

The Ecological Implications of Establishing Property Rights in Atlantic Fisheries

by Elizabeth
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Chapter Summary

The point of departure of Brubaker's chapter is the difficulty people in the fishing industry have in protecting fish stocks against environmental degradation. The difficulty arises from the fact that pollution of the waters creates a public nuisance, and only the Attorney General of each jurisdiction can bring an action on behalf of the public. Lacking property rights in the fish from which they earn their livelihood, fishermen lack also the standing necessary before the courts to claim compensation when the stocks are damaged. Referring to one example of this principle at work, a 1970 Newfoundland Supreme Court decision, she writes:

The chief justice agreed that the company's pollution did not create a private nuisance. In order to sue, he explained, a person must suffer 'peculiar' damage: 'where the damage is common to all persons of the same class, then a right of personal action is not maintainable.' In this case, the plaintiffs held fishing rights in common with other citizens. The polluter didn't violate their rights to any greater degree than it violated those of others. The pollution 'was not a nuisance peculiar to the plaintiffs, nor confined to their use of the waters of Placentia Bay. It was a nuisance committed against the public.' Consequently, the chief justice concluded, 'a private action by the plaintiffs is not sustainable.' The pollution could continue.

The ecological importance of property rights in the fishery, then, arises in part from the tools that they provide to property owners to protect their fish stocks from pollution. The Attorney General, says Brubaker, is often in a conflict of interest, "representing both the public and a government that is itself responsible for the offending pollution or that has licensed or subsidized the polluter."

The lack of effective action by governments has had very damaging effects on Atlantic fisheries. Vast areas of potential shellfish harvesting are regularly closed for health reasons, such as faecal pollution. Cities such as St. John's, Sydney and Halifax have no wastewater treatment. Pollutants from heavy industry, such as logging, mining and manufacturing have damaged streams, estuaries, and harbours throughout the region, as has runoff from farms, certain kinds of marine paints, and oil spills from shipping.

In those cases where fishermen have secure property rights to ocean fisheries, and where the legal regime permits such remedies, "owners often exercise their rights to defend their resources against pollution and other threats." In support of this contention, Brubaker cites examples from places as diverse as Washington State and Japan. Recognizing, however, that such property-based regimes are still the exception rather than the rule for ocean fisheries, she looks also at the better-established experience in freshwater fisheries.

On the basis of examples from Britain and New Brunswick, Brubaker shows how property rights have been frequently used as an effective tool to protect fish stocks, but she also shows how governments have sometimes changed the law so as to weaken these rights and make legal redress more difficult to obtain.

Property rights are not without their limitations as an instrument of environmental protection.

The author notes that there can be high costs to legal action, and that these may deter some rights holders, as may the high costs of proving where the damaging pollution originates. She explicitly recognizes that, where there are many small fishermen suffering cumulative damage from many small sources of pollution, government regulation is also an effective instrument. At the same time, new technologies are constantly lowering the cost of establishing the source of pollutants, and property rights don't always need to lead their owners into court to be effective. Once the strength of these rights is established in the courts, often the outcome of environmental damage is a negotiated settlement. "The resulting bargains, freely and fairly arrived at, reflect the values and circumstances of all directly involved parties."

Giving fish stock owners legal recourse against polluters is not the only environmental advantage that Brubaker sees in property rights. The access that such rights confer is exclusive, which means non-owners have no rights of access. This reduces pressures on fish stocks, while creating incentives to exploit the stock sustainably. Again numerous examples of this principle at work are found in freshwater fisheries, ranging from New Brunswick to Iceland, Scotland and the USA. In respect of New Brunswick she observes that,

The exclusionary practices of New Brunswick's private owners have long been credited with protecting salmon stocks on the province's rivers. In the words of the former president of the Atlantic Salmon Federation, 'Private ownership historically has given better stewardship of salmon rivers, and better management. It's limited the pressure on the fishery.'

In addition to the power to exclude non-owners, rights holders have an incentive to get the maximum economic value out of each fish as well as out of the stocks as a whole. The result is pressure to move from low value/high volume fishing methods to ones that provide more income out of smaller catches. Thus the very high value of a salmon caught through low-intensity sport fishing has shifted many salmon stream owners into the sports fishery, improving their incomes while reducing pressure on the stocks. These higher value uses even permit owners to buy out the rights of lower value producers exploiting the same stock, a strategy known as "side payments," and one that is thoroughly explored by Gordon Munro in another contribution to this volume. Moving to the higher valued uses of the stock, coupled with the ability to exclude non-owners, also encourages capital investment in enhancing habitat and building the stock.

While the experience in freshwater fisheries is clearly relevant, the conditions of the saltwater wild fishery (as distinguished from saltwater aquaculture) are so very different that further analysis is needed. In particular, the fugitive nature of stocks--and hence the difficulty in excluding non-owners and in protecting owners' investment in the stocks, the patchwork of political jurisdictions, the interdependence of species, and the effects of fisheries upon one another are among the key environmental challenges facing rights-based fishing. While there is no single rights-based regime that can take account of the many varied conditions of individual fisheries, Brubaker believes that many of these problems can be satisfactorily resolved when some basic principles form the basis of particular arrangements. The author singles out five such principles. Property rights in the fishery must be: 1) exclusive; 2) enforceable; 3) perpetual; 4) transferable, and 5) accompanied by devolution of decision making power to the greatest extent possible to the rights owners themselves, who are better informed and more accountable than government officials. Property rights regimes characterized by self-managed ownership--either species specific or geographically based--

would best meet these criteria.

Brubaker concludes on a cautiously optimistic note. She remarks,

Ultimately, of course, not everything can be brought under a rights holder's control. Even large territories cannot encompass all fish... Likewise, fishermen will remain unable to control changes in currents or climate that may affect their resources. Like businessmen who contend with changes in markets, or farmers who contend with weather, fishermen will inevitably face uncertainties that diminish their confidence that investments will pay off and, consequently, reduce their incentives to invest. Regardless, a finely-tuned regime--one creating management units small enough to internalize costs and benefits yet large enough to accommodate ecological complexity--will greatly minimize [uncertainties].

One result of such a reform will be a radical change in the role of government in the fishery. No longer responsible for managing many aspects of the fishery, such as quotas and harvesting methods, its role will revolve around matters such as protecting unowned resources, like sea birds, and the establishment of marine reserves where no resource extraction is allowed.