**Resources Outside of the State: Governing the Ocean and Beyond**

**Introduction**

A number of hugely valuable natural resources fall outside of the borders of any nation-state. Amongst these ‘extra-territorial’ resources are the fish and other forms of biodiversity found in the world’s ocean; the minerals or fossil fuels located under the seabed and in the Arctic region; and the water column itself, which functions as an important carbon sink, and as a navigable space in its own right. The world’s atmosphere also functions as a carbon sink, as a navigable space, and as a conduit for mass communication. The Antarctic continent, finally, holds many natural resources which have not been *successfully* claimed by any state.

In order to avoid either open conflict or ecological collapse, clear guidance over both the exploitation and the conservation of these resources is urgently required. In some instances these resources are already being exploited (or indeed over-exploited). In other cases the technology required to access them is fast being developed. Often, however, human use of these resources has gone relatively unrestrained. In some instances, a partial legal framework has emerged to govern resource use. Under the 1994 United Nations Convention on the Law of the Sea (UNCLOS), many states came to extend their resource sovereignty into new offshore spaces – especially the so-called ‘Exclusive Economic Zones’ which stretch up to 200 nautical miles from a country’s coast. The Antarctic Treaty of 1959, meanwhile, witnessed states agreeing to cease making new territorial claims, and also endorsed a total moratorium on resource extraction – a remarkable political achievement which endures to this day. In other areas and for other resource types, the international legal situation is either permissive or simply uncertain. On the so-called ‘High Seas,’ fishing is weakly regulated at best. The fate of ocean biodiversity in the High Seas and in the huge Southern Ocean bordering Antarctica remains undecided. In many cases legal provision has barely kept pace with technological change. The International Seabed Authority, established by UNCLOS, is now issuing contracts to corporations which intend to explore for seabed minerals, though until recently harvesting those minerals was seen as a distant prospect. In the future the ‘resource frontier’ can be expected to shift still further. What appear right now to be far-fetched proposals to mine rare metals from asteroids may come to fruition during our lifetimes or those of our children. Closer to home, the melting of the ice-sheets at both Poles is uncovering valuable troves of resources, around which a number of states are circling.

We can legitimately expect political theory to make a contribution to thinking through questions about the future of these extraterritorial (and even extra-terrestrial) resources. Though these resources are not the only important source of advantage, their exploitation can be expected to have a significant impact on patterns of human wellbeing. It will serve to enrich some agents, and will also shape the opportunities available to future generations. Should these resources be managed collectively in some way? Can private actors or states unilaterally appropriate them? If benefits arise from their exploitation, how should those benefits be shared? These questions concern both first-order and second-order rights over natural resources. First-order rights confer the ability to *access* resources, to *withdraw* resource units, to *derive income* from them, and to sell or *alienate* them. Second-order rights confer the ability to make decisions about how and by whom these first-order rights can be exercised, and may involve the placing of limits or conditions on exploitation, the levying of taxes when income is derived or resources alienated, and so on (Armstrong 2017: 22-23). First-order rights are often described as property rights, whereas second-order rights are more typically labelled rights of jurisdiction.

Within any state’s borders, that state typically enjoys *both* jurisdiction *and* at least some property rights over local resources, though the majority may be owned privately by citizens or even by outsiders. There has been a lively debate in recent years about whether we can justify the extensive set of rights which states enjoy over domestic natural resources, as a result of which our understanding of the complexities of natural resource justice has come on in leaps and bounds (see e.g. Nine 2012, Miller 2012, Moore 2015, Simmons 2016, Armstrong 2017). At the same time, the debate on the proper allocation of rights over extraterritorial resources remains relatively embryonic. A number of theorists have suggested that familiar justifications of state resource rights are actually ill-suited to grounding rights over the many resources which fall outside of state borders. But which positive principles ought to guide us in responding to our questions remains unclear.

The paper will bring together what have often been rather scattered discussions of rights over extra-territorial resources. It will first sketch some early modern contributions to thinking through rights over the ocean. We will then discuss the guidance available within more contemporary contributions to debates on resources beyond the state. We will conclude by emphasising the key questions with which future work on this topic must engage.

**The Ocean in Early Modern Thought**

The annals of political philosophy have witnessed some well-known efforts to engage with questions about resource rights beyond the bounds of particular communities. For the most part, these have focused upon rights over the world’s ocean. In the seventeenth century, most prominently, a famous debate took place over the ocean’s role as a navigable space. Should sea routes be considered ‘open’ to the trading voyages mounted by all nations, or could they be ‘closed’ – that is, controlled by major naval powers such as England, Spain or the Netherlands? Could the apparently boundless sea be *politically* bounded, or occupied, by particular communities? As early as 1269, the powerful city state of Venice had asserted its supremacy over the Adriatic Sea, charging tolls for the passage of vessels (Buck 1998: 76). But from the moral point of view such claims remained moot. In 1608, in response to Spanish and Portuguese declarations of their own dominion over the ocean, the Dutch jurist Hugo Grotius (1608) famously defended the idea of a ‘free ocean,’ or *mare liberum*. On his view, portions of the ocean could not be parcelled off for separate jurisdiction by particular naval powers, or reserved for their exclusive navigation. After all, a ship sailing across the ocean left no (permanent) tracks behind itself which might serve as legal perimeters. As such the possibility of effective ‘occupation’ did not arise. Instead the ocean, as the Romans had earlier claimed, should be considered *res communis*, the common preserve of all (an argument which influenced the later idea that some parts of the earth – and even outer space – ought to be considered the ‘common heritage’ of humankind – on which see Roberts and Sutch 2016).

Later in the seventeenth century John Locke came to a similar conclusion, albeit on the basis of different premises. Locke’s justification for property rights in land emphasised the social benefits of a regime of private property, compared to an open-access regime in which no-one had an incentive to spend time or money improving any particular portion of the land. But for Locke, the ocean and its resources were not improvable, and hence the same argument for rights over portions of the ocean, or its resources, could not arise. Instead the ocean remained the common preserve of all of mankind, or as Locke put it in Chapter V of his *Second Treatise of Government*, ‘that great and still remaining Common of Mankind’ (Locke 1988). Whilst each should be free to harvest its resources, there was no justification for pressing territorial claims over it. Sovereignty claims would be wholly out of place in the ocean.

There were dissenting voices. In 1636 the Englishman John Selden defended the idea of a *mare clausum*, or closed sea. England, the now-rising naval power, wanted to claim the right to delimit its own ocean territory in much the same way as Spain and Portugal had earlier attempted, and Selden’s work provided a normative justification. Whereas Grotius had been sceptical that portions of the sea could practically be carved up as the dominion of particular states, Selden maintained that modern instruments allowed at least notional boundaries to be drawn (Selden 1652). These would allow states both to enjoy exclusive rights of navigation, and to restrict fishing within their exclusive marine territories. States had in any case long staked a variety of claims over the ‘territorial waters’ adjacent to their coastlines. But Selden’s argument would have extended that prerogative dramatically.

For all its richness, one thing which is striking about this early debate is the degree to which it focuses on the ocean’s role as a navigable space. Questions about resource exploitation received much less attention. There were exceptions: Selden’s argument for a closed sea would have reserved fishing rights, as well as navigational prerogatives, for dominant powers. But Locke and Grotius gave withdrawal rights much less consideration. When it came to the fish or mammals which inhabited the ocean, both scholars appeared to assume a paradigm of infinitely replenishable riches. Grotius, despite viewing the ocean as a whole as a *res communis*, was content to depict the fish of the ocean as the private property of whomsoever cared to catch them. Since there was no real practical question of resource limits, there was no need for any mechanism, or principle, for regulating competing demands over extra-territorial resources. Locke appeared to agree: the fish could be taken by whoever wanted them. But since there was no question of improving fish stocks, such harvesting activities could not underpin claims to territory. It was not until notable collapses of whale and seal populations in the nineteenth century that questions about rights to regulate the relevant industries began to be asked in a concerted fashion within international law – though not yet within political theory.

In the mid-twentieth century, the focus of legal discussions over ocean resources began to shift again. From the 1950s onwards came a realisation that the minerals of the seabed were a potential treasure trove, and that the prospects for their exploitation might be closer than once thought. The question of how, if at all, their exploitation ought to be regulated therefore began to emerge as a serious problem within international jurisprudence. The relevant debates were inflected by the contemporary context of the decolonisation struggle, and the (eventually unsuccessful) argument for a New International Economic Order in which the newly-independent countries might achieve catch-up development. During a famous speech to the United Nations, the Maltese diplomat Arvid Pardo sketched a future in which sub-sea minerals were scooped up by wealthy industrialised states, further exacerbating global inequalities. In defiance of that vision, Pardo argued passionately for the collective international management of these resources, so that their exploitation could benefit all, and in particular the citizens of the least developed states – an argument which came to be associated with the idea of ‘the common heritage of mankind’ (see Pardo 1968). At the same time another prominent international figure, Elizabeth Mann Borgese, was sketching a variety of proposals for the global management of ocean resources (see Baker 2012). Though the eventual form that the UNCLOS agreement took disappointed both, their twin efforts raised the profile – within international law – of questions about ocean resource exploitation. Some decades were to pass, however, before these questions were once more picked up within political theory.

**Governing Resources Beyond the State**

Perhaps surprisingly, even the recent flowering of a sophisticated literature on territorial rights has still not supplied extensive guidance on the governance of resources falling outside state boundaries. We might suppose that there is no *need* for them to apply explicit guidance, if theories developed to assess claims over land can straightforwardly be extended to claims over extraterritorial resources. But in fact, many of the leading theories of territorial rights appear ill-equipped to offer concrete guidance here. Nationalist theories, for instance, defend communal resource rights by emphasising the ways in which national communities have engaged with local resources (Miller 2012) and in so doing generated special claims based on what I have called improvement and attachment (Armstrong 2017). Improvement-based special claims emphasise the ways in which national communities have altered the chemical or physical properties of resources in such a way as to make them more valuable for human purposes (and, likely, of greater exchange value). Attachment-based special claims emphasise the ways in which national communities have developed plans and projects which depend upon continued access to, or control over, local resources. But in neither case is it obvious that sound claims can be made over resources which are located outside of the national community, with which those communities will not tend to have developed such close connections (the exception might be an attachment-based claim over fish in the case of artisanal fishing communities). The same can be said for accounts which focus on the ‘people’ as the relevant political community, rather than nations per se. If territorial rights are grounded in the relationship between the people and the land and its resources, then it is not obvious that claims over uninhabited parts of our planet can be justified (Moore 2015).

Functionalist theories, by contrast, tend to ground jurisdictional rights over resources by emphasising the way in which reserving those rights is crucial in order to enable states to fulfil core functions such as securing justice within a territory, or upholding the basic rights of members. But such an account will have difficulty in grounding resource rights in regions of the world where there *are* no settled human communities. Control over these resources does not, after all, appear to be key to the self-determination or security of any community, or necessary for the enforcement of justice over persons (Nine 2016, Simmons 2016). This explains why, for some theorists, there can be no territorial rights over uninhabited places such as the Arctic region or Antarctica (Nine 2013).

Guidance on the governance of these resources, however, is badly needed. Pardo’s dark vision – in which extra-territorial resources are consumed on a first-come-first-served basis, without regard for distributive justice or sustainability – still resonates in a world where state and non-state actors have already begun to stake claims over the resources of the ocean, the seabed and the Arctic, and in which some have argued for the replacement of the current Antarctic Treaty with a new regime more tolerant of resource exploitation (Abdel-Motaal 2016). For the most part, the actors which stand prepared to benefit from the harvesting of these resources are based in the wealthier parts of our world. If appropriation went unregulated, the result could be both environmentally destructive and distributively unfair in much the way that Pardo suggested. But what would the just and legitimate governance of these resources look like? In what follows I will draw out three key questions which a successful account will have to answer, and sketch some of the answers which have been provided in the debate so far. I will call these the *demos* question, the *appropriation* question, and the *conservation* question.

*The Demos Question*

If the governance of extraterritorial resources is to be legitimate, a key question will be: which agents will be included in decision-making, and on what basis? One issue is which *kinds* of agents have a claim to participate. Are the relevant agents states (Moore 2015), or should decision-making be opened up more widely (Mancilla 2016)? In principle non-state actors such as individuals, NGOs, or even corporations might have a stake in decision-making. Still further agents – such as non-human animals, or future generations – might in principle be *represented* in decision-making, even if they do not participate directly.

Another issue concerns the correct principle for selecting the particular agents with the right ‘stake’ in ocean governance. Even if we have determined, say, that individuals are the relevant agents, on what basis do we decide *which* individuals are entitled to participate? Here we can imagine a variety of possible principles. One possibility would be some kind of geographical rule, according to which decision-making on resources lying outside of states is in some sense reserved for the states sitting closest to them. In a sense, this is what the system of Exclusive Economic Zones does. Should such a principle be extended over the entire ocean, and perhaps vertically into the atmosphere? Probably not. According to critics, geographical proximity is a poor basis on which to allocate decision-making power over resources which often matter to all of us, and which cannot always be neatly delineated into separate portions (Mancilla 2018).

Another possibility would be some kind of ‘grandfathering’ principle, according to which decision-making power was reserved for those currently exploiting particular resources. A grandfathering principle suffers from two main flaws. First, it is unclear why we would privilege those agents who are already benefiting from these resources, as opposed to those who *could* benefit from them. Second, many resources are *not* currently being exploited – but soon might be – and it is often in these cases that we require guidance most urgently. An alternative might be to reserve decision-making power for those who are *capable* of exploiting the relevant resources (on which see Nine 2015). But this appear similarly objectionable. For agents to be excluded because they currently lack the capacity to harvest resources seems likely to restrict the benefits flowing from these resources to agents who are already comparatively well off. This is precisely why agencies such as the International Seabed Authority have attempted to secure the transfer of technology to developing countries, to allow a wider pool of actors to benefit from mineral exploitation.

A more radical alternative would be to explore some version of the ‘all affected interests principle,’ according to which everyone whose interests are affected – or even potentially affected – by decision-making about extra-territorial resources has a right to be consulted on their governance (on which see Goodin 2008). In some cases the whole of humanity would plausibly be considered as stakeholders. In theory, we could extend the argument still further, so that some entities which *cannot* currently participate in decision-making – such as future generations, and non-sentient creatures – have a claim to have their interests considered. If we went down this route, we would need to design some institutional mechanism for representing interests of entities unable to directly engage in decision-making themselves (on the case of future people, see e.g. Karnein 2016).

A further practical question would be what precise institutional form the governance of these resources should take. Perhaps existing institutions with authority over some subset of extraterritorial resources might have their remit extended to encompass further resource types. Thus the institutions established under the UN Convention of the Law of the Sea – such as the International Seabed Authority – could have their powers extended over resources in Antarctica (Nine 2012: 43-4), or other ocean resources besides seabed resources (Armstrong 2017, Moore 2015). Alternatively, justice might best be served by the establishment of new global institutions, such as dedicated institutions holding resources in trust for all of humankind, including future generations (Sand 2004).

*The Appropriation Question*

What, if any, constraints should there be on the appropriation of extra-territorial resources? Establishing inclusive institutions to govern resources addresses a concern about the *legitimacy* of resource governance. Competing views on appropriation contest what it would take to make resource use *just*.

One view here – perhaps attractive to some libertarians - would be that appropriation should be left unconstrained. But this solution is unappealing in light of what we know about patterns of exploitation in the real world. A fishing free-for-all on the High Seas has left global fish stocks on the verge of collapse, and threatens the interests of future generations and poor communities currently dependent on fishing. We have also noted Pardo’s worry that non-renewable resources such as seabed minerals will be rapidly extracted by those who happen to possess the requisite technology, in the process exacerbating global inequalities. The intellectual architects of the International Seabed Authority quite reasonably wished the exploitation of these resources to be to the benefit of all, including the citizens of the least developed countries.

A second possibility is some kind of sufficientarian or basic rights proviso. This would prohibit the appropriation of extraterritorial resources whenever that appropriation deprived people of the ability to meet their basic rights (see e.g. Risse 2012). Such a proviso would, for instance, prohibit industrial fishing activities which deprived poor artisanal fishing communities of their means of subsistence. In other cases, though, this kind of principle would be unduly permissive. Nobody, after all, currently relies on the extraction of seabed minerals for their subsistence. As such a basic rights proviso would not appear to prohibit the exhaustion of those supplies by wealthy commercial interests. A basic rights proviso would be compatible with growing inequality, as precious supplies of hard-to-access resources were consumed by the already privileged.

Such a possibility would be ruled out by an egalitarian principle. But egalitarians disagree about what kind of constraint ought to be placed on natural resource appropriation. One well-known view holds that individuals have a strictly equal right to appropriate the world’s natural resources, and are required to compensate others in cases of over-appropriation (see e.g. Steiner 1994). In principle such a view could be extended to extraterritorial resources. Another view suggests that the disadvantaged can permissibly benefit *more* than equally from the world’s resources, so long as this usefully alleviates broader inequalities in access to wellbeing (Armstrong 2017). The latter view perhaps resonates with the International Seabed Authority’s stated aim of using mineral exploitation to facilitate catch-up development on the part of the world’s poor. On that kind of view, the proceeds from exploiting extraterritorial resources ought to disproportionately benefit the world’s least well off, rather than being shared equally.

*The Conservation Question*

When should extraterritorial resources be conserved, and how? In one sense, this is the flip side of our appropriation question. If appropriation is not permitted, then resources will be conserved. But actually, conservation often demands more than simple non-exploitation (Armstrong 2017). It can involve active efforts to *protect* resources from a variety of threats, such as ocean acidification, plastic pollution, and so on. And it can involve efforts to *restore* damaged ecosystems such as coral reefs. Here we have two significant questions to answer. The first is which agents should be selected to engage in conservation efforts. The second is which agents ought to bear the *costs* of conservation. In answering those questions, we can turn to familiar principles such as the contributor pays principle, or the ability to pay principle. But note that our answers to the two questions can come apart. The agent responsible for damaging a marine environment might not be the agent with the greatest capacity to fix the problem. In such cases, we can imagine a division of labour in which conservation efforts are carried out by the most capable, but funded by the agents who have given rise to ecosystem damage. Regrettably, these important questions about conservation have been relatively neglected, especially when it comes to extraterritorial resources. For the most part, when scholars have discussed resource justice, they have focused on the question of who should be allowed to exploit resources, and under what circumstances, rather than who ought to protect or restore precious resources. But as our dependence on ecosystem processes in the ocean or the atmosphere becomes more apparent, these questions will only become more important.

**Conclusions**

The just and legitimate governance of natural resources falling outside of state boundaries will be one of the key challenges of the present century and beyond. This article has surveyed a series of historical and contemporary contributions to thinking through these urgent but complex issues. We have identified crucial questions concerning the demos who ought to be involved in decision-making about these resources, the proper constraints on their appropriation, and the effective conservation of key resources. At present, our understanding of these issues is somewhat rudimentary. Progress in meeting the challenge of just and legitimate resource governance will demand that we make further progress in providing satisfactory answers to each of them.

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