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**The Final Frontier:  
The Law of the Sea Convention and Areas  
beyond National Jurisdiction**

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# **The Final Frontier: The Law of the Sea Convention and Areas beyond National Jurisdiction**

**David Freestone\***

In the thirty years since the conclusion of the 1982 UN Law of the Sea Convention it has become clear that the regime for Areas beyond National Jurisdiction (ABNJ) upon which the 1982 Convention seems to be premised has not materialised. There are still serious lacunae in the governance regime for ABNJ. Despite the growth in intensity of human impacts on ABNJ through pollution, shipping, fishing and threats from new human impacts such as ocean energy projects and geo-engineering, the governance regime of ABNJ is by no means comprehensive, and has serious deficiencies in effectiveness as well as coverage. This paper looks at the limitations of the current ocean governance regime, identifies important issues that need to be addressed more specifically in ABNJ – such as basic principles of ocean governance, environmental impact assessment for new activities, and the establishment of marine protected areas. It looks at the evolution of the debates within the UN in the run up to the Rio +20 United Nations Conference on Sustainable Development (UNCSD) in June 2012, and, then in detail at the Sargasso Sea project – which is designed to see what protection measures can be put in place for a unique ecosystem in ABNJ using existing international institutions, without waiting for the UN to take more comprehensive action.

## **Introduction**

On December 10, 2012 it was thirty years since the finalization of the 1982 Law of the Sea Convention (LOSC) in Montego Bay Jamaica after some nine years of negotiations – the longest in the history of the UN.<sup>1</sup> The Convention

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<sup>1</sup> See generally David Freestone (ed.), *The Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Martinus Nijhoff, Leiden and Boston, 2013); also published as

is an unprecedented achievement – both for its size (320 Articles and IX Annexes) and also for the comprehensiveness of the regime that it establishes. Ambassador Tommy Koh of Singapore, chair of the final session, described it metaphorically as a “Constitution for the Oceans,” and so it is in many ways, in its sheer breadth and coverage. However, it took another 12 years before it entered into force and then only after the negotiation of an innovative Implementation Agreement for Part XI, which many say amended some of the basic provisions of that section relating to deep seabed mining.<sup>2</sup> A year later, after six negotiation sessions a second implementing agreement was concluded – the 1995 UN Fish Stocks Agreement – which addressed what has been described as an unfinished agenda of the Convention – the regime for straddling fish stocks and highly migratory fish stocks – and which introduced some of the new concepts of fisheries management including the precautionary principle and the ecosystem approach, which had emerged since the finalization of the 1982 text, and, which were consolidated in the legal instruments developed for the 1992 UN Conference on Environment and Development – the Rio de Janeiro Earth Summit.<sup>3</sup>

Now, thirty years on, many are highlighting another *lacuna* or unfinished agenda in the convention – the regime covering areas beyond national jurisdiction – in the UN *argot* – ABNJ. This paper examines some of the reasons why governance of ABNJ is being called a *lacuna* in the Convention – or at least an implementation gap. It looks at the issues which have prompted concern about the regime of ABNJ, the debates on this issue within the UN General Assembly, and then at the work of the Ad Hoc Working Group that it established to study particular issues of this regime. It then looks at a unique experiment in addressing one facet of this issue - the ability of the international community to establish marine protected areas in ABNJ. The Sargasso Sea project – led by the Government of Bermuda - seeks to use existing international organizations with established sectoral competence to put protection measures in place for the unique open ocean ecosystem of the Sargasso Sea.

Nearly 50% of the earth surface is covered by marine areas beyond national jurisdiction. That is, areas that are beyond the limits of the Exclusive Economic Zones recognized by the 1982 LOSC, and of the continental shelf which the Convention recognized may extend beyond 200 nautical miles to its

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a Special Issue in (2012) 27 *International Journal of Marine and Coastal Law [IJMCL]* pp. 675-881.

<sup>2</sup> See Dolliver Nelson, “The New Deep Sea-Bed Mining Regime” (1995) 10 *IJMCL* 189, who says at 193 “the Agreement can therefore be considered a Protocol of Amendment.

<sup>3</sup> See David Freestone, “The Road from Rio: International Environmental Law after the Earth Summit” (1994) 6 *Journal of Environmental Law*, pp. 193-218. And on the incorporation of new principles in the 1995 UN Fish Stocks Agreement see David Freestone and Zen Makuch, “The New International Environmental Law of Fisheries: The 1995 Straddling Stocks Agreement,” *Yearbook of International Environmental Law*, Volume 7, Oxford University Press, 1997, pp. 3-49.

outer geomorphological limits.<sup>4</sup> Since the finalization of the 1982 Convention, human activities in the ocean and in ABNJ have burgeoned, as have their impacts.<sup>5</sup> These impacts are not necessarily the result of new activities but of the unprecedented increase of existing activities such as maritime transport, the laying of submarine cables (for internet connections) and, of course, fishing – where effort has consistently increased to compensate for falling catch levels and has pushed into deeper, more distant and more inhospitable waters. This increased effort is also paralleled with the continued incidence of “illegal, unregulated and unreported” (IUU) fishing. Each of these three practices is of course a distinct and separate problem. Taken as whole, the significance of IUU fishing is perhaps as much as one third of all the fish caught globally. This means they are caught without regard to the fisheries management systems, however flawed they may be, that we have in place.<sup>6</sup> At the same time there are proposals for more potentially harmful activities, such as ocean fertilisation to combat climate change.<sup>7</sup>

This increase in actual activities and impacts has not been matched by an increase in governance activity. IUU fishing persists – rendering effective fisheries management virtually impossible. The continued use of flags of convenience even for fishing vessels - has undermined attempts to exercise effective flag state controls. Despite development in international law rules on jurisdiction – including the extension of port state jurisdiction<sup>8</sup> – effective policing of ABNJ is still problematic.

#### *The ABNJ Regime envisaged by Part XII of the 1982 Convention*

The 1982 Convention does not itself leave the legal regime for the high seas as an unfinished agenda. Although Article 87 of the 1982 LOSC talks about “freedom of the high seas,” it also makes the point reiterated in detail in other provisions that this freedom may only be exercised “under the conditions laid

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<sup>4</sup> Art. 76, LOSC

<sup>5</sup> B. Halpern *et al.*, “A Global Map of Human Impact on Marine Ecosystems.” (2008) Vol. 319, no. 5865, *Science*, pp. 948-952 (15 February 2008). E. Ramirez-Llodra *et al.*, “Man and the Last Great Wilderness: Human Impacts on the Deep Sea” (2011) 6(7) *PLoS one* e22588.

<sup>6</sup> see M.A. Palma, M. Tsamenyi and W.R. Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff, 2010).

<sup>7</sup> See e.g., P. Verlaan, ‘Geo-engineering, the Law of the Sea, and Climate Change’ (2009) *Carbon and Climate Law Review* 446–458. See also R. Rayfuse, M. Lawrence, K. Gjerde, ‘Ocean Fertilization and Climate Change: The Need to Regulate Emerging High Seas Uses’ (2008) 23(2) *IJMCL* 297–326; D. Freestone, R. Rayfuse, “Ocean Iron Fertilization and International Law” (2008) 364 *Marine Ecology Progress Series* 227–233. Also P. Verlaan, “Current Legal Developments: London Convention and London Protocol” (2011) 26 *IJMCL* 185–194, and the same author, “Marine Scientific Research: its potential contribution to achieving responsible high seas governance” (2012) 27 *IJMCL* pp. 805-812.

<sup>8</sup> 2009, Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. (Not yet in force). For text see:

<http://www.fao.org/docrep/013/i1644t/i1644t00.pdf>

down by this Convention and by other rules of international law.” In order words the six basic high seas freedoms are all set about by important conditions.<sup>9</sup>

Although the exercise of the freedoms are generally subject to these important general conditions, the only specific additional restrictions that can be made to the exercise of these rights are by international agreement binding only on states which are party to them. Of course, the 1982 Convention does oblige all states to "protect and preserve the marine environment"<sup>10</sup> including "rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."<sup>11</sup> It also obliges states by Article 197 to "cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features."

The LOSC itself establishes an international regime for exploration and exploitation of seabed minerals, in "the Area," overseen by the International Seabed Authority (ISA), but a range of other global and regional treaties regulate a range of specific activities which take place in ABNJ, such as fishing, wildlife protection and navigation. But of course these detailed sectoral treaties are only binding on their parties. So, the problem of proper governance in ABNJ is exacerbated by the patchwork of treaties that exists. A review of existing organizations with jurisdiction over activities in ABNJ shows that there are serious gaps in coverage.<sup>12</sup> In relation to sectoral activities these gaps are both functional as well as geographic. This is not necessarily a defect in the LOSC itself – it is a defect in implementation.

In fact the *lacunae* in implementation are vividly shown by the provisions relating to the monitoring and reporting of potentially polluting activities. Their provisions, which are quite rigorous, are based entirely on good faith implementation by state parties, and provide as follows:

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<sup>9</sup> Navigation; overflight; freedom to lay submarine cables and pipelines; to construct artificial islands and other installations; freedom of fishing and of scientific research.

<sup>10</sup> Article 192 LOSC.

<sup>11</sup> Article 194(5) LOSC.

<sup>12</sup> 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](http://cmsdata.iucn.org/downloads/iucn_marine_paper_1_2.pdf)). See also, David Freestone, "Problems of High Seas Governance," pp 99-130 in D. Vidas and P.J. Schei (eds.) *The World Ocean in Globalisation: Challenges and Responses* (Martinus Nijhoff Publishers, Leiden, 2011), and in the same volume pp. 221–232, K. Gjerde, "High Seas Fisheries Governance: Prospects and Challenges in the 21st Century." For an excellent wider discussion of the ABNJ legal regime see Robin Warner *Protecting the Oceans beyond National Jurisdiction: Strengthening the International Law Framework* (Martinus Nijhoff Publishers, 2009).

Art. 204. States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

Art. 205. States shall publish reports ...or provide such reports to the competent international organizations, [to be] available to all States.

Art. 206. When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments...

Although international permitting of activities does take place on the basis of prior environmental impact assessment (EIAs) in some areas of the ocean – such as the Southern Ocean under the Madrid Protocol, this is very much the exception rather than the rule.<sup>13</sup> Similarly, where regional conventional regimes do envisage the establishment of marine protected areas in high seas areas there has been some progress – as in the OSPAR region,<sup>14</sup> and the Mediterranean.<sup>15</sup> In the overwhelming majority of ocean areas however there is no such framework.

This has led to discussions of this issue within the UN General Assembly, where proposals for a process to develop a new legal framework for high seas have been discussed over the last decade or so. We will consider this development before addressing the question of whether it is possible to protect Areas in ABNJ within the current system.

#### *Governance in ABNJ: the Debate with the UN General Assembly*

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<sup>13</sup> See Robin Warner and Simon Marsden, *Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives* (Ashgate, 2012).

<sup>14</sup> The 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (the "OSPAR Convention") was formed from the merger of the Commissions of the 1972 Oslo Convention and the 1974 Bonn Convention. It entered in force in March 1998. Text at (1993) 32 *ILM* 1072 and at

[http://www.ospar.org/html\\_documents/ospar/html/ospar\\_convention\\_e\\_updated\\_text\\_2007.pdf](http://www.ospar.org/html_documents/ospar/html/ospar_convention_e_updated_text_2007.pdf)

<sup>15</sup> Convention for the Protection of the Mediterranean Sea against Pollution, 16 February 1976, 1102 United Nations Treaty Series 27, amended in 1995 and renamed the Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean (hereinafter Barcelona Convention); Protocol concerning Mediterranean Specially Protected Areas and Biodiversity, 10 June 1995, 2102 United Nations Treaty Series 203, 161.

Governance in ABNJ has been on the agenda of the UN General Assembly for nearly a decade. In 2004, in order to address the full range of issues particularly related to the conservation of biodiversity in areas beyond national jurisdiction, the UN General Assembly agreed on the recommendation of the UN Informal Consultative Process on the Oceans and the Law of the Sea (UNICPOLOS) to establish an *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 (known as the BBNJ process).<sup>16</sup> This Working Group held its first meeting in 2006; a second ran from 28 April to 2 May 2008, a third meeting was held in January 2010, a fourth in May 2011, and a fifth in May 2012. Several important proposals have been discussed at these meetings including a European Union proposal for a new implementing agreement to develop a more specific framework to address conservation and sustainable use of marine biodiversity beyond national jurisdiction. Issues highlighted in the discussions have included the absence of a global instrument regulating the establishment and monitoring of Marine Protected Areas (MPAs) on the High Seas (even though MPAs have proven to be extremely effective in maintaining biodiversity in coastal contexts), the absence of comprehensive EIAs for new activities in ABNJ, as well as the lack of co-ordination between those international organizations that are charged with regulating specific sectoral activities.<sup>17</sup>

Other states have indicated that improved implementation should be the first priority, but have not all provided their views on what might be done to enhance implementation with respect to biodiversity conservation in general. Unfortunately the lively debates on improved governance have been overshadowed by controversy over the future regime for exploitation of marine genetic resources beyond national jurisdiction.<sup>18</sup> The G77 and China have argued that the “common heritage of mankind” concept that the LOSC

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<sup>16</sup> For details of the meeting to date see

<http://www.un.org/Depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm>

<sup>17</sup> It has also been suggested that the international community should reaffirm some of the basic principles that have been agreed in a wide range of existing instruments, including the 1982 Convention, in relation to national activities in ABNJ. At the IUCN 4th World Conservation Congress, in Barcelona on 7 October 2008, IUCN President Valli Moosa of South Africa chaired a plenary session presenting the IUCN “Ten Principles of High Seas Governance.” For a more detailed exposition of these principles and their legal basis see David Freestone, “Principles Applicable to Modern Oceans Governance,” (2008) 23 *IJMCL* 385-391 and David Freestone, “Modern Principles of High Seas Governance: The Legal Underpinnings,” (2009) 39 *International Environmental Policy and Law*, 44–49.

<sup>18</sup> For an excellent assessment of the issues and potential of bio-prospecting see, D. Leary, M. Vierros, G. Hamon, S. Arico and C. Monagle, “Marine Genetic Resources: A Review of the Scientific and Commercial Interest” (2009) 33 *Marine Policy*, 183–194. A comprehensive analysis of various legal issues involved is found in Part IV, “Marine Genetic Resources and Bio-prospecting,” in D. Vidas (ed.), *Law, Technology and Science for Oceans in Globalisation*, pp. 309–419.

applies to deep seabed minerals,<sup>19</sup> should also apply to the living resources of the deep ocean floor, many of which may have important industrial and pharmaceutical potential. They argue that if the drafters of the 1982 Convention had been aware of these resources – rather than simply being aware of the famous “manganese nodules” – then they would doubtlessly have included these living resources within the deep sea bed regime.

The result has been something of a stalemate in the discussions at the BBNJ Working Group, but at the May 2011 Meeting there was something of a breakthrough. It was agreed that the issues of protection of biodiversity through marine spatial planning measures in ABNJ (e.g., EIAs and establishment of MPAs) should be linked with issues relating to access and benefit sharing of marine genetic resources, and that:

A process be initiated, by the UNGA, with a view to ensure that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS; This process would address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology.<sup>20</sup>

This was discussed further at the 2012 BBNJ Working Group meeting,<sup>21</sup> and, as expected was also discussed at the UN Conference on Sustainable Development (Rio plus 20)) in June 2012. The Outcome Document of the Rio

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<sup>19</sup> See Article 138 LOSC: “The Area and its resources are the common heritage of mankind.” Article 133 LOSC further provides that “resources” means “all solid liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules.”

<sup>20</sup> Recommendations of 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 and Co-Chairs’ summary of discussions UN Doc A/66/119 (30 June 2011). Available on line at

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/397/64/PDF/N1139764.pdf?OpenElement>

<sup>21</sup> New York, 7-11 May 2012. For Agenda see UN Doc A/AC.276/L.8. (3 April 2012). On line at:

<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N12/282/68/PDF/N1228268.pdf?OpenElement>



Conference, entitled “The Future We Want,”<sup>22</sup> contained the following commitment:

162. We recognize the importance of the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction. We note the ongoing work under the General Assembly of an *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. Building on the work of the *ad hoc* working group and before the end of the sixty-ninth session of the General Assembly we commit to address, on an urgent basis, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea.

#### *The Sargasso Sea Project*

These processes, even if successful, are likely to take a number of years. In order to secure more rapid protection, and to provide an example of what can be achieved through working within the existing system, the Sargasso Sea project is designed to attempt to use existing treaty regimes and processes in order to seek protection for a unique ecosystem which is primarily located in areas beyond national jurisdiction.

The Sargasso Sea is a 2 million square nautical mile ecosystem in the North Atlantic. Named for the *algae* that accumulates in the North Atlantic Subtropical Gyre and which forms into large mats or windrows, the Sargasso Sea is the world’s only sea without coasts; only the tiny islands of Bermuda have direct coastal frontage. The Sargasso Sea is bounded on all sides by the clockwise flow of major ocean currents: The Gulf Stream and North Atlantic Drift form the western and northern boundaries, the Canary Current forms a more diffuse eastern boundary, and the North Equatorial Current and Antilles Current form the southern boundary. Just as the currents vary, the boundaries of the Sargasso Sea also vary. The *Sargassum* is home to a range of endemic species, and, the Sargasso Sea is a major feeding and migration route for a number of threatened and endangered species including sea turtles, humpback and sperm whales, as well as for commercially important tunas and billfish. It is the only place in the world where the catadromous American eel (*Anguilla*

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<sup>22</sup> UN Doc A/RES/66/288

*rostrata*), and European eel (*Anguilla anguilla*) spawn.<sup>23</sup> Bermuda, at the centre of the Sargasso Sea, is an overseas territory of the United Kingdom. It claims a 200-nautical-mile EEZ of some 173,891 square miles. Beyond the Bermudian EEZ, however, the remainder of the Sargasso Sea is largely an Area beyond National Jurisdiction (ABNJ).<sup>24</sup>

The Sargasso Sea Alliance was formed in 2010 under the leadership of the Government of Bermuda. Its general strategy is to identify the most important environmental threats and then to address them on an activity or organisation-specific basis. The major threats to the Sargasso Sea and the relevant organisations for their management include: navigation and vessel source pollution threats through the International Maritime Organisation (IMO); fishing threats through International Convention for the Conservation of Atlantic Tunas (ICCAT) and perhaps the Northwest Atlantic Fisheries Management Organization (NAFO); and, seabed mining threats through the International Seabed Authority (ISA). The importance of developing a high quality peer reviewed science case is therefore crucial to being able to make strong arguments for a range of different protection measures in these various forums.

### *Protecting the Sargasso Sea*

The Sargasso Sea Alliance is trying to move forward with a possible MPA in ABNJ using the existing sectoral institutions.<sup>25</sup> In other words, accepting that governance of ABNJ is fragmented, what can be achieved in terms of protection for such areas using the existing organisational structures? Some limited success in establishing ABNJ MPAs in other regions has been achieved, notably in the North-East Atlantic OSPAR region,<sup>26</sup> and, in the South Orkney area on the Southern Ocean using the Convention for the

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<sup>23</sup> The European eel is protected by EC Regulations. Council Regulation (EC) No. 1100/2007 of 18 September 2007 establishes measures for the recovery of the stock of European eel. OJ 2007 L248/17.

<sup>24</sup> 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. The Alliance commissioned a new map based on criteria such as ocean current and eddy occurrence, remote sensing of *Sargassum* weed, and historical mapping, which excludes national EEZs. It calls this area the Sargasso Sea Alliance Study Area. The map can be viewed at <http://www.sargassoalliance.org/where-is-the-sargasso-sea>.

<sup>25</sup> See further David Freestone and Kate Killerlain Morrison, "The Sargasso Sea Alliance: Seeking to Protect the Sargasso Sea." (2012) 27 *IJMCL* pp. 647-655. The following section draws on that paper.

<sup>26</sup> The 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (the "OSPAR Convention") was formed from the merger of the Commissions of the 1972 Oslo Convention and the 1974 Bonn Convention. It entered in force in March 1998 Text at (1993) 32 *ILM* 1072 and at [http://www.ospar.org/html\\_documents/ospar/html/ospar\\_convention\\_e\\_updated\\_text\\_2007.pdf](http://www.ospar.org/html_documents/ospar/html/ospar_convention_e_updated_text_2007.pdf)

Conservation of Antarctic Marine Living Resources (CCAMLR).<sup>27</sup> Both those regions have developed regional processes for marine conservation (including in ABNJ) which envisage the establishment of MPAs. However, despite the fact that the Sargasso Sea lies between Europe and the Americas, there is no regional marine environmental treaty expressly covering the Sargasso Sea Region. Nor is there a regional fisheries treaty regime applicable to the whole Sargasso Sea area for non “tuna and tuna-like” species.<sup>28</sup> This again distinguishes it from the North East Atlantic which has the North-East Atlantic Fisheries Commission (NEAFC),<sup>29</sup> to correspond with OSPAR, or the Southern Ocean, where CCAMLR performs both roles, or the Mediterranean which has the General Fisheries Council for the Mediterranean.<sup>30</sup>

The Sargasso Sea Alliance, led by the Government of Bermuda, is seeking to break new ground, by seeking to establish a marine protected area in the high seas areas of the Sargasso Sea using the existing legal framework and any existing sectoral bodies that may be able to assist.<sup>31</sup> 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.

#### *The relevant sectoral organisations*

In the Sargasso Sea, the only international bodies that have sectoral jurisdiction are the International Maritime Organisation (IMO) in relation to

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<sup>27</sup> The 1980 Convention for the Conservation of Antarctic Marine Living Resources (entered into force 1982) is part of the Antarctic Treaty System. Text at (1980) 19 *ILM* 837 and at [http://www.ccamlr.org/pu/e/e\\_pubs/bd/pt1.pdf](http://www.ccamlr.org/pu/e/e_pubs/bd/pt1.pdf)

<sup>28</sup> As opposed to a regime for tuna and tuna-like species – see discussion of ICCAT below.

<sup>29</sup> The 1980 Convention on Future Multilateral Co-Operation in North-East Atlantic Fisheries, entered in force in 1982. For text as amended see [http://www.neafc.org/system/files/london-declaration\\_and\\_new\\_convention.pdf](http://www.neafc.org/system/files/london-declaration_and_new_convention.pdf)

<sup>30</sup> The Mediterranean Sea has an environmental protection treaty in the 1976 Barcelona Convention, as amended, see above, note 14.

<sup>31</sup> The secretariat of the Alliance is located in the Washington DC Office of IUCN. The Alliance has a small Executive Committee and a larger Steering Committee. It is supported by private donors and foundations. For details see [www.sargassoalliance.org](http://www.sargassoalliance.org).

shipping and marine pollution issues,<sup>32</sup> the International Convention for the Conservation of Atlantic Tunas (ICCAT),<sup>33</sup> which regulates fisheries for tuna and tuna-like species in the north and south Atlantic, and the International Seabed Authority (ISA) which has jurisdiction over seabed mineral resource exploration and exploitation.<sup>34</sup> In addition, the northern edges of the Sargasso Sea and of the Bermudian EEZ do extend north of 35°N into the geographical area of competence of the North West Atlantic Fishing Organisation (NAFO).<sup>35</sup> However, the majority of the high seas areas of the Sargasso Sea are neither covered by a regional environmental agreement nor by a regional fisheries management organization.<sup>36</sup>

Also, the FAO Advisory Body, the Western Central Atlantic Fishery Commission (WECAFC), which includes the Sargasso Sea by geography, has recently shown potential for conservation-minded recommendations in their February 2012 meeting which included a resolution on strengthening the implementation of international fisheries instruments. WECAFC noted the “need to preserve biodiversity, minimize the risks of long-term or irreversible effects of fishing operations, avoid adverse impacts on the marine environment, maintain the integrity of marine ecosystems including deep-sea vulnerable marine ecosystems and effectively apply the precautionary and ecosystem approaches to fisheries management.” Furthermore, they “agree(d) to take actions and measures to strengthen implementation of existing international fisheries instruments and those that may be developed in the future...”<sup>37</sup>

There are also a number of other international conventions which are of potential relevance. At the tenth session of the Conference of Parties to the Convention on Biological Diversity (CBD) in Nagoya, Japan the parties

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<sup>32</sup> In 1948 an international conference in Geneva adopted a convention formally establishing IMO (the original name was the Inter-Governmental Maritime Consultative Organization, or IMCO, but the name was changed in 1982 to IMO). It currently has 170 Member States and three Associate Members. See <http://www.imo.org/About/HistoryOfIMO/Pages/Default.aspx>

<sup>33</sup> The International Convention for the Conservation of Atlantic Tunas was signed in Rio de Janeiro Brazil in 1966. It entered into force in 1969. Currently has 48 parties. Further details at <http://www.iccat.int/en/contracting.htm>

<sup>34</sup> Created by Part XI, Section 4 of the 1982 LOSC. Articles 156-158.

<sup>35</sup> NAFO was founded in 1979 as a successor to ICNAF (International Commission of the Northwest Atlantic Fisheries) (1949-1978). The 1979 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries applies to most fishery resources of the Northwest Atlantic except salmon, tunas/marlins, whales, and sedentary species (e.g. shellfish). For text see <http://www.nafo.int/about/overview/governance/convention/convention.pdf>

<sup>36</sup> This is in distinct contrast with the ABNJ areas of the North-east Atlantic which are included within the area of competence of both a regional environmental agreement, in the shape of the 1992 OSPAR Convention, and a corresponding regional fisheries management body – the North East Atlantic Fisheries Commission (NEAFC).

<sup>37</sup> *Resolution on Strengthening the Implementation of International Fisheries Instruments*-WECAFC 14 Session, Panama City, 6-9 February, 2012, (WECAFC/XIV/2012/7. Available at: <http://www.fao.org/docrep/meeting/024/am121e.pdf>

decided to initiate a science driven process to describe ecologically and biologically significant marine areas (EBSAs).<sup>38</sup> To that end a series of workshops have been organised by the CBD Secretariat in association with other organisations to identify such areas.<sup>39</sup> At a workshop in Brazil in March 2012, the Government of Bermuda put forward a proposal for the “Description” of the Sargasso Sea as an EBSA, which was recommended by the Recife Workshop and then approved by the 16<sup>th</sup> Meeting of the CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) in April/May 2012 and was considered by the 11<sup>th</sup> Meeting of the CBD Conference of the Parties (COP) in Hyderabad in October 2012. Although these “described” areas were not specifically endorsed by the CBD COP, they were sent to the UN and other appropriate international organisations, and, the Sargasso Sea, along with other EBSAs, was added to the EBSA repository maintained by the CBD Secretariat.<sup>40</sup> “Description” as an EBSA has no legal significance but it is intended that the CBD process will be taken into account by other international processes charged with managing and conserving ocean resources. For example, while the CBD does not have competence to designate MPAs, information shared through the EBSA identification process may help strengthen the scientific basis for protective measures at other sectoral entities.

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<sup>38</sup> “[The] primary objective of this process is to facilitate the description of ecologically or biologically significant marine areas through application of scientific criteria in annex I of decision IX/20 as well as other relevant compatible and complementary nationally and inter governmentally agreed scientific criteria, as well as the scientific guidance on the identification of marine areas beyond national jurisdiction, which meet the scientific criteria in annex I to CBD Decision IX/20.” CBD Decision X/29, Paragraph 36.

<sup>39</sup> The Workshops held to date include : Joint CBD/NEAFC/OSPAR Scientific Workshop on the Identification of Ecologically or Biologically Significant Marine Areas, EBSAs in the North-East Atlantic-Hyeres, France 8-9 September 2011; Western South Pacific Regional Workshop to Facilitate the Description of Ecologically or Biologically Significant Marine Areas (22–25 November 2011, Nadi, Fiji); Wider Caribbean and Western Mid-Atlantic Regional Workshop to Facilitate the Description of Ecologically or Biologically Significant Marine Areas (28 February–2 March 2012, Recife, Brazil). Further details see <http://www.cbd.int/meetings/>

<sup>40</sup> The CBD COP Decision XI/17, *welcomed* the scientific and technical evaluation of information contained in the reports of the regional workshops, including the Wider Caribbean and Western Mid-Atlantic Regional Workshop, and *requested* the Executive Secretary to include the summary reports on the description of areas that meet the criteria for ecologically or biologically significant marine areas, prepared by the Subsidiary Body on Scientific, Technical and Technological Advice at its sixteenth meeting in the repository, as referred to in decisions X/29 and XI/17, and, for the purpose set out in decision X/29, to submit them to the United Nations General Assembly and particularly its 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, as well as to submit them to Parties, other Governments and relevant international organizations.

The Convention on the Conservation of Migratory Species (CMS) may also be of relevance.<sup>41</sup> A number of migratory species travel through the Sargasso Sea – some of which – like the American and European eel are not protected in international waters. Under the CMS, States can enter into Range State Agreements and/or Memoranda of Understanding to protect species within their full habitat range and can serve as a strong example of how international collaboration can improve marine protection for a shared species across jurisdictions, and even in ABNJ.

The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage envisages the inscription in the World Heritage List, sites of “outstanding universal value” that are part of the world’s “natural” and “cultural” heritage, defined in Article 1 and 2 respectively.<sup>42</sup> Nothing in the texts of Article 1 and 2 suggests that they could not be in areas beyond national jurisdiction, however the procedure for nomination seems to restrict it to sites which are “situated on the territory” of any of its Parties (Articles 3 and 4) or “in its territory” (Article 11). It has consequently been remarked that a World Heritage List that excludes sites in ABNJ (which covers nearly half the globe) should perhaps be called “Half the World Heritage”<sup>43</sup> The issue was raised in 2011 after an audit of the “Global Strategy for a credible, balanced and representative World Heritage List.”<sup>44</sup> Consequent to this, the Convention Secretariat began, in collaboration with IUCN, to look at a scientifically sound method through which the concept of Outstanding Universal Value of the 1972 World Heritage Convention might be applied to the high seas.<sup>45</sup> The Sargasso Sea would clearly be a poster child for such a venture.

In addition to pursuing the adoption of protection measures in the organisations described above, the Alliance is also planning to convene an intergovernmental meeting in 2013 to encourage states and international organisations to collaborate voluntarily to protect the Sargasso Sea, through the negotiation and acceptance of an agreed political declaration on

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<sup>41</sup> The Bonn Convention on Migratory Species was concluded in Bonn on 23 June 1979, and came into force 1983. For text see (1980) 19 *ILM* 15 and at [http://www.cms.int/documents/convtxt/cms\\_convtxt.htm](http://www.cms.int/documents/convtxt/cms_convtxt.htm)

Migratory species may be listed under Appendix I and/or II. Appendix II species may be the subject of Range State AGREEMENTS (sic, per text of Article 5) between Parties. Non-Parties, such as the US may participate in non-binding MOU arrangements, for example, the 2010 MOU on the Conservation of Migratory Sharks, text at [http://www.cms.int/species/sharks/sharks\\_bkrd.htm](http://www.cms.int/species/sharks/sharks_bkrd.htm)

<sup>42</sup> 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, in force 1975. Text at (1972) 11 *ILM* 1358 and at <http://whc.unesco.org/archive/convention-en.pdf>.

<sup>43</sup> Per Professor Dan Laffoley, marine vice-chair of the IUCN World Commission on Protected Areas (WCPA).

<sup>44</sup> Referenced at <http://whc.unesco.org/en/marine-programme>

<sup>45</sup> Note that, as an analogy, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora has felt able to address trade in ABNJ based on the phrase in Article 1(e)—“in the marine environment not under the jurisdiction of any State.” I am grateful to the Editor for this useful suggestion.

collaborative action to conserve the Sargasso Sea. Such a Hamilton Declaration (Hamilton is the capital city of Bermuda) is envisaged to include key Atlantic Rim countries and states from the Caribbean as well as the range states of key species such as the European eel. It is an on-going diplomatic effort in parallel to the pursuit of proposals for protected measures using existing international sectoral organisations.

The Sargasso Sea Alliance was only launched in 2010, but it has already become clear that there are major challenges in seeking to use existing sectoral organizations to achieve a purpose that is greater than each of their individual mandates. Although virtually all of the organizations mentioned above may have specific powers to protect the marine environment – including in ABNJ – in various ways, it is clear that despite the injunction of Article 197 of the 1982 Convention cited above - there is virtually no co-ordination between these organizations. The culture, processes and epistemic communities of each of these institutions are entirely different. Conservation arguments raised in one institution carry little, if any, weight in the others. Because IMO serves the shipping community, ICCAT the tuna fishing community, and the ISA is a more mainstream UN process, their respective formal meeting agendas and even schedules are, perhaps understandably, put together without regard to the activities of other sectoral bodies.<sup>46</sup>

In this sense, the overall objective of the obligations that the Law of the Sea Convention imposes on states by Article 197 to collaborate through international and regional organizations in marine environmental protection has not really been achieved. Many hope that the process initiated by the CBD to use scientific processes to identify Ecologically or Biologically Significant marine Areas (EBSAs) will provide a unifying conceptual framework for the description or identification of areas in ABNJ that are worthy of conservation. It remains still to be seen, however, whether existing institutions will be willing or indeed able to respond to this challenge in the way that Article 197 of the 1982 Convention appears to envisage. If they do not, then it is indeed an unfinished agenda. Scholars have pointed out that there are serious gaps in the regulatory framework applicable to ABNJ as well as gaps in implementation and enforcement. It has been suggested that the elements of lawlessness are reminiscent of the 19<sup>th</sup> century frontier areas of the “wild west” in the USA; governance of ABNJ is also perhaps the last, the final, major issue still to remain unresolved under the regime of the 1982 Law of the Sea Convention.

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<sup>46</sup> 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.