Interaction of the RFMOs and the High Seas Regime

Phillip Saunders
Dalhousie Law School
Marine and Environmental Law Programme
Regime for ABNJ

• All areas beyond national jurisdiction (ABNJ)
  • Includes water column above extended shelf
  • Water column above the “Area” (deep seabed)
• Not subject to sovereignty or claims of any state
• All states may exercise high seas freedoms, including inter alia (LOS 1982 - Art. 87):
  • Navigation
  • Overflight
  • Fishing
  • Cables and pipelines
  • Research
Key Characteristics Of ABNJ Under LOS 1982

• Obligations Exist – But minimal
  • Shipping – duty to enforce on own vessels
  • Fishing – some duty to regulate own fleets
  • Some special regimes- eg. mammals
  • BUT: much of this is really in duties to “cooperate”

• Obligations versus Enforcement
  • Violations DO NOT Confer Automatic Enforcement Powers
Characteristics cont’d

• Regime is *Sectoral* In Nature
  • Built Around Industries or Resources: *eg.* Fishing, Shipping, Seabed Mining
  • Related agreements – IMO and Fisheries – presumed in structure of LOS 1982

• Flag State Jurisdiction: Default Position Except Where Otherwise Provided
  • Real problem where not effectively exercised
Post-UNCLOS Pressures and Developments

• High Seas Fishing: Straddling Stocks, Highly Migratory Stocks, Discrete High Seas Stocks

• Vessel Source Pollution: Operational and Accidental
  • Enforcement Issues Within EEZs and outside

• Integrated Management versus Sectoral Regulation on High Seas (and national)
  • Additional Problems With New Uses (e.g. bioprospecting, deep-sea mining)
  • Area-Based Management
Sectoral Responses

- Living Resource Management – egs:
  - UN Fish Stocks Agreement
  - Multiple RFMOs – critical to UNFSA regime
  - Compliance Agreement
  - FAO Code of Conduct
  - Bilateral and other regional options
Responses

• Shipping
  • MARPOL 73/78 (PSSAs and Special Areas)
  • Security-related Initiatives (SUA Convention)
  • European Union Pollution Directive

• Ocean Dumping
  • London Convention
RFMOs – Issues In Implementation

• Flag state enforcement still a major problem
• A number of RFMOs with measures below those of UNFSA?
• High obligations on developing coastal states
• Problems with available scientific info and degree of consensus
• Jurisdiction clearer than management principle obligations

• In essence: Fisheries Organizations – NOT Ocean Management Organizations
• Broader approaches?
  • UNGA Res. 61/105 on impact of bottom fisheries
  • Emphasizing EIAs, location of vulnerable ecosystems
  • “Freezing the footprint”
• But no global, binding measures
High Seas Marine Biodiversity

• Pressure from NGOs and Others To Deal With Biodiversity More Coherently

• Vulnerable Habitats, Species, Threats (egs.):
  - Seamounts
  - Submarine canyons
  - Marine Mammals
  - Deep sea corals
  - Hydrothermal Vents
  - High Seas Fishing
  - Bioprospecting

• Calls for High Seas MPAs – Legally Problematic and Scientifically Speculative
Concrete Example: The Grand Banks

• Issues Most Salient Where National and High Seas Regimes Intersect
  • Straddling Stocks,
  • HMS,
  • Shipping Within EEZ
  • Non-living Resources

• All Factors Present On Grand Banks

Approximate Limits of Canadian Extended Continental Shelf Claim
Management Challenges on Grand Banks

• Multiple Zones:
  • EEZ, Cont. Shelf, High Seas

• Multiple Uses and Users:
  • Fishing, Oil and Gas, Shipping, Pipelines, Cables, Military & Security

• Multiple Legal Authorities:
  • Canada
  • NAFO (fishing beyond 200)
  • IMO, Other International Organizations
HMCS Fredericton: Boarding on the Grand Banks

Bilge Dumping Grand Banks
Diplomatic and Legal Responses

• “Pushing the Limits” of LOS / MARPOL Regime (*egs*)
  - Special Areas and PSSAs (*eg* Western Europe)
  - Quasi-Criminalization – *eg* Canada (seabirds), EU (pollution)
  - Turbot war

*The Estai*
Diplomatic and Legal Responses cont’d

- Specific Agreements on Defined Areas of Species (Binding on Parties):
  - CCAMLR Regime
  - CITES
  - Whaling
  - Ligurian Sea Marine Mammals Sanctuary *eg*
- More Speculative
  - CBD – High Seas
  - Expanding ISA Role

Ligurian Sea Sanctuary
Other Actions

• Threat of Unilateral Action: *eg.* “custodial management” of Grand Banks to Limits of Shelf

• BUT: Amendment of LOS 1982 under Arts. 312-313 is difficult, unlikely

• AND: Action By Other States – *eg.* Australia, France, South Africa - to cooperate in pushing limits of enforcement within the LOS regime
• Not yet at stage of widespread assertions of new coastal state control
• Priority for implementation of existing measures
  • Focus on actual, not speculative problems first
• Regional level important to implementation of regime; Global for new principles
• Most “progress” – fishing issues
Non-sectoral?

• Convention on Biodiversity
  • Some arguments for extension – but limited by its terms
  • Beyond national jurisdiction
    • Covers only “processes and activities”, not components
    • And limited to activities within the jurisdiction or control of the State Party
Seabed

• Regime of Deep Seabed?
  • No jurisdiction for Seabed Authority beyond the impact of mining and related activities
  • No broader environmental jurisdiction
Area-Based Management

• Sectoral examples: PSSAs for shipping; RFMO restrictions (e.g., NEAFC seamounts; NAFO)

• Regional efforts (Antarctic regime; UNEP) – based on consent of parties, not binding on third states

• In general, no strong legal basis for mandatory HSMPAs without consent
Summary

• Despite progress, dominant features of the high seas regime remain: high seas freedoms and flag state enforcement.
  • Derogations from those principles have been made by consent of the parties involved

• Greatest progress made in development of sectoral measures for particular issues
• Measures most achievable where conflicts with the exploitation interests of coastal states - rather than conservation per se (UNFSA, RFMOs)

• Formal legal measures not enough: flag state implementation remains a problem (lack of will or enforcement capacity)

• Limited progress on HSMPAs – most progress regional, and requiring consent
Way Forward

• Negotiate new legal instrument or instruments for ABNJ?
  • Implementing agreement?
  • Regional agreements?
• Apply existing agreements to ABNJ (CBD)?
• Coordinated and effective use of existing tools
  • PSSAs, RFMOs, integration with adjacent national measures
Filling the Gaps – A Way Forward?

• Coordinated and effective use of existing tools
  • PSSAs, RFMOs, integration with adjacent national measures

• Focus should be primarily on sectors and areas of current activity (fisheries).
  • More speculative industries (such as deep-sea-bed mining and bioprospecting on an industrial scale) less urgent
  • Identify like-minded groups of States confronting similar issues
• Priority for implementation of existing legal instruments (including UNFSA/RFMOs)
  • Complementary focus on the long-term development of new legal mechanisms

• Focus: improved coordination or targeting of multiple measures within current regimes:
  • eg. RFMO + PSSA/Special Area action + coastal state measures to piece together virtual MPA?
  • Antarctic Treaty system – CCAMLR integration with Cttee for Environmental Protection
  • Integrated Management by coordination?
New Instruments or Institutions?

- Have not fully used what we have
- Time-consuming diversion from real work?
- Must recognize sectoral nature of most pressing problems – but achieve coordination
- Any new instrument or institution would still have to work within the existing structure of the Law of the Sea
• Same issues in EEZ – no plenary authority for “full-service” MPAs

Sable Gully MPA – partial measures, multiple authorities