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WHAT PROMISES WILL STATES KEEP BEYOND NATIONAL JURISDICTION?

This panel was convened at 11:30 a.m., Thursday, June 25, 2020, by its moderator Brian Egan of Steptoe & Johnson LLP, who introduced the panelists: Stefan Kirchner of the Arctic Center, University of Lapland; Cymie Payne of Rutgers University; and Lydia Slobodian of Serova.

Remarks By Cymie Payne,* Brian Egan, Lydia Slobodian,*** and Stefan Kirchner******

I. Introduction

Professor Cymie Payne introduced this session, the final event for the Society's Signature Topic, "Beyond National Jurisdiction," which examined international law governing the oceans, polar regions, cyberspace, and outer space.

The topic explored areas that lie beyond the territorial jurisdiction of any state, and recognized that they present unique challenges and opportunities for international law. Through podcasts, essays, and a variety of events, the topic investigated how international law, transnational law, and global institutions complement national governance.

Brian Egan began the discussion by recognizing that there is broad consensus amongst states, including the United States, that international law does apply to these areas beyond national jurisdiction. But the status of international law in these areas on a broad range of issues is unsettled and evolving. From the exploiting or sharing of resources, to potential impact from accidents or other harms, to issues related to immigration, law enforcement, and the law of armed conflict—many international law topics must be addressed in considering these areas beyond national jurisdiction.

II. Current Events and Areas Beyond National Jurisdiction: Climate Change and COVID-19

Egan led an initial discussion on how current events are impacting international legal issues in areas beyond national jurisdiction. He started with an exploration of the implications of the threat of climate change for activities in areas beyond national jurisdiction. Egan posed the question of whether climate change is creating international law challenges and opportunities in relation to the high seas, polar areas, and outer space.

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Lydia Slobodian highlighted three main aspects that feature in current discussions about the relationship between oceans and climate change. First, she pointed out that climate change is already having a measurable impact on the world's ocean, contributing to serious threats like acidification and deoxygenation that require international cooperation to overcome. The effects of climate change weaken ecosystems and leave them vulnerable to impacts from other activities like fishing and shipping. Current sectoral governance regimes, like regional fisheries management organizations (RFMOs) and the International Maritime Organization (IMO) system are not equipped to take these cumulative impacts into account. Climate change may also lead to changes in ocean processes and the behavior and geographic location of marine biodiversity, leading to a need for dynamic ocean governance measures, which the current frameworks do not support. Second, she recalled that there is increasing recognition of the importance of the ocean as a carbon sink. This has spurred discussion under the UN Framework Convention on Climate Change and other international fora on how to maintain and enhance Blue Carbon. Third, Slobodian argued that the ocean could be impacted by climate change mitigation measures. The deep seabed has been identified as a source of minerals used in solar panels, which has led to calls for deep seabed mining that could have disastrous effects on marine life. Ocean fertilization and other geoengineering proposals that involve the ocean may have uncertain consequences. Currently there are no legal frameworks for managing or regulating these activities when they take place in areas beyond national jurisdiction.

According to Stefan Kirchner, it is now widely accepted that no part of the world is as affected by climate change as the Arctic. Here, climate change is not a trend or a future problem but has been practical reality for years. Climate change has dramatic impacts on local communities, for example the loss of traditional livelihoods, increased flood risks as has been realized this spring in Northern Europe, but also more wildfires and an increasing interest by outside actors in the Arctic as a resource areas or simply as a shortcut for cargo ships operating between East Asia and Western Europe. Following up on the comments by Slobodian, Kirchner emphasized the relevance of the Arctic Ocean. The Northern Sea Route, along Russia's Arctic Ocean coast, provides significant cost savings compared to the routes through the Suez Canal or around Africa. In addition, shipping in the Arctic is relevant for the transport of natural resources, which are extracted in the Arctic and then transported to markets, for example in East Asia. Until the current pandemic brought tourism to a hard stop, Arctic cruise shipping benefited from three simultaneous booms: a global boom in tourism, a boom in cruise tourism, and a major boom in Arctic tourism.

Climate change makes the Arctic Ocean more accessible. It has to be noted that the reduction of sea ice cover does not mean a complete absence of sea ice. Instead, these waters can be bergy and still hold dangers for navigation. This means not only increased risks for the people who work on board. These ships that just pass through the Arctic Ocean or engage in other activities that have a limited benefit for the residents of the Arctic can turn into a danger for the local communities and for the Arctic marine environment. This is a problem that affects parts of the ocean that are within and beyond the jurisdiction of the coastal states and sea-ice is a problem that is not limited to the Arctic Ocean. The increasing relevance of shipping in polar waters and the relative danger associated with operating ships in these waters has long been a concern. This is one area which is seeing increasing regulatory efforts, both in soft law and hard law, most notably with the Polar Code, which entered into force three years ago. The protection of the Arctic marine environment and of human safety in the Arctic Ocean remain key concerns. But there is still room for regulatory improvement, for example when we think of emissions from ships, which are not covered by the Paris Agreement. Climate change makes the Arctic more accessible, also for ship operations. But these activities also contribute to climate change.

The discussion then turned to the coronavirus epidemic. Egan proposed that the epidemic raised challenging international law questions in areas beyond national jurisdiction—for example, when

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several cruise ships at sea discovered that they had infected passengers and crew members on board and needed to figure out plans for returning to shore.

Kirchner reminded the audience that, ships, especially cruise ships, have been affected by COVID-19. From a human rights perspective, the situation of many crewmembers is worrisome, especially those who are far from home. The Maritime Labour Convention of 2006 has improved the situation of seafarers since entering into force in 2013, but the pandemic has shown that there are shortcomings. Under MLC Regulation 4.3, for example, states have to make sure that ships which fly its flag provide occupational health protection for seafarers and that the ship is a safe and hygienic work environment. Kirchner emphasized that it is difficult to imagine a more dangerous environment from an infectious disease perspective than a cruise ship, where we have thousands of passengers and crew members in close vicinity. Here flag states will quickly reach the limits of their abilities, and beyond national jurisdiction, this flag state responsibility is, of course, even more important. In the case of COVID-19, securing a safe and hygienic work environment on ships which fly the flag of a state will be difficult for the flag state. In practice, the burden of the response has been shouldered by the port states.

The reaction of some states will have to be looked at in order to develop better practices for the future. Some states have prevented cruise ships that have been affected by COVID-19 from entering their ports. In principle, states of course have full sovereignty over their ports and, initially, the threat posed by COVID-19 had been difficult to assess. But there is definitively room for improvement here. In case of a future outbreak of infectious diseases that are transmitted between humans we need clear rules. This should apply not only to cruise ships but also to cargo ships, which are the backbone of the globalized economy. This is not an entirely new problem. Improved rules concerning ports of refuge for ships in emergency situations, especially ships transporting dangerous cargo, could help reduce the risk of disasters at sea. This is an area in which legal certainty can allow authorities and decision makers on ships to react quickly and adequately in unprecedented emergency situations, like the outbreak of COVID-19 on cruise ships. This can save lives. But seen from the perspective of the coastal states, closing ports was the right decision. For example from an Arctic perspective, the fact that Canada put an end to Arctic cruise shipping in Canadian waters early on, likely has saved lives in small Arctic communities with very limited access to health care.

Slobodian added that one of the most interesting issues raised by COVID-19 was the international response, or lack thereof. In the absence of strong global leadership and government cooperation, she noted the role of social pressure and relationships in compelling people to social distance, shut down performances and events, and wear masks, based on internationally shared scientific research. She postulated that to some extent this shows the limitations of international institutions to address a crisis, but it also shows the potential for global action and scientific cooperation outside the political sphere.

III. Dynamic Space for International Law

Egan put forward a hypothesis (which he acknowledged some might consider a "glass half full" hypothesis) that increasing numbers of states engaged in increasing activities in areas beyond national jurisdiction—particularly outer space and the oceans—is creating a "dynamic space" for international law. "Dynamic space" for international law suggests changes to international law, which suggests some amount of consensus amongst states regarding the need for changes to international law. Egan asked whether increasing activity in areas beyond national jurisdiction (ABNJ) and increasing numbers of states engaging in these activities creates challenges or opportunities in international law.

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Slobodian responded by looking at the problems caused by the emergence of new types of activities in the high seas, such as seabed mining, bioprospecting, and geoengineering. Many of these activities are in their infancy, which creates opportunities for development of legal frameworks. However, it also creates problems, because it is difficult to predict how the technologies or industries will develop.

She highlighted the question of *which* states are able to engage in activities regarding biodiversity in areas beyond national jurisdiction (BBNJ). Accessing the high seas and deep seabed requires significant financial and technological resources. There is a lot of worry that developed states will be able to take advantage of resources in ABNJ while developing countries are left behind.

This has led to one of the fundamental legal debates in ocean governance: whether resources in ABNJ, and specifically genetic resources, should be subject to the doctrine of freedom of the high seas, or common heritage of humankind. Freedom of the high seas would mean that states can freely access and use resources, while common heritage would mean that benefits should be shared with all humankind. According to Slobodian, there is general agreement that benefits from genetic resources from BBNJ should be shared, but there is no consensus on how

Asked whether he agreed that an increased number of states are active in the Arctic region, and if is this creating challenges or opportunities for international law, Kirchner answered that both are the case. There is an increasing interest in the Arctic and one key question is who gets to govern the Arctic. Only Arctic states or non-regional states as well? This question is directly reflected in the choice of the framework for the creation of international legal norms concerning the Arctic. A key forum in which Arctic states cooperate to draft treaties is the Arctic Council, a regional organization, which also involves indigenous representatives. The alternative is to approach the Arctic through a global framework, such as the UN Convention on the Law of the Sea (UNCLOS). That, of course, gives states from outside the region a vote as well. The growing importance of the Arctic Council, on the other hand, is recognized by a large number of non-Arctic states that seek observer status with the Council. Only a small part of the Arctic is actually beyond national jurisdictions and the history of the Arctic, which has been home for many peoples for thousands of years, the geography, especially the limited accessibility of the Arctic Ocean, and impacts of climate change and globalization shape the different perspectives on the Arctic.

The Arctic Ocean might not be an enclosed sea within the meaning of Article 122 of UNCLOS, but in practice the cooperation of Arctic states through the Arctic Council plays an important role in shaping the rules which govern the Arctic Ocean. This includes not just the five coastal states of the Arctic Ocean—Norway, Denmark (with regard to Greenland), Canada, the United States of America (with regard to Alaska), and Russia—but all Arctic states, also including Sweden, Finland, and Iceland. In the case of the Central Arctic Ocean Fisheries Agreement, the five coastal states have been joined by outside actors—Iceland, the European Union, Japan, South Korea, and China—to conserve the biodiversity in the part of the Arctic Ocean which is beyond the jurisdiction of the coastal states. These efforts and the specific role played by Arctic states in the governance of the high seas portion of the Arctic Ocean are not directly governed by the regime foreseen in UNCLOS Article 123, but the spirit of regional cooperation which is at the heart of UNCLOS Article 123 can also be seen in action in the Arctic Ocean. Insofar as climate change not only leads to challenges but also to opportunities. In the Arctic, it certainly helps that there is a long history of cooperation, not only between the Nordic countries but also across the Arctic. Cooperating beyond political boundaries is vital in areas such as Antarctica, the Arctic, or outer space. The challenges posed by climate change provide an opportunity to continue this cooperation. The practical effectiveness of this approach, of course, depends on the willingness of states to deal with these challenges. This cannot be taken for granted. For example, the Arctic Council last

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year, for the first time in its history, failed to adopt a declaration at its biannual meeting because of differences over climate change. This, according to Kirchner, is something to keep in mind when discussing climate change in the Arctic: while climate change already has devastating effects for many in the Arctic as traditional livelihoods are becoming more difficult or impossible to pursue, others perceive climate change as an economic opportunity, allowing for increasing resource extraction or other non-traditional forms of income. Climate change means melting permafrost and a loss of overland transport possibilities for small communities in Russia or Canada but more food security as agricultural production grows in southern Greenland. There is not one coherent Arctic view on climate change.

IV. Current Developments in International Law

The conversation next turned to current examples of how international law is developing in areas beyond national jurisdiction, starting with outer space. Outer space is an area where many countries—including the United States—are parties to the Outer Space Treaty, or another multilateral agreement governing state activities in outer space. Kirchner described the current period as an "exciting time" for the development of international law in outer space. Explaining his view, he noted that private actors in space have been around for some time now, but there is this sense in the space community that things are moving forward quickly. It is not just the big events, which you can see in the news, but also the fact that students at universities in many countries are working on small satellites. Cubesats, a technological concept which has been around for about two decades now, allow for the standardization of small satellites. Standardization is one of the most exciting issues in space activities right now because, like reusability, it makes space more accessible. You can buy components for spacecrafts off the shelf and private actors and reusability of launch systems make access to space cheaper. That allows for the development of new services, especially in the Earth observation sector. Currently, the most important space product of the New Space sector is data. Kirchner then used the opportunity to link different areas, in this case outer space and the Arctic, by explaining that especially in remote regions, like the Arctic, this kind of data is vital, for example in the context of emergency situations like forest fires or floods. Today, we do not just have satellite TV, weather forecasts, and GPS, but a range of space-related services that have an impact on everyday life. Further, it is no longer just governments or large corporations that are active in space, but also small start-ups and non-profit entities.

From a legal perspective, the involvement of private actors in a field that has long been dominated by states creates new demands for regulation. There are regulatory gaps that need to be filled. From an international law perspective, satellite operations are well regulated, but many countries, including technologically advanced countries, do not yet have a functioning domestic set of space law norms. But also international law has shortcomings in areas in which some countries are moving ahead of the crowd with domestic legislation that is forward-looking but which raises serious issues under existing international law. Kirchner mentioned resource extraction in space as one example. Both Luxembourg and the United States are trailblazers when it comes to creating domestic legislation that is meant to facilitate resource extraction in space. What is needed, though, is international regulation and cooperation. The Moon Agreement, which applies to all celestial bodies in the solar system, except Earth, includes an obligation of states to create an international legal framework for resource exploitation on other celestial bodies. States parties to this Agreement hereby undertake to establish an international regime when "such exploitation is about to become feasible." This obligation under Article 11, Section 5 of the Moon Agreement is triggered by technical developments. Basically we have a situation that is the opposite of UNCLOS Part XI where we had regulation long before deep sea mining in the Area became feasible. But only eighteen states

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have ratified the Moon Agreement and the key nations, most European countries, including Luxembourg, the United States, Russia, and China, have not done so. Therefore there is a lot of uncertainty about the future of international regulation in this field. There will be new legal developments in the coming years and decades, but it is far from certain what they will look like. The key question is whether we will have a system of limited regulation and maximal competition or one of cooperation and an international system based on binding rules. The history of the regulation of human activities in areas beyond national jurisdiction shows that the latter option is preferable because legal certainty will facilitate international investments and will allow early investors to take economic and technical risks.

Turning back to the oceans, Slobodian summarized the status of negotiations regarding a new multilateral treaty governing marine biodiversity in areas beyond national jurisdiction. The international community has been looking at the question of marine biodiversity in the high seas for several years. In 2015, the UN General Assembly set up a Preparatory Committee to consider the elements of a possible implementing agreement under UNCLOS that would cover environmental impact assessments, area-based management tools like marine protected areas (MPAs), marine genetic resources and capacity building and technology transfer in relation to marine biodiversity in areas beyond national jurisdiction. In 2018, on the basis of the PrepCom report, the UN General Assembly convened an intergovernmental conference (IGC) to negotiate the instrument. The IGC has met three times, and was scheduled to meet for its fourth and final session in April of this year. That meeting has now been pushed back to 2021.

Slobodian admitted that even before COVID-19 she had some doubts as to whether the negotiations would be able to conclude in 2020. She described the situation as a three-way tension between ambition, universality, and time: getting a strong, ambitious treaty with significant and enforceable obligations; getting to an agreement that every country can sign on to; and getting something through as soon as possible.

As in the context of outer space, development of international law in relation to the oceans is driven by gaps in the existing framework. There is already a massive amount of law that applies to the ocean, from UNCLOS to the IMO Agreements, to the UN Food and Agriculture Organization (FAO) Agreements to the Regional Seas Conventions. However, existing frameworks are often either regional or sectoral, or in the case of UNCLOS lack specificity in terms of obligations or processes.

One significant gap is the inability to account for cumulative impacts of climate change and other pressures from different sectors. The new instrument would provide for environmental impact assessments and also area-based measures like MPAs that could respectively assess and coordinate multiple measures.

Another gap relates to marine genetic resources. Whether they were not known or just not considered a priority, Slobodian considers that marine genetic resources are strikingly absent from UNCLOS. The provisions on the deep seabed define "resources" as mineral resources, which many jurists have taken to indicate an explicit exclusion of genetic resources. The result is a system for managing mineral resource exploitation—however flawed—but nothing on genetic resources.

V. Alternatives to a Treaty?

As Egan put it, much like a surgeon favors surgery, sometimes international lawyers are accused of favoring formal international agreements as the solution for all problems with an international law dimension. He asked the discussants if there were areas in their respective fields of work where something short of a treaty or formal international agreement could help resolve a current gap, or dispute, or similar issue. Slobodian and Kirchner both agreed that there was room for

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improvement. Kirchner highlighted the absence of a regional seas agreement for the Arctic Ocean but noted positively that there is already a lot of work happening in a range of fora, which together begins to form a whole. The work of the Arctic Council, which is not only working on ocean issues but also on climate change, environmental pollution, and emergencies, to name just a few topics, has been especially important here.

One important recent development is the aforementioned Central Arctic Oceans Fisheries Agreement, the CAOFA, which was concluded last year but has not yet entered into force. This really concerns the high seas part of the Arctic Ocean, the part which is beyond the jurisdiction of the coastal states. But the Central Arctic Ocean is only one part of the Arctic Ocean. We distinguish between eighteen different ecosystems in the Arctic Ocean. All of these ecosystems are vulnerable. Oil spills are a particular risk because the oil will disperse differently and can cause great damage across large areas. Currently, the responsibility here still rests mainly with the coastal states because the threat of oil spills in the Arctic is greatest in areas that are under the jurisdiction of the coastal states. But as shipping increases and as the ice cover is reduced, eventually ships will cross through the center of the Arctic Ocean. Ship operations put an ecosystem at risk that the scientific community is learning about. In this context, Kirchner reminded the audience that the use of heavy fuel oils is especially a concern for the Arctic. This is something that has been discussed for a long time. Certainly the International Maritime Organization's efforts concerning the reduction of sulfur content have influenced the debate, but right now it is private companies that are the trailblazers here. Last year, the members of the Association of Arctic Expedition Cruise Operators decided that they would voluntarily refrain from using heavy fuel oils in the Arctic. According to Kirchner, this voluntary step is important because for a lot of small and remote communities in the Arctic, for example in Greenland, the switch from heavy fuel oils to cleaner oils would result in higher costs that in turn could, for example, threaten food security in places that are highly dependent on fishing and the importation of food by ship.

Slobodian echoed Kirchner's sentiment that more is needed in terms of legal frameworks, but also emphasized the importance of voluntary and non-legal measures. She noted that many civil society organizations and other conservation interests involved in the negotiations are frustrated that the new agreement will not be sufficiently ambitious or concrete. The current draft does not create strong oversight mechanisms or detailed rules for protecting specific species or ecosystems, and it is clear that because of political issues and the need to not undermine existing frameworks—whether or not they are currently effective—it is not going to be possible to achieve everything that the most ardent conservationists might want. Instead, she argued that the new agreement will function as a skeleton, but that muscles would need to be built up over time and made up of a mix of legal and non-legal measures, plans and standards developed and implemented by a range of stakeholders.

Here she pointed to the example of the Sargasso Sea Alliance, which seeks to work with existing sectoral organizations such as the International Commission for the Conservation of Atlantic Tuna, the IMO, and the ISA to put in place measures to protect the Sargasso Sea. The BBNJ Agreement will provide a framework for supporting and catalyzing this and similar efforts, without dictating the specific measures that should be adopted.

VI. Regulating Activities by Private Parties

Egan brought up the fact that areas beyond national jurisdiction are increasingly seen and used by private parties as well. Within the few weeks preceding the session, SpaceX launched astronauts to the space station and dozens of satellites into orbit. In the oceans, emerging technologies make the possibility of deep sea resource exploitation a more realistic possibility. Egan asked: do we

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need new or different legal mechanisms to better account for the activities of private parties in areas beyond national jurisdiction?

Recalling Kirchner's mention of Cubesats, Slobodian described another area of technological development with implications for high seas governance: synthetic biology. With the development of new tools and approaches for genetic manipulation, a new DIY Bio movement has grown. Biotechnology has become more accessible than ever before, to the extent that amateur scientists in community laboratories and even high school students can engage in invention of genetically engineered machines—efforts that have included ideas such as plastic-eating microorganisms intended to be released into the ocean. This can be promising as a tool for open science, but it also challenges regulations that were primarily designed for formal laboratories and publicly funded enterprises. The DIY Bio community itself has become a primary force in governing synthetic biology, through community standards and regulations adopted and promulgated through institutions like the international genetically engineered machine foundation (iGEM). According to Slobodian, any national or international regulation of synthetic biology will need to rely heavily on the current practices and governance expertise of the community of practitioners.

In a broader context, the question of how to ensure accountability of private actors relates to one of the main challenges to governance of marine biodiversity: the existence of flags of convenience, or states unable or unwilling to control the actions of vessels flying their flag. To effectively ensure compliance by private parties, Slobodian felt that it is necessary to go beyond flag state jurisdiction and think about the other forms of control a state can exercise over its citizens—including natural persons as well as corporations registered or doing business in the state—as well as its ports and markets.

For example, the new agreement will need to require parties to adopt mechanisms to make sure that private actors using genetic resources from ABNJ follow the required procedures particularly in terms of benefit sharing. Such mechanisms can include disclosure of origin requirements at the point of patenting, or benefit-sharing and reporting requirements tied to public research funds.

Slobodian reiterated that it will be important to take advantage of financial, scientific, and industry standards that can support accountability and compliance, and make sure the legal frameworks align with and support these standards.

Kirchner agreed with Egan that compliance with international law is indeed a challenge, and one for which many states are not yet ready. We can distinguish between two models to ensure compliance: requiring permits and imposing conditions on permits, or exercising control while activities are underway. At first sight, the second option is of limited use in outer space. This is why national regulatory institutions will require extensive testing before a spacecraft is rated for the transport of humans. But as reusability in space transportation becomes the new normal, we will move toward a new possibility: obligatory regular checks of spacecraft when they are on Earth, or in the future in an off-planet location where such checks will be possible. This could be similar to the port state control systems that exist for ships under regional memoranda of understanding. From a purely regulatory perspective, there is not much of a difference between such a model and port state control of a ship's compliance with environmental or safety standards today. The law of the sea has long been an inspiration for space law and compliance could be one more area in which this approach might be useful.

VII. Conclusion

Egan concluded the panel, which also concluded ASIL's consideration of this signature topic, with thanks to the panelists and Professor Payne. He encouraged everyone, particularly students, to get involved—find a research topic, follow the BBNJ negotiations, contact any of us—as international law in this area is dynamic, it is creative, and in Kirchner's words, it is exciting.

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