal their significance for equal right to participate in rule-making in a global community. If we accept the functionalist arguments, what regime will the rules that result from these sorts of arguments construct? Do we view the potential (by no means yet the actuality) of efficiency in saving the fish, to outweigh the actual costs in legitimacy that the resulting institutions must bear? The Paper explores whether the "non-relevant" states should suffer the tradeoff offered by the SSA regime: we'll save the fish, so long as you agree its ours to save and ours to benefit from after we've saved it. If what it takes to become "relevant" under this regime, is to join the fray of fishers, the regime includes a perverse incentive: it conditions governance rights and status on the act of fishing, the very act that any true conservation imperative (the self-evident argument offered earlier) should wish to discourage. Thus those states whose conduct most contributes to conservation (fishing forbearers), lose their right to ensure the overall success of conservation for the benefit of present and future generations everywhere--and this outcome is justified, remarkably, as a pro-conservation measure.

[para. 6] Having shown that what is to be saved by the SSA is not the global commons [para. 4] and that the means proposed for saving it (giving control to those most able and likely to destroy it) seems not the most calculated to promote or reward a conservation imperative [para 5], the Paper speculates as to whether, nevertheless, states rendered non-relevant within the terms of the SSA would have good reason to accept such marginalization in the regime. It briefly explores whether non-relevant states (that did accept the regime or that were effectively unable to mount a successful protest on the merits) could take ameliorative steps (other than perverse ones) to minimize their loss of influence. [amplification of Keohane/Schroeder suggestion].

[para. 7] At this juncture, familiar competing accounts of what sort of relationship IR and IL should have, will surface. The Paper concludes that international law's core legitimacy depends on strengthening wherever we can (certainly not knowingly weakening) certain legal fictions: that international law creates political space for true global commons; that international law is a law that promotes the interests of the international community (not merely of the trumping members among it who can make pragmatist/realist arguments that force waiver of rights); and that international law does not condone further burdening its most functionally burdened (most functionally marginal?) constituents

in by means of a sub silentio coup de grace. On this Paper's account, more than one Rome is burning and it is likely that all 200 or so Neros will need to stop fiddling to put out the fire.

**Rules of Relevancy in International Law:  
Straddling Stock Case Study**

Catherine Adcock Admay  
Duke Law School  
Environmental Institutions Colloquium  
April 20, 2000

I have been hatching this project for some time now because it raises general issues of a more thoroughgoing theoretical and practical significance than this particular context--fish, the commons, global lawmaking. My hunch is that when I fit all the parts together I will be able to show some startling aspects of public international law. Since I address only one empirical area here--one case study--I will limit my theoretical concerns to what I can show from it. The core project is to show that a set of rules run through IL in range of subfields--IEL, Choice of law, Law of institutions, among others-- that have not been adequately theorized, if at all. I use the term rules to emphasize the de jure element. What's happening is happening au niveau de droit.

So the title of my bigger project is Rules of Relevancy in IL. **Today I am presenting its Part 1, "Losing the Commons in the Name of Saving It."**

I take the Straddling Stock Agreement, an agreement that is closely connected with the omnibus Law of the Sea Treaty of 1982 (in effect for some 132 parties--real IL) as my first case study.

Since I'm a stickler for the nitty gritty of the law--whether it is law in the IL sense of that word--I should say that the SSA is not hard/binding law yet (12 ratifications to go) but IL scholars live in a world of soft law and regime precedent and so any kind of fleshed out mechanism, negotiated over 3 years with many of the key fishing states present, and with 59 signatories, is not to be sloughed off lightly.

Show FAO Commodity Market Review slide

Indeed the Agreement has been heralded, ballyhood in most quarters politically and academically and is not politically doomed by any means (for one thing, two big fish --US and USSR--have ratified; as have two medium sized fish--Iceland & Norway; and many of the players in production, consumption and trade are signatories)

Why am I worried about this Agreement?

That there is an agreement should be a sign that things are going well in international law. "We have a major problem--fisheries depletion and fisheries collapse around the world--made apparently intractable

because a number of states have economic reasons (over capitalization in fishing fleets) that drive them to apply as much fishing effort as they can in as many corners of the globe in ways that undermine the conservation efforts being mounted at great domestic cost by the responsible stewards of the world.” (This is Canada’s morality play account of the situation–epitomized by its conflict with Spain.) The SSA means to stop this. At least for straddling and highly migratory fish–the ones that swim in and out of sovereign state waters and enter the high seas, the global commons, belonging to none and all.

Surely this is an example of IL mechanisms overcoming the public choice difficulty: here diffuse actors with different and conflicting interests have gotten together and elaborated a detailed and enforceable set of rules: established a governance regime.

I should be careful not to give the impression that I am hostile to all the features of the Agreement or most importantly to the central impulse behind it–the notion that a governance regime for the HS is needed.

Indeed, the Agreement has rightly been hailed for innovative voluntarily-assented to compliance techniques (art 21) and for specifying real governance duties (art 10) including collecting data so that reasonable decisions can be made about what to do in the face of waning fish supplies around the world. Art 6 is dedicated to giving meaning to precautionary principle in specific practice, not merely vague principle.

I don’t want to throw the whole instrument away; but do want to point out what I think is a significant, deliberate (in the sense of intentional) but not sufficiently deliberated (not fully thought out, or in my view ultimately justified), blind spot in the law.

I’m interested in putting one feature of this institutional design–its rules for deciding who can and cannot participate--to justification. Buried in such a purpose is more than a descriptive project, namely, what justifications are in fact given (in the terms of the law itself or in the policy arguments of those that support it), but also a normative project–what sorts of justifications should count as justifications in this context. Indeed, what sorts of justifications should we agree are relevant for establishing a rule of relevancy as to who should regulate/govern the valuable, dynamic fish in the HS.

[fn to MacIntyre’s familiar clarion call, rephrased as whose justification, based on whose sense of what counts as reasons]

To prefigure where I am going, I think all the justifications that have been given for the architecture of the SSA to date are functional in a thin/narrow sense and that these functional justifications are inadequate because they fail to account for the constitutive outcomes or the dysfunctional outcomes they produce. In this context I will argue that constructivists, those who pay attention to the structures we’re putting into place and how we’re putting them into place as expressions of who we are and who we will be, have better insights into what sorts of justifications should count. Interestingly,

constructivists can be viewed as thick/wide angle functionalists. They worry about how the legal forms and institutions will function in the world, not only for saving fish, but, say in this case, for preserving the commons-ness of the commons.

Why do I say that SSA is an example of narrow functionalism revealing inadequate attention to the structure of IL governance –that it stands to lose the commons in the name of saving it?

Before I unpack how I could make this sort of argument, I need to focus on the device I think would be most responsible for such an outcome. The device I criticize here is the rule of relevancy at the core of the SSA. As I've said, I think this rule came about without full understanding (intended but not theorized) that it is a  
a blind spot, a function of not seeing, recognizing, accepting in fact all the relevant parties.

In de jure terms—quite explicitly—in the very language of the central provision mandating the creation of mechanisms for cooperation in the governance of high seas fisheries (Art 8)—that is THE governance mechanisms—the Agreement contemplates only two sorts of parties as RELEVANT for these mechanisms. Arts 8 & 10 set up the structure and function of the governance mechanisms for the HS, by declaring that the relevant states, the ONLY ones that will be allowed to participate in the contemplated governance mechanisms will be coastal states (obviously relevant to conservation of local HS fisheries that straddle their territorial borders) and those states that have a “real interest in the fisheries concerned.” (Art. 8(3)) (most often named are the states actually fishing on the HS now—DWFN).

I want to probe, ask, ponder...What does it mean to declare a state relevant or to designate it as having a “real” interest.

Such a construction at an analytical level carries the implication that some states are not relevant and some don't have real interests in the matter at hand. Or else what would be the point? If everyone was relevant and everyone had a real interest, there would be no payoff to singling out their status, privileging the realness of their interest, giving them standing with respect to some issue.

Yes there are resonances to standing doctrine and its focus on real injury to determine the relevant rights-holder. Domestic constitutional lawyers understand standing doctrine to be an exclusionary device. In my reading of the SSA, designation of relevancy is also an exclusionary device—the IN “relevant” states are selected from an overall pool of possibly relevant, but ultimately OUT or “non-relevant,” states—those who don't have “a real interest in the fisheries concerned.”

In many IL contexts this ordering or privileging principle is not a per se problem. Important to distinguish situations where it wouldn't stir alarm where the privileging principle, or rule of decision makes sense and is justified.

Let's take a favorite institutional example of ours--the EU. At least one serious conversation with our EU fellow [Michael Rogers] about what the membership principle should be for joining the EU. Intuitively we understand that it is appropriate for the EU collectively to decide who is European in a sense viewed as relevant to its States Parties. That membership decision has crucial bearing on jurisdiction. To be a member is to fall within the European jurisdiction.

So one can call European law a set of rules for those who are relevant, for those who fall within the European jurisdiction. The key rule of relevancy is European-ness. Article O of the Treaty on European Union discloses on what basis those states become relevant, ie it discloses the rule of relevancy.

Whats wrong with having as a rule for who gets to participate--who can be a member of the governance regimes for the HS,--who is relevant within the realm of regulating HS fish that you have a "real interest in the fisheries." How can I get from this device to the conclusion that SSA loses the commons in name of saving it?

The short answer is that I'm worried about how the rule can be used as an exclusionary device to oust NON-relevant states (the OUTS) from high seas governance which I take to be the province of all states and thus not validly subject to any rule of relevancy. All the possibly relevant states, that is all states, are relevant. We are not talking about regional jurisdiction like Europe, but a global commons jurisdiction, the high seas.

In my view, the SSA represents a law-based\* coup in the palace or among the nations of the world. Some states--those designated relevant and those that can make a case to the relevant that they are relevant too--have arrogated to themselves the right to govern the high seas fisheries of any note. By what right do a subset of states assert exclusive jurisdiction over waters they acknowledge are commons or international?

[\*Of course this is not a lawless coup--the law which states can choose to ratify or not--is what elevates the relevant states to relevancy. It will matter who ratifies it.]

Notice that the element of a select few governing the bounty of the commons has gone almost unnoticed\*, considered mere common sense, naturalized in a way that other de jure elements of international law are not. Consider the ruckus about security council and how it is that the Permanent members of the UN--the veto powers--are more relevant than all the other states; are more equal despite the foundational principle of the UN charter of the sovereign equality of states.

[\*only one scholarly article has focused on how to read the "real interest" provisions or the fact that two classes are created--relevant and non-relevant]

People will call my title counter-intuitive. How is it that we are losing the commons when for the first time we have a management mechanism that proposes to save it?

Much depends on what we view as the commons at stake. In my view, we not only have fish to lose, but an understanding—a legal baseline in fact—of who does or should count in figuring out how to save the fish. Once the relevant states get exclusive jurisdiction over HS fisheries, they become the stewards of the resource and the resource beneficiaries. [The allocation decisions Coastal states were given authority to make in the LOST with respect to their sovereign waters (EEZ's) are in effect extended to the HS as long as they make the allocation decisions in cooperation with DWFN.]

Right now that baseline has been set by the LOST. Before 1982 most of the ocean had the legal character of HS; 70 % of it was redistributed/reallocated by the states (many) who ratified it. All coastal states were given zones of sovereign waters 200 miles from their coasts. The residual category—what was left over after the ocean grab—was designated the HS.

#### Article 86

Application of the provisions of this Part [VII on the High Seas]

The provisions of this Part [VII] **apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.**

LOST is often described as a codification of customary law; it reduced to conventional language what were the backdrop rules of custom.

In codifying them, LOST reshuffled the applicable principles. No longer is the HS a place of freedom of fishing—the old laissez-faire management system (now many qualifications placed on FoffF)\*[fn to 87]; the whole ocean in fact became the object of stewardship duties.

#### Article 192

##### General obligation

**States have the obligation to protect and preserve the marine environment.**

#### Article 193

##### **Sovereign right of States to exploit their natural resources**

States have the sovereign right to exploit their natural resources pursuant

to their environmental policies and **in accordance with their duty to protect and preserve the marine environment.**

That conserving and managing (read doling out) the living resources of the HS were the responsibility and right of all STATES was captured explicitly:

#### Article 118

Cooperation of States in the conservation and management  
of living resources

**States shall cooperate with each other** in the conservation and management of living resources **in the areas of the high seas.**

No notion that only a subset of states must cooperate. “[Implicit “all”] States shall cooperate.” The valid question arises at what scale should ALL states cooperate. The SSA commits in its heartland provisions (arts 8-10, but not art 5) to a regional scale, but this is not foreordained by the LOST:

#### Article 197

**Cooperation on a global or regional basis**

**States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.**

Notice, that a global scale governance mechanism for the small residual area of HS is privileged as clearly appropriate, whereas the regional scale is only contemplated where appropriate. Also, whatever the institutional scale, the governance system will formulate and elaborate international rules, not regional rules. Both scales of governance would be under the obligation—sensibly—to take into account regional natural features—the Peruvian upwelling, the Benguela current, regional ecosystems/food chains.

I’ve made the argument that the commons-ness of the commons (as understood by foundational/constitutive instrument LOST) requires that all states have a say in what should be done to save the commons—preserve the environment—save the fish. To say this is not to say the scale of governance can’t be at the regional level (though I worry about that for other reasons) and it is not to say that a standard property regime is in place that allocates all the fish in the HS to some Agent

operating for all the States (analogous to the Part 11 authority for mineral nodules). In some parts of the LOST one gets the sense that there is something quite subtle and interesting about its design with respect to the res communis of the HS: Jurisdiction and property are separated. Jurisdiction over the High Seas falls to everyone—the HS is a “common thing”—but cannot be reduced to “property” in the classical sense of ownership by any one State.

### **Article 89**

Invalidity of claims of sovereignty over the high seas

**No State may validly purport to subject any part of the high seas to its sovereignty.**

It's not clear if this provision would allow a collectivity of states to subject the HS to their collective sovereignty (in the direction of Public Trust/Agent), although in my view the very fact that there is even a constitutive instrument like LOST setting out the rules for each part of the ocean, means that at the public law level, understanding the public as the collection of states who have ratified the Treaty, the HS has been made the subject of their collective control.

Why is there collective control at the LOST level and selective control at the SSA level? How did public law that embraced all states [LOST], become the launching pad for a side agreement (not yet law, but fairly widely signed) that excludes non-relevant states from regional organizations and purports to have those regional organizations occupy the field of HS governance, at least region by region. What's galling about this is that SSA is explicitly framed as “in no way prejudicing the rights, jurisdiction and duties of States under the Convention” and directs that its content be “interpreted and applied in the context of and in a manner consistent with the Convention.” (art 4) (of course as a lawyer I would invoke that provision as a basis for undoing all of my alarmed black letter law analysis today, but that's a last line of defense and not one to rely upon when the SSA is viewed as a good institutional precedent).

That this legal shift from collective control to selective control would have occurred sub silentio and without a political fight, is almost too hard to believe. Need to show at the black letter law level.

Art. 8: cooperation for conservation and management

(1) **Coastal states and states fishing on the high seas** [notice the two sets of relevant states] shall, in accordance with the Convention, [notice the nod to LOST/claw black clause] pursue cooperation in relation to straddling fish stocks and highly migratory fish stocks...

(3) Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling and HM fish stocks [what gives or denies this competence? LOST?], States fishing for the stocks on the high seas

and relevant [don't be confused about this use of the relevant—means relevant to the region] Coastal states shall give effect to their duty to cooperate by becoming members of such organizations..., or by agreeing to apply the conservation and management measures established by such organization....  
**States having a real interest in the fisheries concerned may become members** of such organization or participants in such arrangement.

The terms of participation in such organization... shall not preclude such States from membership or participation: nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

[so the form of discrimination is framed in an anti-discrimination clause—you can discriminate against a State or group of States that don't have a real interest]

(4) ONLY those States [who are members or agree to apply conservation rules of these RFO's] shall have access to the fishery resources [located in national jurisdiction and beyond national jurisdiction in the high seas] to which those measures apply.

To make it really clear the scope of power these RFO's have under SSA, look to

Article 10: Functions of [RFO's]

In fulfilling their obligation to cooperate through subregional or regional fisheries management organizations or arrangements, States shall:

(a) agree on and comply with **conservation and management measures** to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks;

(b) agree, as appropriate, on **participatory rights such as allocations of allowable catch or levels of fishing effort**;

....

(i) **agree on means by which the fishing interests of new members of the organization or new participants in the arrangement will be accommodated**;

(j) **agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner**;

....

What sort of policy decision has been made and for what reasons to frame a law that excludes the non-relevant states or the states deemed not to have a “real interest” in the HS fishery?

Let's understand what this means. In the least optimistic form\*: those states that are not fishing in the area or are not the local Coastal state are deemed not to have a "real interest" in the HS fishery. Real interest analysis, suggests that there is some core interest to protect: notion is that the states that are most implicated by SSA are states that are fishing or will be fishing (prospective new entrants—just overhauling the used trawlers or fishing boats to go for the long journey)

Why are non-fishing states not viewed as sufficiently interested in a resource within collective HS jurisdiction? Why are they not allowed to participate in debating and framing the rules that will lead to the conservation/preservation of these fish (forming part of global biodiversity)?

This is the juncture at which I put the supporters of the SSA to justification. What justifies the rule of relevancy that privileges fishing states and local coastal states:

Typically the answer is this is the only way to save the fish in HS and in the EEZ/national sovereignty zones:

- (1) We need to reduce the number of actors so as to lower the transaction costs and collective agency problems of designing governance structure for EEZ
- (2) reduce the number of actual fishing states chasing after scarce resource [but note, once you are fishing, you should be able to show you have a real interest and benefit from the antidiscrimination/discrimination clause]
- (3) create incentive structure by further enclosing the commons and internalizing the costs and benefits to some subset of specific States who will bear the cost of "[sub-]community policing" against potential free-riders in the HS
- (4) per Hollick and Cooper, in light of the absence of any real community behind global commons "where the problem of management is made more complex...by the international system that retains the legal fiction of sovereign equality for all states," we should promote effective joint management (3<sup>rd</sup> device after laissez faire and property partitions) among the parties that are "directly concerned." This is the strongest argument for the rule of relevancy—that we should understand that not all states are equally affected, equally concerned by what happens to the commons. If we continue to indulge the fiction of equal effects we'll let ourselves in for strategic bargaining: "the inclusion of actors whose interest in the issue is marginal runs great risk of impeding a successful outcome, for they will tend to use their influence to pursue other objectives that are more important to them" (170)

These are all functional justifications (a non-exhaustive list, let me add) that I want to criticize for being inadequately attentive to the normative value of constituting the HS governance regime in a way that is faithful to the global constituency [\*LOST makes that global constituency all states, but we could put to justification that premise, in effect the classical IL rule of relevancy privileging states, and look for sub-state interests, actors, stakeholders instead]. If you were given to thinking as a thick/higher-order functionalist—what does this regime do in the world—paying decisive attention to the normative value and

its expressive significance might itself be a functional argument.

One of the clear costs I see to excluding states is that even if the fish are saved, the fish that enter the HS won't be saved for them, but only for those who now have arrogated control over conservation and management/distribution policy. In other words the big loss here is not only the fish, but the right to govern the commons alongside all the other present generation beneficiaries of its largesse.

Criticize each of the four functional arguments offered above in constructivist terms:

- (1) why should we focus on the “n” factor so fixedly? Do we have to do that in order to generate effective governance? Just how important is the “n” in collective action (Ostrum sees it as “overrated as a determinant of success or failure of collective action” (K0-57)).
  - (a) Other ways of getting manageable groups (and we should note here that the states making up international community of states are less than 200, more than half of what we think is manageable in Congress and a lot less than many CPRs) include partitioning into smaller subsets initially before returning to negotiate with the larger set (KO-21).
  - (b) If we're so sure that we need fewer delegates/negotiators at the huge palais where UN conferences unfold, then why not allow all states to elect those who will represent them in the smaller setting and let them keep residual right to withdraw that agency? Why not make it clear who we are managing the commons for: of the people, by the people, for the people.
  - (c) in fact this is a core problem with functionalism; doesn't tell us to what end we are supposed to direct our pragmatic-do-something-useful sensibilities; if it dispenses with the question useful to whom, it often hides the fact that it is useful only to some—clearly not appropriate in the context of the commons
- (2) if the problem is trying to reduce the number of fishing states chasing scarce HS fishery resources, why is the rule of relevancy that you fish or are a coastal state near the fishery? Wouldn't such a rule become perverse incentive to bring non-fishing states into fishing industry if only to transform themselves from non-relevant states to relevant states?
- (3-a) lots of commentators have endorsed enclosure as a way to avoid the tragedy of the commons, but many have pointed out the fallacy of thinking commons need to be enclosed by individuals (or small groups of individuals) in order to be saved. If HS is a global collectively-held commons, how is it serving the commons to alienate it to a subset of states? Thus there is a big difference between Hardin's two answers—privatizing or public-izing the commons.

- (3-b) If we focus on incentives. The justification given by the SSA begs a foundational question: whose interests are we counting here as predominant?

It seems to me that this crucial enquiry—whose benefits and costs are we hoping to internalize—is prejudged in a way that is absolutely not argued for. Since when do CS's worried about managing straddling stock in their EEZ's get to assert primacy as to management of HS stock for HS beneficiaries? Why is the sea ceded so quickly to CS declaring they need it for their own purposes? Recall under LOST, art. 193, sovereign states only have the right to exploit THEIR natural resources and even that right is conditioned by their duty to preserve environment and conserve biodiversity, presumably because their actions will have an effect on what happens in the HS!

Once that point is made exactly who is doing community policing and who should be viewed as the free riders in the commons becomes much less skewed in favor of the self-declared stewards? If both sets of interests EEZ and HS are viewed as having at least equal claims, the free-riders are those who take without regard to interests of others, without complying with restrictions placed on use of commons by duty to conserve/preserve. A better way to restrict the overuse/depletion of the commons is not to restrict who counts in the HS management regime, but to apply regulatory rules that apply to all inter se (duty to preserve and conserve that conditions use rights). Community policing in the SSA model involves ejecting, some states—non-relevant ones—from the global community, akin to dispossessing them.

- (3-c) And what is happening to the “clear boundaries” (Ostrom-esque design principle) that the LOST has created in carving out national and HS jurisdiction—blurred not reinforced by these RFO's whose powers superimpose another layer of jurisdiction, EEZ, RFO (EEZ & HS) on the HS. The question of what scale (helpfulness of regional carve-outs) to use for managing the commons is a different one than who should be in on the basic right of management, or right to benefit from the fruits of that good management, who should reap the fish harvest.

C I worry that changing the scale CAN change the rights structure, but there are obvious advantages to regionalization that would be nice to harness

- (4.) The Hollick Cooper argument—that there are shades of interest—fundamentally ignores constructivists view of the commons. We're building a community here not wishing it away. Health community building was the impulse behind Charter's sov equality principle. Not just relying on the law, but on the policy behind the law. The interest at stake IS participation, being counted and that is hardly something that admits of degrees. Age old critique of realism is that it is a emmiserated form of constructivism—that it actually constructs a society based on “major parties” with greater attention paid to privileges already acquired. Only reason non relevant states aren't deemed to be direct affected or to have a real interest is that they don't already have an economic stake in fisheries. My impulse is to say that they do and that they shouldn't have to compound the commons problem (too much fishing) to escape their marginalization of both economic and institutional sort.

We need to redraw the picture. Venn diagram would not allow HS interest to retreat with each extension of CS interest, but collective interest would abut national CS interest. Fishing nations and non-fishing nations alike form the collective. The relevant difference would be in the type of jurisdiction asserted—HS on one side of the boundary; EEZ on the other—but the goal would be the same—proconservation management. Still employ the rules against imposing transboundary harm but the rule runs both ways. CS can't externalize costs onto HS and HS collective can't externalize costs onto CS. HS collective could easily be dominated by fishing nations amongst them (just as was evident in SSA arrangements); non-fishing nations will have to assert their rights in order to keep them. It's for these states to insist that they have "real interests" at stake—real interest in the fish (nutritionally and economically) and real interest in the governance regime (participatory, architecturally, symbolically).

Institutionalists are very interested in embedding the "right institutions," making them work based on layers of incentives—push and pull factors (lego-structural, political, economic, sociological). If we are to herald the embeddedness of institutions we need to worry about what we are embedding. To say that only a subset of the relevant actors—in my constitutive/constructivist schema that is all actors—shall control the HS fisheries that range in and out of EEZ's and HS, is to no longer have HS fisheries function as a common (albeit restricted) resource. Why herald or allow stand as a precedent a way of preserving the global commons that vitiates it?

Under SSA, not only is the scale not global, but the nature of the resource being managed is no longer rightly viewed as common. RFO's control regional fish for benefit of some regional and some non-regional participants. The silent, absent, deliberately overlooked parties, the non-relevant states, are not named, except by implication. If those states are to remain relevant in the public order, they will have to speak up...NOW. The institutional design behind the SSA is not friendly to them and before it locks them out, they should demand explicit recognition as parties with real interest in what happens to the fish in our HS and the governance structure we use to ensure that the global commons flourish.\*

\* ideas about what they can do: make commons more robust and felt in the world; declare an "interest" so that relevant states comes again to mean all states, see esp. art 7(8); go to the conference 4 years later per art 36(1) and reframe who counts in practice and in law

---

who does SSA bind:

C only binding on the states that have ratified it, basic analytical point of IL—instrument of consent binds only those who have consented.

Supported by Vienna Convention: Arts. 34. Art. 34: "a treaty does not create either obligations or rights for a 3<sup>rd</sup> state without its consent."

BUT VC creates space for CIL in Art. 38: "nothing in art. 34-37 precludes a rule set forth in a treaty from becoming binding upon a 3<sup>rd</sup> state as a customary rule of IL,

recognized as such.”

- C In definitions section, instrument defines states parties as those who have consented (this is definitional) but goes on to state art 1(3) that “the Agreement applies mutatis mutandis to other fishing entities whose vessels fish on the HS”. Question is what to make of the “entities.”
  
- C Part IX, article 33 is entitled “non-parties to this agreement” Two subsections: first calls for parties to “encourage non parties...to become parties;” second gives notice that “States Parties shall take measures consistent with this A and IL to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this A.”