"Implementing High Seas Biodiversity Conservation: Global Geopolitical Considerations"

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Abstract

This paper will consider the broad geopolitical considerations in measures towards biodiversity conservation and governance of high seas areas. Traditionally, international law has provided for jurisdiction based upon flag State in high seas areas, and States have shown themselves reluctant to depart from this model. International organisations with responsibility for high seas living resource management have proven, in many cases, to be of limited utility in the sustainable management of high seas resources. This traditional norm of flag State jurisdiction, while still dominant, is now being joined by the use of supra-national management in the context of regional fisheries organisations under the United Nations Fish Stocks Agreement. Part of the reason for this limited effectiveness is the focus of individual States on national interest, which may undermine international cooperation. The paper explores what mechanisms exist within international law that would permit a more effective management of high seas biodiversity conservation, and how these may be used to combat the erosion of the effectiveness of measures by individual State interests. Recognition of geopolitical factors that undermine cooperation in biodiversity conservation, and active efforts to address these matters, will prove essential in the establishment of a successful regime for high seas areas.

Introduction

The management and governance of high seas areas represents a subject of some contention with the international community. An effective regime for the protection of high seas biodiversity would require some circumscribing of traditional high seas freedoms, while the unrestricted maintenance of those freedoms might potentially undermine the efficacy of protective measures. Such a situation is complicated by the fact that the high seas are beyond the principal modality of international regulation, territorial jurisdiction, thereby restricting the nature of possible solutions to the problems. As the international law issues and possible international responses are considered elsewhere in the Workshop, this paper will consider some of the geopolitical considerations that serve to raise the level of contention injected. While the international law issues are by no means insubstantial, they are accompanied by significant geopolitical concerns that make the establishment of a high seas marine protection regime a daunting prospect. This paper will consider some of the broad geopolitical issues that may impede progress towards the negotiation of high seas biodiversity protection areas.

International Law and the High Seas

The traditional approach to high seas governance reflect the dominant paradigm within the international legal system, that of State sovereignty. Jurisdiction within international law is vested in States, and in high seas areas, although outside State territorial control are managed by States on the basis of flag and nationality. Even where management authority is vested in a regional fishing organisation, this draws its legitimacy from the agreement of States through treaties, and is generally enforced on a flag State basis. The high seas are beyond the general jurisdiction of

any State or organisation, and, for the most part, only jurisdiction based on flag and nationality hold sway.[1]

The notion that the high seas are beyond individual State control was perceived as an important element of the negotiations at UNCLOS III. A number of States had reservations about the "creeping jurisdiction" with the adoption of the exclusive economic zone (EEZ) and their acceptance of the EEZ was predicated on the preservation of certain high seas freedoms.[2] These freedoms are contained in Article 87 of the Law of the Sea Convention[3]:

> Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
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> (a) freedom of navigation;
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> (b) freedom of overflight;
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> (c) freedom to lay submarine cables and pipelines[4];
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> (d) freedom to construct artificial islands and other installations permitted under international law[5];
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> (e) freedom of fishing[6];
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> (f) freedom of scientific research[7].

These freedoms represent the legal framework in which any new protection regime must operate, and concerns by States to avoid the diminution of these freedoms will need to be addressed if new measures are to be successful. Clearly some of these freedoms are of greater significance to State interests than others, and the manner in which they may be exercised varies considerably. For example, for some States a possible diminution in their access to high seas fisheries might be of little significance, while to another there may be major economic or social ramifications. The discussion below will consider usage, and the impact upon a number of freedoms including navigation, fishing, construction of installations and marine scientific research.

The discussion will proceed on the basis that the establishment of a marine park will impact to some extent on high seas freedoms. Certainly existing marine parks within the EEZ and territorial sea do not generally restrict navigation, nor do they completely forbid fishing, but it is clear that their operation does have some effect upon these

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1 This is emphasised in the Law of the Sea Convention, where most provisions relate to jurisdiction in the maritime zones, which is based on territory, followed by flag State jurisdiction. Only in the context of environmental protection is port State jurisdiction utilised.

2 See generally B. Kwiakowska, "Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice" (1991) 22 *Ocean Development and International Law* 153; see also S. Oda, *International Control of Sea Resources* (Dordrecht: Martinus Nijhoff, 1989) xxi.

3 *United Nations Convention on the Law of the Sea, done at Montego Bay 10 December 1982*, entered into force 16 November 1994: reprinted at 21 ILM 1261.

4 Subject to Part VI of the Convention.

5 Subject to Part VI of the Convention.

6 Subject to the conditions laid down in Part VII, section 2 of the Convention.

7 Subject to Parts VI and XIII of the Convention.

and other uses. While what restrictions might arise out of a new regime of high seas biodiversity protection is certainly a moot point, that some restriction is likely can be considered, and the analysis below will consider the different geopolitical interests raised by those restrictions.

High Seas Fisheries

The most significant use of the high seas today is fishing. No high seas areas are presently being exploited in terms of mining or other activities with the exception of fishing While the bulk of the world's fishing effort takes place within the EEZs of the world's coastal States[8], high seas fisheries still retain some significance. Firstly, high seas fisheries are of great importance to States whose EEZs provide insufficient catch levels for their fishing fleets. Unless vessels from these States can purchase rights to fish in the EEZs of foreign States, they are obliged to fish in high seas areas.

When foreign fishing vessels were excluded from many long standing international fisheries with the extension of jurisdiction by way of the EEZ in the 1980s, there were substantial changes in fisheries patterns. Some high seas areas came under great pressure in a relatively short space of time, as was the case for example with the pollock fishery in the Bering Sea, and this led to collapse.[9] Similarly, straddling stocks were placed under greater pressure as vessels displaced from the EEZ sought other locations, leading to confrontations with coastal States, most notably between Canada and the European Union on the Grand Banks.[10]

While the adoption of the Straddling Fish Stocks Agreement promises a more effective regulatory system for high seas fishing, distant water fishing nations (DWFNs) still are concerned over restrictions on their access to high seas fisheries. Adoption of the Straddling Fish Stocks Agreement by DWFNs has been slow, and there remains significant concern in relation to high seas regulation. Concerns about the extension of coastal State jurisdiction from DWFNs, particularly Japan, have a long history. Japanese concerns over exclusions from coastal fisheries extend back to the years immediately following World War II, and have not diminished up to the present day. Other active DWFNs include the United States, Russia, China, Taiwan, Korea, the Philippines and some member States of the European Union.[11]

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8 While estimates vary, an estimate of 85% is given by Schreiber: H.N. Schreiber, "Ocean Governance and the Marine Fisheries Crisis: Two Decades of Innovation" 20 *Virginia Environmental Law Review* 119 at 126.

9 On the Bering Sea see D.A. Balton, "The Bering Sea Doughnut Hole Convention: Regional Solution Global Implications" in O.S. Stokke (ed.), *Governing High Seas Fisheries - The Interplay of Global and Regional Regimes* (Oxford: Oxford University Press, 2001) 153; S.B. Kaye, *International Fisheries Management* (The Hague: Kluwer Law International, 2001) Chapter 8. For a range of examples see E. Meltzer, "Global Overview of Straddling and Highly Migratory Fish Stocks: The Non-Sustainable Nature of High Seas Fisheries" (1994) 25 *Ocean Development and International Law* 255 at 279-305.

10 For examples of the literature on the dispute see D.R. Teece, "Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High-Seas Environment?" (1997) 8 *Colorado Journal of International Law and Policy* 89; M. Christopherson, "Toward a Rational Harvest: The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species" (1996) 5 *Minnesota Journal of Global Trade* 357.

11 See <www.fao.org>.

The DWFNs are likely to react negatively, or at best in an unsupportive fashion to any proposal that would require international cooperation to protect high seas marine parks. Logically protection in some form must impact upon the freedom of fishing. The most likely contemporary threat to biodiversity in high seas areas comes from fishing, and therefore it is difficult to foresee much support from the States carrying out such activities. Obviously the more actively engaged in high seas fishing a State is, the more probable that areas of protection will negatively affect its nationals, and the less likely it will be to support a proposal for high seas marine parks.

The nature of any restriction will clearly inform the degree of opposition which a DWFN might demonstrate. Complete fisheries closure of a sea mount might be a possible consequence of a regime designed to protect the biodiversity of the area might attract significant opposition from States interested in any fisheries there. To some extent, such opposition could be addressed through coordination and cooperation with relevant regional fishing organisations, but from a geopolitical point of view the economic and social impacts on fishing will drive State support.

In addition, even where a DWFN has been engaged in cooperating within the international system through the Straddling Fish Stocks Agreement or regional fisheries organizations, there is no guarantee that will see support for the introduction of marine parks in high seas areas. Many States are generous in permitting the registration of vessels to fly their flag, without requiring a close connection between the vessel to be registered and the State concerned. Often, particularly in the case of developing States, the State has little or no capacity to bring about effective enforcement of its laws over the vessel.[12] Such "flags of convenience" are used by some fisheries companies to avoid some of the more onerous regulatory requirements of regional fisheries organisations, as the flag States are selected as non-members.

These States obtain limited revenue from such registrations, and hence would be reluctant to participate in any international arrangement that might dilute their attractiveness as a "flag of convenience" provider State. This can be demonstrated by analogy by considering the level of ratification of the High Seas Compliance Agreement.[13] The Agreement has taken a decade to enter into force although only requiring the support of 25 States and does not have among its members any "flag of convenience" States. A similar level of support for international measures to support high seas biodiversity conservation would substantially undermine the efficacy of such measures.

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12 See J. Faith, "Enforcement of Fishing Regulations in International Waters: Piracy or Protection: Is Gunboat Diplomacy the only means left?" (1996) 19 *Loyola of Los Angeles International and Comparative Law* 199 at 203.

13 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, done at Rome on 24 November 1993, entered into force 24 April 2003: reprinted 33 ILM 968 (1994).

Geographically Disadvantaged States

One geopolitical interest grouping of States that may also be impacted upon by a regime of high seas marine parks would be that of the geographically disadvantaged States. These States coalesced as a group at UNCLOS III, and were united in their trepidation of the consequences of unfettered extension of coastal jurisdiction.[14] These States were concerned to limit the rights of coastal States in their EEZ, and to ensure that there were few restrictions on high seas areas, the latter being motivated by a desire to access high seas resources without impediment.

Such States may be skeptical of the merits of restrictions upon high seas. High seas areas for these States represent the remaining common resource areas where their nationals may exploit living resources. The prospect of having possibly highly productive regions within the ocean subject to restriction may be unpalatable, in the same way that some environmental protection measures are viewed by developing States. These States may feel they have already contributed their share through the adoption of the EEZ, and are reluctant to be deprived of further benefit.

It is submitted that such concerns have potentially diminished over time. In the years post-UNCLOS III, a number of States closed their EEZs to foreign fishing. This led to changes in exploitation patterns that, together with other economic pressures, substantially diminished the fleets of many DWFNs. As such, the likely level of resistance that would be faced from geographically disadvantaged States might be perceived to be somewhat reduced.

Strategic Considerations

Maritime security has traditionally not had a great deal to do with ocean areas far beyond national jurisdiction. Rather it has tended to focus upon the control and security of crucial "chokepoints" such as straits, or the points of entry lying between one ocean and another, or upon areas close to the coast of the littoral States. One area of remote ocean tends to have no greater strategic relevance than another, although there have occasionally been exceptions to this over time.[15] If of consideration at all, it has been part of an overall concern of maritime powers to ensure the continued freedom of the seas to permit maritime trade and the movement of naval forces.

With the largest navy in the world, the United States has long recognised the strategic importance of the freedom of the seas. It maintains a Freedom of Navigation program of examining the maritime claims of States in order to determine whether those claims are consistent with its view of the law of the sea.[16] The United

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14 T.T.B. Koh & S. Jayakumar, "The Negotiating Process of the Third United Nations Conference on the Law of the Sea" in M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Dordrecht: Martinus Nijhoff, 1985) Vol.1, 29 at 72-75.

15 An exception might have been the sea gaps between Greenland, Iceland and Scotland during the Cold War.

16 See G. Galdorisi, "The United States Freedom of Navigation Program: A Bridge for International Compliance with the 1982 United Nations Convention on the Law of the Sea" (1996) 27 *Ocean*

States' approach has strongly favoured the retention of the widest possible freedoms of navigation, which is consistent with its policy objective of allowing the United States Navy access to as much of the world's ocean space as international law can permit. Interestingly, the United States has been prepared to protest any infringement it perceives, even if its national interest is not directly affected. For example, in the context of the enclosure of historic waters, the United States has not merely protested the actions of States such as Libya enclosing the waters of the Gulf of Sidra, but has protested Australia's proclamation of historic waters in Encounter Bay in South Australia.

They may indicate that if the creation of a high seas marine park might adverse affect navigation, then there could be opposition to the measure by the United States. Any restriction on navigation, even in an isolated or remote area, could be seen to merely encourage coastal States to seek to restrict navigation in marine park areas closer to shore. The US State Department is unlikely to be sympathetic to navigational restrictions in the open ocean if they might be used by a State with interests hostile to the United States in respect of its own waters or EEZ.

Even if a marine park does not hamper surface navigation, it may be accompanied by restrictions on the types of activity that can be undertaken, or in relation to sub-surface navigation. It is notable that MARPOL and other marine environmental agreements does not apply to State vessels[17], and that the Law of the Sea Convention has done little to undermine sovereign immunity.[18] States, including the United States, will be reluctant to accede to measures that might prevent the use of active sonar equipment in certain waters.[19] Similarly, there will be a disinclination on the part of States with submarines to support measures that might hamper submarine navigation. This would likely be the case even if the prospects for interference with such navigation were remote, given the nature of defence contingency planning, and the regular exercise of forces.

Deep Seabed Issues and the International Seabed Authority

The role of the International Seabed Authority in relation to high seas marine parks could also be of some interest. All of the seabed beyond the legal continental shelf falls within the Area, under the jurisdiction of the International Seabed Authority. This

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Development and International Law 399; J.W. Rolph, "Freedom of Navigation and the Black Sea Bumping Incident: How 'Innocent' must Innocent Passage be?" (1992) 135 *Military Law Review* 137.

17 See Article 3, *MARPOL 73/78*, done at London on 17 February 1978, entry into force 2 October 1983: 1492 UNTS 365; Article 7(4), *International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* done at London, Mexico City, Moscow, and Washington on 29 December 1972, entered into force on 30 August 1975: 1046 UNTS 120.

18 Article 236 of the Convention provides:

> The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

19 The issue of environmental regulation of underwater noise was considered by McCarthy: E.M. McCarthy, "International Regulation of Transboundary Pollutants: The Emerging Challenge of Ocean Noise" (2001) 6 *Ocean and Coastal Law Journal* 257.

includes the vast majority of the seabed lying under the high seas, and therefore a very large proportion of the area in issue when considering high seas marine parks.

The interest of the International Seabed Authority may be particularly awakened when one considers that the most likely locations of high seas biodiversity conservation are areas like high seas seamounts, which are islands of relatively shallow water surrounded by the deep ocean. Relatively shallow areas are certainly easier to exploit than the deep seabed, and such areas may be of interest to deep sea miners. Further, biodiversity conservation would not be restricted to the fauna of the water column, but would certainly have to take into account the plant life of the area, and sedentary species.[20] A marine park that protected fish species in the vicinity of a seamount might prove of extremely limited efficacy if there were no measures to prevent the destruction of habitat through mining or other activity. Since all activities affecting the Area are subject to the jurisdiction of the International Seabed Authority, their likely reaction to the proposal would seem to be most significant.

The Law of the Sea Convention makes provision for the Authority to have a role in environmental protection.[21] Article 145 provides:

> Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia:
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> (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;
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> (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

At the present point in time, the Authority is yet to introduce a comprehensive code for environmental protection, but there is consideration of environmental protection in its Polymetallic Nodules Mining Regulations.[22] This reflects the lack of urgency in the Authority's deliberation, as no seabed mining is either presently undertaken, or

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20 See A.M. Post, *Deepsea Mining and the Law of the Sea* (The Hague: Martinus Nijhoff, 1983) 57-65.

21 See M.G. Schmidt, *Common Heritage or Common Burden? The United States Position on the Development of a Regime for Deep Sea-Bed Mining in the Law of the Sea Convention* (Oxford: Clarendon Press, 1989) 142.

22 See Regulations on Prospecting and Exploration for Polymetallic Nodules, UN Doc. ISBA/6/C/12; see also the commentary by Lodge: M.W. Lodge, "The International Seabed Authority's Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area" (2001) *10 Internet Journal of the Centre for Energy, Petroleum and Mineral Law and Policy*.

planned in the foreseeable future.[23] Nevertheless, the Authority is directing research that is designed to assist in the identification of criteria for environmental protection, as well as the biodiversity of deep ocean areas, and the impacts of deep seabed mining on the water column.[24] This would indicate a willingness to consider matters that would be directly raised by oceanic marine parks beyond national jurisdiction. This adds a complication to the negotiations that would be necessary to protect deep ocean areas.

Marine Scientific Research

Very much a subsidiary issue, marine scientific research is potentially impacted upon by a regime of marine high seas biodiversity protection. Freedom of marine scientific research on the high seas is a key provision within the Law of the Sea Convention, and it may be assumed that any new measures designed to protect flora and fauna in high seas areas will take this into account. If protection does not equate to exclusion, then logically some process to regulate research in protected areas can be foreseen.[25]

The necessity of some regulatory mechanism for research would certainly be important. Research has been used as a vehicle to continue exploitation of stocks beyond internationally agreed limits, for example the Japanese "scientific" whaling programme, or the Japanese over quota research catch of southern bluefin tuna. Clearly States that may not be able to obtain their desired level of exploitation from an area covered by a marine protected area, may seek to continue their catch by undertaking a widespread "research programme" for the area.

How such a regulatory process for research might work in practice is not without difficulty. Unless international agreement provided for the establishment of a supranational regulatory authority, the most likely construction is that each State provide approval for its own nationals. While such systems have functioned well in some circumstances, there have been substantial lapses in effectiveness[26], and there is a risk that research will be used in the same fashion as Japan has done in relation to whaling and tuna. The use of a supranational body would be also open to criticism in that State freedom of research might be seen as substantially more constrained, and the expense of maintaining a secretariat and other mechanisms would be perceived as expensive.

Conclusions

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23 Issues surrounding environmental protection and deep seabed mining are considered in: C.H. Allen, "Protecting the Oceanic Gardens of Eden: International Law Issues in Deep-Sea Vent Resource Conservation and Management" (2001) 13 *Georgetown International Environmental Law Review* 563.

24 For example, the International Seabed Authority conducted a workshop into environmental research collaboration in 2002: see <http://www.cdr.isa.org.jm/doc/Scientist_2003/en/seabedarea/2002workshop1.stm>

25 For some of the difficulties already inherent in the regime for marine scientific research see J.A. Knauss, "The Effects of the Law of the Sea on Future Marine Scientific Research and of Marine Scientific Research on the Future Law of the Sea" (1985) 45 *Louisiana Law Review* 1201

26 Environmental regulation in Antarctica operates in this fashion, and while, for the most part, the efforts made have been positive, there have been some spectacular examples of abuse of the system.

A number of conclusions present themselves from the above analysis. Firstly, there are a number of substantial obstacles facing any attempt to create a regime for the implementation of biodiversity protection in high seas areas. These obstacles are essentially economic and strategic concerns that are likely to be concentrated in a relatively small number of States. Second, while the State interests adversely affected by any proposal are small in number, this is balanced by the relative strength and influence of the States concerned. Those affected include the United States, Russia, Japan, China, and the European Union.

While this would seem a negative prognosis, matters should be put into perspective. The high seas represent a small fraction of world fishing output, and no percentage at all of seabed exploitation. Further, the proposed areas of protection are likely to make up a small percentage of the total high seas, limited the impact upon States. Further, the international community has shown itself willing to adopt measures directed towards environmental stewardship and sustainable development. The movement that was supported by so many States at Rio, and led to the Biodiversity Convention has not vanished from the world, and a great many States will so no adverse impacts upon their own situations. Consequently while the geopolitical obstacles are not insubstantial, nor are they insurmountable and much pressure can be assembled against those interests that might impede the proposal.