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SYMPOSIUM ON GOVERNING HIGH SEAS BIODIVERSITY

THE LIMITS OF SECTORAL AND REGIONAL EFFORTS TO DESIGNATE HIGH SEAS MARINE PROTECTED AREAS

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This essay addresses the question of how the international community could designate high seas marine protected areas (MPAs) that would be binding on all states. This is a key issue for the forthcoming UN negotiations of an International Legally Binding Instrument (ILBI) on conservation and sustainable use of biodiversity in areas beyond national jurisdiction. However, this is a longstanding question, the importance of which transcends the ILBI negotiations. Some have argued for the establishment of a centralized Ocean Governance Authority, whose decisions would be universally binding; others have argued that existing regional and sectoral bodies can be relied on to protect biodiversity in areas beyond national jurisdiction. The experience of the Sargasso Sea project is that some sort of centralized or coordinating regime is needed to make MPAs effective across regional and sectoral bodies.

The Debate

Many of the states negotiating the ILBI have very different perspectives as to the respective roles of global and regional ocean governance. Some appear to envisage or fear that a new ILBI could create a centralized global ocean governance system analogous to the seabed exploration and mining regime administered by the International Seabed Authority (ISA). This new hypothetical Ocean Governance Authority would thus, for example, be able to adopt rules that were automatically binding on all states, including rules designating marine protected areas in areas beyond national jurisdiction. It could require new and existing maritime activities to be subject to environmental impact assessments and strategic environmental assessments, requiring proof that such activities were not likely to cause significant adverse effects, alone or in combination, before being allowed to proceed. It could oversee the way that regional bodies such as Regional Fishery Management Organizations (RFMOs) and sectoral bodies such as the International Maritime Organization (IMO) and the UN Food and Agriculture Organization live up to their obligations to protect and preserve the marine environment,[1] and it could require improvements where those bodies come up short.

Other states have a different vision for ocean governance. These states emphasize that, consistent with the relevant UN General Assembly resolutions, the negotiating process should "not undermine" existing legal instruments and frameworks and relevant global, regional, and sectoral bodies.[2] They have thus proffered a minimalist view that would rely on the existing framework of regional and sectoral bodies to implement existing, and perhaps new, obligations to conserve marine biodiversity.

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[1] *See* UN Convention on the Law of the Sea arts. 192, 195(4), 197, Dec. 10, 1982, 1883 UNTS 397 [hereinafter UNCLOS].

[2] G.A. Res. 69/292 (July 6, 2015).

The experience of the Sargasso Sea project over the last seven years has been that RFMOs and other sectoral organizations (such as the IMO and ISA) are too narrowly focused on their particular sectoral concerns to perform a wider biodiversity or ecosytem-stewardship role[3] and that there is a clear need for a more holistic and integrated system of governance in order to conserve and sustain biodiversity and ecosystem functions in areas beyond national jurisdiction. That system could have a lighter touch than a full-time, comprehensive Ocean Governance Authority. It might, for example, be overseen by regular meetings of a Conference of Parties to the new ILBI, advised perhaps by a scientific advisory body or a legal, scientific, or technical commission (scientific advisory commission). That Conference of Parties might exercise a supervisory rather than a full governance role, reviewing environmental impact assessments and strategic environmental assessments for new ocean activities as well as efforts by regional and sectoral bodies to integrate the new ILBI requirements into their existing roles.[4]

Such a structure would recognize the important role of the regional and sectoral organizations, such as RFMOs, without (as Dire Tladi terms it) "deferring" to them.[5] Tladi thinks that the Conference of Parties could have a preeminent role in designating MPAs in areas beyond national jurisdiction. In his scenario, a potential site that meets agreed, science-based criteria would be identified by a scientific advisory commission. The Conference of Parties could simply designate those areas as marine protected areas, but if such areas were within the jurisdictional area of a regional or sectoral body (such as an RFMO), then the Conference Secretariat or the scientific advisory commission itself would consult with those bodies to discuss appropriate conservation measures. The ideal outcome then would be for the RFMO to adopt appropriate conservation measures that could be endorsed by the Conference of Parties and thus be binding on all the parties to the ILBI. The support of the RFMO will always be useful and would greatly enhance the effectiveness of the ILBI process, but failure to act by the RFMO is not necessarily fatal. The Conference of Parties could nevertheless designate the area as an MPA. Such a decision would be universally binding on the parties to the ILBI—many of whom will also be parties to the RFMO. Such a situation would not, Tladi suggests, trigger a legal conflict, as no RFMO *obliges* its parties to fish in certain areas; it would be merely an "incoherence between the obligation under the [ILBI] and the permissiveness of the RFMO."[6] States parties to the ILBI could be obliged to simultaneously pursue adoption of compatible conservation measures through the relevant organizations.

Existing Practice on the Establishment of Protected Areas in Areas Beyond National Jurisdiction

The high seas are open to all states to exercise, subject to due regard for the interest of other states and other provisions of the UN Convention on the Law of the Sea (UNCLOS), a number of "freedoms of the high seas."[7] Any measure that attempts to restrict the exercise of these freedoms (for example, by restricting the passage of vessels or fishing activities) requires the consent of affected states to be effective. A sectoral organization with near universal membership, such as the IMO,[8] may take decisions regarding restrictions on high seas freedoms by, for

[3] *See* David Freestone, *Governance of Areas Beyond National Jurisdiction: An Unfinished Agenda?*, *in* LAW OF THE SEA: UNCLOS AS A LIVING TREATY 231 (Jill Barrett & Richard Barnes eds., 2016).

[4] *See* Dire Tladi, *The Proposed Implementing Agreement: Options for Coherence and Consistency in the Establishment of Protected Areas beyond National Jurisdiction*, 30 INT'L J. MARINE & COASTAL L. 654 (2015).

[5] *Id.* at 668.

[6] *Id.* at 670.

[7] UNCLOS, *supra* note 1, art. 87 (identifying, subject to certain conditions, freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations permitted under international law; freedom of fishing; and freedom of scientific research).

[8] The IMO currently has 173 member states and three associate members.

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example, restricting navigation in certain areas. These restrictions are then binding on all its members and hence are opposable to them. Regional organizations, such as RFMOs, have fewer members and so their power to restrict activities is more limited. If an RFMO determines that it is necessary to close an area to fishing, then that decision is only binding on its members.[9] It is against this background that we can briefly review the development of MPAs in areas beyond national jurisdiction.

The International Union for the Conservation of Nature defines a protected area as a "clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values."[10] Hence a single sectoral designation simply preventing fishing or vessel traffic activities does not in itself meet these criteria. The management regime ideally needs to be multisectoral.

A number of sectoral organizations do have specific instruments to protect areas from their specific activities. The International Convention for the Prevention of Pollution by Ships (MARPOL 73/78)[11] envisages that states may establish "Special Areas" of the ocean, where more rigorous regimes apply to pollution from vessels. IMO also envisages the designation of "Particularly Sensitive Sea Areas" to denote areas of particular vulnerability to shipping activities, with associated protection measures,[12] though to date none have been established in the high seas.[13] RFMOs also envisage protection measures, including closing areas for fishery management reasons. In 2009, responding to two General Assembly Resolutions on protection of marine biodiversity, including protection of vulnerable marine ecosystems from significant adverse impacts of deep-sea bottom trawling,[14] the Food and Agriculture Organization's Committee on Fisheries adopted guidelines[15] that provided criteria for "vulnerable marine ecosystems" in areas beyond national jurisdiction and outlined procedures for preventing significant adverse impacts from bottom trawling, including closure of designated areas.[16] The ISA has recognised "Areas of Particular Environmental Interest" in the Clarion-Clipperton Zone in the Pacific.[17] In addition, the parties to the Convention on Biological Diversity (CBD) developed "Ecologically or Biologically Significant Areas" to inform and advise sectoral organizations of the importance of areas over which those organizations may have relevant competences.

In sum, states have developed tools to protect certain areas from specific human activities. There have also been regional efforts to identify MPAs in areas beyond national jurisdiction. The first high seas MPA, established in 1993 by agreement among France, Monaco, and Italy, was the famous Pelagos Whale Sanctuary in the

[9] However, states parties to the 1995 UN Fish Stocks Agreement that fish for covered species within the area of a regional convention are also obliged to become members of the convention or agree to abide by its conservation and management measures in order to continue fishing. UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks arts. 8(3) & 8(4), Dec. 4, 1995, 34 I.L.M. 1542.

[10] Int'l Union for Conservation of Nature, Guidelines for Applying Protected Area Management Categories (Nigel Dudley ed., 2013).

[11] International Convention for the Prevention of Pollution by Ships 1973/78, Nov. 3, 1973, 17 I.L.M. 546.

[12] Int'l Maritime Org., Assembly Resolution A.982(24) (Dec. 1, 2005); *see also* K. Gjerde & D. Freestone, eds., *Special Issue: Particularly Sensitive Sea Areas: an Important Environmental Concept at a Turning Point*, 9 Int'l J. Marine & Coastal L. 431 (1994).

[13] *See also* Julian Roberts et al., *Area-Based Management on the High Seas: Possible Application of the IMO's Particularly Sensitive Sea Area Concept*, 25 Int'l J. Marine & Coastal L. 483 (2010); David Freestone & Viva Harris, *Particularly Sensitive Sea Areas beyond National Jurisdiction: Time to Chart a New Course?*, *in* International Marine Economy: Law and Policy 322 (Myron Nordquist et al. eds., 2017).

[14] G.A. Res. 59/25 para. 66 (Nov. 17, 2004); G.A. Res 61/105 paras. 80–90 (Dec. 8, 2006).

[15] Food & Agriculture Org., International Guidelines for the Management of Deep-sea Fisheries in the High Seas (2009).

[16] For a map of such closures, see *Vulnerable Marine Ecosystems Database*, Food & Agriculture Org.

[17] Int'l Seabed Authority, Decision of the Council Relating to an Environmental Management Plan for the Clarion-Clipperton Zone, ISBA/18/C/22 (July 26, 2012).

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Mediterranean Sea around Corsica,[18] which was subsequently absorbed into the system of "Specially Protected Areas of Mediterranean Importance."[19] In 2010, the parties to the OSPAR Convention in the North-East Atlantic[20] established six MPAs in areas beyond national jurisdiction; they established a seventh in 2012.[21] In the Southern Ocean, the parties to the Convention on Conservation of Antarctic Marine Living Resources have to date established two huge MPAs: in 2010, the South Orkney Islands[22] and in 2017, the world's largest MPA in the Ross Sea.[23] While these initiatives are extremely important, technically they are only binding on the restricted number of parties to the treaties that establish them.

Case Study: Sargasso Sea Project

A number of initiatives—which include the Sargasso Sea, the Costa Rica Thermal Dome, and the Arctic—have attempted to test the utility of existing tools for developing protection measures for important high seas ecosystems. The Sargasso Sea initative is even trying to establish a multisector MPA using the existing international legal regime.

The Sargasso Sea is in the North Atlantic Subtropical Gyre around Bermuda. Named after the floating holopelagic *Sargassum* seaweed, it covers two million square miles, creating a unique open ocean ecosystem. The *Sargassum* supports a number of endemic species and also plays an important part in the life cycle of a number of commercially important as well as threatened and endangered species, such as tunas, bill fishes, whales, sharks, and sea turtles, as well as the catadromous European and American eels.

Led by the Government of Bermuda since 2010, the Sargasso Sea initiative aims to build a network of partners to achieve international recognition of the global importance of the Sargasso Sea; to work with existing international and sectoral organizations to better protect the Sargasso Sea in accordance with UNCLOS; and to use this experience as a model for achieving protective status for areas beyond national jurisdiction elsewhere.[24] Representatives from ten governments have now signed the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea.[25] The Declaration mandated that the Sargasso Sea Commission would act as "stewards" of this unique ecosystem.[26]

The initiative has had a number of important achievements. In 2012, the Sargasso Sea was described as an "ecologically or biologically significant area" under the CBD. As a result, the Northwest Atlantic Fisheries Organisation established a moratorium on bottom trawling on the Sargasso Sea seamounts in its area and gear restrictions on midwater trawling.[27] The Sargasso Sea was accorded a special chapter in the UN First Integrated World Ocean

[18] *History*, Pelagos Sanctuary.

[19] Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean, Feb. 16, 1976, 1102 UNTS 27 (Barcelona Convention); Protocol Concerning Mediterranean Specially Protected Areas and Biodiversity, June 10, 1995, 2102 UNTS 203.

[20] Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 32 I.L.M. 1069 (OSPAR Convention).

[21] *See MPAs in Areas Beyond National Jurisdiction*, OSPAR Commission.

[22] *See South Orkneys Marine Protected Area*, Brit. Antarctic Survey (Nov. 20, 2009).

[23] *See CCAMLR to Create World's Largest Marine Protected Area*, Comm'n for the Conservation of Antarctic Marine Living Resources (Feb. 24, 2017).

[24] *See About Our Work*, Sargasso Sea Comm'n.

[25] *See* Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea, Mar. 11, 2014.

[26] *See About the Commission*, Sargasso Sea.

[27] Daniela Diz, *The Seamounts of the Sargasso Sea: Adequately Protected?*, 31 Int'l J. Marine & Coastal L. 359 (2016).

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Assessment.[28] The Sargasso Sea Commission is an observer at the ISA. In 2014, Monaco, a Hamilton Declaration signatory, successfully proposed the listing of the European eel, which spawns in the Sargasso Sea, under Appendix II of the Convention on Migratory Species (CMS). The Commission is now working with the CMS and Range States on a possible instrument to protect the European eel, which might include protection for the Sargasso Sea.

However, after seven years of work, it is clear that the existing system does not provide an adequate framework for protecting high seas areas. There is little evidence that basic environmental precepts, including the ecosystem and precautionary approaches (contained in the key international legal and policy instruments), are being effectively applied by most international sectoral bodies. The International Commission for the Conservation of Atlantic Tunas, for example, declined to follow the 2013 recommendation of its ecosystem subcommittee that the Sargasso Sea be used as a case study for an ecosystem-based approach to fisheries management.[29]

More fundamentally, sectoral organizations are not taking a precautionary approach in relation to activities on the high seas—where scientific evidence is sparse. The IMO Guidelines for Particularly Sensitive Sea Areas, for example, state that it is "helpful" to have "any evidence that international shipping activities are causing damage and whether damage is of a recurring or cumulative nature." In practice, many influential delegations at IMO have treated this as an evidentiary requirement, and they refuse to take action without convincing proof.[30]

Conclusion

Elsewhere, I have identified the Sargasso Sea Commission and the structure envisaged by the Hamilton Declaration as a new paradigm for high seas conservation.[31] In trying to work within the current system of ocean governance for areas beyond national jurisdiction, the Commission has identified a number of serious problems with that system.[32] It has also sought to test whether a more flexible, holistic approach may provide a way of knitting together the various organizations with competences in areas beyond national jurisdiction. The Hamilton Declaration signatories do have the ability to respond nimbly. In 2014, Monaco took forward a Sargasso Sea Commission proposal to list the European eel under Appendix II of the Convention on Migratory Species. However, the signatories to a political declaration have no power to take legally binding decisions. It is clear from the work of the Commission that under the existing status quo, regional and international sectoral organizations have been very slow to internalize the concerns about the impacts of their activities on high seas species and ecosystems that the international community is voicing through the ILBI process. Further, purely hortatory injunctions in the ILBI seem unlikely by themselves to bring about the changes that will be necessary to ensure the conservation and sustainable use of high seas biodiversity.

The Sargasso Sea experience suggests that the existing ocean governance system does not really address contemporary needs. The idea of a new permanent institution—such an an Ocean Governance Authority—seems unlikely to be acceptable to the majority of states. However, a centralized system with a "lighter touch" for establishing MPAs in the high seas—as suggested by Tladi—seems to offer the greatest chance for success in achieving the conservation and sustainable use of high seas biodiversity.

[28] Howard Roe et al., *Sargasso Sea*, *in* THE FIRST GLOBAL INTEGRATED MARINE ASSESSMENT (2016).

[29] *See* Int'l Comm'n for the Conservation of Atlantic Tunas, 2 REPORT FOR THE BIENNIAL PERIOD, 2012–2013, at 336 (2014).

[30] *See* David Freestone & Kristina Gjerde, Lessons from the Sargasso Sea: Challenges to the Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction (2016); *see also* Freestone & Harris, *supra* note 13.

[31] *See* David Freestone & Kate Killerlain Morrison, *The Signing of the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea: A New Paradigm for High Seas Conservation?*, 29 INT'L J. MARINE & COASTAL L. 345, 354–462 (2014).

[32] *See* Freestone & Gjerde, *supra* note 30.

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