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Governmentality and Risk: Managing ‘Ocean Space’

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1. Introduction

The term ‘fisheries management’ at first glance seems to be a reasonably unproblematic one. It implies that firstly, that there are resources called fish, and secondly, that these resources called fish can be harvested and managed. So far, so good. Next, there is the word ‘convention’. It is a commonly understood word in law in general and there are many conventions in International law and in International environmental law as well. Lastly there is the term ‘sustainable development’, a well-used term in International theory and practice, usually said to mean that although we understand the finite nature of the matter and energy that can be safely used by countries to develop, this can be tempered by putting in place measures and instruments to curb the excesses of human, and by that I mean industrialised, human activity on the environment.

The majority of the literature on international environmental law does not consider any of the above to be anything other than part of the lexicon of terms that are used to describe and to analyse environmental problems. Similarly ‘ocean space’ is now increasingly divided up by regional bodies, established by conventions to oversee the management of (usually) labelled species that are to be managed and or protected by these bodies that have a series of measures that have been designed to ensure the survivability of the resources under our gaze. Ernst Haas asked the provocative question in the 1970s ‘Why “ocean space” rather than “the human environment”, “the ecosystem”, “atmospheric space” or “outer space”?’¹

What Haas did was to *ground* the concept ‘ocean space’ as materiality giving that space a territorial function for the purposes of regime construction. In that sense Haas made a valuable early contribution to thinking about the vastness of the oceans and of the living things that constitute ocean space by attributing to it the same ontological status as territory. It is, of course a double-edged sword contribution as once the oceans are perceived on the same plane of reality as land a twofold effect occurs. Firstly, there is the recognition that the ocean space is not limitless; it has boundaries.² And secondly, once boundaries are concretised, there is ample room for territorial disputes over the space itself and increasingly the resources contained within those boundaries.

Ocean space and the ecosystem which is used in the legal definition of the methodological approach to the management of ocean space in fisheries are described as

¹ Ernst B. Haas, (1975) ‘Is there a Hole in the Whole? Knowledge, Technology, Interdependence and the Construction of International Regimes’, *International Organization*, 29:3, p.831.

² See Andrew Abbott (1988), ‘Things of Boundaries’, *Social Research*, Vol. 62, No.4, p.860.

complex adaptive systems and the behaviour of the parts or individual scale-entities has a co-evolutionary effect on the behaviour of all the other agents. In other words non-linearity represents a clear break with Cartesian certainty and opens up theoretical space for uncertainty, irreducible indeterminism and exposes the weaknesses of our fondness for reductionist forms of analysis. Breaking things down into their smallest constituent parts seems to have much appeal but when we reveal the objects of our enquiries are more often than not repeated practices and processes situated in irreversible time we are confronted with the in-built limitation of both static analysis and reductive analysis.³

This is not an entirely new idea and has been well explained in other texts. Karl Mannheim in his classic work *Ideology and Utopia* exposes our tendencies to attempt to make rigid and fixed practices and processes to give the illusory appearance of spatio-temporal stability. Again, this situation may make for a certain utility of analysis, but covers up critical areas of experience such as complexity, emergence and the inherent instability of identities.

He notes:

‘The world of external objects and of psychic experience appears to be in a state of continuous flux. Verbs are more adequate symbols for this situation than nouns. The fact that we give names to things which are in flux implies inevitably certain stabilization oriented along the lines of collective activity. The derivation of our meanings emphasizes and stabilizes that aspect of things which is relevant to activity and covers up, in the interest of collective action, the perpetually fluid process underlying all things’.⁴

Mannheim published this work in the 1930s, not so long after the establishment of quantum mechanics, which had revealed a number of fundamental problems for physics but which also became germane to the study of social systems too. However Mannheim appears to be acutely aware of the functional reasons why we do not, in most cases, attempt to designate things as they really are. He acknowledges that the “interest of collective action” serves to simplify and solidify unstable entities for the explicit purpose

³ For a detailed explanation of the irreversibility of time see Ilya Prigogine (1997), *The End of Certainty: Time Chaos and the New Laws of Nature*, New York and London, The Free Press.

⁴ Karl Mannheim (1936), *Ideology and Utopia: An Introduction to the Sociology of Knowledge*, London and New York, Keegan Paul, p.20.

of functional activity. This logic gives impetus for us to problematise the fluid concepts of nation-states, the system of nation-states and the myriad conventions that constitute most aspects of global governance, including international environmental law.

The nation-state and the international system of states are on-going projects and can never be said to be fully complete. There is a continuous ebbing and flowing of people, information, laws and norms, and the transportation of matter-energy flows. When Mannheim mentions the “the perpetually fluid process underlying all things” we should be careful to place this phrase in context. It can be taken too far thus disabling our attempts to analyse any given phenomenon. The stabilization of things is often required for us to make any meaningful statements about them. Although Mannheim’s statement may be correct, stability is often required for analytical convenience even when we know that it merely represents an approximation of the real.

In this essay I will consider one body that has been established to manage the ocean space within set geographic boundaries. As stated in article 2 of its convention the objective of this body is to act ‘through the application of the precautionary approach and an ecosystem approach to fisheries management, to ensure the long-term conservation and sustainable use of fishery resources and, in so doing, to safeguard the marine ecosystems in which these resources occur.’

This body is the South Pacific Regional Fisheries Management Organization (SPRFMO), which was instituted after years of negotiation under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean in November 2009 and entered into force in December 2012.⁵ The Convention itself falls under the auspices of United Nations Convention on the Law of the Sea (UNCLOS)⁶ which was established the 1982, although many similar regional regimes predate the present framework for ocean governance.

In the pages that follow I will outline a critique that takes the terms mentioned at the very beginning of this essay into account and suggest that far from being reasonable and unproblematic, it is more reasonable to suggest that these words and terms, and others similar to them, and the framework of thinking in which they inhabit, are indicative of the

⁵<http://www.mfat.govt.nz/Treaties-and-International-Law/01-Treaties-for-which-NZ-is-Depositary/0-sprfmo-convention.php>

⁶ *U.N. Convention on the Law of the Sea*, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 396, entered into force, Nov. 16, 1994.

culturally modernist ontology and predominantly positivist epistemology that tend to dominate the discourse of so-called advanced industrialised societies. In doing so I will have to open up the scope of my enquiry well beyond environmental law and into areas of philosophy and in particular the question of the relationship humans have with nature, the international political economy of industries beyond fishing techniques and accepted practice, and the great uncertainties and gaps in scientific knowledge⁷ in general and of the deep seas in particular.

Furthermore, my point of departure necessitates a questioning of the use and abuse of technology to pursue questionable ends in general⁸ and technological practices in particular, especially those practices that have enabled humans to fish in deeper waters using techniques that do not discriminate between fish, marine mammals, other life-forms and the ocean space.

It should be clear by now that this introduction has identified at least two areas of similar but quite distinct areas of critical theory. The first of these is that of the original Frankfurt School of Critical Theory espoused by Horkheimer and Adorno and their now famous maxim which states ‘[T]o the Enlightenment, that which does not reduce to numbers, and ultimately to the one, becomes illusion; modern positivism writes it off as literature’.⁹ The second is to be found in the work of Michel Foucault and in particular his notion of ‘governmentality’, which he first used in a lecture series at the College de France, summed up succinctly by Colin Gordon as the ‘conduct of conduct’.¹⁰

My aim in choosing this approach to address a question of International environmental law is not to take aim at ‘law, institutions and contract’ in general in the style of Nietzsche or Deleuze. Rather it is firstly, to suggest that there may be an opening for theoretical and empirical space that might enable us to ask, what would be gained if we conceived of traditional analytic units not as fixed, unitary entities, but as contingent,

⁷ Ludwik Fleck “To Look, To See, to Know [1947] (1986), in R. S. Cohen and T. Schnelle (eds.), *Cognition and Fact – Materials on Ludwik Fleck*, Dordrecht, D. Reidel Publishing, pp.129-151. Ludwik Fleck [1935] (1986), in R. S. Cohen and T. Schnelle (eds.), *Cognition and Fact – Materials on Ludwik Fleck*, Dordrecht, D. Reidel Publishing, pp. 59-78.

⁸ See Martin Heidegger (1977), *The Question Concerning Technology and Other Essays*, New York, Harper and Row.

⁹ Max Horkheimer and Theodor Adorno [1944] (1997), *Dialectic of Enlightenment*, New York, Continuum.

¹⁰ Colin Gordon (1991), ‘Governmental rationality: an introduction’, in Graham Burchell, Colin Gordon and Peter Miller (eds.) *The Foucault Effect: studies in governmental rationality*, London, Harvester Wheatsheaf, p.2.

contested, aporiatic and socially complex flows? This does not necessarily mean that international politics and international law should rescind conventional theoretical assumptions about states, economies and non-state actors, for instance, the notion that actors can be reduced to a certain singularity, fixity and unity; I have affirmed the utility of that approach at the outset, but rather that it might enable us to touch on the question of whether other, critical theory might provide us with a more sophisticated model for understanding the complexity of world affairs, which might illuminate the socially complex and perpetually contested and emergent flows that much of the 'problem-solving' focus has occluded.

Secondly, it is to suggest that although the state-form appears to hold a particular centrality in international fora a different comprehension of power that takes us beyond the concept of the sovereign state within global governance and offers up an arguably more realistic view of power; how it is exercised, and how it relates between agents to produces particular outcomes is arguably preferable. In this sense power is not held; it is productive and relational. As I have previously noted, 'Governance is not simply the state or the functions and actions of government that enable authority to be recognised and exercised. Governance is the multitude of controlling mechanisms that enable power relations to function in a manner that is said to be efficient'.¹¹ In other words, in the Foucauldian sense, it is the introduction of economy into the functioning of governance and ultimately of states themselves.

To conclude this introduction I should make clear that although this essay addresses an issue of international environmental law, it is apparent that interdisciplinary approaches are necessary in order to even ask the appropriate questions. Thus it seems necessary to attempt some understanding of the hard sciences, of the philosophy of science, and of political economy. One should not take the world as given; one should ask how the objects that make up our world have come into being and given our meagre knowledge and understanding of things (which are not 'things' at all) such as ecosystems, then by asking these questions we may move away from the Enlightenment myth of stability of identities and certainty of knowledge and ultimately ask: is it possible to deal with the myriad connections between all of the flows of organic and inorganic energy, matter and meaning in all of their states of (in)coherence? To attempt such an undertaking necessitates a tripartite arrangement of arguments; firstly of being, secondly of knowing and finally of discourse. This approach might get us to the beginning of the right

¹¹ Robert Deuchars (2004), *The International Political Economy of Risk: Rationalism, Calculation and Power*, Burlington and Aldershot, Ashgate, p.57.

question set which ultimately, might not be answered but as Bergson and Deleuze both assert, have to be in due course, properly stated, which is the real task at hand.¹² By the same token the negation of a problem-solving approach in favour of a genealogical one, offers up some hope for change. It is clear that although global environmental consciousness has a foothold in the consideration of problems such as climate change, nuclear proliferation, the destruction of the oceans, some of these issues threaten species survival; and by that I mean the human species, it is equally clear that the grand narratives offered up by conventions such as the Rio Declaration on Environment and Development, the valuable work of the IPCC and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) to name the most prominent, have not achieved much. It would be very overly-simplistic to ascribe blame for the lack of progress at the abstract notion of the state and the national interest. Therefore it may be more fruitful to inquire, as I have suggested above, into the dominant episteme, acceptable discourse, and cultural individualism. International environmental law in this regard is of particular interest as it can be viewed as a beneficial enterprise but by the same token it can also be viewed as serving to maintain the status quo, at a point in human history, when to many the politico-strategic notion of the state, the politico-economic doctrine of liberalism and the politico-social ideology of individualism need to be called into question.

This essay is necessarily limited so of the myriad and interconnected issues that are possible choices for inclusion; its focus is on a particular regional fisheries management organisation. The reason for this is twofold. The South Pacific Regional Fisheries Management Organisation (SPFRMO) has been argued to be a departure and an improvement on other RFMOs due to the fact that the ‘decision-making procedure “raises the bar” for those members that would seek to avoid compliance with its decisions’.¹³ The second reason is that despite its arguable ‘success’ in this area of law, a wider problem presents itself insofar as the institutional arrangements have and continue to collide with the imperatives mentioned at the outset, namely the fixation with a particular ontology, epistemology and discourse, despite the near collapse of one of the major species said to be under the management of the convention and as such the institution: the *Trachurus Murphyi* or Chilean Jack Mackerel.¹⁴

¹² Gilles Deleuze, *Bergsonism* (1990), New York: Zone Books, pp.15-16.

¹³ Howard S. Schiffman (2013), ‘Culture, Conservation and Competition: Orange Roughy and the South Pacific Regional Fisheries Management Organization’ *Journal of International Wildlife Law & Policy*, 15:3-4, p.198.

¹⁴ *New York Times* ‘In Mackerel’s Plunder, Hints of Epic Fish Collapse’, January 25, 2012.

2. *Critical Theory: a short overview*

In an essay published in 1937 Max Horkheimer outlined the basic theoretical contours of what would form the foundations of the Frankfurt School of Critical Theory. In this essay he distinguished between traditional theory i.e. theory as understood by conventional science. He notes:

Theory is stored up knowledge, put in a form that makes it useful for the closest possible description of facts. Poincare compares science to a library that must ceaselessly expand. Experimental physics is the librarian who takes care of acquisitions, that is, enriches knowledge by supplying new material. Mathematical physics—the theory of natural science in the strictest sense—keeps the catalogue; without the catalogue one would have no access to the library's rich contents.¹⁵

This sentiment was maintained by Horkheimer and Adorno in the *Dialectic of Enlightenment*¹⁶ with their critique of the Enlightenment. For Horkheimer and Adorno the promise of the Enlightenment was always a false one; Cartesian certainty and a singular truth of the world and of the self. Therefore, although influenced by Kant, they turned against him and his appeal to reason and posited that from the beginning Enlightenment was a self-fulfilling myth. Their targets were not only the world as they found it around them but at the epistemological level a view of the world founded by Descartes¹⁷ and the effects of his legacy in their own times which could be found the logical positivism of Carnap, Mach and the Wittgenstein of the *Tractatus*, whereby Wittgenstein's opening salvo reads as follows:

1 The world is everything that is the case.

1.1 The world is the totality of facts, not of things.

¹⁵ Max Horkheimer [1937] (2002), 'Traditional and Critical Theory', in *Critical Theory Selected Essays Max Horkheimer*, New York, Continuum, p.188

¹⁶ Max Horkheimer and Theodor Adorno [1944] (1997), op.cit. It was not until Jürgen Habermas took over the Frankfurt School that it returned to a type of enquiry that could be accurately described as Kantian, in the cosmo-political sense. By contrast, Horkheimer, Benjamin and especially Adorno held on to a deep mis-trust of modernity, a certain type of pessimism, but with the hope that the emancipatory potential of Critical Theory could release the individual from the myth of the Enlightenment.

¹⁷ For good or ill, Descartes greatest achievement was not his famous cogito but his mathematisation of nature by quantifying the natural world. In other words by enumerating colours, sounds, odours, tastes and textures he has enabled us to mathematize and more importantly objectify the natural world, thus solidifying the artificial separation between man and nature. Man becomes subject and nature his object. See Antonio R. Damasio (1994), *Descartes' Error: Emotion, Reason and the Human Brain*, London and Basingstoke, Macmillan.

- 1.11 The world is determined by the facts, and by these being all the facts.
- 1.12 For the totality of facts determines both what is the case, and also all that is not the case.
- 1.13 The facts in logical space are the world.
- 1.2 The world divides into facts.¹⁸

To counter this view (although I have to note that Wittgenstein had a radical change of mind later and moved to language games in the *Blue and Brown Books*, which formed the basis for his *Philosophical Investigations*),¹⁹ Horkheimer posited the difference between traditional theory and critical theory in the following way:

The social sciences take human and nonhuman nature in its entirety as given and are concerned only with how relationships are established between man and nature and between man and man. However, an awareness of this relativity, immanent in bourgeois science, in the relationship between theoretical thought and facts, is not enough to bring the concept of theory to a new stage of development. What is needed is a radical reconsideration, not of the scientist alone, but of the knowing individual as such.²⁰

What Horkheimer meant by this is not a simple negation of Cartesian thinking but a different epistemology, partly informed by orthodox Marxism but also of the phenomenology of Husserl²¹ and Heidegger.²² In other words rather than the disembodied self, exemplified by Descartes, knowledge as an end in itself, and the primacy of knowing over being, Horkheimer situates the production and use of knowledge in a stricter situational position. Taking some of its inspiration from Kant and Weber ‘Traditional and Critical Theory’ grounded critique on more sociological grounds and represented a shift towards a sharper analysis of the base-superstructure model of classical Marxism, with the emphasis firmly on an attempt to understand the superstructure. Or in more simple terms Horkheimer and his colleagues embarked on a project that attempted to understand how despite conditions of relative freedom, the benefits of action in the social world always tended towards favouring the interests of capital over labour.

¹⁸ Ludwig Wittgenstein (1922), *Tractatus Logico-Philosophicus*, London, Kegan Paul, p.25.

¹⁹ Ludwig Wittgenstein (1958), *The Blue and Brown Books: Preliminary Studies for the ‘Philosophical Investigations’* New York, Harper and Row; Ludwig Wittgenstein *Philosophical Investigations*, G. E. Anscombe (trans.) [1953] (2001), Oxford Blackwell.

²⁰ Max Horkheimer [1937] (2002), op.cit., p.199.

²¹ See Edmund Husserl [1954] (1970) *The Crisis of European Sciences and Transcendental Phenomenology*, Evanston, Northwestern University Press.

²² See Pierre Bordieu (1988), *The Political Ontology of Martin Heidegger*, Stanford, Stanford University Press.

This foundational essay formed the basis of the early Frankfurt School of Critical Theory, although there had been antecedents most notably to be found in the Prison Notebooks of Antonio Gramsci,²³ the Italian Marxist intellectual. Basically Horkheimer and Adorno, with the other member of the Frankfurt School, most notably Erich Fromm and Walter Benjamin represented a shift in Marxist thinking away from the teleological and deterministic thought of Marx and Engels and took Marxism in to a more holistic view of society and the superstructure. The most important aspects for Adorno were the role of culture and of the culture industry in general and for Fromm, a movement towards the psychoanalytics of desire in the *socius*. When thinking about environmental questions it therefore comes as some surprise that writers such as Horkheimer with his critique of reason²⁴, Adorno with his critique of the culture industry²⁵ and Fromm with his deep insights into the drivers of human behaviour have been largely overlooked or more accurately ignored by mainstream inquiries into the relationship between science, nature, human behaviour and what they would term bourgeois law, including environmental law.²⁶

I now turn to a short overview of Foucauldian governmentality and its applicability in the context of this essay. Governmentality represents for Foucault a shift away from an understanding of government that is centred on the concept of state sovereignty. Foucault was interested in government as an art, as in how best to govern.²⁷ It also has a focus on the discourses used by various agents beyond the formal apparatus of the state and the mechanisms by which state legitimacy becomes de-centred and how the focus shifts to various agencies that craft people's conduct, making them reflect on their behaviour, and in Foucault's view becoming part of a self-regulating set of processes.

This shift away from sovereignty as the guiding principle or expression of power in the international realm can be seen in the current context. To be sure, the state and its importance is not underestimated; rather it is suggestive that a model of power that only

²³ See Antonio Gramsci (1971), *Selections from Prison Notebooks of Antonio Gramsci*, Quintin Hoare and Geoffrey Nowell (trans. and eds.), London, Lawrence and Wishart. Of particular relevance here is the fragments called 'Americanism and Fordism'.

²⁴ Max Horkheimer (2003), *Eclipse of Reason*, New York, Continuum.

²⁵ Theodor Adorno (1991) *The Culture Industry: selected Essays on mass culture*, London, Routledge

²⁶ Erich Fromm (1971), *Man for Himself: An Enquiry into the Psychology of Ethics*, London, Routledge and Kegan Paul; Erich Fromm [1942] (2001), London and New York, Continuum. I have deliberately left out any reference to Walter Benjamin as he was the most Nietzschean of the original Frankfurt School.

²⁷ Michel Foucault (1991a), 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds.) *The Foucault Effect: studies in governmental rationality*, London, Harvester Wheatsheaf.

gives the state primacy is limited and that power should be conceived of as extending well beyond the agency of the state and into the realm of other agents. In this sense Foucault highlights the limits of the sovereignty model of power and suggests that governance extends well beyond the state to include mundane processes and practices, the establishment of conventions and to use an example in this context the formalisation of institutions with expert bodies tasked with deriving the appropriate facts to be brought to bear on particular problems. These mundane practices of course include coding, classification and most importantly calculative practices. Immediately we can see the link between fisheries management in the form of total allowable catch (TAC) and how Foucault would describe it as a technology of power, although he would much later shift his position to suggest that the panoply of calculative practices were more indicative of a control function rather than one of domination.

So it should come as no surprise that the SPRFMO when viewed through the lenses of governmentality is formalised at the institutional level, has a secretariat, is tied to the disciplines of academia in the form of a scientific committee and exercises its compliance measures and objection procedures through expert knowledge, both in the form of normal science and modernist managerialism. In this sense the SPRFMO is tied into a model of governance that has been replicated on a global scale. This however, is not to suggest, that it is all malign and planned for the purpose of pure control. Rather it is more suggestive of a normalising discourse that has globalising tendencies as pointed out by Fisher when discussing ‘ecological governmentality’, who notes that:

These dominant global discourses can be co-opted by the state in advancing the goals of ‘ecological governmentality’; that is, these discourses are used through state agency as a means of gaining control and regulating the social life of both individuals and nature.²⁸

In this sense nature and in this case the oceans are analogous to Foucault’s ‘docile bodies’.²⁹ They are situated within a particular framework of thinking and are framed as passive and in a similar manner to Fisher’s discussion of the application of ecological governmentality to indigenous peoples in Brazil the world’s oceans and the life-forms that inhabit them are similarly idealized as ‘nature’, and concomitant to this idea is that they are passive actors in a game of dominant discourses whereby ‘Idealized transnational environmental narratives often then converge and conflict with other

²⁸ P. Brian Fisher (n.d.) ‘ECOLOGICAL GOVERNMENTALITY: THE DISPLACEMENT OF THE LOCAL IN THE RIO NEGRO RIVER REGION OF BRAZIL’ working paper at <http://astepback.com/EVSS695/Rio%20Negro.pdf>, accessed 20/08/13, p.1.

²⁹ Michel Foucault (1991b), *Discipline and Punish: The Birth of the Prison*, London, Penguin, pp.135-170.

dominant global discourses, such as globalization, neoliberalism, modernization, and sustainability, creating contestable grounds for multifarious interpretations of nature, often with significant consequences for local peoples'.³⁰

We can see that this departure from the sovereignty model of power, if we accept the argument, has major implications for the words and terms that I introduced at the very beginning of this essay. A shift from power embodied in the state form as formalised political power towards the 'best' way to govern as more of an art of government and of governance has global implications. As I have noted in previous research:

Foucault suggests that the formulation of the economic as a separate entity changes the idea of what the purpose of governing is. Governing becomes much more of an economic affair and, as such, this different plane of reality is re-constituted on the ground that makes it amenable to rational calculation, and even more so, to numerical calculation'.³¹

It is within this framework of thinking that I will now turn to the establishment of the South Pacific Regional Fisheries Management Organisation. To be clear from the outset a critique of a particular piece of International Environmental law is not to suggest that the whole endeavour is not worth the effort. On the contrary by developing a different way of thinking about any aspect of the attempts to control the harmful effects of human action in ocean space may not bring about the sought after change in terms of immediate policy prescription but it seems clear that the current framework of thought, the system of facts and the measures that are currently in place simply means that other worlds are possible and the challenge, given that we know this, is what we are prepared to do about it?

3. The South Pacific Regional Fisheries Management Organisation

Our knowledge of the vast expanse of the South Pacific Ocean and the impact of fishing and particular fishing techniques is weak. Deep sea or bottom trawling of fish that are long-lived, relatively unproductive and poorly understood within their environment is without question a destructive practice and the effects on fragile marine ecosystems as well as the food chain is poorly understood. Indeed, the establishment of the SPRFMO is testament to this fact. There have been catastrophic collapses in fish stocks as a direct

³⁰ P. Brian Fisher op.cit., pp.1-2.

³¹ Robert Deuchars (2004) op.cit., p.64.

consequence of industrial-scale fishing since at least the 1970s; however that the SPRFMO has only been in formal existence for all intents and purposes for less than one year suggests strongly that not only is it a weak organisation, the other regional fisheries management organisations are too.³²

As Jennings notes:

Some RFMOs have been supporting the use of MPAs in management. For example, the North-East Atlantic Fishery Commission (NEAFC) has designated MPAs on Hatton Bank, Rockall Bank, the Logachev Mounds, and West Rockall Mounds to protect deep-water corals (NEAFC, 2006), and the newly established South Pacific Regional Fisheries Management Organisation (SPRFMO) has agreed to voluntary measures, starting 30 September 2007, not to expand bottom-fishing activities into new regions.³³

Despite these measures Jennings goes on to suggest that overall the regime and the numerous regional bodies are largely ineffective in many regards, in particular to Marine Protected Areas (MPA's). As he argues:

Although scientific analysis and advice can indicate when MPAs may help to meet management objectives for state, the contribution of MPAs to meeting these objectives depends on whether or not realized fishing pressure is consistent with that assumed in the predictions. In many MPAs, unauthorized fishing has compromised the achievement of objectives, and enforcement and compliance have been inadequate or unsupported. The Galapagos Marine Resources Reserve is a good example. Currently, it is the world's fifth largest area designated as an MPA and a World Heritage Site, but there has been almost no capacity to control illegal fishing.³⁴

That being said, there are some interesting features of the SPFRMO that suggest that there has been some evolution in the thinking of the management of the South Pacific Ocean. The first point to note is reasonably uncontroversial in that the organization is guided by both the principle of precaution and an ecosystem approach (Article 3 1b, 2a i, ii, iii, 2b).³⁵

³² Howard F. Schiffman (2010), 'The Evolution of Fisheries Conservation and Management: A Look at the New South Pacific Regional Fisheries Management Organization in Law and Policy', *Thomas M. Cooley Law Review*, 28:2, p.182.

³³ Simon Jennings (2008), "The role of marine protected areas in environmental management" *ICES Journal of Marine Science*, 66, p.19.

³⁴ Simon Jennings (2008) *Ibid.*, p.19.

³⁵ SPRFMO Convention p.6

The article and related provisions mentioned above state as follows:

(b) apply the precautionary approach and an ecosystem approach in accordance with paragraph 2.

2 (a) The precautionary approach as described in the 1995 Agreement and the Code of Conduct shall be applied widely to the conservation and management of fishery resources in order to protect those resources and to preserve the marine ecosystems in which they occur, and in particular the Contracting Parties, the Commission and subsidiary bodies shall:

(i) be more cautious when information is uncertain, unreliable, or inadequate;

(ii) not use the absence of adequate scientific information as a reason for postponing or failing to take conservation and management measures; and

(iii) take account of best international practices regarding the application of the precautionary approach, including Annex II of the 1995 Agreement and the Code of Conduct.

(b) An ecosystem approach shall be applied widely to the conservation and management of fishery resources through an integrated approach under which decisions in relation to the management of fishery resources are considered in the context of the functioning of the wider marine ecosystems in which they occur to ensure the long-term conservation and sustainable use of those resources and in so doing, safeguard those marine ecosystems.

The centrality of the ecosystem approach is important here as it represents a shift in fisheries management away from the allowable catch of fisheries and towards a more holistic sense of attempting to know the connectionism inherent in such systems. Wang notes that the term “ecosystem” was coined by Alfred George Tamsley in 1935³⁶ (although the idea has been around for much longer and he outlines five key features of an ecosystem as follows:

(1) An ecosystem exists in a space with boundaries that may or may not be explicitly delineated. Ecosystems are distinguishable from each other based on their biophysical attributes and their locations. (2) An ecosystem includes both living organisms and their abiotic environment, including pools of organic and inorganic materials. (3) The organisms interact with each other, and interact with the physical environment through fluxes of energy, organic and inorganic materials amongst the pools. These fluxes are

³⁶ Hanling Wang (2010), ‘Ecosystem Management and Its Application to Large Marine Ecosystems: Science, Law, and Politics’, *Ocean Development and International Law*, 35:1, p.42.

mediated and functionally controlled by species' behavior and environmental forces. (4) An ecosystem is dynamic. Its structure and function change with time. (5) An ecosystem exhibits emergent properties that are characteristic of its type and that are invariant within the domain of existence.³⁷

What this outline of an ecosystem and an ecosystem approach to 'problem-solving' goes against the grain of much commentary regarding the human relationship with science, nature and time and this problem can be illustrated within the Convention itself. At 2b the Convention invokes the word 'sustainable' as being central to aligning its principled objectives and the ecosystem approach. It is not entirely clear however, what an 'ecosystem approach' actually is. This point is exemplified by recent book-length contributions such as Christensen and Maclean's edited volume.³⁸ In short an ecosystem approach seems on the surface to be an idea linked quite loosely to the notion of holism and as reported by the journal *Science* it is '...Greater holism in fisheries management [that] can be achieved by consideration of multiplespecies interactions, broad-scale physical forcing, and the response of management to pressure for greater harvests under uncertainty'.³⁹ Indeed there also appears to be a tension between the ecosystem approach and sustainability, which I will turn to next. The argument is summed up by Pitcher and Pauly who argue that:

Even if our science and management were capable of sustaining exploitation at a defined ecosystem structure, we argue that this is the wrong goal...management that moves aquatic systems in their primal states and abundance should be rewarded, and that this rebuilding and restoration of ecosystems should be the overarching goal of the new fisheries management.⁴⁰

³⁷ Space precludes me from a detailed discussion of this very important concept. However for a fuller discussion around these themes see Mark Newman, Albert-László Barabási, Duncan Watts *The Structure and Dynamics of Networks* (2006), Princeton and Oxford, Princeton University Press, Ilya Prigogine (1980), *From Being to Becoming: Time and Complexity in the Physical Sciences*, W. H. Freeman and Company, San Francisco, Ilya Prigogine (2003), *Is Future Given?*, New Jersey, London, Singapore, Hong Kong, World Scientific, Robert Deuchars (2010), "Deleuze, DeLanda and Social Complexity: Implications for the 'International'" *Journal of International Political Theory*, Vol. 6, pp. 161-187.

³⁸ Villy Christensen and Jay Maclean (eds.) (2011), *Ecosystem Approaches to Fisheries: A Global Perspective*, Cambridge, Cambridge University Press.

³⁹ Louis W. Botsford, Juan Carlos Castilla, and Charles H. Peterson, (1997), 'The Management of Fisheries and Marine Ecosystems' *Science*, Vol. 277, 23 July.

⁴⁰ Tony J. Pitcher and Daniel Pauly (1998), 'Rebuilding ecosystems, not sustainability as the proper goal of fishery management', in Tony J. Pitcher, Paul J. B. Hart and Daniel Pauly (eds.) *Reinventing Fisheries Management*, London, Kluwer Academic Publishers, pp. 311-312.

Likewise, ‘Sustainable development’ is not, however, an uncontested term. It is arguably a euphemism that hides and distorts the trade-off between the economic growth imperative and negative externalities.⁴¹ It used to be argued that this was a liberal or neo-liberal imperative. However, this is not quite accurate. It is more accurate to state that the economic growth imperative is a function of late modernist cultures as the system of states, of production, finance and trade and of cultures become increasingly subject to globalising tendencies.⁴² It is also a quite understandable euphemism in the face of arguments about the limits to growth. Contained within the discourse of sustainable development is the discourse of corporate responsibility and there are elements of truth within this discourse. However, from a critical theoretical perspective this discourse although it may produce some real-world lessening of harm is reactionary and still follows the internal logic of capitalist and individualist self-interest. If it were truly reactionary though then it would be highly unlikely that any environmental conventions would be signed far less come into force. Space precludes me from going into too much detail here but this is also the basic argument presented by Karl Polanyi in his classic work *The Great Transformation*.⁴³

Furthermore, the (mostly accepted) narrative of the human relationship with nature is one that comes from a long-line of thinking that can be traced in part to the sacral context of early Christian thought that over time became entangled with Occidental modernity, liberalist notions of growth and the perfectibility of man.⁴⁴ However, as Ilya Prigogine correctly points out:

‘...it should be noted that there are no limits to structural stability. Every system may present instabilities when suitable perturbations are introduced. Therefore there can be no end to history....This “over creativity” of nature emerges naturally...in which “mutations” and “innovations” occur stochastically and are integrated into the system

⁴¹ For a defence of sustainable development see Anthony Giddens (1998), *The Third Way: The Renewal of Social Democracy*, Cambridge, Polity Press. For one of many sceptical views see Ruth Irwin (2008), *Heidegger, Politics and Climate Change: Risking It All*, New York, Continuum.

⁴² See for example, Robert Deuchars (2010), “Towards the Global Social: sociological reflections on governance and risk in the context of the current financial crisis”, *Cambridge Review of International Affairs*, 23:1., Fredric Jameson (1991), *Postmodernism, or, The Cultural Logic of Late Capitalism*, Durham, Duke University Press, John Gray (1998), *False Dawn: The Delusions of Global Capitalism*, New York, The New Press,.

⁴³ Karl Polanyi [1944] (2001), *The Great Transformation: The Political and Economic Origins of our Time*, Boston, Beacon Press.

⁴⁴ See for example Francis Fukuyama (1992), *The End of History and the Last Man*, New York, The Free Press, John Passmore (1978), *The Perfectibility of Man* New York, Scribner.

by the deterministic relations prevailing at the moment. Thus, we have in this perspective the constant generation for “new types” and “new ideas” that may be incorporated into the structure of the system, causing its continual evolution’⁴⁵

So we can see immediately that the legal convention becomes entangled with politico-economic and politico-cultural elements. Thus it should come as no surprise that attempts to codify and protect the oceans through the juridical form is played out on the surface of state and non-state actor interests with the complicating factors of instabilities of identities and existing within a system that is always ‘far from equilibrium’.⁴⁶ In New Zealand this matter is made explicitly complex due to Maori fishing rights, and as Schiffman points out, due to their part-ownership in Sealord, which is one of the largest industry players in the Orange Roughy market; Orange Roughy are one of the most over-fished using the bottom trawling method.⁴⁷

The second point of note is centred on the question of compliance with the numerous non-binding obligations embodied in the Convention and as such within the SPRFMO itself. Nation-states that are signatories to the Convention have a number of measures contained within the regime that take us from the general and difficult philosophical problem that manifests in all complex adaptive systems⁴⁸ towards the particularities of the SPRFMO itself, how it is constituted in law, supported by science in the broadest sense of the word, and how even though many of its measures are voluntary there has been a degree of compliance that cannot be explained by realist or neo-realist international politics and therefore offers up a semblance of hope for similar measures to be adopted in other international legal fora.

4. Voluntary compliance measures and Article 17

Even though the SPRFMO did not become a legal entity until 2012 a number of interim measures were adopted. The interim measures were voluntary and non-binding. Measures apply to pelagic and bottom fisheries. (Jack Mackerel are a good example of a pelagic species and Orange Roughy are a good example of deep-sea fish).

⁴⁵ Ilya Prigogine (1980), *From Being to Becoming*, p.106.

⁴⁶ See New Zealand’s “National Interest Analysis” on the Convention as illustrative of this argument, at http://www.parliament.nz/en-nz/pb/sc/business-summary/00DBSCH_ITR_10531_1

⁴⁷ H. Schiffman op.cit., pp185-186.

⁴⁸ See John H. Miller and Scott E. Page (2007), *Complex Adaptive Systems: An Introduction to Computational Models of Social Life*, Princeton, New Jersey, Princeton University Press.

In respect of pelagic fisheries, states agreed to a number of obligations. These included reporting current levels of fishing to the interim Secretariat and to place limits on the overall number of vessels permitted to fish in the any one particular area of the ocean. There was also a degree of co-operation on the scientific front, largely related to establishing a data set of available stocks. Participating nation-states also agreed to ensure that vessel-monitoring systems were installed on the vessels they sent out to fish.

For bottom fisheries, the interim measures were even more stringent. States agreed to limit fishing effort to existing levels. They also agreed to refrain from fishing in new regions where bottom trawling was not in use and require impact assessments before fishing was permitted. Parties also agreed on...“conservation and management measures for areas vulnerable to bottom trawling; require vessels to cease bottom trawling within 5 nautical miles of any site with evidence of vulnerable marine ecosystems; appoint observers to vessels conducting bottom trawling; and ensure all vessels are equipped with vessel monitoring systems”.⁴⁹

Firstly, with regards to existing levels being maintained for both pelagic and deep sea fish this represents an on-going problem for Chile for example, but especially for pelagic species.⁵⁰ Secondly, as noted above in an ocean as vast as the Pacific, 5 nautical miles is statistically insignificant given the state of current scientific knowledge of the seabed and the ‘move away’ measure is very difficult to assess on an on-going basis. Finally, deep sea trawling is incredibly destructive and its impact and the corresponding ‘impact assessment’ requirements are incredibly complex i.e. small perturbations in complex adaptive systems display emergent properties and as such also there can be large and unintended consequences in the long term of seemingly small occurrences today. As Vinson points out ‘[T]he unique characteristics of the deep sea, including remarkable habitats such as seamounts, make deep sea ecology invaluable. Unfortunately, anthropogenic activities threaten the health of the deep sea. One of the greatest threats is deep sea bottom trawling...The ecological impact...is so grave that the minimal economic benefit in no way justifies the practice’.⁵¹

⁴⁹ *New Zealand Yearbook of International Law* [Vol 5, 2007-2008].

⁵⁰ ‘Chile: Fish Stocks face continued threat of decline’, Oxford Analytica Daily Brief Service, 14.02.2013.

⁵¹ Anna Vinson (2006), ‘Deep Sea Bottom Trawling and the Eastern Tropical pacific Seascape: A Test Case for Global Action’, *Georgetown International Environmental Law Review*, 18:2, p.357.

So it is with caution that I proceed to outline the decision-making and dispute resolution mechanisms that arguably have some promise for other international environmental regimes.

Article 17 of the Convention has the following key provisions:

2

- . (a) Any member of the Commission may present to the Executive ☐Secretary an objection to a decision within 60 days of the date of notification “the objection period”. In that event the decision shall not become binding on that member of the Commission to the extent of the objection, except in accordance with paragraph 3 and Annex II.
- . .
- . (b) A member of the Commission that presents an objection shall at the same time:
 - . (i) specify in detail the grounds for its objection;
 - . (ii) adopt alternative measures that are equivalent in effect to the decision to which it has objected and have the same date of application; and
 - . (iii) advise the Executive Secretary of the terms of such alternative measures.
- . .
- . (c) The only admissible grounds for an objection are that a decision unjustifiably discriminates in form or in fact against the member of the Commission, or is inconsistent with the provisions of this Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.⁵²

The Russian Federation lodged such an objection under Article 17 stating that its general objection was that:

“the 2010 catch cannot be used as the basis for determining of national quotas for the following reasons.

1. The 2010 catch was obtained in the time when the Revised Interim Measures for Pelagic Fisheries were in force, and in accordance with paragraphs 3 and 4 of these Measures “the management measures in these Interim Measures in no way special or a precedent should serve as a reference for future management decisions of the Commission” and “are not to be considered the precedents for future allocation or other decisions taken by

⁵² The legal definition of a fact is not a value-neutral statement and facts in general do not necessarily just exist ‘out there’ waiting to be discovered, but are also as much ‘in here’ and ‘in us’. The situation becomes more of a problem when we look at the interface between facticity, truth and power. See Georges Canguilhem (1991), *The Normal and the Pathological*, New York, Zone Books, Mary Poovey (1998), *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society*, Chicago and London, University of Chicago Press, Ludwik Fleck (1981), *Genesis and Development of a Scientific Fact*, Chicago and London, University of Chicago Press, Peter Berger and Thomas Luckmann (1966), *The Social Construction of Reality, : A Treatise in the Sociology of Knowledge*, New York, Anchor Books.

the Commission in accordance with Article 21 of the Convention, relating to the participation in fisheries for *Trachurus* species”.⁵³

The Russian Federation gave a number of supplementary objections but as reported by the Commission its principle objection was that:

The Russian Federation states that the division of shares in the catch limit of *Trachurus murphyi* for 2013, as set out in CMM 1.01, “demonstrates an unjustifiable discrimination against the Russian Federation in form and in fact, and is inconsistent with the provisions of the Convention”. The Russian Federation states that the Commission has “neither grounds nor competence to review the catch data presented by the Parties”.⁵⁴

In accordance with the decision-making process of the Commission the Russian Federation was obliged to put in place an alternative limit catch. Also in accordance with the Commissions’ rules the Russian objection was placed before the Commission’s Review panel under article 17 5 (a)-(f).

The wording of article 17 6 is instructive in this regard given what subsequently transpired. It states:

6 Nothing in this Article limits the right of a member of the Commission at any time to refer a dispute concerning the interpretation or application of this Convention for binding settlement in accordance with the provisions of this Convention relating to the settlement of disputes.

In short, the Russian Federation voluntarily complied with the findings of the Review panel which stated as follows:

100. In light of the foregoing, pursuant to Article 17(5) (e) of the Convention, the Review Panel:

- a. *Finds* that the Decision to which objection has been presented unjustifiably discriminates in form or in fact against Russia;
- b. *Finds* that the alternative measures adopted by Russia are not equivalent in effect to the Decision to which objection has been presented by Russia;
- c. *Recommends* the following alternative measures as equivalent in effect to the Decision to which objection has been presented:

Russia will authorise vessels registered in the Russian Federation to catch *Trachurus murphyi* in the Convention Area in 2013:

⁵³ www.southpacificrfmo.org/.../20130614-Submission-of-the-Russian-Fed...

⁵⁴ Objection to CMM 1.01 at SPRFMO <http://www.southpacificrfmo.org/objection-to-cmm-1.01/>

- . (i) only after Russia concludes from data reported by the Organisation, and in accordance with Article 3, paragraph 1(a)(v) of the Convention, that it is likely that the total catch in 2013 will not reach the total allowable catch of 360,000 tonnes referred to in paragraph 6 of CMM 1.01, and
- . (ii) only until the Organisation reports that this total allowable catch has been reached;

d. *Finds*, without prejudice to the foregoing, that the Decision to which objection has been presented by Russia is not inconsistent with the provisions of the Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement.⁵⁵

Article 17 is generally viewed as the improvement that proponents of the SPFRMO have been pushing for and from a strict reading of international environmental law perspective it is actually quite significant. The case demonstrates that it is possible for environmental concerns, as in this case, of over-fishing to over-ride the politico-economic interests of a very large nation-state. As we know there is no over-arching authority in the governance of international affairs and that the oceans are not only vast and vulnerable but over-fishing, as well as illegal fishing are notoriously difficult to establish, but more importantly, to enforce rules and regimes for their continued sustainability.⁵⁶

If this was the end of the story then we might suggest that care for the environment has indeed become superordinate to the interests of capital. However, on closer inspection just because a ruling is binding says nothing about enforcement. Moreover when viewed through the lens of Critical Theory a number of features ought to be highlighted. Since 2006 when the initiative to establish the SPRFMO by Australia, New Zealand and Chile, there has been a scramble bordering on the edge of madness to decimate the remaining stock of Jack Mackerel, involving many countries, vessels and agents. The most notorious of these is probably the Russian-flagged vessel the *Lafayette*, which isn't actually a fishing vessel but a processing one, which is capable of processing 5470,000 metric tons per year assuming it operated every day.

At a deeper level though the scramble for remaining resources makes perfect sense. RMOs are calculative regimes, supported by a scientific apparatus, so whilst there was an ideal posited in 2006 to do something about Orange Roughy and Jack Mackerel it is rational that two things should occur. Firstly, politico-economic interests should extract as much of the fish as possible prior to Article 17 becoming binding (this process took seven years) and secondly, the knowledge that there might be the political will to enact

⁵⁵ SPRFMO Review Panel Findings at <http://www.southpacificrfmo.org/objections/>

⁵⁶ Benjamin K. Sovacool (2009), "A Game of Cat and Fish: How to Restore the Balance in Sustainable Fisheries Management", *Ocean Development and International Law*, 40:1 97-125., Callum M. Roberts (2002), "Deep impact: the rising toll of fishing in the deep sea", *TRENDS in Ecology and Evolution*, 17:5, 242-245.

through juridical forms banning the practice of bottom trawling, then bottom trawling activities should be accelerated. From both the Foucauldian global governmentality prism and the more orthodox neo-Marxism of the Frankfurt School of political theory, these would be the predicted actions of all the actors that stood to gain from industrialised fishing extraction and processing. It is not even controversial when viewed through these lenses.

5. Conclusion

The purpose of this essay was to look at an aspect of ocean management in general and in particular the institution that was brought into being by the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, the SPFRMO, which is one of the world's Regional Fisheries Management Organisations responsible for the South Pacific Ocean. I have argued that to attempt to get a clear understanding of the purpose and function of such regimes it would be necessary to look at three inter-related areas; the first of being, the second of knowing and the third of discourse. To that end I introduced a theoretical framework drawn primarily from the neo-marxism of the Frankfurt School and what some might label the poststructuralist thought of Michel Foucault in general and his notion of governmentality in particular. I also suggested that some engagement with the physical sciences was necessary to understand the nexus between international environmental law and ocean space which I depicted as a complex adaptive system.

I situated this legal regime within a slightly broader context of science, the philosophy of science, technology, political economy and nation-state interests. One of the interesting aspects of marine 'management' is its inherent complexity, the fact that the ocean space as a system is a complex adaptive one and that our knowledge of it is meagre. Despite this clearly demonstrable ignorance, we have developed techniques that have the potential to cause irreparable damage to the fragile marine ecosystem and produce unintended consequences long into the future due to the fact that all complex systems display emergent properties.

I looked specifically at article 17 of the Convention and argued that although it can be viewed as an improvement, I do not view this improvement to be of material significance, given the real world consequences on fishing stocks and the discourse that surrounds them. In that sense I have come to the conclusion that the South Pacific Ocean cannot be managed under the dominant ways of being and knowing as the notion that it can via a

regime premised on a legal convention, supported by an administrative and scientific apparatus is erroneous. From a long line of critical theory I have suggested that the convention, the idea of management with attendant notions of modernist managerialism and a culturally liberalist discourse will produce the effects and outcomes that we have before us, namely the devastation of marine life in the Southern Pacific Ocean and the continued over-exploitation of the remaining fishing stock, despite binding compliance measures. The SPFRMO is at present locked into a calculative discursive regime and a predominantly positivist problem-solving approach to ocean space. Lest this be too gloomy a conclusion I have also suggested that softer aspects of the law such as voluntary compliance with international environmental legal rules and regimes is not only possible, but with some imagination and political will, capable of expanding.⁵⁷

⁵⁷ See Fritjof Capra (2002), *The Hidden Connections: A Science for Sustainable Living*, Anchor Books, New York, see also David Bohm (1980), *Wholeness and the Implicate Order*, Routledge, London and New York.