

International Governance, Responsibility and Management of Areas beyond National Jurisdiction

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Abstract

This article is a summary of a keynote address given at the Symposium held at the Netherlands Institute for the Law of the Sea at the University of Utrecht on 8 July 2011, the articles from which are collected in this Special Issue. It considers the threats facing the high seas and open ocean, and it considers the defects of the current state of governance of areas beyond national jurisdiction (ABNJ), using the current efforts to protect the Sargasso Sea as an example. It then puts forward the case for the restatement of principles of ocean governance as part of a process within the UN to develop a new instrument to govern ABNJ.

Keywords

high seas; areas beyond national jurisdiction (ABNJ); Sargasso Sea; ocean governance; principles

Introduction

It was a great pleasure to have been invited to deliver a keynote address to initiate the timely Symposium at the Netherlands Institute for the Law of the Sea at Utrecht University in July of 2011. The articles collected here represent a very useful contribution to the debate about the possibility of a new instrument to complement the 1982 Law of the Sea Convention (LOSC or the Convention).¹

Later this year, in December 2012, it will be thirty years since the conclusion of the historic Convention. It is worth recalling that the nine years of negotiation to conclude the text was the longest in the history of the United Nations. This enormous Convention with its 320 Articles and 9 Annexes did not, however, come into force immediately. It languished for 12 years and it

¹ United Nations Convention on the Law of the Sea, 10 December 1982 (hereinafter LOSC) (1833 UNTS 396). See also D. Freestone, "A Decade of the Law of the Sea Convention: Is It A Success?" (2007) 39 *George Washington University International Law Review* (Issue 3: Special Issue on the Symposium in Remembrance of Professor Louis Sohn) pp. 101–143.

took the further negotiation of a highly original and innovative agreement—the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982—to bring it into force.² The following year—as a result of a decision taken in Rio de Janeiro at the 1992 UN Conference on Environment and Development, a further implementing agreement was concluded after five negotiating sessions.³ The UN Fish Stocks Agreement represented a major effort to address one of the unfinished agendas of the 1982 text—the regime of straddling and highly migratory fish stocks.⁴ The UN Fish Stocks Agreement not only sought to introduce new governance requirements for the conservation and management of these stocks, but it also included new concepts that had been brought into fisheries management since the LOSC was negotiated at the Third United Nations Conference on the Law of the Sea (UNCLOS III)—notably the precautionary approach in Article 6 and the ecosystem approach in Article 5. This was followed by the finalization of the Food and Agriculture Organization (FAO) Code of Conduct for Responsible Fisheries. Alan Boyle and I have elsewhere characterized this as a revolution in international fisheries law.⁵

It is not too much of an exaggeration to say that we are at such a turning point again. In the 30 years since the finalization of the Convention, our understanding of the significance and importance of areas beyond national jurisdiction—ABNJ in the *argot* of the United Nations—has increased vastly, but so too have our own human impacts on them.

² Adopted on 28 July 1994. (1994) 33 *International Legal Materials* 1309. On the issue of implementation and/or modification of the Convention see D. Freestone and A.G. Oude Elferink, “Flexibility and Innovation in the Law of the Sea: Will the LOS Convention Amendment Procedures Ever be Used?” in A.G. Oude Elferink (ed.) *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers, Leiden, 2005) pp. 169–221 at pp. 184–90.

³ The first session was in New York in July 1993. Sessions followed in March 1994, August 1994, March–April 1995 and a final session in 24 July–4 August 1995. See further D. Freestone and Z. Makuch, “The New International Environmental Law of Fisheries: The 1995 Straddling Stocks Agreement” (1997) 7 *Yearbook of International Environmental Law* pp. 3–49.

⁴ Agreement for the Implementation of the Provisions of the United Nations Conventions on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 Aug. 1995, S. Treaty Doc. No. 104–24, 2167 UNTS 88 (hereinafter 1995 UN Fish Stocks Agreement) (adopted by the negotiating parties without a vote on 4 August 1995). See further Freestone and Makuch, *supra* note 3.

⁵ A. Boyle and D. Freestone, “Introduction”, in A. Boyle and D. Freestone (eds.) *International Law and Sustainable Development* (Oxford University Press, Oxford, 1999) pp. 1–21 at p. 8.

Changing Threats to the High Seas

In 2010 I tried to capture these ideas in an article I wrote on high seas governance that may be worth reproducing verbatim:⁶

The high seas cover more than 50% of the planet's surface. The last thirty years have seen unparalleled expansion of human activities and impacts on the oceans and on the high seas in particular. Scientists have discovered valuable new resources in high seas areas: ocean hydrothermal vents with temperatures of 300–600°C containing gold and other valuable minerals with accompanying *hyperthermophile* and *extremophile* life forms—crabs, bivalves, tube worms and shrimp-like creatures as well as microbes—that process hydrogen sulphide... and that function in very deep ecosystems where the ambient water temperature is over 100°C. These are already proving to have important bio-technological and pharmaceutical value. Deep cold water corals—much slower growing than their shallow tropical water counterparts, but equally colourful and very diverse—are much more common than initially thought and highly vulnerable to ocean floor fishing equipment. Also, cold seeps and huge frozen methane deposits have been discovered, with potential for exploitation, albeit with risks of major damage to the global atmosphere.

Sustained demand for fish has accelerated fishing pressures and pushed fishing efforts into more extreme environments, such as the Southern Ocean, as well as into deeper waters. Heavy exploitation of valuable deep sea species, such as orange roughy and Patagonian toothfish (often sold as Chilean sea-bass), has meant that some stocks are on the verge of extinction before scientists have discovered much about them. Slow-growing orange roughy, for example, are thought to live to over 150 years and not reach sexual maturity until their thirties—and then spawning only infrequently. Bottom trawling for stocks that spawn on seamount ecosystems can eliminate whole year groups, as well as destroy the very sea-bed ecosystems that attract them.

At the same time there is evidence of the impacts of the increased intensity of existing human activities: increases in maritime transportation, marine pollution, particularly from land-based sources, such as garbage, as well as traditional fishing techniques. High seas fish stocks are a valuable source of protein for human consumption, but there is evidence of serious depletion in the larger pelagic species, such as tunas and billfishes, resulting in fishing for smaller species, lower down the trophic levels.⁷ This raises serious questions about the impact of such fishing on the whole marine ecosystem and its long-term sustainability.

⁶ From D. Freestone, "Problems of High Seas Governance" in D. Vidas and P.J. Schei (eds.) *The World Ocean in Globalisation: Challenges and Responses* (Martinus Nijhoff Publishers, Leiden, 2011) pp. 99–130 at pp. 100–102.

⁷ See D. Pauly, V. Christensen, J. Dalsgaard, R. Froese and F. Torres Jr., "Fishing Down Marine Food Webs," (1998) 279 *Science* 860–63 at 862–63.

Economists, as well as biologists, have begun to raise sustainability concerns in the light of the huge amounts of money spent each year to support fisheries.⁸

The international science community has also, albeit somewhat late in the day, become more vocal about the role of the oceans in relation to climate change. While it is well known that the oceans are the most important global sink for CO₂, recent research from, *inter alia*, the Census of Marine Life suggests that the processes that absorb carbon depend heavily on ocean species—including the tiniest life forms. Before we have even discovered the existence of many of these micro-organisms, human activities—particularly pollution—have reduced their bio-mass by perhaps up to 30%.⁹

Warming of the oceans and rises in sea level, prompted both by the resulting increases in volume and fed by melting glaciers and ice-caps, have already attracted public attention. But, in addition the increased atmospheric carbon load—now estimated at above 380 parts per million (ppm) in the atmosphere—is already beginning to affect the ocean acidity levels. Recent research suggests that at 450 ppm corals and shellfish, and perhaps even plankton, may have problems in creating and maintaining their carbonate structures.¹⁰ These issues, which affect waters both inside and outside national jurisdiction, pose governance issues far beyond the remit of the LOSC. The relevant international framework provided by the UN Framework Convention on Climate Change and its science advisory body—the Intergovernmental Panel on Climate Change—have barely started to focus on these issues, even though some entrepreneurs have already seen opportunities for generating lucrative ‘carbon offsets’ by using as yet unproven ocean fertilization techniques in an attempt to generate algal blooms that might fix more carbon in the ocean.¹¹

Given these major and mostly unforeseen developments, the 1982 Convention regime has not lived up to expectations in terms of delivering the instruments of international co-operation and governance that the UNCLOS III drafters may have intended. In that sense governance of the high seas does

⁸ See FAO/World Bank Study, *The Sunken Billions* (World Bank, Washington DC, 2008) that estimates that US\$1.05 is spent for every US\$1 of fish produced.

⁹ R. Danovaro, C. Gambi, A. Dell’Anno, C. Corinaldesi, S. Fraschetti, A. Vanreusel, M. Vincx, A.J. Gooday, “Exponential Decline of Deep-Sea Ecosystem Functioning Linked to Benthic Biodiversity Loss” (2008) 18(1) *Current Biology* 1–8.

¹⁰ O. Hoegh-Guldberg, P.J. Mumby, A.J. Hooten, R.S. Steneck, P. Greenfield, E. Gomez, C.D. Harvell, P.F. Sale, A.J. Edwards, K. Caldeira, N. Knowlton, C.M. Eakin, R. Iglesias-Prieto, N. Muthiga, R.H. Bradbury, A. Dubi, M.E. Hatzioiols, “Coral Reefs Under Rapid Climate Change and Ocean Acidification” (2007) 318 *Science* 1737–1742.

¹¹ See D. Freestone and R. Rayfuse, “Ocean Iron Fertilization and International Law”, Theme Section on: “*Implications of Large-scale Iron Fertilization of the Oceans*” (2008) 364 *Marine Ecology Progress Series* 227–233; R. Rayfuse, M. Lawrence and K. Gjerde, “Ocean Fertilisation and Climate Change: the Need to Regulate Emerging High Seas Uses” (2008) 23 *IJMCL* 297–326.

represent an unfinished agenda.¹² The basic principles in place in the law of the sea regime are sound, but it is also clear that they require a great deal of fleshing out, co-ordination and much more systematic and rigorous implementation. The issues that are discussed in this volume represent the most important elements that a new instrument—possibly a further LOSC implementing agreement—would need to address. Over the last few years the discussions at the *Ad-Hoc* Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction (BBNJ Working Group) have crystallized the issues that would need to be discussed and possibly included in such an instrument.

The UN discussions have also highlighted the divisions of opinion which exist between countries as to the need for more effective governance. But a review of existing organizations with jurisdiction over activities in ABNJ shows that there are serious gaps in coverage.¹³ In relation to sectoral activities there are both functional and geographic gaps. This is not necessarily a defect in the LOSC itself—it is a defect in implementation.

The LOSC does envisage the International Seabed Authority (ISA) having jurisdiction in ABNJ—over the “Area”—but only over the non-living resources of the seabed, what it terms ‘solid, liquid or gaseous mineral resources.’¹⁴ Hence, there is a *lacuna* in the LOSC framework regime relating to management and conservation of deep-sea or seabed living resources and for exploration and exploitation activities unrelated to seabed mining.¹⁵

The International Maritime Organization (IMO) has sponsored a complex, albeit not entirely comprehensive, network of international treaties governing

¹² As discussed below, the governance of the seabed beyond national jurisdiction—termed ‘the Area’ by LOSC Article 1(1)—is regulated by the LOSC through the International Seabed Authority, see LOSC Part XI.

¹³ K. Gjerde, H. Dotinga, S. Hart, E.J. Molenaar, R. Rayfuse, R. Warner, *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction* (IUCN, Gland, Switzerland, 2008) (available at http://cmsdata.iucn.org/downloads/iucn_marine_paper_1_2.pdf). See also, K. Gjerde, “High Seas Fisheries Governance: Prospects and Challenges in the 21st Century” in D. Vidas and P.J. Schei (eds.) *The World Ocean in Globalisation: Challenges and Responses* (Martinus Nijhoff Publishers, Leiden, 2011) pp. 221–232. For an excellent and up to date discussion of the legal regime see R. Warner, *Protecting the Oceans beyond National Jurisdiction: Strengthening the International Law Framework* (Martinus Nijhoff Publishers, Leiden, 2009).

¹⁴ LOSC, Art. 133(a).

¹⁵ Although the LOSC does impose unequivocal obligations to “protect and preserve the marine environment” and to “protect and preserve rare or fragile species and ecosystems in all parts of the marine environment, as well as the habitat of depleted, threatened or endangered species and other forms of marine life” (LOSC, Arts. 192, 194(5)).

shipping safety, security and marine pollution. The IMO also hosts the 1972 London Convention and its 1996 Protocol regulating ocean dumping. There is also a complex but also by no means comprehensive network of species and regional fisheries regulatory bodies.¹⁶ There is now global coverage of fishing for tuna and tuna-like species by species conventions. However, the situation is not the same for general fisheries management in the high seas. General fisheries regional bodies exist in the North-west, North-east and South-east Atlantic, as well as in the Mediterranean Sea and the Southern Ocean. But it has taken years to negotiate similar arrangements for the Indian Ocean, the South Pacific, and the North Pacific, and at the time of writing the first two of these are not yet in force and the last is still under negotiation. In addition, the conservation and management of fisheries by these bodies is also subject to considerable criticism—especially in relation to high-value species, such as tunas and bill fishes. The Independent Performance Review of the International Commission for the Conservation of Atlantic Tunas (ICCAT) reported that its management of Atlantic blue fin tuna “was widely regarded as an international disgrace.”¹⁷

There are also thirteen Regional Seas programmes established under the auspices of UNEP’s Regional Seas Programme, involving some 140 countries,¹⁸ as well as a number of other similar conventions outside the UNEP auspices. However, they are essentially coastal conventions, regulating national activities within 200 nautical miles of the coasts. Only four conventions envisage any regulatory activity beyond 200 nautical miles: the OSPAR Convention, which has high seas areas within its remit;¹⁹ the Barcelona Convention System in the Mediterranean—where most coastal states have for a number of reasons not claimed exclusive economic zones (EEZs); the South Pacific, which includes within its mandate the ‘donut’ holes between its members’ EEZs, and, of course, the Antarctic Treaty System, consisting of both the Antarctic

¹⁶ See generally D. Freestone, “International Fisheries Commissions and Organizations” in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, Oxford, 2010).

¹⁷ The ICCAT’s 2008 review commented that:

ICCAT CPCs’ performance in managing fisheries on bluefin tuna particularly in the eastern Atlantic and Mediterranean Sea is widely regarded as an international disgrace and the international community which has entrusted the management of this iconic species to ICCAT deserve better performance from ICCAT than it has received to date (at page 2) (available at http://www.iccat.int/Documents/Other/PERFORM_%20REV_TRI_LINGUAL.pdf, accessed December 2011).

¹⁸ See <<http://www.unep.org/regionalseas/about/default.asp>>, accessed December 2011.

¹⁹ Convention for the Protection of the Marine Environment of the North-East Atlantic—Oslo and Paris Conventions, adopted 1974, revised and combined into the OSPAR Convention 1992, in force 1998; (1993) 32 ILM 1069.

Treaty and its Protocol on Environmental Protection, as well as the Convention for the Conservation of Antarctic Living Marine Resources (CCAMLR).²⁰ CCAMLR is a genuinely ecosystem-based regime that regulates the Antarctic marine living resources of the area south of 60° South latitude and the areas between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem. It is perhaps no surprise that in these four areas there have been initiatives to establish marine protected areas in ABNJ under their remit. In most ABNJ, where there are no regional environmental protection treaty regimes, however, regulatory activity is very piecemeal. The Sargasso Sea is a useful case study.

The Sargasso Sea

Dr. Sylvia Earle has called the Sargasso Sea the “Golden Rainforest of the Ocean.” It is the only sea without a coast, for the *Sargassum* weed from which it gets its name is held in place by the currents of the North Atlantic, concentrating it into large mats and windrows around the tiny islands of Bermuda. Spreading over more than 5 million square kilometres or 2 million square miles, the Sargasso Sea is home to endemic species uniquely adapted to life among the *Sargassum*, but it also provides shelter and nutrition to large numbers of threatened and endangered species, including sea turtles, and also to commercially important species, such as wahoo, dolphinfish, tunas and billfish. It is the only spawning place in the world for the American eel (*Anguilla nostrata*) and the endangered European eel (*Anguilla anguilla*).

Bermuda, which is an overseas territory of the United Kingdom, claims a 200-nautical-mile EEZ of some 450,370 square kilometres or 173,891 square miles. Beyond the Bermudian EEZ, however, the remainder of the Sargasso Sea is largely ABNJ.²¹ Unlike the OSPAR area to the north, which has a corresponding regional fisheries management body—the North East Atlantic Fisheries Commission (NEAFC)—these ABNJ areas are neither covered by a regional environmental agreement nor a regional fisheries management organization. The only international bodies that have sectoral jurisdiction are the IMO, in relation to shipping issues, ICCAT, which regulates fisheries for

²⁰ Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR); in force 1982; (1982) 19 ILM 837.

²¹ Depending on what is defined to be the geographical extent of the Sargasso Sea, it can be taken to extend into the EEZs of the United States to the East and the Northern Antillean islands to the south.

tuna and tuna-like species in the north and south Atlantic, and the ISA, with jurisdiction over seabed mineral resource exploration and exploitation.

The Sargasso Sea Alliance, led by the Government of Bermuda, is seeking to establish a marine protected area in the high seas areas of the Sargasso Sea using the existing legal framework and existing sectoral bodies. The Alliance has four basic aims:

- To build an international partnership to secure global recognition of the importance and ecological significance of the Sargasso Sea, the threats that it faces, and the precautionary management it needs;
- To use existing regional, sectoral and international organizations to secure a range of protective measures for the Sargasso Sea;
- To establish appropriate management for the Sargasso Sea; and
- To use the current process as an example of what can and cannot be delivered through existing frameworks in marine ABNJ to inform the global debate and provide a model for protection of other high seas regions.

One of the key challenges in seeking to use existing sectoral organizations to achieve a purpose that is greater than each of their individual mandates is that although all three of the organizations mentioned above have powers to protect marine areas—including ABNJ—in various ways, it is clear that there is absolutely no co-ordination between these organizations. The culture, processes and epistemic communities of each of these institutions are also entirely different. Conservation arguments raised in one institution carry little, if any, weight in the others. Because IMO serves the shipping community, ICCAT the fishing community, and the ISA is a more mainstream UN process, their respective formal meeting schedules are, perhaps quite understandably, put together without regard to the schedules of other sectoral bodies.²²

The Need for a Re-Statement of Modern Principles of High Seas Governance

In the context of the United Nations General Assembly (UNGA) discussions, it has also been suggested that it would assist in the clarification of the debates over the emerging high seas governance regime, to set out more clearly and

²² For example, the second week of July 2011 saw a meeting of the IMO Marine Environment Protection Committee, the ISA Legal and Technical Commission and Kobe 3—the third meeting of the various Tuna Commissions.

explicitly the basic principles that the international community has already established and agreed to in existing legal and policy instruments, in relation to the use and exploitation of the high seas.

The background to this may be of interest. In October 2007, I was invited by IUCN to give a keynote presentation on “General Principles of Modern Ocean Governance” at a Workshop on High Seas Governance for the 21st Century in New York.²³ At that time I suggested eight principles drawn from existing instruments.²⁴ In January 2008, I introduced the same principles at an Experts’ Workshop in Nice organized by the Global Oceans Forum on Global Ocean Issues in Marine Areas Beyond National Jurisdiction.²⁵ After some discussion, the meeting endorsed the concept as a useful one and the Global Oceans Forum has regularly used the concept in its presentations, publications and submissions to the BBNJ Working Group.²⁶ In October 2008, IUCN conducted an electronic consultation on the principles and as a result developed them into 10 Principles.²⁷ I then presented these principles at the Barcelona World Conservation Congress at a session chaired by the then IUCN President, Valli Moosa.²⁸ In November of 2008 I was recipient of the Elizabeth Haub Gold Medal for Environmental Law²⁹ and the presentation I made on that occasion also addressed these principles and was published in *International Environmental Policy and Law*.³⁰

²³ Workshop on High Seas Governance for the 21st Century, New York, 17–19 October 2007, IUCN, Gland, 2007. For Co-chairs’ Report see http://law.dal.ca/Files/MEL_Institute/IUCN_Workshop_Co-Chairs_Summary_FINAL_VERSION.pdf, accessed Jan. 2012.

²⁴ “Conditional” freedom of activity on the high seas; Protection and preservation of the marine environment; Conservation and sustainable use and management of marine biodiversity; Cooperation; Transparent, science-driven approach to sustainability; Precautionary approach; Ecosystem approach; and Responsibility. See further D. Freestone, “Principles Applicable to Modern Oceans Governance” (2008) 23 *IJMCL* 385–391.

²⁵ Strategic Planning Workshop on Global Ocean Issues in Marine Areas Beyond National Jurisdiction in the Context of Climate Change, Nice, France, 23–25 January 2008.

²⁶ See for example Submission of the Global Forum on Oceans, Coasts, and Islands to the UN *Ad-Hoc* Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction, New York, 28 April–2 May 2008. Available at: <http://www.cbd.int/doc/meetings/mar/ewbcsima-01/other/ewbcsima-01-gfoci-en.pdf>, accessed January 2012.

²⁷ For elaboration of the Principles see: http://cmsdata.iucn.org/downloads/10_principles_for_high_seas_governance_final.pdf, accessed January 2012.

²⁸ http://www.iucn.org/about/work/programmes/marine/marine_our_work/marine_governance/?1694/IUCN-President-Valli-Moosa-to-launch-10-principles-to-save-the-high-seas.

²⁹ Awarded by the International Council on Environmental Law and the University of Stockholm.

³⁰ D. Freestone, “Modern Principles of High Seas Governance: The Legal Underpinnings” (2009) 39/1 *International Environmental Policy and Law* 44–49.

These principles could at some point be more formally enumerated—whether as a free-standing declaration (perhaps by the UNGA) or as a part of another international agreement or arrangement, including an implementing agreement. As discussed above, IUCN has put forward ten such principles, and I have described these in much more detail elsewhere;³¹ they are also discussed further below.³² However, in the interests of space I here only discuss three principles specifically, which I think encapsulate some of the key challenges which a new regime would face. Nevertheless, all these principles have been generally accepted by the international community in a range of global and regional instruments, as well as in the decisions of many international courts and tribunals.³³

They are already widely applied on land and to various marine sectoral activities, but they are not yet uniformly applied to the high seas. Some represent established international law; others represent agreed international minimum standards. All, however, require much more rigorous implementation as the first step in the development of a robust and appropriate system of international governance for the high seas.

The ten principles are the following: Conditional Freedom of the Seas; Protection and Preservation of the Marine Environment; International Cooperation; Science-Based Approach to Management; The Precautionary Approach; The Ecosystem Approach; Sustainable and Equitable Use; Public Availability of Information; Transparent and Open Decision-Making Processes; Responsibility of States as Stewards of the Global Marine Environment.

Principle 1: Conditional Freedom of the Seas

Article 87 of the 1982 LOSC explicitly recognizes six ‘freedoms’ of the high seas.³⁴ However, these are not absolute rights but are subject to a number of limitations and corresponding duties upon which their legal exercise is pre-conditioned. For example, under Article 116 LOSC all states have the right for their nationals to engage in fishing on the high seas, subject to three

³¹ *Ibid.*

³² At pp. 000.

³³ The legal and policy instruments from which these are derived are: the LOSC; the 1992 Rio Declaration and Agenda 21; the 1993 FAO Compliance Agreement; the 1995 UN Fish Stocks Agreement; the 1995 Code of Conduct for Responsible Fisheries; the 2001 Reykjavík Declaration on the Ecosystem Approach; 2002 WSSD Plan of Implementation; the various FAO International Plans of Action; and the 2009 Port State Measures Treaty.

³⁴ Freedom of Navigation; Freedom of Overflight; Freedom to Lay Submarine Cables/Pipelines; Freedom to Construct Artificial Islands/Installations; Freedom of Fishing; Freedom of Scientific Research.

conditions: “(a) their treaty obligations; (b) the rights and duties, ...[and] interests of coastal states . . .; (c) the provisions of this section.” So this is not an absolute right. It is subject to all the treaty obligations that the flag state may have contracted by its membership of global and regional treaty regimes, including regional and species fisheries conservation and management treaties. It is also subject to the whole slew of rights and duties that it may owe to, or be due as, a coastal state (b) and finally the provisions of Articles 116–120 (i.e., section 2 of Part VII of the LOSC). These duties, briefly summarized, include: obligations to take measures for their own nationals for the conservation of the living resources of the high seas; to co-operate with other states in conservation and management of those resources; and to base those measures on the best scientific evidence available, environmental and economic factors and ‘generally recommended international minimum standards’. So, it is important to remember that the freedoms of fishing and of other high seas uses are conditional freedoms.³⁵

Principle 7: Sustainable and Equitable Use

Many international legal instruments now recognize the new paradigm of “sustainable use” or “sustainable development.” Sustainable development, as defined by the Brundtland Commission is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”³⁶ It thus reinforces the equitable notion of fairness or equity in relation to the needs of present and future generations as balanced by environmental limits and goals.³⁷ A commitment to sustainable use can now be found in a wide range of international instruments, including those relating to ocean use, such as the 1995 UN Fish Stocks Agreement,³⁸ the 1995 FAO

³⁵ Similar conditions condition the exercise of the other freedoms and one can, and should, therefore talk about conditional high seas freedoms, rather than absolute rights.

³⁶ G.H. Brundtland (ed.), *Our Common Future* (Oxford, Oxford University Press, 1987).

³⁷ The principle is Principle 4 of the 1992 Rio Declaration, and permeates other principles, Agenda 21 and numerous other instruments. In 1997 it was considered by the International Court of Justice in the *Gabcikovo-Nagymaros Case* between Hungary and Slovakia. Although the famous separate opinion of Judge Christopher Weeramantry, arguing that sustainable development was a principle of customary international law, was not endorsed by the majority of the Court, it did, however, recognize the “need to reconcile economic development with protection of the environment . . . aptly expressed in the concept of sustainable development.” [1997] ICJ Reports 78 at para. 140.

³⁸ Art. 5(a) provides that States that are party to the Agreement are, for example, obliged to “(a) Adopt conservation and management measures to ensure long-term sustainability and promote the objective of their optimum utilization.”

Code of Conduct for Responsible Fisheries and the 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem.³⁹

Principle 10: Responsibility of States as Stewards of the Global Marine Environment

Principle 21 of the 1972 Stockholm Declaration provides that:

States, have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.⁴⁰

A simpler statement of a principle, derived directly from these words and applicable to the high seas and which would be widely regarded as a principle of customary international law, would read as follows: “States . . . have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment . . . of areas beyond the limits of national jurisdiction.”⁴¹

This concept of responsibility reflects a proactive obligation that would support a number of proposals that have been put forward for a form of stew-

³⁹ In relation to fisheries, see the UN Fish Stocks Agreement, the FAO Code of Conduct on Responsible Fisheries, as well as the 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem (available at ftp://ftp.fao.org/fi/DOCUMENT/reykjavik/y2198t00_dec.pdf). Sustainable use of fisheries is also included in the commitments of the world community in the 2002 Johannesburg World Summit on Sustainable Development Plan of Implementation. A well-publicized aspect of this is the disproportionate overcapitalization and use of state subsidies in the fisheries sector, which decreases the ability of developing countries, as new entrants, to benefit from fisheries (intra-generational equity) and diminishes future options for sustainable fisheries (inter-generational equity) See *The Sunken Billions: The Economic Justification for Fisheries Reform* (FAO/World Bank, 2008). This study shows that the difference between the potential and actual net economic benefits from marine fisheries is in the order of \$50 billion per year—equivalent to more than half the value of the global seafood trade.

⁴⁰ These rights and obligations are repeated virtually verbatim in Rio Principle 2, and note that LOSC 194(2) includes a detailed obligation to the same effect.

⁴¹ This is indeed the text of Article 3 of the 1992 Convention on Biological Diversity:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

ardship role in protecting the resources of ABNJ.⁴² It was that same concept of responsibility that the drafters seemed to be trying to capture in the 1995 FAO Code of Conduct for Responsible Fisheries. That, and similar provisions of the United Nations Fish Stocks Agreement and the 1993 FAO Compliance Agreement, require flag states to supervise properly the activities of their fishing vessels when on the high seas. And yet the continued major threats of IUU fishing demonstrate that flag states are simply not exercising this sort of control. Responsibility in this sense involves an obligation on states not merely to regulate vessels flying their flag operating on the high seas—and many states seem unable to manage that—but also their nationals, captains, crews, owners and investors—all those in the value chain of activities that do, or might, cause harm to the environment in ABNJ. The FAO has already begun to develop principles for audits of Flag State Performance.

An interesting example of this concept can be found in Article VI of the 1979 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Celestial Bodies. It reads:

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.⁴³

There is a similar provision relating to responsibility of states regarding seabed activities in Art. 139 LOSC, and in February 2011 the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea delivered an historic interpretation of the duties of States sponsoring seabed exploration and exploitation which reinforces the important duties that the LOSC imposes on them—designed, said the Chamber, to prevent the development of

⁴² P.H. Sand, “Sovereignty Bounded: Public Trusteeship for Common Pool Resources?” (2004) 4 *Global Environmental Politics* 47–71; R. Rayfuse and R. Warner, “Securing a Sustainable Future for the Oceans Beyond National Jurisdiction” (2008) 23 *IJMCL* 399–422.

⁴³ It should be noted that at the end of 2008, only 13 states had ratified and a further four had only signed the Moon Treaty.

‘Sponsoring States of Convenience’ to mirror the problems of flags of convenience in merchant shipping.⁴⁴

As the following articles in this Special Issue will indicate in a great deal of detail, the UNGA has mandated a number of important actions and the meetings of the BBNJ Working Group have helped to widen understanding of the issues and to focus informed opinion on the major issues facing ABNJ. Unfortunately, the lively debates on improved governance have been overshadowed by controversy over the future regime for exploitation of marine genetic resources in ABNJ.⁴⁵ A number of important initiatives are in train, but progress has been very slow. As the discussions in this Special Issue will demonstrate, the case for a new instrument, perhaps based on agreed principles, to pull together all the various themes and sectoral responsibilities and to provide some overarching system of governance of the high seas, is becoming very difficult to resist.

⁴⁴ See D. Freestone, “Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area”, Advisory Opinion of the Seabed Disputes Chamber of ITLOS (2011) 105 *American Journal of International Law* 755–761.

⁴⁵ Should these be subject to the ‘Common Heritage of Mankind’ principle as proposed by the G77 or a continuing open access regime? For an excellent assessment of the issues and potential of bio-prospecting, see D. Leary, M. Vierros, G. Hamon, S. Arico, C. Monagle, “Marine Genetic Resources: A Review of the Scientific and Commercial Interest” (2009) 33 *Marine Policy* 183–194.