



Adapted from, *Geographic Map of the Circum-Pacific Region*, American Association of Petroleum Geologists, 1978.  
 And, *New Zealand Continental Shelf Project*, Land Information New Zealand.

# Enclosure of the Tasman Sea, or establishing the Tasman Sea as a Common Pool Resource Domain?

By Peter Knight

## Abstract

*As a researcher working within the surveying context, the continental shelf boundary provides a focus and a starting point for research, but one which I am not reluctant to let be eclipsed by the larger issues. What does the enclosure of the oceans mean to the world and to the people of New Zealand and Australia? What do we gain and what might we lose through the institution of a management regime extending to the maximum reaches allowed under the law of the sea? And how are we to evaluate the system of which the boundaries are only a part? The answers to the foregoing questions certainly bear on the subject of delimitation. We can only assess the effectiveness of the delimitation exercise as it fits into the larger effort, and as our understanding of the larger effort evolves so might our approach to the specific tasks it involves.*

“ I shall distinguish the environment as commons from the environment as resource. On our ability to make this particular distinction depends not only the construction of a sound theoretical ecology, but also—and more importantly—effective ecological jurisprudence.”<sup>i</sup> —Ivan Illich

## INTRODUCTION

Enclosure is an apt word to describe the process resulting from application of the continental shelf boundary rules established by the 1982 UN Convention on the law of the sea (UNCLOS).<sup>ii</sup> Following from the UNCLOS rules, the Tasman Sea will henceforth be subject to continental shelf claims advanced by Australia and New Zealand.<sup>iii</sup> There is some irony to a story that began with the Maltese diplomat Arvid Pardo’s idea that a primary mission of the law of the sea must be to protect remaining unclaimed ocean spaces as the common heritage of mankind.<sup>iv</sup> Enclosure is an assertion to the effect that particular areas of land, or ocean, are no longer the common property of all, but fall under a new form of tenure. The purpose of the new form of tenure (that of a particular sovereign government) is, ostensibly, to allow economic development to take place.<sup>v</sup> But economic development is not without a certain form; it occurs in the service of some idea, and is explained in terms of certain theories. It is to this background of economic philosophy that I turn, in part, to begin formulating a model around which we might consider development options for the Tasman Sea.

I often return to the idea that the surveying profession forms part of the process by which society shares land. True that in a society dominated by private property that process might seem less like sharing and more like exclusion. But anthropologically speaking, property rights contribute to the orderly way in which we make necessary divisions and regulate access; in other words, share land. The property rights paradigm, by which I mean a system of belief based on the tenets of classical economics (including the primacy of the individual, the efficiencies of the profit motive etc.) accompanied by a property rights administration protected by law, is the basis of resource management as it is practised by sovereign governments. This is the system by which a line is to be drawn through the middle of the Tasman Sea.

Alongside the property rights approach we posit “The Commons” and systems of commons management. I do not wish to restrict the definition or meaning of commons and, as a beginning, encourage the reader to use whatever idea of the commons their experience may suggest. As a child in England I used to walk to school each morning across ‘The Common’. Our common was where the school took the children for physical education and sports, and where the fair erected its tents once a year. I’m not sure one would have been able to graze sheep on The Common; it was probably a remnant, more akin to a park than lands the material resources of which are common property of the local people. A few years ago I visited my cousins in Wales who, owning land in a certain community, had rights in

common with neighbouring farmers to run their sheep on what they called 'The Mountain'. Ideas about the commons are developed in the modern literature,<sup>vii</sup> and one of the purposes of this essay is to try and show how this literature is relevant to discussions on enclosure of the oceans.

The commons literature is adding a new dimension to the analysis of how resources are apportioned and managed at both local and international levels. What this work has shown is that traditional approaches to property rights (i.e. the privatization of what was originally common property) need not necessarily always provide the most efficient means of allocating resources. It is worth noting that economic efficiencies are not the only considerations that must be made with respect to sharing up the planet. Commons management contributes something of the ethics of sustainability, something of custom, democracy, and inclusion.

## PRIVATE RIGHTS, COOPERATIVE RIGHTS

At the mention of the word management, and before raising any question of division of territory, I think it worthwhile to clarify the intentions of Australia and New Zealand with respect to the continental shelf. Is the proposed enclosure of the Tasman simply a land grab—implying a rapid and somewhat thoughtless acquisition of territory? Susan Buck writes that,

*Historically, human response to vast areas of valuable resources unfettered by legal rights recognized by the dominant culture usually has been appropriation by governments and individuals, followed by exploitation as soon and as rapidly as physical force and technology would permit.<sup>viii</sup>*

An unabashed frontier ethic of subjugation and exploitation seems an outdated approach to ocean policy and management in the 21st Century. What then are the theoretical platforms on which the continental shelf claim and future management are to be built? In what follows I shall examine the 'goes without saying' model of continental shelf sovereignty, a model which is based, I believe, on the power to exclude. I will then propose an alternative approach to the sharing of continental shelf resources, one that is based on the study of institutions (institutional scholarship), and in particular the study of common pool resources (CPRs); I call this the CPR approach.

At the heart of the theories with which we might approach the sharing of resources there appears to be something of an old conflict in ideology; capitalist vs. communist; competition vs. cooperation; neo-utilitarian vs. communitarian etc.<sup>ix</sup> Actually, no explicit communist ideology remains as part of the discussion, but collective attitudes toward law and economics have modified the extremities of the capitalist approach, and are now a recognized part of our thinking.<sup>x</sup> In fascinating explorations of legal theory with respect to property, Carol Rose demonstrates the operation of principles based on public ownership, and community access and

needs, that have existed throughout (and perhaps as a necessary conjoint to) the heyday of private economic rights.

English philosopher John Locke (1632-1704) is responsible for generating much interest in ideas about individual rights (*natural* rights) and also ideas about property, hence property rights. The concept of property rights, supplemented with classical economic theory, provides a language and a context for the elaboration of ideas about development. Combine property rights with markets, and a theory of efficient allocation of resources emerges. Harold Demsetz, a leading proponent, appears to take up the cudgels against communally owned resources in his work on a theory of property rights.<sup>xi</sup> The theory is that, when a communally owned resource becomes sufficiently valuable, a system of private property rights will emerge as the most efficient form of management of that resource. However, even wholehearted supporters of this theory recognize that the objectives of efficiency may, alternatively, be accomplished by co-operative agreement between those with rights to the resource.<sup>xii</sup>

An example from industry which illustrates a mixture of private rights and co-operative agreement (albeit an agreement imposed by a regulating authority) is the requirement for unitization of the exploitation of offshore hydrocarbon fields. Unitization, contrary to what the word implies, means the unification of separate parcels of rights in the interest of efficiency. Competition between drillers tapping a common reservoir from separate privately held land holdings has long been recognized as a source of inefficiency in the oil industry. The problem is overcome in the offshore by legal requirements that operators develop agreements for the co-operative exploitation of adjacent or common hydrocarbon reserves.

Having begun the discussion by suggesting a conflict of ideology between private and collective approaches to management we move now toward an integration of the two, a recognition that each approach might have an application and that these might even be combined. To anticipate the vocabulary of CPRs that follows we might say that *nested* combinations of collective and private management systems are possible. In the case of the Tasman Sea we might recognize that the continental shelf between Australia and New Zealand is a resource common to both countries, and that within this common resource domain a system for the management of private rights might be instituted. In what follows I am going to make the assumption that sovereign countries may enter into relationships with each other in the same manner that individuals or communities may develop such relationships. And that furthermore, theories of economic competition and co-operation that hold between individuals or groups may also be extended to the interactions of neighbouring, culturally similar, countries.

## COMMON POOL RESOURCES

By way of introduction to the literature of common pool resources (CPRs), it is interesting to note the considerable

debate centred on Garrett Hardin's 1968 essay *The Tragedy of the Commons*.<sup>xiii</sup> Like those professing neo-classical ideas about privatization, Hardin believed that commonly owned land could not be efficiently exploited, or worse still, that communal ownership leads inevitably to destruction through overexploitation.<sup>xiv</sup> The only rational approach to the tragedy of the commons, according to Hardin, is the transfer of communally owned land resources to the private ownership of either the state or individuals. In a happy reversal of the rather stifling atmosphere created by Hardin, there now exists a body of literature able to demonstrate situations in which, contrary to the tragedy theory, communal ownership and management of resources not only works, but often provides a superior solution than that of privatization. The best example of the new approach, to my knowledge, is Elinor Ostrom's book, *Governing the Commons*.<sup>xv</sup> In her widely acknowledged work, Ostrom has studied the sustainable management of localized and small scale CPRs, and developed an analytic tool known as Institutional Analysis and Development (IAD).<sup>xvi</sup>

Susan Buck has taken the work of Ostrom, and others, and shown how IAD might be applied to the governance of large-scale commons.<sup>xvii</sup> Buck avoids ideological confrontation by allowing the contribution of eighteenth and nineteenth century—private rights as the foundation of successful economics—schools of thought, while promoting the relevant modern literature.

*These theorists [conservative political theorists], brilliant in their own day, lacked the 'working rules' derived from the modern concepts of institutionalism, political culture, and anthropology to help them organize the new world in which they found themselves.*<sup>xviii</sup>

Buck encapsulates IAD in a series of guidelines for commons management. This framework might be used as an analytic tool for the study of an existing commons government, or it might be applied to the design of a new system. The government of Antarctica is one international commons to which Buck applies the IAD analysis. The design principles for Sustainable Regimes include the following:

- Clearly defined boundaries
- Operational rules congruent with local conditions
- Collective choice arrangements
- Monitoring
- Graduated sanctions
- Conflict resolution mechanisms
- Rights to organize regimes
- Nested enterprises

The following additional considerations are appropriate for multiple use commons,

- Resource domain must be able to support all uses
- All users must be represented
- Knowledge of operational rules must be shared<sup>xix</sup>

Not much can be said, at this point, about the application of the above principles to a Tasman common pool resource area. They are presented here only as an example of the form that a study of a CPR approach to the Tasman might take, and as evidence of the experience that has been gained from the study of common pool resource systems. I continue now with further definitions in the CPR vocabulary.

A resource is anything that might be used to satisfy a human need,<sup>xx</sup> and the term *resource domain* describes the spatial extent of an area with resource potential. In the case of the Tasman Sea the resource in question might be hydrocarbons and the resource domain the area of continental shelf lying between Australia and New Zealand. Buck gives the following definition of common pool resources,

*Common pool resources are subtractable resources managed under a property regime in which a legally defined user pool cannot be efficiently excluded from the resource domain*<sup>xxi</sup>

The user pool are those groups that have rights to a particular resource domain; subtractable simply means that once the resource has been appropriated by one party it is no longer available for another. The point concerning efficient exclusion describes a characteristic of commons; traditionally commons have existed precisely because of the difficulty of excluding people from such activities as digging clams or running cattle on the open range. In the case of potential hydrocarbon reserves in the Tasman Sea, it is not the difficulty of excluding users from the resource domain for which reason it makes good sense to constitute a commons, rather it is the *nature of the resource domain*.<sup>xxii</sup> The seabed resources of the Tasman Sea are hidden. It is as though a blindfolded shepherd is asked to choose, for pasture, an area of mountain he/she has never before seen. In these circumstances a wise shepherd might choose to share the whole mountain rather than be limited to a particular area.

“Commons are resource domains in which common pool resources are found.”<sup>xxiii</sup> The idea of a Tasman Commons or Tasman common pool resource domain is presented here as an international commons with a limited user pool.<sup>xxiv</sup> Within the international commons I would expect a nested system of private property rights similar to those already in existence within the EEZs of the respective countries.<sup>xxv</sup> In the case of the North Sea resource domains, the oil companies themselves had a leading role in the development of a management scheme, which characteristic alone suggests similarities with commons approaches.<sup>xxvi</sup> For the purpose of simplicity and while the idea is being discussed in its general form we ought to keep separate the layers of application of the CPR approach. This does not preclude looking ahead to the possibility of ‘nesting’ a combination of management regimes (which regimes might involve both traditional private rights and CPR approaches) within one another.

## CONCLUSIONS

The fact that the Tasman Commons is presently under-explored (i.e. we do not know what kind of resources the commons may contain or where these resources might lie) is one reason for taking a commons approach to the management of this offshore area. There are other reasons for which the commons approach might prove advantageous. A commons approach could make the delimitation of the continental shelf boundary between New Zealand and Australia an unnecessary exercise. Existing EEZ boundaries could be used to define the commons and where end boundaries are needed these could be decided jointly by New Zealand and Australia.<sup>xxvii</sup>

In my view, there is enough potential in the economic argument alone for seriously considering the CPR approach to the continental shelf.<sup>xxviii</sup> But its real value might be found in its philosophy, and ethics, in short, the spirit of The Commons. The challenge of instituting sustainability means we need to be looking out for new ways of doing things, ways that are grounded in the ethics of sustainability. Sustainability is about valuing life-supporting processes and these can be cultural as well as biological. One of the great lessons of sustainability is that the indigenous cultures of the world have a contribution to make to the future ways in which we relate to each other, to our place, and to sharing. Gary Snyder says,

THAT WE MUST TRY NOT TO CONFUSE

the vernacular, place-and culture-based management of CPRs by living communities using traditional knowledges, — i.e. sustainable subsistence economies WITH

The Bureaucratic management and its endless meetings or “data presentations” or thousands of pages of “Alternatives” as done by nation-States on behalf of their multinational clients.<sup>xxix</sup>

Sustainability relates to process as well as the physical characteristics of a resource system. Mining is not itself a sustainable activity, but the organization, and the planning of mining can, and should be, informed by the ethics of sustainability. The inclusion of customary forms of tenure in modern land administration is an example of sustainable process.<sup>xxx</sup> In this context we might see that a CPR approach to the Tasman is more in keeping with custom, more ‘organic’ than the idea of enclosure.

I do not agree with Snyder if he means that we cannot apply the lessons learned at the local level (the lessons of the commons) to the international situation. Further I do not believe that all elements of the corporate approach to offshore management need be damned. The choice that we need to make is to find ways of working together in inclusive rather than exclusive ways. If we make a conscious choice to be guided by the ethics of sustainability the proper management tools will be found.

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## REFERENCES

- <sup>i</sup> Illich, Ivan, *Silence is a Commons*, *Co-Evolution Quarterly*, No. 40, 1983.
- <sup>ii</sup> The Third United Nations Conference on the Law of the Sea at Montego Bay, Jamaica, resulted in the United Nations Convention on the Law of the Sea (UNCLOS) signed by 117 delegates on 10<sup>th</sup> December 1982. See, *The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the Sea, Introductory Material on the Convention and the Conference*, Croom Helm, 1983, published in co-operation with the United Nations. Australia and New Zealand ratified UNCLOS in 1994 and 1996 respectively. Under the rules of UNCLOS outer continental shelf limits must be submitted to the UN within ten years of ratification. For information on the Australian continental shelf boundaries see: Australia’s

Marine Science and Technology Plan, The Marine Science and Technology Plan Working Group, June 1999, Department of Industry, Science and Resources, GPO Box 9839, Canberra, ACT, 2601. The document is also available on the Internet at <http://www.isr.gov.au/science/marine/marineplan>. For information on New Zealand continental shelf boundaries, see Lamont, Iain (note iii below) also: <http://www.lin.govt.nz/services/csdp/csdp/nzunclos.htm>.

<sup>iii</sup>Lamont, Iain, *Formulating the New Zealand Continental Shelf Claim: A First Step*, Report of Proceedings, International Hydrographic Organization. Monaco, 1999.

<sup>iv</sup> Eckert, Ross, D, *The Enclosure of Ocean Resources*, Hoover Institution Press, 1979.

<sup>v</sup> I understand that the use of the word enclosure can have negative connotations as there are few who would not associate it with the destruction of European and Asian peasant communities as medieval forms of tenure gave way to more 'economic' forms. But in the case of the oceans there is, happily, no peasantry to dispossess. Is there? The question of aboriginal rights to oceans must certainly not be glossed over. Flannery (1994, p.172) writes, "... the Lapita were the world's first true blue-water mariners. If the Banda were the first people of the seashore and shallows, then the Lapita called the vast Pacific itself home. ... Their preference for settling on tiny islands, their fearlessness in repeatedly crossing the trackless waste of the Pacific, and their blue-water fishing skills, shows that they were truly at home on the open ocean."

<sup>vii</sup> See Illich, Ivan, *The Flourishing Commons*, Whole Earth Review, Fall 1998 at p.49 "Commons are cultural spaces that lie beyond my threshold and this side of wilderness. Custom defines the different usefulness of commons for each one. The commons are porous. The same spot for different purposes can be used by different people. And above all, custom protects the commons."

<sup>viii</sup> Buck, Susan J. *The Global Commons An Introduction*, Earthscan, London, 1998, p.1 Buck goes on (at p. 11) to contrast this frontier type ethic with the legitimacy of sustainability as a policy goal.

<sup>ix</sup> Rose, Carol M. *Property and Persuasion Essays on the History, Theory and Rhetoric of Ownership*, Westview Press, 1994 p.3-4 "Very briefly, the neo-utilitarian view asserts that property rights are a good thing because they encourage people to invest their efforts in things they claim ... and because they encourage trade". The communitarian approach would be to stress that, "... property regimes are located in and managed by communities."

<sup>x</sup> Berman, Harold J. *Law and Revolution The formation of the Western Legal Tradition*, Harvard University Press.

<sup>xi</sup> Demsetz, Harold, *Toward a Theory of Property Rights*, *American Economic Review*, Papers and Proceedings 46 (1967)347-59, quoted in, Eckert, Ross D *The Enclosure of Ocean Resources Economics and the Law of the Sea*, Hoover Institution Press, Stanford University, 1979 p.10.

<sup>xii</sup> Eckert, Ross. *Op.Cit.* p.100.

<sup>xiii</sup> Hardin, Garrett, *The Tragedy of the Commons*, 162 *Science* 1243 (1968).

<sup>xiv</sup> The power of Hardin's writing lies not in argument for any particular economic or political position. It is instead Hardin's deep concern about human impact on the environment and the consequences of that impact for society that

makes him still very readable today.

<sup>xv</sup> Ostrom, Elinor, *Governing the Commons*, The evolution of Institutions for collective action, Cambridge University Press, 1990.

<sup>xvi</sup> Ostrom began her work with investigation of how water resources are collectively managed in California. She has continued by amassing a wealth of other international data, the management of fisheries resources by village producers in Turkey for example.

<sup>xvii</sup> Buck, Susan J. See references to the work on multiple use commons by Edwards and Steins on p.34.

<sup>xviii</sup> Buck, Susan J *supra* p.26.

<sup>xix</sup> Buck, Susan J. *Op.Cit.* p.35

<sup>xx</sup> I note that Wendell Berry, and Ivan Illich have much richer explanations of the etymology, and current meaning of the word resource. See Illich, *The Flourishing Commons*, *Op. Cit.* and also, Berry, *Home Economics*, *Whole Earth Review*, No. 51, 1986.

<sup>xxi</sup> Buck, Susan J. *Op. Cit.* p.5.

<sup>xxii</sup> The flow of resources from a resource domain and the nature of the resource domain are useful concepts that emerge from the vocabulary of common pool resources which can lead the discussion beyond that engendered by the more traditional vocabulary of property rights. See Buck, Susan J. *Op.CIT.* p.4

<sup>xxiii</sup> Buck, Susan J. *Op.Cit.* p. 5

<sup>xxiv</sup> Antarctica is an example of an international commons, only countries signatory to the Antarctic treaty are part of the user pool. In the case of the Tasman Commons the two main pool users are Australia and New Zealand. Whether any other nation or group might have rights in the domain would be a subject for negotiation.

<sup>xxv</sup> The EEZ itself may be thought of as a kind of common pool resource managed through the intermediary of the national government. It is interesting how management systems lose their ideological boundaries under the pressure of pragmatic administration.

<sup>xxvi</sup> Cameron, Peter D, *Property Rights and Sovereign Rights The Case of North Sea Oil*, Academic Press, 1983.

<sup>xxvii</sup> As the interests of the two countries would coincide on this delimitation it could be efficiently accomplished.

<sup>xxviii</sup> The main economic argument is that of taking an approach appropriate to the unexplored nature of the Tasman. Some micro-economic efficiencies also present themselves. For example, administrative costs for a commons management regime would likely be less than the combined costs of each country advancing a competitive continental shelf claim.

<sup>xxix</sup> Snyder, Gary, *The Flourishing Commons*, *Whole Earth Review*, Fall 1998.

<sup>xxx</sup> Riddell, James, C. *Reforme Des Regimes Fonciers 1 : Les Nouvelles Tendances Progrès vers une théorie unifiée*. Document préparé pour le Colloque: Politique des structures et action foncière au service du développement agricole et rural. St Denis (la Réunion), novembre 1997.