HIGH SEAS MARINE PROTECTED AREAS: UNFULFILLED PROMISE, OR IMPOSSIBLE PREMISE?

Joanna Mossop*

I INTRODUCTION

Over the past several years, a number of organisations and individuals have discussed the possibility of establishing marine protected areas in the high seas.1 From a scientific and environmental perspective, there are numerous cogent reasons to preserve areas of the high seas from exploitation.2 However, policy analysts and international lawyers tend to approach the issue with great caution. In order to establish a marine protected area (MPA) on the high seas, proponents must contend with concerns about sovereignty and opposition to extended jurisdiction.

* Lecturer, Faculty of Law, Victoria University of Wellington. A shorter version of this paper was presented at the Fourth World Fisheries Congress, Vancouver, 2-4 May 2004. I would like to thank Jan Matthews and Claire Burnet for their research assistance.


The legal basis for MPAs on the high seas is fundamentally different to that of MPAs within the territorial seas and exclusive economic zones (EEZ) of coastal states. Within the EEZ, states have a broad discretion to govern the exploitation of living resources. With fisheries and resources found on the seabed, the government of the coastal state determines how resources are exploited. Although other states have rights to navigation, laying of pipelines and marine research in the EEZ, it is a relatively straightforward process to find authority to declare a particular area off limits to exploitation of its natural resources.

On the high seas, on the other hand, in searching for legal authority one encounters a minefield of competing rules. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) established different rules for different parts of the high seas. For example, protection of a hydrothermal vent may require reconciling the interests of those who wish to mine the rich mineral resources of the vent, those who wish to undertake extensive scientific research, those who wish to explore the living resources on the vent for possible medical benefits, those who wish to fish in the water column above and those who wish to preserve the whole for the protection of biodiversity. All of these activities are treated differently under international law. In addition, the fundamental rule of flag state jurisdiction means that, on the high seas, only the flag state has jurisdiction to make and enforce laws on a vessel.

The term "marine protected area" is used in different ways around the globe. In this paper, MPA refers to an area of the high seas in which some uses of the ocean are restricted. For the purposes of this

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5 UNCLOS, above n 3, art 92.
discussion, it is assumed that no impediment to navigation is intended, but that certain activities relating to mining or fishing may be prohibited. The precise restrictions would depend on the characteristics of the protection that is sought by the MPA.

This paper will outline the legal basis on which high seas MPAs could be established. It will then address some of the significant barriers to the formation of protected areas, some of which have been overlooked by the existing literature on high seas MPAs. Ultimately, even if states locate an appropriate international institutional structure to establish MPAs, without appropriate compliance mechanisms high seas MPAs risk becoming "paper parks".

It should be noted that MPAs, whether within or outside national jurisdiction, should not be perceived as the only method for protecting biodiversity and species management. On the contrary, most scientists and managers recognise that they are only one tool among many that can be employed to enhance and protect the marine environment. However, MPAs have special promise in ensuring that some ecosystems and areas rich in biodiversity are exposed to minimal disturbance from the adverse effects of some exploitative techniques.

II THE CASE FOR ESTABLISHING HIGH SEAS MARINE PROTECTED AREAS

Advances in technology have opened up new opportunities for commercial operators to access more and more of the world's oceans. Seemingly as fast as scientists discover new ecosystems or resources, operators create the technology to exploit them. The problem is particularly acute in the fishing context, where the world's fishing fleet can strip a seamount of its habitat and inhabitants in a few short years by repeatedly running trawling equipment over the sea floor. These seamounts are often deep below the surface (up to 600 metres) and only recently exploitable due to technological developments in fishing gear. Rare and slow-growing creatures such as cold-water corals are

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6 Some Japanese trawlers fished pelagic armourhead on the southern Emperor seamounts in the North Pacific from depths of up to 600 metres over a surface
wiped out in the race to catch the commercially valuable fish that surround them. This unsustainable practice results in a short term windfall to the fishermen, but a permanent loss to the environment.

It is not only seamounts that are candidates for rapid environmental exploitation. A second category needing protection are areas around hydrothermal vents. Hydrothermal vents are geological formations on the seabed and are created by volcanic activity below the seabed. Superheated water emerges from the seabed releasing minerals that create valuable metal sulphide deposits. Hydrothermal vents also support some of the most unusual animal communities on the planet representing very high levels of microbial diversity. However, these areas are threatened by competing uses. Marine scientific research, mining, bioprospecting and fishing generally result in substantial damage to the vent, if not destruction of the characteristics that make it unique.

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Arguably more controversial would be high seas MPAs created to protect the spawning grounds of high seas and migratory fish species. These areas would probably need to be large, as the goal is to prevent fishing in a part of the ocean where valuable stocks, such as tuna, breed. Given the lack of scientific knowledge about the biology of various fish species, there would be significant controversy about delimitation of the area. This sort of MPA is also likely to require a much larger area of the ocean to be set aside than an MPA protecting seamounts or hydrothermal vents.

Proponents of protecting areas of the high seas have two main goals: protecting biodiversity and ecosystems and assisting in the management of living resources.\(^\text{10}\) Scientists admit that our knowledge of the deep sea is still very limited, and new species are continually being discovered. In addition to the anthropocentric argument that new species may be valuable to humanity – for example as the basis for medical treatments – the scientific and environmental values of protecting biodiversity also provide compelling arguments to protect the sites. Without some form of management or restriction, unique resources on the high seas risk being stripped before the international community has an opportunity to respond.

MPAs are also being considered as tools for managing fishing efforts. Scientists recognise the benefit of being able to compare unexploited areas with those subject to fishing in order to better understand the impact of fishing techniques on the environment. Experience from MPAs in national jurisdictions has indicated that a no-take area may increase the numbers of fish outside the reserve, although this outcome is highly dependent on the fish stocks being targeted and having a well designed and enforced MPA.\(^\text{11}\)

\(^{10}\) See for example Steven D Gaines "Avoiding Current Oversights in Marine Reserve Design" (2003) 13 Ecological Applications Supplement 13, Section 32.

The characteristics of high seas MPAs are likely to differ depending on the purpose for which the area is established. An MPA established for the protection of a seamount may regulate or prohibit deep sea trawling, marine scientific research, bioprospecting as well as deep sea tourism. The MPA rules would probably not restrict freedom of navigation, but prohibit trawlers from operating on and around the seamount. Depending on the circumstances, there may also be a prohibition on fishing in the water column above the seamount. A high seas MPA is likely to be a "multi-use" zone that allows some activities and not others.

Experience with domestic MPAs indicates that the design (including placement and size) and characteristics (including the types of activities that are excluded) of the area have a significant impact on whether the goals are achieved. Given the political and economic costs associated with establishing high seas MPAs, it is important to identify the scientific and ecological value of the area to be protected.

III THE LEGAL FRAMEWORK

Over the past decade, the establishment of MPAs within coastal state jurisdictions has been proceeding at an increasing pace. This development has been supported by international policy statements. The Jakarta Mandate on Marine and Coastal Biological Diversity recognised the need to establish MPAs in 1995. In 2002, the World Summit on Sustainable Development Plan of Implementation recommended the establishment of representative networks of marine

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protected areas "consistent with international law and based on scientific information" by 2012.\textsuperscript{14}

The call to establish high seas MPAs is relatively recent. Advocated by non-governmental organisations such as the World Conservation Union, the idea was taken up by the Seventh Conference of the Parties to the Convention on Biological Diversity in 2004. The Conference established an ad hoc working group on protected areas and recommended that the work programme, \textit{inter alia}, explore:\textsuperscript{15}

\begin{quote}
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\textbf{A The Legal Principles Applicable to the Establishment of High Seas MPAs}

Although some observers would like to be able to argue that states have a \textit{duty} to establish and enforce high seas MPAs, there is no legal obligation binding upon states. International law does provide a legal justification for high seas MPAs in the event that states agree to establish such zones. The true difficulty lies with states that do not agree to the MPA as, under international law, they generally have a right to ignore the restrictions imposed by a high seas MPA.

\textit{1 Fisheries}

The relevant legal framework is characterized by a struggle between two concepts that, at times, seem impossible to resolve.

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\textsuperscript{14} World Summit on Sustainable Development Plan of Implementation, para 31(c) <http://www.johannesburgsummit.org> (last accessed 4 December 2004). See also Tim Eichenberg and Mitchell Shapson "The Promise of Johannesburg: Fisheries and the World Summit on Sustainable Development" (2004) 34 Golden Gate U L Rev 587, 628.

\textsuperscript{15} Conference of the Parties, Protected Areas (Articles 8(a) to (e)), Decision VII/28 Convention on Biological Diversity <http://www.biodiv.org> (last accessed 19 September 2004).
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Despite the fact that marine resources are under considerable pressure from exploitation,\textsuperscript{16} the prevailing rule in international law is that, subject to some conditions, states have the right to freedom of fishing on the high seas.\textsuperscript{17} On the other hand, UNCLOS stipulates that states have obligations to conserve the marine environment and cooperate with other states to conserve and manage fisheries.\textsuperscript{18} Although the latter principles may not automatically override the former, they do provide a basis for a consensus-based MPA.

The freedoms of the high seas, conceptualized by Grotius and still pertaining to the (highly reduced) areas of the high seas today, are based on the concept that the oceans are inexhaustible.\textsuperscript{19} Thus, use by one state will not reduce the ability of another state to use the oceans. Unfortunately, the assumption of inexhaustibility no longer can be held to be self-evident truth. It is clear that humanity now has the ability to exhaust the oceans, but the legal framework has yet to catch up to this reality.

There are a number of limitations on the freedoms of the high seas: some are found under UNCLOS; others are found in treaties negotiated separately. UNCLOS specifies explicitly that the freedom of the high seas is subject to such obligations as the duty to cooperate to protect the living resources of the oceans,\textsuperscript{20} the duty to cooperate with coastal states with regard to straddling stocks and other states with regard to highly migratory species\textsuperscript{21} and the obligation to protect

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\item \textsuperscript{16} The Food and Agriculture Organization of the United Nations (FAO) estimates that up to 60 per cent of fish stocks are at the limits of, or above, their safe exploitation levels.
\item \textsuperscript{17} UNCLOS, above n 3, art 116.
\item \textsuperscript{18} UNCLOS, above n 3, arts 118, 192.
\item \textsuperscript{20} UNCLOS, above n 3, art 117.
\item \textsuperscript{21} UNCLOS, above n 3, arts 116, 63 and 64.
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the marine environment.\textsuperscript{22} The United Nations Fish Stocks Agreement (UNFSA) sets out a number of principles that states cooperating through a regional fisheries management organisation (RFMO) should adopt, including the protection of biodiversity and ecosystems.\textsuperscript{23} The UNFSA also incorporates the concept of a precautionary approach to decision-making. However, while the precautionary approach might be one factor in arguing for an MPA, and relevant to the management of an MPA once established, as it stands, it cannot be the sole basis for the establishment of an MPA. Although the UNFSA is now in force, not all members of the international fishing community have ratified the Agreement.

A common point of confusion is the extent to which the UNCLOS Article 192 obligation to protect and preserve the marine environment \textit{requires} states to undertake conservation measures. First, it is clear that Article 192 is a general obligation that is capable of being overridden by inconsistent, particular UNCLOS provisions. For example, it is unlikely that Article 192 could be used to derogate from the freedom of fishing on the high seas to the extent that states are forced to suspend fishing in the high seas. However, to the extent that fishing activities impact adversely on the marine environment, Article 192 could be employed to argue for a modification of those practices.

Therefore, the fisheries law established by UNCLOS permits, but does not require, states to agree to establishing an area on the high seas that is closed to some extractive activities.

2 \textit{The seabed}

The legal principles relating to the seabed are different to those governing fishing. First, it is important to note that states potentially have jurisdiction over the resources of the seabed beyond the 200-mile

\textsuperscript{22} UNCLOS, above n 3, art 192.

EEZ to the edge of the continental shelf. In the area of the seabed beyond national jurisdiction (the Area), the governing principle is management for the common heritage of mankind.

The International Seabed Authority (the Authority) has responsibility for making management and conservation decisions about the Area. Article 145 specifies that measures should be taken to ensure "effective protection for the marine environment from harmful effects" that may result from extractive activities. The Authority is required to adopt "appropriate rules, regulations and procedures" for "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." The fact that the Authority has jurisdiction to make decisions for the Area and that it is under an obligation to protect the environment has led some commentators to suggest that it may be the best focus for efforts to establish MPAs.

3 Other relevant international law principles

In addition to documents relating to the law of the sea, the Convention on Biological Diversity (CBD) also imposes obligations to protect the marine environment, particularly by protecting biodiversity. Many individuals seeking to strengthen the arguments for conservation of marine resources cite the CBD as authority. However, it is important to note that the CBD explicitly states that the obligations in the Convention must be observed consistently with the rights and obligations of states under the law of the sea. Therefore,

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24 UNCLOS, above n 3, arts 76-77.
25 UNCLOS, above n 3, arts 136-141.
26 UNCLOS, above n 3, art 145.
28 Convention on Biological Diversity (5 June 1992) 1760 UNTS 79; 31 ILM 818, art 22(2).
the freedom of fishing on the high seas is not further limited by the obligations in the CBD.

A number of non-binding agreements encourage states to protect marine ecosystems and resources. For example, Article 6 of the Code of Conduct for Responsible Fisheries, developed by the United Nations Food and Agriculture Organization (FAO), urges states to conserve aquatic ecosystems.\textsuperscript{29} Agenda 21, a non-binding manifesto for environmental action emerging from the 1992 United Nations Conference on Environment and Development, mentions the need to protect marine ecosystems in several places.\textsuperscript{30}

The various obligations to protect the resources of the oceans provide a solid legal basis for establishing high seas MPAs, provided that there is a scientific justification for the zone. It is difficult to argue that such MPAs are prohibited by international law. The establishment of restricted use zones on the high seas is perfectly consistent with these principles, so long as the zones are created by agreement with all states involved in fishing in that area of the high seas. The difficulties arise when asking whether a state can be legally required to observe the MPA, even if the state does not wish to do so. The answer, under current international law, must be: no.

\textbf{B The Compliance Problem}

Commentators have so far generally focused on the existence of legal justifications for establishing high seas MPAs. As already discussed, there seem to be no legal obstacles to the voluntary creation of protected areas. However, very little attention has been paid to the second part of the equation: how will states achieve compliance with the restrictions imposed?


The "compliance problem" is vital to the success of high seas MPAs for two reasons. First, if states do not ensure compliance with the rules of the MPA, the purpose of the protected area may well be undermined. If the majority of states refrains from trawling a seamount but a minority continues to do so, the biodiversity of the seamount will still be destroyed. Second, a high seas MPA may fail to garner support at the initial stages without a guarantee of near full compliance. States are likely to come under considerable pressure from their fishing industries not to support an MPA if there is a genuine belief that the measure will ultimately fail due to free riding states ignoring the restrictions.

Activities on the high seas have often been cited as a classic example of the tragedy of the commons. In the absence of a body with the authority to regulate the resource and enforce the regulations, states must cooperate to create rules to protect the resource from over-exploitation. However, effective arrangements require the participation of nearly all (if not all) of the users of the resource. States will be unwilling to undertake restrictive measures if other states do not. This is particularly a problem where the failure of the other states to comply undermines the purpose of the restrictive measures.

Of course, most regimes for the protection of the oceans operate without full participation of all states with interests in the regime or

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without full compliance by members of the regime. This does not mean that those regimes are always effective, however. Illegal, unregulated and unreported (IUU) fishing is a familiar problem for most RFMOs. IUU fishing poses a serious threat to the integrity and the survival of many international fisheries, such as in the Southern Ocean.\(^{33}\) Yet, RFMOs continue to operate despite this.

It is suggested that the success of many high seas MPAs will depend on near complete participation by all states with interests in the region, even more than regular fisheries management activities. For example, an MPA designed to protect the habitat and diversity of a seamount may prohibit bottom trawling to protect living species and the habitat on the seamount.\(^{34}\) The political danger to negotiating an MPA is that a state that chooses not to join the consensus in favour of an MPA could send vessels bearing its flag and – legally – continue to trawl on the protected seamount. This has two consequences: the non-compliant vessels would damage the habitat and resources the MPA is aiming to protect; and, it is likely that in that situation participating states would bow to pressure from domestic fishing interests to allow access to the area. The same difficulty is faced for MPAs protecting, for example, spawning fish stocks or hydrothermal vents.

Therefore, a move to create high seas MPAs must establish either that MPAs can be effective even with less than full participation or that states can be confident that few incidents of non-compliance will occur. In the absence of these conditions, the MPA initiative is likely to fail.


\(^{34}\) Anthony Grehan and others The Irish Coral Task Force and Atlantic Coral Ecosystem Study: Report on Two Deep-Water Coral Conservation Stakeholder Workshops Held in Galway in 2000 and 2002 (Marine Science Institute, National University of Ireland, Galway, 2003).
IV BARRIERS TO ACHIEVING FULL PARTICIPATION AND COMPLIANCE WITH HIGH SEAS MARINE PROTECTED AREAS

It would be unrealistic to assume that all states will be supportive of the creation of high seas MPAs. However, for a number of reasons, there is likely to be significant opposition to such a move and this will undermine the goal of achieving full internal and external compliance by all states.

A Opposition to the Erosion of the Freedom of the High Seas

It is likely that many states may be broadly opposed to the concept of closing an area of the high seas to international use for fear of the precedent it sets. One must consider the background to UNCLOS that forms the starting point for any legal question concerning the oceans. At the time negotiations began in 1972, a number of states were claiming extended territorial or exclusive fishing zones that greatly exceeded the generally accepted limits under the law. Many maritime nations were troubled by the concept of "creeping jurisdiction", whereby more and more areas of the oceans appeared to be claimed by states. The claims were eventually resolved by giving coastal states the right to claim 200-mile EEZ, with the proviso that no area of the remaining high seas could be subject to a claim by any state.\(^\text{35}\) A number of maritime nations jealously guard the right to freedom of navigation and fishing, with a challenge inevitably being made where there is a perception of interference with such rights.\(^\text{36}\) Such incidents as the dispute between Canada and Spain in 1995\(^\text{37}\) demonstrate the


\(^{36}\) Kaye, above n 27, 222.

seriousness with which states view such interference and it is in this environment that proponents of MPAs, which will purport to restrict a range of activities in an area of the high seas, must situate their arguments.

Proponents of high seas MPAs rightly indicate that there are a number of ways in which the freedom of the high seas has been eroded. UNCLOS itself requires states fishing on the high seas to cooperate to conserve the living resources of the high seas. Proponents of high seas MPAs, which purport to restrict a range of activities in an area of the high seas, must situate their arguments.

UNCLOS, above n 3, art 117. See also arts 63-67.

UNCLOS, above n 3, art 116.

UNFSA, above n 23, art 8(4).

UNFSA, above n 23, art 21.
Therefore, states cannot legally be forced to observe a high seas MPA, and some states may be cautious about agreeing to the development of a regime or treaty that they perceive as infringing the freedom of the high seas.

B The Structure of International Treaty Regimes

Even if all states involved in exploiting a resource are part of the management regime, this does not necessarily ensure that all states will agree to follow the measures established by the regime. The literature often refers to existing examples of areas of the high seas which involve restrictions on the use of the high seas. However, in many of these cases the rules governing them generally allow for a degree of non-participation by members. The terms of membership often allow states to opt out of a regulation with which they disagree. For example, the International Maritime Organization (IMO) recently announced that the Baltic Sea had been designated as a Particularly Sensitive Sea Area (PSSA), which means that ships operating in the area are subject to special conditions imposed by coastal states in recognition of the area's vulnerability. However, Russia opposed the designation and Russia's territorial waters and Russian-registered ships are exempt from any special measures implemented by other coastal states to protect the Baltic Sea. In a similar way, members of the International Whaling Commission (IWC) have the ability to register their opposition to any decision, meaning they do not have to comply with any decision establishing regulations, such as the Southern Ocean Whaling Sanctuary. A few RFMOs, such as the new Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Western and Central Pacific Fishery Convention), are moving

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43 International Convention for the Regulation of Whaling (ICRW) (2 December 1946) 161 UNTS 72, art V(3).
towards decision-making by majority,\textsuperscript{44} but this is not yet a common procedure.

Not all commentators would see the presence of an opt-out clause as totally problematic. It is possible that MPA proponents may be content to allow a similar situation to develop for any international regulation addressing high seas MPAs. States are more willing to agree to submit to international rules if they have the ability to opt out of rules they disagree with. Therefore, allowing a degree of flexibility in the conditions of any international regime designed to implement high seas MPAs may encourage widespread acceptance by states. However, the loose internal rules may in turn undermine the goals of the protection, as has been the case in a number of international organisations.

\textbf{C \ Lack of a Coordinating Organisation}

At present, no single organisation has the jurisdiction or mandate to enforce a high seas MPA. Regional fisheries organisations often do not address the issues surrounding the exploitation of seamounts because these issues are new and not reflected in the constituent documents of the RFMO. It may be that a new organisation is created to establish MPAs, or that an existing organisation is modified and given broader jurisdiction in order to govern the area. However the regime is managed, finding an institutional home is likely to pose at least a preliminary obstacle to the establishment of high seas MPAs.

Of course, much will depend on the nature of the proposal.

\textbf{D \ Flag of Convenience States}

It has been estimated that approximately 46 per cent of the world's ocean fleet operates under flags of convenience.\textsuperscript{45} States such as


\textsuperscript{45} Robin R Churchill and Alan V Lowe \textit{The Law of the Sea} (3 ed, Manchester University Press, Manchester, 1999) 255.
Liberia, Cambodia and Panama offer vessels registration with the benefit of lax enforcement of international marine regulations. Flag of convenience states rarely sign up to restrictive treaties or fail to enforce their provisions even if they are parties. Vessels registered to such states are a major factor in illegal and unregulated fishing. It is highly unlikely that flag of convenience states will join any international consensus on the establishment of high seas MPAs. Therefore, involving those states in negotiations must be a priority.

**E Mobility of Fishing Fleets**

Deep sea fishing vessels have the ability to move easily from one area of the oceans to another as fish stocks fluctuate or opportunities present themselves. Even in areas traditionally fished by a few states, there can be no guarantee that new entrants to the fishery will not emerge. Therefore, even in closely managed areas, fleets may be attracted by the possibility of exploiting an area that has further capacity. This factor may pose a challenge to the establishment of high seas MPAs, even where there is a limited number of participants currently exploiting the existing fishery who all support a high seas MPA.

The mobility of fishing fleets also poses a problem when it is considered that a legal framework for a high seas MPA could take some time to establish. States are unlikely to agree to the creation of an MPA without firm scientific evidence of the biological value of the area. Unfortunately, the very act of identifying areas rich in biodiversity may lead to the exploitation of the area before the international legal community is able to protect it.

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47 Carr and Scheiber, above n 46, 60.
F Commercial Incentives

Although most states are treating the global decline in fish stocks as a sign that action is needed to protect the latter, it has also resulted in a strong commercial incentive to exploit the remaining sources as quickly as possible. It has only been in the last decade that trawling of seamounts in the high seas has been economically and technically feasible. And yet, the evidence is that such activities are devastating to the ecosystems that are targeted. Commercial pressure from the fishing industry may lead some states to resist closure of resource-rich areas of the high seas.

Although these problems are not all unique to high seas MPA discussions, they are particularly important issues to resolve if such efforts are to be effective. The next section of the paper explores some of the options for resolving these issues.

V EXISTING EXAMPLES OF HIGH SEAS MARINE PROTECTED AREAS – LESSONS TO BE LEARNED

There are a few areas in the world's oceans that effectively operate as high seas MPAs, particularly with regard to marine mammals. Commentators often refer to these areas as providing possible models for the establishment of high seas MPAs. However, the main two examples, while providing examples of restricted activities on the high seas, do not necessarily resolve the compliance issues outlined above. The circumstances of these restricted areas may limit their application to other situations.

A Whale Sanctuaries Established by the IWC

The IWC established whale sanctuaries in the Indian Ocean (in 1974) and the Southern Ocean (in 1994). These sanctuaries were created as a result of pressure from anti-whaling members of the

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48 Koslow and others, above n 7.
There have also been repeated attempts to create a whale sanctuary in the South Pacific Ocean, but proponents have failed to achieve the three quarters majority vote needed to establish the sanctuary.

Paragraph 7 of the Schedule to the International Convention for the Regulation of Whaling provides that no commercial whaling is to take place in the sanctuaries. In the Indian Ocean, the prohibition is expressed to be irrespective of any catch limits that have been assessed for the stocks. In the Southern Ocean, the prohibition "applies irrespective of the conservation status of baleen and toothed whale stocks in [the] Sanctuary." Some states are highly critical of the fact that the Southern Ocean Sanctuary explicitly states that it is not related to conservation purposes. The sanctuaries are subject to review on a periodic basis, and the Indian Ocean Sanctuary has been extended following a review in 2002.

It is difficult to assess the efficacy of the whale sanctuaries, as there has been a moratorium on commercial whaling since 1986. It is interesting that the Indian Ocean Sanctuary was established early, well prior to the commercial moratorium. The sanctuaries are politically controversial – there is a disagreement between the pro-whaling and anti-whaling nations about the principles on which they are based. Anti-whaling nations view the sanctuaries as a limited tool to allow

51 ICRW, above n 43, Schedule, para 7.1.
52 ICRW, above n 43, Schedule, para 7.2.
for the recovery of the whale stocks, whereas pro-whaling states regard the sanctuaries as semi-permanent reserves. Perhaps more significant is the fact that compliance with the sanctuaries is less than optimal. Anti-whaling commentators argue that Japan operates small-scale commercial whaling, despite the existence of the sanctuaries, under the guise of scientific whaling.

Despite the disagreements, it is arguable that the IWC sanctuaries have been reasonably successful examples of high seas MPAs. The success of the sanctuaries has depended on several important factors that may be unique to the IWC. First, the IWC is an organisation that contains most, if not all, the states conducting the activities being regulated, so there is no question of states undermining the regime from without. Second, the IWC has a considerable level of compliance pull due to the length of its existence and the political capital that has been invested in its deliberations over the years. Third, the establishment of the sanctuaries reflected the political consensus that a cessation of whaling activities was necessary – at least for a time.

The IWC sanctuaries do not reflect the situation in other areas affecting the law of the sea. Current fisheries arrangements fail to reflect these three factors. There is an ongoing difficulty caused by fishing operators flagged to states not party to RFMOs. Even among states party to RFMOs there is rarely agreement about the extent of the problem and the level of compliance by the states. The Authority, on the other hand, does at least tend to provide a single institution governing the seabed, but the level of political recognition of the environmental problems may be harder to obtain. If the IWC sanctuaries are to provide guidance for the creation of high seas MPAs, the best lesson is the fundamental importance of a strong, inclusive regulatory organisation.
B Mediterranean Marine Mammals Sanctuary

The Mediterranean Marine Mammals Sanctuary was established as a Specially Protected Area of Mediterranean Interest in 1999. The Sanctuary applies to the territorial waters of France, Italy and Monaco as well as adjacent high seas. The parties agree to prohibit the taking of marine mammals, regulate activities that might adversely impact on the mammals and undertake research. In the parts of the Sanctuary outside state jurisdiction, each party is responsible for the enforcement of agreed measures, "with respect to ships flying its flag as well as, within the limits provided for by the rules of international law, with respect to ships flying the flag of third States."  

The Agreement appears to provide a mandate for the states parties to enforce the Sanctuary against third party states. However, as Scovazzi has pointed out, there are at least two reservations to this interpretation. First, the critical words "within the limits provided for by the rules of international law" tend to greatly restrict the measures that could be taken by the parties. It would be contrary to international law, for example, for a state party to arrest or use force against a vessel flagged to a third party. Second, the states party to the Agreement have not claimed EEZ in the Mediterranean, and the areas of the high seas covered by the Agreement would come within these zones if they were claimed. This fact may provide additional authority.


56 Agreement Concerning the Creation of a Marine Mammal Sanctuary in the Mediterranean, above n 55, art 3.

57 Agreement Concerning the Creation of a Marine Mammal Sanctuary in the Mediterranean, above n 55, art 14.

for the states parties to enforce the Sanctuary’s rules against a third party. Therefore, the strength of potential enforcement action by states on the high seas in the Mediterranean may be unique.

VI TOWARDS HIGH SEAS MARINE PROTECTED AREAS

A Finding the Institutional Capacity to Establish High Seas MPAs

If high seas MPAs are to become a reality, the question is what appropriate institutional mechanism should be used for their creation. Although current political activity is focusing on the CBD and the United Nations General Assembly (UN General Assembly), the most likely venue for creating high seas MPAs remains RFMOs.

1 The UN General Assembly

Environmental NGOs are currently leading a campaign to have the UN General Assembly declare a moratorium on deep sea trawling. Although this is not strictly a campaign to establish MPAs, the effect of such a declaration can be compared to some multiple use MPAs in existence around the world. The intention is to prohibit a method of fishing with destructive consequences for the environment.

The campaign is reminiscent of the effort to prohibit fishing with long driftnets that was also conducted in the UN General Assembly in the 1980s and 1990s. A series of UN General Assembly resolutions called for the elimination of long driftnets at the same time that the Wellington Convention prohibited the use of driftnets in the Pacific. The non-binding resolutions led to the creation of a number of binding instruments that banned the use of long driftnets, including in the high seas. In addition, it is arguable that the use of extremely long driftnets is now contrary to customary international law.

59 Scovazzi, above n 58.


While the campaign in the UN General Assembly is likely to create political awareness of the issues created by destructive fishing practices such as deep sea trawling, the UN General Assembly alone is not capable of resolving the problems. First, obtaining consensus within the General Assembly can be time consuming, as the slow progress on driftnets can demonstrate. Second, it is an inappropriate forum for creating a regulatory regime capable of identifying and enforcing a high seas MPA. High seas MPAs can address a number of concerns, including destructive fishing practices, and UN General Assembly Resolutions are a blunt instrument for the sorts of arrangements required. However, the more international agencies call for the establishment of high seas MPAs or the elimination of particular activities, the more likely it is that concurrent efforts to create regulatory mechanisms will be successful.

In addition to the UN General Assembly, there are a number of inter-governmental organisations that are likely to play a role in facilitating discussions about high seas MPAs. The FAO and the United Nations Environment Programme are two organisations that have a continuing interest in fisheries activities and the marine environment. These organisations have the potential to facilitate discussions on the appropriate institutional frameworks for high seas MPAs.

2 Existing institutions

There are three potential avenues for creating high seas MPAs in existing international institutions. These include the Authority, the IMO and RFMOs. The latter would take a regional approach to creating MPAs, whereas the Authority and the IMO would have the benefit of taking a global approach.

One of the difficulties already mentioned is the reality that most existing institutions with the capacity for oceans governance address only an aspect of the likely activities that affect MPAs. The IMO deals with pollution and navigation issues, the Authority with extractive activities on the seabed and RFMOs with fishing activities.
Somewhat overlooked has been the possibility that high seas MPAs might be created by a range of these institutions. Certainly, for certain types of MPAs the Authority might be the most appropriate body to undertake regulation. For example, the risks to hydrothermal vents are primarily from extractive activities, and so it may be appropriate for the Authority to take the lead in making decisions about MPAs designed to protect the biodiversity.

RFMOs are probably the strongest possibility for establishing MPAs. They have a recognised status under UNCLOS and the UNFSA and significant conservation obligations attach to the operation of these bodies, even if states are not always successful in achieving conservation and management objectives. For example, Article 5 of the UNFSA obliges states to take into account the need to preserve biodiversity. It may be possible for a supportive group of states within an RFMO to push for the establishment of a high seas MPA to protect a seamount or spawning ground.

If successful, the RFMO may be able to rely on the UNFSA to legally exclude non-participants from the MPA. Provided a state has ratified the UNFSA, it is obliged to observe the conservation and management measures established by a RFMO or refrain from fishing the stocks the RFMO governs.62 This obligation applies whether or not the state is a member of the RFMO.

Although the UNFSA authorises the boarding and inspection of vessels suspected of undermining RFMO measures, there are at least two difficulties in relying on this Agreement. First, there is some doubt that the UNFSA could apply to fish species that are neither straddling nor highly migratory species, as would be the case in many of the areas identified as potential high seas MPAs.63 This may not be the case, however, if the MPA was established by an RFMO which

62 UNFSA, above n 23, art 8.
had incorporated the provisions of the UNFSA into its operative principles. The second difficulty is that a number of distant water fishing states and flag of convenience states have not yet signed or ratified the Agreement, meaning that its provisions could not be used to ensure compliance. This latter problem reflects the difficulties underlying any attempt to reach a quick, binding agreement establishing high seas MPAs.

3 New institution

In light of the considerable difficulties with using existing international organisations to establish successful high seas MPAs, there is a clear case for establishing new institutions that are designed to operate across the range of high seas jurisdictions. An institution could be set up as a regional cooperative arrangement retaining some features of RFMOs, but with a broader mandate. The institution would have to establish cooperative links with the IMO, the Authority and any relevant RFMOs. It would have decision-making powers to establish, manage, monitor and enforce MPAs by means consistent with international law.

The two main disadvantages of relying on a new institution are time and participation. First, the development of international law and institutions tends to be a slow moving activity. It may take years to establish a regime, and yet conservationists argue that the pace of technology means that an increasing number of vulnerable sites in the ocean are open to exploitation. It may in fact be more efficient to focus efforts on existing institutions. Second, there is a good chance that a regime established primarily to create MPAs may not receive the necessary cooperation from a wide range of states. Distant water fishing nations, for example, will not necessarily have any incentive to participate in the regime if it is solely based on prohibitions on activities. In RFMOs, these states at least have the incentives of allocation of catch to encourage cooperation with the institution. If states do participate in the institution, it may result in difficulties in establishing strong principles for the creation of the MPA.
There is insufficient space to address all the institutional options in detail. However, states should consider whether the organisation chosen addresses the fundamental concern regarding compliance with the MPA.

B Options for Achieving Compliance

When considering the establishment of a high seas MPA, it is vital to pay attention to enforcement mechanisms to ensure that states have some assurance that the MPA will not be a "paper park". As already mentioned, the level of compliance will have an impact on the success of the initiative.

Lessons about enforcement and compliance can be drawn from the efforts to achieve compliance with international fisheries law. It is possible that MPAs could be established under the aegis of RFMOs, and the compliance regime is therefore likely to be similar to those in place for general fisheries measures. Although the enforcement of MPAs and fisheries measures are not completely analogous – partly because the goals are slightly different – there is a significant overlap in the problems facing both situations.

1 Enforcement ... or compliance?

Much of the discussion about compliance in oceans issues, particularly fisheries matters, is dominated by a coercive, enforcement-focused paradigm, meaning there is an increasingly urgent search for coercive measures to compel states to comply with international rules, even those they have not signed up to. There is considerable merit in such an approach, especially in light of the devastation that IUU fishing has on global fish stocks. Therefore, states are seeking to use measures such as trade sanctions and port state powers to exercise control over non-compliant parties to regimes as well as non-party states.64 These measures are an attempt to

64 See, for example, Jean-Pierre Plé "Responding to Non-Member Fishing in the Atlantic: The ICCAT and NAFO Experiences" in Scheiber, above n 33, 197; Richard Herr "The International Regulation of Patagonian Toothfish: CCAMLR and High Seas Fisheries Management" in Olav Schram Stokke (ed) Governing
overcome the manifest weaknesses of a consent-based international legal system, which can lead to poor management of the global environment.

One must be cautious about wholeheartedly endorsing the enforcement approach. Some international lawyers and international relations theorists argue that coercive measures are less effective at ensuring compliance with environmental rules than an approach focusing on the structure of the legal rules. The "managerial" or "compliance" approach argues that one must examine why states are not complying with a regime and encourage compliance rather than coercing it. This approach would thus advocate such measures as providing assistance to developing countries for capacity building, the clarification of state obligations through dispute resolution or eliminating ambiguous language or non-compliance mechanisms such as those used in the ozone regime. Under the managerial approach, the focus is on engaging the cooperation of as wide a group of states as possible, even if this means that the initial obligations are less than concrete.

The reasons explaining why states have been unable to curb IUU fishing are complex and many, and neither of these paradigms is able to fully explain all behaviour by states and vessels. More attention should be given to the managerial or compliance approach in strengthening international fisheries regimes. A combination of these approaches may help to move towards full participation in any regime that may be established to further the goal of high seas MPAs.


65 Chayes and Handler Chayes, above n 32. Also, Chayes, Handler Chayes and Mitchell, above n 32, 39-63.

66 Chayes, Handler Chayes and Mitchell, above n 32, 39-63.
2 Enforcement paradigm

The first question is what sort of regime would allow the greatest rate of participation and compliance. Under an enforcement paradigm, proponents of high seas MPAs would seek to implement binding measures on the greatest number of states possible. Therefore, MPAs would need to be established by institutions with the authority to enforce measures, such as RFMOs or, perhaps, the Authority.\(^{67}\)

A second factor would focus on any decision-making process. Adopting an enforcement paradigm would tend to suggest that consensus based decision-making is inappropriate. Decision-making structures such as those contained in the recent Western and Central Pacific Fishery Convention,\(^ {68}\) where decisions are voted on in chambers of interested states, could be one potential model.

Thirdly, an increasingly common method of discouraging non-member states is to apply trade sanctions against those states that are perceived to be undermining an RFMO's measures. For example, in 1996 and following years, the International Commission for the Conservation of Atlantic Tunas (ICCAT) recommended import restrictions be imposed against selected flag of convenience states that were not members of ICCAT.\(^ {69}\) There are numerous doubts about the legality of such measures in light of the General Agreement on Tariffs and Trade and its associated texts. However, the relationship between the World Trade Organization and multilateral environmental agreements (including RFMOs) is yet to be clarified. It is possible that trade related measures against non-compliant states – or even

\(^{67}\) Kaye, above n 27, 221-226.

\(^{68}\) Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, above n 44.

individual vessels – may prove a valuable tool in the search for an answer to non-member state fishing.

It is possible to list a range of other measures designed to coerce compliance such as catch documentation schemes and port state controls against non-compliant vessels. The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA) has identified a number of steps that individual states can take to discourage IUU fishing. At an international level, these include ratifying and implementing international instruments aimed at reducing IUU fishing, strengthening RFMOs and taking steps consistent with international law to deter activities of non-cooperating states to a relevant RFMO which engage in IUU fishing. At a domestic level, states are encouraged to take a range of actions including enacting controlling legislation, developing national plans of action to deter IUU fishing and exercising effective flag state jurisdiction.

3 Compliance and managerial paradigm

Under a compliance paradigm, states seeking agreement on high seas MPAs would attempt to reach agreement at a relatively low normative level in order to ensure as wide a participation by states as possible. Through dialogue and negotiation, states would then seek to ratchet up the obligations, perhaps relying on increasing scientific and social understanding of the problem at hand. Such an approach may be consistent with the current efforts to promote debate in the UN General Assembly on high seas MPAs.

Once a regime has been developed, compliance theorists would suggest a range of factors to encourage compliance with the regulations. The starting point is the assumption that states that have signed up to a regulatory regime intend to comply with it. Rather than looking for sanctions to apply in instances of non-compliance, it is

vital to understand why a state is not complying. The non-compliance may be due to a lack of capacity within a state to undertake stock assessment or effective monitoring of its vessels rather than wilful non-compliance. For example, it would be important to ensure transparency within the regime – this has the effect of reassuring other participants that there are no free riders.

Unfortunately, in the fisheries context, it is too often all too obvious that there are non-compliant states that wilfully disobey. Despite this, the compliance approach has an important contribution to make to the discussion. In focusing on the enforcement approach, states run the risk of sanctioning nations that may want to comply but lack the capacity to do so. There are few gains to be made in sanctioning such states. For example, the IPOA places a number of requirements on states to exercise flag state jurisdiction through establishing registers of vessels, assuming comprehensive monitoring and enforcement activities, undertaking research and gathering and exchanging data. In total, these measures are potentially onerous on developing countries, even those where fishing is a major industry. The IPOA recognises that some states may need assistance. It calls for the establishment of a special fund to assist in making available technical capacity and resources;\textsuperscript{71} and states are called upon to cooperate to support training and capacity building and consider providing financial and other assistance to developing countries. However, these paragraphs are tentative in nature and lack specific direction. Some states have undertaken bilateral development assistance, but this is uncoordinated and inconsistently applied.

If states are committed to establishing high seas MPAs, the provision of technical and financial assistance to developing states to help them enhance compliance mechanisms under domestic law may be a more effective method of dealing with compliance than taking a strict enforcement approach. This approach may also have the benefit of encouraging recalcitrant states to become involved in any

\textsuperscript{71} IPOA-IUU, above n 70, para 33.
international regime set up to regulate the MPA rather than remaining outside in order to exploit the MPA.

VII CONCLUSION

Although proponents of high seas MPAs have not focused on compliance, it is one of the factors that will determine the ultimate success of any attempts to establish an MPA outside areas of national jurisdiction. The international legal regime governing the law of the sea is a significant impediment to achieving full compliance – states that choose not to enter into an agreement establishing a high seas MPA are entitled to continue to exploit the area without interference from other states.

Any institutional arrangements established to create high seas MPAs face significant legal and political hurdles. The limited examples of restrictions on activities on the high seas are heavily dependent on their particular facts and are not easily transferable to the new challenges prompting calls for high seas MPAs. The international community faces a need for political and legal ingenuity to implement the proposals. Fundamentally, however, ensuring compliance is the key to success. It is only when states address the question of how high seas MPAs will be implemented and enforced that the promise will become the reality.

The compliance issues resemble those caused by IUU fishing that face all RFMOs around the world. These RFMOs have tended to seek coercive, binding rules that potentially impose sanctions on non-compliant states. While this tactic may be necessary in many cases, it is worth considering an approach that focuses on addressing the sources of non-compliance in order to encourage states to cooperate with the international conservation measures. This would require the political commitment of established fishing nations because measures likely to be useful would include the transfer of financial and technical assistance to states that are struggling to achieve effective control of their domestic fishing fleet. There is a basis for providing such assistance in the existing legal documents and state practice, but it has not been prioritised as a method for dealing with compliance issues.
The legal and political obstacles to the establishment of high seas MPAs are real and significant. Although it is too early to say whether these difficulties mean that high seas MPAs are an unfulfilled promise or an impossible premise, the growing consensus surrounding the crisis facing the world's oceans may result in a genuine effort to overcome these obstacles.