

Note

Expensive Freedom: Establishing Marine Protected Areas on the Open Ocean Requires an End to the Freedom of the Seas

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The oceans cover 72% of the Earth's surface, provide 3 billion people with at least 15% of their animal protein, and absorb about 30% of global CO₂ emissions.¹ Marine fisheries in particular are a massive global industry, providing livelihoods for about 540 million people.² Water is so essential to the planet that “no water, no life.”³ Protecting the biodiversity of the oceans is critical to preserving this vital source of food and jobs.⁴ The complex food webs in the open ocean means that attempts to protect single species are unlikely to be effective.⁵ Yet the high seas are currently beyond any one State's national jurisdiction, complicating regulatory efforts. Despite the importance of maintaining biodiversity in the oceans, existing international law has failed to effectively protect our oceanic resources.

This Note will argue that the custom of international law recognizing the freedom of the seas, specifically the freedom to fish without interference, is the fundamental reason for such inaction on biodiversity protection. To effectively protect and

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1. United Nations Conference on Sustainable Development, Rio de Janeiro, Braz., June 20–22, *Rio 2012 Issues Briefs No. 4*, ¶ 3, available at http://www.uncsd2012.org/content/documents/216Issues%20Brief%20No%204%20Oceans_Rio20_FINAL.pdf.

2. *Id.*

3. Sylvia Earle, *Sylvia Earle's TED Prize Wish to Protect Our Oceans*, TED TALKS, (Posted Feb. 2009), http://www.ted.com/talks/sylvia_earle_s_ted_prize_wish_to_protect_our_oceans.html.

4. *See id.*

5. Ashley Lillian Erickson, *Out of Stock: Strengthening International Fishery Regulations to Achieve a Healthier Ocean*, 34 N.C. J. INT'L & COM. REG. 281, 283–84 (Fall 2008).

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restore all marine animal populations, the international community must pass a new implementation agreement to establish ecosystem-based management on the high seas. Part I outlines the relevant agreements on high seas conservation and governance, as well as the history of Marine Protected Areas (MPAs) as an effective ecosystem-based conservation program. Part II will analyze the current problems under the governance structures in place and argue for a new paradigm for the oceans favoring sustainable exploitation of their resources over States' sovereign rights. This note will conclude that until States are willing to accept an end to their traditional rights in the high seas, the current overexploitation⁶ of the oceans' resources will continue to the detriment of all.

I. BACKGROUND

There is no shortage of agreements and treaties regulating the world's oceans.⁷ Yet despite these efforts, environmental conservation efforts on the high seas have fallen short.⁸ Biodiversity is "the variability among living organisms—animals, plants, their habitats and their genes—from all sources including terrestrial, marine and other aquatic ecosystems, and the ecological complexes of which they are a part."⁹ The variability among marine organisms has crashed as human exploitation of the high seas occurs with little oversight.¹⁰ This section will examine the three main agreements that guide biodiversity protection in areas beyond national jurisdiction that provide context for prior efforts to promote and regulate biodiversity. It will also outline the merits of ecosystem based preservation as a conservation best practice.

6. U.N. Environment Programme, Certification of Sustainable Fisheries, XV (2009), available at <http://www.unep.ch/etb/publications/FS%20certification%20study%202009/UNEP%20Certification.pdf> [hereinafter Fishery Certification] (finding that 80% of the world's fish stocks are classified as "fully exploited, over-exploited, or depleted).

7. Regulations range from controlling pollution to catch quotas on tuna. See e.g., Internal Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978, (Oct. 15, 2004), available at http://www.amsa.gov.au/marine_environment_protection/revision_of_annexes_i_and_ii_of_marpol/index.asp; International Commission for the Conservation of Atlantic Tunas, (2007), available at <http://www.iccat.int/Documents/Commission/BasicTexts.pdf>.

8. Fishery Certification, *supra* note 6.

9. *Biodiversity Glossary*, INT'L UNION FOR CONSERVATION OF NATURE, http://www.iucn.org/iyb/about/bio_glossary/ (last updated May 12, 2010).

10. *Id.*

A. HISTORY OF FREEDOM OF THE SEAS

The bedrock of all high seas law is the principle of the freedom of the seas.¹¹ This principle states that the high seas are open to all nations equally, and that no one State has jurisdiction over another on the open ocean.¹² Freedom of the seas is an ancient custom, dating back to early Greek and Roman mariners.¹³ The premise for the freedom of the seas was that the ocean is unlimited in both size and resources, and therefore does not require rationing. A famous early proponent of the freedom of the high seas, Hugo Grotius, argued that freedom of navigation and trade were natural law in his 1609 paper *Mare Liberum*.¹⁴

Although challenged at the time, freedom of the seas became a custom of international law by the eighteenth century.¹⁵ The custom is, however, not without limitation. The British navy historically asserted their ability to stop and search ships to search for pirates, deserters, or contraband as a tool in affirming Britain's primacy of the ocean.¹⁶ Universal jurisdiction over the crime of piracy, including the right of any nation to board and capture pirates, was a longstanding custom codified in both the 1958 Geneva Conventions and later in 1994 when the UN Convention on the Law of the Sea (UNCLOS) came into force.¹⁷ The custom of international law on the freedom of the seas has therefore always recognized some

11. See United Nations Convention on the Law of the Sea arts. 55–57, Dec. 10, 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter UNCLOS] (codifying six freedoms of the sea into the constitution of the ocean); Christopher C. Joyner, *Compliance and Enforcement in New International Fisheries Law*, 12 TEMP. INT'L & COMP. L.J. 271, 278 (Fall 1998) (explaining that the right of people from all states to fish on the high seas has long been recognized in international law).

12. UNCLOS, *supra* note 11, art. 87.

13. Efthymios Papastavridis, *The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited*, 24 LEIDEN J. INT'L LAW 45, 48 (2011).

14. *Id.* at 50 (arguing as counsel to the Dutch East India Company against Portuguese claims of monopoly over the shipping lanes to the East Indies).

15. *Id.* at 51–52 (explaining that England consistently challenged freedom of the seas until both its maritime power was sufficiently established and colonialism and mercantilism became driving forces in global politics).

16. *Id.*

17. ROBIN WARNER, PROTECTING THE OCEAN BEYOND NATIONAL JURISDICTION 28 (2009).

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limitations on a State's right to navigate freely.

These limitations only occur, however, when there is broad international consensus on the need to do so, for example with the need to fight piracy.¹⁸ Freedoms other than that of navigation, such as the freedom to fish, remain in practice largely unlimited.¹⁹ The freedom to fish is premised on the idea of the ocean as an unlimited resource, endless in its bounty and incapable of exhaustion.²⁰ This may have been true as the custom formed, when fishing fleets were wooden sailing ships and technology limited how much fishermen could catch. Yet this is no longer the case.²¹ The largest fishing ships today, super trawlers, can catch over 250 tons of fish a day, hold a total of 6,200 tons, and catch over 18,000 tons of fish in a season.²² Yet "despite modern trawlers being 50 times more effective than their sailing equivalents in the 19th century, they only catch a third more fish."²³ As fish populations crash, fishermen have to work harder to catch the few left. It is clear that the ocean no longer holds an inexhaustible supply of food and resources. The premise underlying the freedom to fish is no longer accurate, but the right still remains in place.

18. Rebecca Fantauzzi, *Rascals, Scoundrels, Villains, and Knaves: The Evolution of the Law of Piracy from Ancient times to the Present*, 39 INT'L. J. LEGAL INFO. 346, 358 (2011) (outlining the history of piracy as historically "especially harmful to the world at a time when intercourse between states occurred primarily by the way of the high seas" and the international consensus that "pirates were considered outlaws") (quoting Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 794-95 (1988)).

19. *Freedom for the Seas: Now and for the Future*, GREENPEACE, 1, 3 (Mar. 2008), <http://www.greenpeace.org/international/Global/international/planet-2/report/2008/4/freedom-for-the-seas-now-and.pdf> ("[The high seas] are currently open to fishing by anyone interested in doing so, with only minimal flag state controls.").

20. Wilfried Prewé, *Ocean Fishing: Economic Efficiency and the Law of the Sea*, 15 Tex. Int'l L. J. 261, 261-62 (1980).

21. *Id.* at 264.

22. *Super Trawler Fact Sheet*, GREENPEACE, http://www.et.org.au/system/files/userfiles/Super%20Trawler%20fact%20Sheet_July%202012_0.pdf.

23. Richard Alleyne, *Fisherman Have to Work 17 Times Harder to Catch Fish than They Did in the 19th Century*, THE TELEGRAPH (May 4, 2010), <http://www.telegraph.co.uk/earth/7677320/Fisherman-have-to-work-17-times-harder-to-catch-fish-than-they-did-in-the-19th-century.html>.

B. MAJOR AGREEMENTS GOVERNING BIODIVERSITY CONSERVATION ON THE HIGH SEAS

There are three major treaties that provide the framework for governance on the high seas. The first, and most important, is the UN Convention on the Law of the Seas (UNCLOS), an overarching “constitution of the ocean” that covers many areas of ocean regulation, including the freedoms of navigation and fishing.²⁴ The second is Chapter 17 of Agenda 21, the working paper that came out of the 1992 Earth Summit in Rio de Janeiro. The third is the Convention on Biodiversity (CBD), a global agreement stemming from various UN working groups that came into force a year after the Rio Earth Summit.²⁵ Together, these three international agreements set the guidelines and basic structural framework for environmental protection on the high seas.

1. UNCLOS

UNCLOS sets up a basic structure of geographic fragmentation.²⁶ UNCLOS splits the oceans into areas that are under a coastal State’s national jurisdiction, and areas that are beyond national jurisdiction. A coastal state has the right to claim a 200-mile Exclusive Economic Zone (EEZ), in which it has the right of regulation in most matters, including fishing and navigation.²⁷ These rights of regulation were the driving force behind the nationalization of such a large amount of the oceans; coastal States were frustrated that nearby fishing stocks were being overexploited by foreign fishing fleets.²⁸ The previous limit of national jurisdiction had been only three miles; the EEZ vastly increased the amount of water under national control.²⁹ Beyond the new 200-mile EEZ are the high seas, which UNCLOS defines as “all parts of the sea that are

24. *Constitution for the Oceans*, INT’L FOUND. FOR THE L. OF THE SEAS, <http://www.iflos.org/en/background/the-constitution.aspx> (last visited Mar. 3, 2013).

25. *History of the Convention*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/history/> (last visited Mar. 3, 2013).

26. Warner, *supra* note 17, at 27.

27. UNCLOS, *supra* note 11, arts. 55–57.

28. Olav Schram Stokke, *Governance of High Seas Fisheries: The Role of Regime Linkage*, in *ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY* 157 (Davor Vidas & Willy Ostreng eds., 1999); Joyner, *supra* note 11, at 271.

29. *Law of the Sea: History of the Maritime Zones Under International Law*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., http://www.nauticalcharts.noaa.gov/staff/law_of_sea.html.

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not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State.”³⁰

Part VII of UNCLOS specifically addresses the high seas. Under Article 87, the “high seas are open to all States”.³¹ Each State has the freedom of navigation, overflight, to lay submarine cables and pipelines, construct artificial islands, fish, and conduct scientific research.³² The only form of jurisdiction on the high seas is flag state jurisdiction, where the State that registers a ship enforces its own laws and regulations on that ship.³³ States have general obligations to prevent harm to the environment, to control harmful changes to the environment due to the use of technologies, as well as to operate under a definition of marine pollution that includes harm to marine life.³⁴ These obligations are not, however, given a formal structure for implementation.

The freedom to fish is subject to Section 2 of Part VII. This brief section recognizes the need for sustainable use of the living resources of the high seas. Article 117 states that all “States have the duty to take . . . such measures . . . as may be necessary for the conservation of the living resources of the high seas.”³⁵ Article 118 encourages States to cooperate to conserve the living resources of the high seas by establishing “subregional or regional fisheries organizations to this end.”³⁶ Article 119 stipulates that States shall “maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield,” and provides for the sharing of scientific information between the relevant international organizations.³⁷ These three articles are the only environmental obligations that apply to the high seas. They are qualified by the language “may be necessary.” The UNCLOS structure is therefore one that contains hard rights of access to ocean resources for all States, but with optional limitations on those rights to ensure sustainable exploitation of those ocean resources.

Part XII does specifically address environmental

30. UNCLOS, *supra* note 11, art. 86.

31. *Id.* art 87.

32. *Id.*

33. *Id.* art. 92–94; Warner, *supra* note 17, at 35.

34. UNCLOS, *supra* note 11, arts. 204–06.

35. *Id.* art. 117.

36. *Id.* art. 118.

37. *Id.* art. 119.

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preservation of the marine environment. Article 192 provides that “States have the obligation to protect and preserve the marine environment,” while Article 194(5) adds that States shall take actions that “include those necessary to protect and preserve rare or fragile ecosystems.”³⁸ However, these articles address action that States can take within *their own jurisdiction*. They do not address how to protect marine resources in areas beyond national jurisdiction.

Under UNCLOS, the high seas belong to everyone as a “global commons.” In the debates leading up to ratification two points of view emerged: should the ocean belong to everyone or should it belong to no one?³⁹ This was not merely an academic question. If the open ocean was established as a common ground, belonging to everyone, then governance would depend on mutual cooperation. However, if it was a negative space, belonging to no one, then an international body could claim jurisdiction.

The decision in UNCLOS to create a global commons was grounded in States’ protection of their own sovereignty, particularly those States that have high seas fishing fleets.⁴⁰ Under this model, every State preserves a sovereign right to fish the high seas.⁴¹ Indeed, distant water fishing nations, such as the European Union, China, Japan, South Korea, Thailand, the Ukraine, and Poland, strategically defended the principle of the freedom of the high seas to counter “creeping jurisdiction” by the coastal states’ EEZs and gain greater access to high seas fisheries.⁴² This has created what one commentator has called “governance without government.”⁴³ As commercial fishing has migrated out of the 200 miles of the EEZ into the high seas following ratification of UNCLOS, this lack of government has grown as a problem.⁴⁴ “Because communities of fisheries take

38. *Id.* arts. 192, 194.

39. ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* 28 (1993).

40. See Rosemary Rayfuse & Robin Warner, *Securing a Sustainable Future for the Oceans Beyond National Jurisdiction: The Legal Basis for an Integrated Cross-Sectoral Regime for High Seas Governance for the 21st Century*, 23 *INT’L J. MARINE & COASTAL L.* 399, 409 (2008) (stating this discussion took place primarily in the context of the deep seabed).

41. Patricia Birnie, *Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principles?: Part I*, 12 *INT’L J. MARINE & COASTAL L.* 307, 315 (1997).

42. Joyner, *supra* note 11, at 273.

43. Stokke, *supra* note 28, at 157.

44. Stokke, *supra* note 28, at 158; Joyner, *supra* note 11, at 271 (stating

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the freedom of the high seas too literally and think the ocean's resources are inexhaustible, 'species after species of fish and whales [are brought] closer to extinction.'"⁴⁵

The problem of the high seas is therefore one of the "tragedy of the commons."⁴⁶ This concept was introduced by Garrett Hardin in 1968 to describe the consequences of granting open access to a resource. He describes a pasture open to all, used by several herdsmen to graze their cattle. As each herdsman seeks to maximize his own personal gain by adding cattle to his herd, the pasture is overgrazed and all the herdsmen suffer the loss. "Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited."⁴⁷ The high seas are susceptible to the same tragedy. Each fishing nation seeks to allow their fleets more fish, eventually leading to the destruction of the fish stocks. "[T]he freedom of open access leads inexorably to the tragedy of the commons."⁴⁸

UNCLOS also codified the traditional piracy limitation on freedom of the seas. The right of intervention aims to "criminalize and suppress practices on the high seas, which have as a consequence . . . the abuse of the wealth of the oceans."⁴⁹ It is encapsulated in Article 105, allowing any State to seize a pirate ship or aircraft, and Article 108, allowing States to suppress illegal drug trafficking. Thus, codified within UNCLOS are limitations on the freedom on the seas, if there is an "endangerment of the freedoms themselves."⁵⁰ In other words, as piracy constitutes a threat to the freedom of navigation by lawful ships, it is preferable to seize a pirate ship as necessary to protect that freedom generally.

that the drastic decline in traditional fisheries caused fishers to go elsewhere, resulting in worldwide fish populations crashing).

45. Erickson, *supra* note 4, at 289 (quoting Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1245 (1968)).

46. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (stating that property held in common for the use of all will be destroyed); Robert Stewart, *Tragedy of the Commons*, OCEANOGRAPHY IN THE 21ST CENTURY – AN ONLINE TEXTBOOK, <http://oceanworld.tamu.edu/resources/oceanography-book/tragedyofthecommons.htm> (last updated Jan. 15, 2013).

47. *Id.*

48. Rayfuse, *supra* note 40, at 407–08.

49. Papastavridis, *supra* note 13, at 65 (discussing the right to visit the high sea and suggesting the current right to visit the high sea shows old arguments and falls under three categories).

50. *Id.*

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Overall UNCLOS provides the framework that States must work to preserve or restore marine biodiversity.⁵¹ The U.N. Food and Agriculture Organization (FAO) declared that UNCLOS provided the “principal legal framework for the development of the regime for high seas fishing.”⁵² UNCLOS has indeed proved to be the foundation for a variety of further actions on environmental preservation.⁵³ The success of its framework depends on continuing party cooperation to take responsibility for international fisheries.⁵⁴ To build on this framework, the 1992 Rio Earth Summit issued Agenda 21 as a more precise guide for future biodiversity protections.

2. Agenda 21

The U.N. Conference on Environment and Development, more commonly known as the Rio Earth Summit, was an international discussion on global environmental problems.⁵⁵ Rio Earth Summit produced *Agenda 21*, an overarching commitment to pursue sustainable development across a wide range of environments. *Agenda 21* is a non-binding declaration of goals and does not create binding obligations.⁵⁶ Chapter 17 addresses the oceans. The qualified environmental obligations from UNCLOS were expanded to explicitly provide support for a precautionary approach in areas under State jurisdiction.⁵⁷ This approach mandates that where “there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁵⁸ The

51. See Joyner, *supra* note 11, at 279–80 (stating that UNCLOS is the framework agreement for fisheries law and fisheries law is the framework for creating conservation norms).

52. Birnie, *supra* note 41, at 317, n. 41.

53. Lee A. Kimball, *The Biodiversity Convention: How to Make it Work*, 28 VAND. J. TRANSNAT'L L. 763, 770–71 (1995) (stating that the agreement on Straddling Stocks and Highly Migratory Stocks serves “explicitly as an implementation agreement” for Law of the Sea obligations).

54. Joyner, *supra* note 11, at 279.

55. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, Annex II, Preamble, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), (Aug. 12, 1992) available at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/CONF.151/26/Rev.1%20> [hereinafter Rio Declaration].

56. Birnie, *supra* note 41, at 315.

57. Rio Declaration, *supra* note 55, at Annex II, Chapter 17, ¶ 17.21.

58. *Id.* at Annex I, Principle 15.

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Preamble to UNCLOS supports this approach. It recognized that “the problems of ocean space are closely interrelated and need to be considered as a whole.”⁵⁹ Therefore, Chapter 17 claimed the precautionary approach as a custom of international law. On the high seas specifically however, the final draft of *Agenda 21* did not call for the precautionary approach, though it did call again for State cooperation on managing high-sea fish stocks.⁶⁰ It also recognized that trade and environmental policies needed to work together and encouraged the UN General Assembly (UNGA) to regularly consider developments on marine issues.⁶¹

3. The Convention on Biodiversity

The Convention on Biodiversity (“CBD”) is largely an aspirational document, identifying objectives rather than establishing legal obligations.⁶² It often uses the language “as far as possible and as appropriate” to set the objectives for States.⁶³ The CBD is, however, largely understood as establishing a custom in international law for a precautionary approach to environmental conservation.⁶⁴ It also defines biological diversity as “the variability among living organisms from all sources including . . . marine and other aquatic ecosystems and the ecological complexes of which they are part.”⁶⁵ The CBD again called for Parties to cooperate directly or through international organizations for the “conservation and sustainable use of biological diversity.”⁶⁶ As evidence of evolving custom of international law, the CBD formalized the emphasis on biodiversity conservation as an aspirational goal for the international community.

To this end, the CBD provided a framework for continuing

59. UNCLOS, *supra* note 27, Preamble.

60. William T. Burke, *UNCED and the Oceans*, 17 MARINE POLICY 519, 523 (1993) (discussing proposals to address conflicts about high sea fisheries management).

61. Rio Declaration, *supra* note 55, at Annex II, Chapter 17, ¶¶ 17.118, 17.119.

62. Kimball, *supra* note 53, at 765.

63. *Id.*; Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993), available at <http://www.jstor.org/stable/pdfplus/20693713.pdf?acceptTC=truehttp://www.cb d.int/doc/legal/cbd-en.pdf> [hereinafter CBD].

64. See Birnie, *supra* note 41, at 311.

65. CBD, *supra* 63, art. 2.

66. *Id.* art. 5.

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review of international steps toward environmental protection. It created working groups that provide research and guidance on the best methods of conservation and attempt to keep track of State practices.⁶⁷ Conferences of the Parties can also adopt annexes to the CBD that expand implementation of conservation methods, though these decisions are not legally binding.⁶⁸ The Programme of Work on Protected Areas created under the CBD has outlined sixteen broad goals and ninety-two actions that can be taken in protected areas.⁶⁹ Therefore, the CBD is a useful forum for strategic planning. The groups and meetings authorized under CBD authority provide crucial guidance on how to proceed with best practices for conservation in various places, including on the high seas.

By providing a focus on the conservation of biodiversity in particular, the CBD was an important moment in international cooperation for sustainable development. The theme that emerged from UNCLOS, Chapter 17, and the CBD is support a precautionary approach for ocean preservation. On the high seas it is left to State cooperation to achieve this goal.

C. ECOSYSTEM-BASED MANAGEMENT IS RECOGNIZED AS A BEST PRACTICE

The type of conservation practice that ought to be pursued on the high seas is the Marine Protected Area (MPA). The most recent definition of a MPA was given by the International Union for the Conservation of Nature (IUCN): “a clearly defined geological space, recognized, dedicated and managed, through legal or other effective means, to achieve the long term conservation of nature with associated ecosystem services and cultural values.”⁷⁰

67. See Secretariat of the Convention on Biological Diversity, *Introduction*, CBD (Jan. 26, 2013, 5:33 PM), <http://www.cbd.int/convention/bodies/intro.shtml>.

68. Petra Drankier, *Marine Protected Areas in Areas Beyond National Jurisdiction*, 27 INT'L J. OF MARINE & COASTAL L. 291, 297 (2012) (discussing how marine protected areas are treated in various conventions).

69. Jamison Ervin & Sarat Gidda, *Resource Requirements for Aichi Targets 11-Protected Areas*, PROGRESS REPORT FOR THE HIGH LEVEL PANEL MEETING, 7 (Sept. 17, 2012), <http://www.cbd.int/doc/meetings/fin/hlpgar-sp-01/official/hlpgar-sp-01-08-en.pdf> [hereinafter *Aichi Target Requirements*].

70. IUCN, *Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas*, IUCN WCPA'S BEST PRACTICE PROTECTED AREA GUIDELINES SERIES, 9 (Sept. 25, 2012), https://cmsdata.iucn.org/downloads/iucn_categoriesamp_eng.pdf; see also *Aichi Target Requirements*, *supra* note 69, 4 (restating the CBD definition).

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Analogous to national parks on land, MPAs have been increasing in popularity in the past thirty years within EEZs. This is because a MPA protects an entire habitat, as opposed to a single species.⁷¹ Such protection conserves the complicated food webs that exist in the marine environment that are critical to maintaining the health of any given fish stock. In addition, MPAs protect against harmful fishing practices that result in a high level of bycatch⁷² in a way that single species protections cannot. Illegal, unreported and unregulated fishing (IUU) practices, such as long lining,⁷³ drift net use,⁷⁴ and bottom trawling,⁷⁵ are a serious threat to marine life because they result in a high level of bycatch.⁷⁶ In fact, IUU fishing has been recognized as one of the top threats facing the open oceans, and its incidence is increasing.⁷⁷ IUU methods can have a huge impact on ecosystem biodiversity, as they can kill anything that swims or flies into the fishing gear, not only the targeted species.⁷⁸ Therefore, single species regulations, such as quotas,

71. Enric Sala, *Glimpses of a Pristine Ocean*, TED TALKS (posted May 2010), http://www.ted.com/talks/enric_sala.html.

72. *What is Bycatch?*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. FISHERIES SERVICE (Jan 26, 2013, 9:07 PM), http://www.nmfs.noaa.gov/by_catch/bycatch_whatism.htm (defining bycatch as "discarded catch of any living marine resource plus retained incidental catch and unobserved mortality due to a direct encounter with fishing gear.").

73. *What is Longlining?*, SEA SHEPARD CONSERVATION SOCIETY, <http://www.seashepherd.org/sharks/longlining.html>, (explaining that a longline is a fishing line hooked and baited, buoyed with floats and usually between one mile and 62 miles long, and that sea birds, sea turtles and sharks are often bycatch).

74. *Driftnet Fisheries and Their Impact on Non-target Species: A Worldwide Review*, U.N. FOOD AND AGRIC. ORG., ¶ 3.2.1.4 (Jan 26, 2013, 9:15 PM), <http://www.fao.org/docrep/003/T0502E/T0502E04.htm#ch3.2> (stating that the low selectivity of drift nets leads to bycatch problems, which are particularly exacerbated on the high seas due to the lack of effective management regimes).

75. *Destructive Fishing*, MARINE CONSERVATION INST. (Jan 26, 2013, 9:16PM), <http://www.marine-conservation.org/what-we-do/program-areas/how-we-fish/destructive-fishing/> (describing bottom trawling as dragging a net across the sea floor which catches everything in its path and often destroys coral and sponges).

76. Erickson, *supra* note 5, at 291; see G.A. Res. 46/215, A/RES/46/215 (Dec. 20, 1991), available at <http://www.un.org/documents/ga/res/46/a46r215>, (banning drift nets that are 2.5 km or longer).

77. See *Fisheries Digest*, GREEN FACTS DIGEST, ¶ 7.3 (Jan 26, 2013, 9:20 PM), <http://www.greenfacts.org/en/fisheries/1-2/07-regulation.htm#2>, [hereinafter *Digest*] (explaining that IUU fishing is a serious threat to fisheries, marine habitats, and the food security of developing countries).

78. *Bycatch*, GREENPEACE INT'L (Jan 26, 2013, 10:00 PM),

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are not effective in preventing large amounts of non-target species death. By creating no-fishing zones, MPAs are a useful tool to cut down on IUU fishing in sensitive areas of the ocean. The MPAs' ability to protect an entire ecosystem is recognized as a "cornerstone of biodiversity conservation; they maintain key habitats, provide refuge, allow for species migration and movement, and ensure the maintenance of natural processes across the landscape."⁷⁹

Yet, despite MPAs' recognized effectiveness at protecting marine biodiversity,⁸⁰ there is no procedure in current international law for establishing MPAs in areas beyond national jurisdiction. Unlike in an EEZ, where the coastal state can create and enforce a MPA under its own jurisdiction, international law on the high seas does not promote such an ecosystem based management tool.

The idea of ecosystem based conservation is not a new one.⁸¹ As early as 1987, there was an international recognition that a different kind of environmental protection was needed to implement effective conservation.⁸² With the passage of the CBD, MPAs became an internationally approved tool of conservation. Article 8 requires the Contracting Parties to "establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity."⁸³ In 1995, a Conference of the Parties adopted the Jakarta Mandate on Marine and Coastal Biodiversity, stating in its later decision that the "ecosystem approach should be promoted at global, regional, national and local levels,"⁸⁴ and called for a global

<http://www.greenpeace.org/international/en/campaigns/oceans/bycatch/>, (noting that non-target species, such as seabirds, turtles, and sharks continue to be killed in large numbers by fishing practices such as nets, longlines, and bottom trawling).

79. *Protected Areas—an overview*, CBD (Jan 26, 2013 10:02 PM), <http://www.cbd.int/protected/overview/> (introducing the value of the protected areas, and CBD program of work on protected areas).

80. Sala, *supra* note 71 (showing that establishing no-take reserves have, on average, increased biomass 446%); Kristina Gjerde, *Ocean Views From Hyderabad*, IUCN, portals.iucn.org/blog/2012/10/16/ocean-views-from-hyderabad-2/ (noting that MPAs have been shown to restore resources and maintain ecosystems, including an example in East Indonesia where coral cover and fish catches increased dramatically in just one year).

81. Birnie, *supra* note 41, at 310.

82. *Id.*

83. CBD, *supra* note 63, art. 8(a).

84. Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Bratislava, Slovakia, May 4–15, 1998, Decision IV/5 (1998) Annex B(2), available at <http://www.cbd.int/decision/cop/?id=7128>

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network of MPAs by 2012.⁸⁵ The 2004 Conference of the Parties voted to establish an Ad Hoc Open-Ended Working Group on Protected Areas.⁸⁶ This group was specifically mandated to “explore options for cooperation for the establishment of marine protected areas in marine areas beyond limits of national jurisdiction.”⁸⁷ Two years ago, another Conference of the Parties in Aichi, Japan, agreed that 10% of the oceans should be covered by an ecologically representative and well-connected network of MPAs by 2020.⁸⁸ Explanations on the Aichi targets provide some basic criteria for identifying an area as a potential MPA, including: areas of particular importance for ecosystem services, ecologically representative areas, and areas of particular importance for biodiversity.⁸⁹ In October of 2012, the 11th Conference of the Parties met in Hyderabad, India and agreed to provide a list of marine areas classified as “ecologically or biologically significant” to the UNGA for consideration as future protected areas.⁹⁰ Thus far, the CBD structure has proved well-suited for developing the criteria used to select MPAs.⁹¹

The implementation process, however, has proved more difficult.⁹² As the Hyderabad agreement shows, UNGA plays a significant role in high seas regulation. For instance, in 2005, UNGA passed Resolution 59/24 establishing a Working Group, the “BBNJ,” to examine the “issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.”⁹³ The BBNJ “stressed the need for a global network of MPAs,” and proposed that UNGA take a leading role in determining the necessary criteria “for the

(citing U.N. Doc. UNEP/CBD/COP/4/Inf.9).

85. Drankier, *supra* note 68, at 298.

86. *Ad Hoc Open-Ended Working Group on Protected Areas*, CONVENTION ON BIO. DIVERSITY (Jan 26, 2013, 11:02 PM), <http://www.cbd.int/convention/wgpa.shtml>.

87. *Id.*

88. *Aichi Biodiversity Targets: Target 11*, CONVENTION ON BIO. DIVERSITY (Jan 26, 2013, 11:20 PM), <http://www.cbd.int/sp/targets/#GoalC>.

89. *See Aichi Target Requirements*, *supra* note 69, at 6, ¶ 3.1.

90. *Press Release, At United Nations Biodiversity Conference, Countries Agree to Double Resources for Biodiversity Protection by 2015*, UNITED NATIONS ENVIRONMENT PROGRAMME, (Oct. 20, 2012) *available at* <http://www.cbd.int/doc/press/2012/pr-2012-10-20-cop-11-en.pdf>.

91. Drankier, *supra* note 68, at 298.

92. *See id.*

93. G.A. Res. 59/24, ¶ 73, U.N. Doc. A/RES/59/24 (Feb. 4, 2005); *see also* Drankier, *supra* note 68, at 306.

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establishment of MPAs.”⁹⁴ Thus, the BBNJ and UNGA recognize the importance of MPAs in restoring and maintaining the health of the open oceans. That being said, UNGA has not yet taken steps to create an implementation scheme for high seas MPAs.

Despite these difficulties, it must be noted that there are several MPAs on the high seas already.⁹⁵ MPAs have been established by a variety of regional organizations and multilateral fishing bodies such as the North Atlantic Fisheries Organization and the Commission for the Conservation of Antarctic Marine Living Resources.⁹⁶ The U.N. itself has a Regional Seas Program,⁹⁷ though there are other independent regional bodies that address high seas fisheries.⁹⁸ The problem with entrusting regional organizations with a larger program of MPA creation is jurisdictional limitations; regional organizations only have authority over the ocean or species that is under their purview.⁹⁹ Under the current regime, each newly proposed MPA requires procurement of a sponsor organization that will decide where and how the MPA should operate, leaving all the details and management issues to be decided anew with each MPA proposal.¹⁰⁰ Further difficulties

94. Drankier, *supra* note 68, at 307.

95. See e.g., Giuseppe Notarbartolo de Sciarra et al., *The Pelagos Sanctuary for Mediterranean Marine Mammals*, LESSONS IN CONSERVATION, June 2009, at 90, 93, available at ncep.amnh.org/linc/linc_download.php?component_id=27, (outlining the difficulties in establishing a MPA in the Mediterranean); Inst. for Sustainable Dev. and Int'l Relations, *Current Legal Developments*, 27 INT'L J. MARINE & COASTAL L. 179, 180 (2012) [hereinafter *Current Legal Developments*] (naming several MPAs in the Southern Ocean and in the North East Atlantic).

96. See generally Joyner, *supra* note 11, at 281–82.

97. *United Nations Regional Seas Programme*, UNITED NATIONS ENVIRONMENT PROGRAMME, <http://www.unep.org/regionalseas/>.

98. See e.g., *About the Work of NEAFC*, NORTH EAST ATLANTIC FISHERIES COMMISSION, <http://www.neafc.org/about> (last visited Jan. 23, 2013) (explaining that the NEAFC is a regional fisheries organization); *About OSPAR*, OSPAR COMMISSION, http://www.ospar.org/content/content.asp?menu=00010100000000_000000_000000 (last visited Jan. 23, 2013) (“OSPAR is the mechanism by which fifteen Governments of the western coasts and catchments of Europe . . . cooperate to protect the marine environment of the North–East Atlantic.”).

99. See generally *Current Legal Developments*, *supra* note 95, at 181–82. Some areas, like the Sargasso Sea in the Atlantic Ocean, are not covered by any regional seas convention. *Id.* at 182.

100. See *id.* at 181 (“[T]he regulation of the various activities occurring in the MPAs will have to be decided in various different fora with each forum following its own procedures and requirements.”).

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arise when States that are not a part of the regional framework nevertheless assert a fishing interest in the area.¹⁰¹ Under UNCLOS, each State has a sovereign right to assert such an interest.¹⁰² Despite progress in accepting MPAs as a best practice, there is currently no recognized process for establishing MPAs in areas beyond national jurisdiction. Thus, international law continues to lag behind the environmental needs of the open ocean.

D. THE CURRENT SITUATION

In June 2012, twenty years after the 1992 Rio Earth Summit, the Rio+20 Conference took place.¹⁰³ The purpose of the Rio+20 Conference was to generate a renewed interest in environmental issues and develop concrete solutions to these issues; however, the Conference fell far short of these goals.¹⁰⁴ The failure of Rio+20 is one of many. Experts are divided on whether the global inability to move forward effectively on environmental goals is the result of an implementation gap or a governance gap.¹⁰⁵ An implementation gap assumes that the agreements currently in place are sufficient to achieve effective conservation on the high seas but have not been fully implemented. On the other hand, a governance gap assumes that the existing structure is inadequate and therefore a new agreement creating a new structure is necessary. There is a recognition that successful conservation efforts will need to work primarily within the existing frameworks of UNCLOS and the CBD.¹⁰⁶ This framework is predominately aspirational, focused on developing goals and ideals rather than legal obligations. The current framework has changed the “jurisdictional and conceptual nature in the law of the sea generally and particularly in relation to the conservation of

101. *Id.* (referring to such States as “free rider” States).

102. *See* UNCLOS, *supra* note 9, art. 193.

103. *See, e.g.*, RIO+20: UNITED NATIONS CONFERENCE ON SUSTAINABLE DEVELOPMENT, <http://www.uncsd2012.org/> (last visited Nov. 10, 2012).

104. Stewart M. Patrick, *The Internationalist, Governing and Protecting the World's Oceans: Still at Sea in Rio*, COUNCIL ON FOREIGN RELATIONS (June 22, 2012), <http://blogs.cfr.org/patrick/2012/06/22/governing-and-protecting-the-worlds-oceans-still-at-sea-in-rio/>.

105. *See Current Legal Developments, supra* note 95, at 180 (quoting Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-Ended Informal Working Group to the President of the UN General Assembly).

106. *See Current Legal Developments, supra* note 95, at 185.

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living resources.”¹⁰⁷ However, this conceptual change on conservation and the high seas has not yet allowed conservation principles to have meaningful authority over States.¹⁰⁸ At this point, all concerned parties agree that more must be done to preserve biodiversity in the high seas. MPAs have been acknowledged as a best practice; the challenge now is to decide how to create them.

II. ANALYSIS

A. PROBLEMS WITH THE CURRENT SYSTEM

In 2009 the United Nations Environment Programme (UNEP) determined that “[e]ighty percent of the world’s fish stocks are classified as being fully exploited, over-exploited, or depleted,” and a bleak “1 percent of stocks are estimated to be recovering from depletion.”¹⁰⁹ Economically speaking, falling fish populations mean the difference between potential and actual net economic benefits. This is the difference between what a sustainably managed fishery could earn and what fisheries are actually earning.¹¹⁰ The number of falling fish populations demonstrates that the UNCLOS structure, despite all of its declarations in support of environmentally sound use of the ocean’s living resources, is simply not working. The intention of UNCLOS and the CBD to make regional fisheries management organizations (RFMOs) “the cornerstones of international fisheries governance,” has proved largely unworkable.¹¹¹ Current fishery regulations and conservation measures negotiated by State parties “intentionally . . . create obligations that further national policy objectives . . . [and so] provisions in fishery agreements mirror the relative success of the parties in promoting their interests.”¹¹² Two specific problems with the UNCLOS global commons approach will be discussed below: first, the inability under the General Agreement on Tariffs and Trade (GATT) for environmentally concerned nations to take unilateral trade measures to promote

107. Birnie, *supra* note 41, at 322.

108. See Andrew Serdy, *Postmodern Fisheries Law, or We Are All Coastal States Now*, 60 INT’L & COMP. L.Q. 387, 388–89 (2011).

109. U.N. Environment Programme, *Certification and Sustainable Fisheries*, at xv (2009), available at <http://www.unep.ch/etb/publications/FS%20certification%20study%202009/UNEP%20Certification.pdf>.

110. See *Digest*, *supra* note 77, ¶ 7.1.

111. *Id.* ¶ 7.2.

112. Joyner, *supra* note 11, at 277.

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conservation, and second, the dependence on RFMOs as the primary actors in environmental protection.

1. GATT Limitations on States Taking Unilateral Measures to Promote Biodiversity Protection

GATT has become a barrier to States that wish to reward sustainable fishing practices worldwide by imposing limitations on the national market for fish caught with unsustainable practices.¹¹³ States attempt to enforce domestic environmental policies by using trade agreements, and as a result, “GATT has become the conservationist’s worst enemy as it continuously trumps domestic attempts to initiate marine environmental protection.”¹¹⁴

In 1990, the U.S. Government imposed an embargo on imports of yellowfin tuna from Mexico.¹¹⁵ At issue was the high number of dolphins killed by the Mexican tuna fishing fleet which the U.S. contended was above the U.S. kill rate because of controversial fishing practices.¹¹⁶ When the U.S. imposed a unilateral embargo on tuna caught by the Mexican fleet, Mexico brought the case before a GATT panel for resolution.

The panel found that such unilateral embargos, even when established for environmental reasons, were in violation of the GATT.¹¹⁷ The panel limited Article III of GATT, which demands that parties treat imported products like domestic products, to the products themselves, rather than the harvesting practices of the country of origin.¹¹⁸ The Panel established a two-part test to determine whether an embargo

113. Andrew Kelly, *The GATT Obstacle: International Trade as a Barrier to Enforcement of Environmental Conservation on the High Seas*, 12 FLA. J. INT'L 153, 154 (1998–2000).

114. *Id.* at 154.

115. Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R – 39S/155 (Sept. 3, 1991) [hereinafter *TunaDolphinI*], available at <http://www.worldtradelaw.net/reports/gattpanels/tunadolphinI.pdf> (GATT Panel Report). The ban was pursuant to provisions in the Marine Mammal Protection Act of 1972 (MMPA) that required the Secretary of Treasury to ban the importation of commercial fish caught with technology “which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.” *Id.* ¶ 2.5.

116. *Id.* ¶ 2.2 (explaining fishing norms in the Eastern Tropical Pacific Ocean, where the practice was to chase dolphins as they hunted tuna and then intentionally circle them with purse seine nets, thus killing both tunas and dolphins).

117. *Id.* ¶ 7.

118. Kelly, *supra* note 113, at 156.

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could be upheld to preserve an exhaustible natural resource: first, the restriction must be “related to” or “primarily aimed at” conservation, and second, the restriction must have been enacted in conjunction with domestic conservation measures that fall within a range of accepted methods.¹¹⁹ This means that a State could only enact an embargo to support conservation measures so long as the State has enacted similarly accepted domestic measures.

Practically speaking, this is a serious limitation on the ability of environmentally concerned nations to enforce best practice fishing methods outside of their own EEZ. There is no economic enforcement mechanism for establishing best practices, such as allowing dolphins to escape nets set for tuna or including turtle excluder devices (TED) in shrimping nets.¹²⁰ Various GATT panels have continued to uphold this restriction on State action, even as the problems of unsustainable exploitation increase.¹²¹ In addition to GATT panels, UNCLOS, the CBD, and the Rio Declaration all “actively discourage unilateral trade measures.”¹²² Yet the problem with this approach is that it analyzes sustainability through “the interpretation of trade laws rather than environmental law and policy.”¹²³ As such, GATT panels have a greater interest in promoting free trade than environmental conservation. Restrictions on unilateral State action means that recognized best practices will not be enforced until there is global support for an agreed upon enforcement mechanism.

2. RFMOs Are Inadequate for the Task of High Seas Protection

RFMOs are international bodies “made up of countries that

119. *Id.* at 161.

120. See Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp Products*] (WTO Panel Report), available at http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf.

121. See Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R (June 16, 1994), [hereinafter *Tuna Dolphin II*] (GATT Panel Report) available at <http://www.worldtradelaw.net/reports/gattpanels/tunadolpinII.pdf>. The Marine Mammal Protection Act was again defeated in an action brought by the European Economic Community and the Netherlands in 1994. *Id.*; see also *Shrimp Products*, *supra* note 120.

122. Kelly, *supra* note 113, at 162; see generally UNCLOS, *supra* note 11, art. 150.

123. Kelly, *supra* note 113, at 162.

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share a practical and/or financial interest in managing and conserving fish stocks in a particular region.”¹²⁴ There are currently around seventeen RFMOs, including five tuna RFMOs, which collectively have responsibility over approximately ninety-one percent of the ocean.¹²⁵ RFMOs generally focus on commercial fish stocks, although several recently established RFMOs have larger mandates.¹²⁶

RFMOs are useful and perhaps even necessary given regional differences between cultures, fishing practices, economies, and the needs of threatened species.¹²⁷ However, RFMOs lack global coordination and effective mechanisms for balancing sovereign equality of States with sustainable fishing practices.¹²⁸ Furthermore, there is an international debate over whether or not RFMOs are adopting best practice methods of sustainable use in their internal regulations.¹²⁹ For example, determinations on allowable catch levels, while theoretically based on the best available science, are often highly political in practice.¹³⁰ Some States have even questioned the legality of MPAs established by RFMOs.¹³¹ There are two inherent problems with depending on RFMOs for biodiversity protection.¹³² First, they tend to focus on single species, which is an ineffective method of conservation.¹³³ RFMOs have an

124. *FAQ: What is a Regional Fishery Management Organization?*, PEW ENVIRONMENT GROUP (Feb. 23, 2012), <http://www.pewenvironment.org/news-room/fact-sheets/faq-what-is-a-regional-fishery-management-organization-85899371934> [hereinafter *RFMO FAQ*].

125. *Id.*

126. *Id.* (noting examples such as: the Western and Central Pacific Fisheries Commission, which is responsible for tuna, sharks, seabirds, and turtles, and the Inter-American Tropical Tuna Commission, which considers all marine species within its convention area).

127. *See generally* Joyner, *supra* note 11, at 292–95.

128. *See generally* *A Net With Holes: the Regional Fisheries Management System*, DEEP SEA CONSERVATION COALITION, available at <http://www.savethehighseas.org/publicdocs/RFMO.pdf> (last visited Mar. 28, 2013) (listing several criticisms of the effectiveness of RFMOs).

129. *See Digest*, *supra* note 77, ¶ 7.2 (noting that some tuna RFMOs have failed to reach management decisions on bigeye and yellowfin stocks).

130. *RFMO FAQ*, *supra* note 124.

131. Letter dated June 13, 2012 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, U.N. Doc. A/67/95, ¶ 37 (June 13, 2012) (explaining that some delegations were concerned that RFMO MPAs were not compatible with the freedoms contained in the UNCLOS framework) [hereinafter *BBNJ GA Recommendations*].

132. Erickson, *supra* note 5, at 297.

133. *Id.*

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abysmal record of maintaining healthy levels of fish stocks.¹³⁴ Second, States that are not parties to RFMOs still have the right to fish under UNCLOS and can therefore exploit the fish stock.¹³⁵ This second problem has political undertones which makes effective coordinated action in the international community difficult.

RFMOs have always been political creatures. The adoption of UNCLOS and EEZs simply changed the “class war” from coastal states versus distant water fishing nations,¹³⁶ to those States already fishing versus those wishing to enter the fishery.¹³⁷ Under UNCLOS’ freedom to fish, every state has an equal right to fish in the high seas, even if the fish stock in question is currently exploited to its maximum sustainable yield.¹³⁸ “Restated in economic terms, the problem stems from the residual open-access nature of high-seas fisheries, as an obstacle to the efficacy of any fisheries commission that its member States may endow with regulatory jurisdiction over the particular area of ocean or fish stocks concerned.”¹³⁹ Critics of RFMOs seize upon the “open-access nature of high-seas fisheries” to argue that the use of environmental restrictions, such as quotas, restricted fishing seasons or even exclusion from the fishery, are in fact “a distribution scheme rather than a conservation measure.”¹⁴⁰ Fishery law is “increasingly about how States in existing international fisheries . . . are striving to exclude newcomers.”¹⁴¹ To exclude newcomers, RFMOs expend a great deal of energy on political issues surrounding rights to fish, instead of on conservation or restoration of fish stocks. This power vacuum led the FAO to declare in 2008 that the failure of RFMOs to effectively enforce sustainable fisheries “results partly from the frameworks within which they operate and from an apparent lack of political will by members to implement decisions in a timely manner.”¹⁴² The existing regulations have created complex networks of governance on

134. *RFMO FAQ*, *supra* note 124 (“Although RFMOs play an important role in facilitating cooperation between fishing countries, historically they have failed to prevent overfishing and maintain healthy fish stocks.”).

135. Erickson, *supra* note 4, at 297.

136. *See supra* § I.B.1.

137. Serdy, *supra* note 108, at 390.

138. *See supra* § I.B.1; *supra* note 48 and accompanying text.

139. Serdy, *supra* note 108, at 388.

140. *Id.* at 393.

141. *Id.* at 387.

142. *Digest*, *supra* note 77, § 7.2.

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the high seas that are “fragmented, poorly coordinated and sometimes conflicting in their implementation.”¹⁴³ The high seas are a global area, and regional solutions are simply inadequate to the task.

B. A NEW IMPLEMENTATION AGREEMENT IS NEEDED TO PROVIDE STRUCTURE TO THE HIGH SEAS REGIME

Given the open and obvious failure of current international agreements, concerned parties disagree over how to reverse these failures and produce meaningful biodiversity conservation. There are two main coalitions: those who argue there is an implementation gap and those who argue there is a governance gap.¹⁴⁴ The first argues that meaningful biodiversity conservation in the high seas would be achieved if the agreements already in place are properly implemented. The second argues instead that the current system established by UNCLOS is outdated and a new implementation agreement is necessary to execute the environmental rhetoric.

1. Implementation Gap

The underlying assumption of an implementation gap solution is that the framework established by UNCLOS simply needs to be properly and fully implemented in order to effect conservation goals. There are two primary forums for promulgating high seas regulations. As discussed above, the UNGA has taken a leadership role in passing resolutions and generally providing a setting for discussion of the problems of the high seas.¹⁴⁵ Some parties, such as the European Union and Australia, advocated for using the CBD working group to implement rules and procedures for establishing MPAs beyond national jurisdictions.¹⁴⁶

143. BBNJ GA Recommendations, *supra* note 131, ¶ 38.

144. Elisa Morgera, *Competence or Confidence? The Appropriate Forum to Address Multi-Purpose High Seas Protected Areas*, 16 REV. EUR. COMMUNITY & INT'L ENVTL. L. 1, 9 (2007).

145. See BBNJ GA Recommendations, *supra* note 131, ¶ 10 (“[Many] delegations were of the view that the Working Group [of the UNGA] represented the only international forum at which all aspects related to marine biodiversity beyond areas of national jurisdiction were dealt with in a setting that encouraged wide participation and open discussions.”).

146. Morgera, *supra* note 144, at 6. There were two different proposals brought up during the CBD working group, the first by the EU, proposing “procedures and criteria for identifying and establishing high seas protected areas and establishing registers of marine areas requiring protection.” The second proposal, from Australia, wanting to establish pilot MPAs by 2008. *Id.*

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The advantage of the UNGA is that it is a global and relatively informal organization with the competence to deal with a wide range of multidisciplinary issues.¹⁴⁷ There is broad based consensus “on the identification of the UNGA as the appropriate forum for discussions on marine biodiversity beyond areas of national jurisdiction.”¹⁴⁸ The UNGA provides a useful arena where all states with an interest in the high seas, both developed and developing, can meet and talk. Multiple UNGA resolutions have supported ecosystem-based management tools, showing the willingness of states to use the UNGA as a forum for advocating for marine biodiversity conservation measures.¹⁴⁹ The UNGA also has the benefit of the biennial reports from the BBNJ working group, which provide the scientific and technological information needed to drive practical marine biodiversity conservation measures.¹⁵⁰ In May 2012, the BBNJ argued that an implementation gap was a serious problem facing marine biodiversity conservation.¹⁵¹ It reported that there is international agreement on the need for regulation on the high seas.¹⁵² The critical problem was one of implementation: persuading States to stand by the sustainability promises they have made.¹⁵³

Unfortunately, UNGA resolutions and findings have no binding effect on States. Similarly, the discussions have so far failed to produce any effective change in the customs of international law towards the high seas. Although a majority of

147. *See id.* at 7.

148. *Id.* at 7.

149. *See, e.g.*, G.A. Res. 66/231, at 3, U.N. Doc. A/RES/66/231 (Apr. 5, 2012) (recognizing the need for a more integrated and ecosystem-based approach to the sustainable use of areas beyond national control); G.A. Res. 63/111, ¶ 22, U.N. Doc. A/RES/63/111 (Feb. 12, 2009) (appreciating the development of training manuals for implementing ecosystem approaches); G.A. Res. 62/215, ¶ 99, U.N. Doc. A/RES/62/215 (Mar. 14, 2008) (reaffirming proposed elements of an ecosystem approach to the ocean); G.A. Res. 61/222, ¶¶ 89–91, U.N. Doc. A/Res/61/222 (Mar. 16, 2007) (reaffirming the need to conserve and manage marine ecosystems, and requesting further consideration of using MPAs for areas beyond national control).

150. G.A. Res. 59/24, ¶ 73, U.N. Doc. A/RES/59/24 (Feb. 4, 2005) (establishing the Ad Hoc Open-ended Working Group and defining the purpose of the working group).

151. *See* BBNJ GA Recommendations, *supra* note 131, ¶¶ 11, 34–45 (noting that a careful balance between competing uses of the oceans and the rights of States under UNCLOS had to be preserved, and identifying gaps in UNCLOS implementation).

152. *Id.*

153. *Id.* ¶ 38.

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nations bemoan the state of high seas fisheries, they still claim the freedom to fish as an UNCLOS right, a right which so far has trumped and fatally undermined the requirements for States to work together to protect the ocean environment in UNCLOS. UNGA's role has been one more of information-gathering than actual implementation of findings. It is therefore useful primarily as a discussion forum, rather than an independent institution of governance.

The CBD working groups have many of the same problems. Their reports are focused on providing scientific recommendations on where MPAs should be established and what they should protect, rather than on how to move forward on legal implementation. This is exemplified by the recent Hyderabad agreement, in which the parties to the CBD agreed to send a list of potential MPA areas to the UNGA.¹⁵⁴ These areas were identified for their ecological or biological significance.¹⁵⁵ Once specific areas were chosen for protection, they would be forwarded to UNGA for deliberation on how to proceed. These areas could then "be considered by relevant UN processes linked to the United Nations Convention on Law of the Sea, in particular the United Nations General Assembly Working Group," which would then have to forge an international agreement in order to take action.¹⁵⁶ This illustrates how the CBD structure is better understood as a fact-finding and recommendation organization, rather than an implementation and enforcement institution. An international forum capable of properly implementing the sustainability requirements outlined in UNCLOS simply does not yet exist. Full implementation of the aspirational goals of the CBD therefore requires an additional international agreement to take place.

In short, the constitution of the sea, UNCLOS, has not set up an authority for areas beyond national jurisdiction. Yet it is clear that a single authority is preferable to a global commons approach if effective regulation is to take place. In the lead-up to the ratification of UNCLOS, "governments became acutely concerned over the lack of compliance with international law regulating the global fisheries regime."¹⁵⁷ This concern led to the sharp reduction in the area of the high seas, as "forty

154. *Press Release supra*, note 90.

155. *Id.*

156. *Id.*

157. Joyner, *supra* note 11, at 271.

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percent of the world ocean space became enclosed within 200-mile offshore exclusive economic zones,” thus placing that space under national control.¹⁵⁸ Under this single-authority control, backed by State enforcement, a number of MPAs have provided safe zones for restoring ecosystems to health.¹⁵⁹ Outside EEZs, however, there is no such sovereign authority that can step in.

2. Governance Gap

There is no multilaterally agreed upon regime for establishing marine protected areas in areas beyond national control.¹⁶⁰ The current mixture of UNCLOS emphasis on State cooperation within regional organizations and CBD and UNGA information gathering provides for an ad hoc ability to identify areas in need of protection. It does not, however, provide for an authority to set up protected areas and enforce the existing protections. A compromise reached by the BBNJ working group in 2011 ended with a strong call for a high seas implementing agreement.¹⁶¹ The BBNJ repeated this call in June 2012, noting that “even full implementation of existing instruments would not be sufficient” to achieve the sustainable use of marine resources in areas beyond national control.¹⁶² Problematically, MPAs on the high seas cannot “be established unilaterally or by a group of States,” as one State cannot unconditionally ban another State from fishing in an area.¹⁶³ The freedom to fish, and the dependence on full international cooperation that it requires, is a serious barrier to meaningful implementation of environmental practices.

Currently, the only governance on the high seas is that

158. *Id.*

159. See Sala, *supra* note 71 (explaining the economic and conservation benefits of MPAs in coastal waters).

160. See BBNJ GA Recommendations, *supra* note 131, ¶ 22.

161. Deep Sea Conservation Coal., *A Strong Outcome at the 4th UN BBNJ Meeting*, SAVE THE DEEP SEA (June 6, 2011, 3:33 PM), <http://savethedeepsea.blogspot.com/2011/06/strong-outcome-at-4th-un-bbnj-meeting.html> (noting that the G77, EU, Mexico, New Zealand, Australia, and Iceland were key to reaching a compromise with the US, Canada, and Norway to develop new rules for establishing high seas MPAs).

162. BBNJ GA Recommendations, *supra* note 131, ¶ 31; see also *id.* ¶ 41 (stating that many delegations believed “full implementation of existing instruments, including the United Nations Convention on the Law of the Sea, while important, would be insufficient to achieve the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction.”).

163. *Id.* ¶ 22.

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provided by flag state jurisdiction.¹⁶⁴ This means that ships are held to the laws of the country under whose flag they sail. Reflagging is, however, a serious problem.¹⁶⁵ This occurs when a foreign ship registers and flies the flag of a State which is not a Party to any fishery organizations and hence, is not bound by conservation regulations.¹⁶⁶ Reflagging is a “focal point in the inadequacies of flag state control” over the high seas.¹⁶⁷ It prevents effective enforcement, which encourages IUU fishing,¹⁶⁸ as it provides “the flags for vessels to operate with few or no restrictions and the havens in which to base operations and to handle catches.”¹⁶⁹ *Agenda 21* recognized the need for action on reflagging by calling on States to take “effective action . . . to deter reflagging of vessels by their nationals.”¹⁷⁰ The FAO provided guidelines for States by adopting the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.¹⁷¹ The agreement allocates responsibility to the flag state to take enforcement measures “such as to ensure that the fishing vessel ceases to engage in activities that undermine the effectiveness of the international conservation and management measures.”¹⁷² These “effective measures” are enforced with a database created by each Party State of its fishing vessels, so ships can be tracked and flag states can identify offending fishing vessels.¹⁷³ Yet even with these efforts in place, weak enforcement led Greenpeace to observe in 2005 that the “high seas are currently open to fishing by anyone interested in doing so with only minimal flag state controls.”¹⁷⁴

164. UNCLOS, *supra* note 11, arts. 94, 217.

165. Fisheries & Aquaculture Dep't, *FAO Compliance Agreement*, FOOD & AGRIC. ORG. UNITED NATIONS, <http://www.fao.org/fishery/topic/14766/en> (last visited Jan. 27, 2013).

166. *Id.*

167. Erickson, *supra* note 4, at 294–95.

168. Illegal, Unreported and Unregulated fishing. *See generally supra* § I.C.

169. *Digest, supra* note 77, § 7.2

170. Rio Declaration, *supra* note 55, at Annex II, Chapter 17, ¶ 17.53.

171. Joyner, *supra* note 11, at 283–84.

172. Food and Agriculture Organization of the United Nations, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, art. III, Nov. 24, 1993, 2241 U.N.T.S. 39486.

173. *Id.*

174. Greenpeace, *Freedom for the Seas, For Now & For the Future*,

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The 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing took a market-based approach to the dual problems of reflagging and IUU fishing.¹⁷⁵ This plan focused on minimizing the market for fish caught through IUU methods by calling on port states to implement measures, consistent with WTO rules, to stop trade in IUU-caught fish.¹⁷⁶ Given the “high degree of international acceptance that . . . IUU-caught fish . . . is seen as equivalent to a stolen product,” the WTO rules actually allows for States to adopt markedly strong measures.¹⁷⁷ The plan is a voluntary document, available for adoption by any and all States. In addition, the FAO negotiated a treaty in 2009 that empowered port states to bar vessels from their ports that are known to engage in IUU practices.¹⁷⁸ So far, a number of important fishing States, including Canada, Chile, the EU, Japan, and New Zealand submitted national plans of action to prevent IUU.¹⁷⁹ This marks a strategic shift in the conservation movement towards attacking the profitability of IUU fishing.¹⁸⁰

These agreements, however, are still framed under UNCLOS with all the freedoms and rights guaranteed by that document.¹⁸¹ The ability of market-based measures to deter IUU practices is commendable, but they only come into force after the fish are already dead. The harm is already done by

GREENPEACE INT'L 1, 1 (May 2005), <http://www.greenpeace.org/international/Global/international/planet-2/report/2007/8/freedom-for-the-seas.pdf>.

175. *Digest*, *supra* note 77, § 7.3.

176. *Id.*

177. *Id.* at n. 39.

178. FAO: *New Treaty Will Leave Fish Pirates Without Save Haven*, MERCOPRESS, (Sept. 1, 2009), <http://en.mercopress.com/2009/09/01/fao1>.

179. Judith Swan, *Implementation of the International Plan of Action to Prevent, Deter, and Eliminate Illegal Unreported and Unregulated Fishing: Relationship to, and Potential Effects on Fisheries Management in the Mediterranean*, 76 GEN. FISHERIES COMM'N FOR THE MEDITERRANEAN: STUDIES AND REVIEWS 8 (2005); *Communication from the Commission: Community Action Plan for the Eradication of Illegal, Unreported, and Unregulated Fishing*, at 4, COM (2002) 180 final, (May 28, 2002); FISHERIES AGENCY OF JAPAN, IMPLEMENTATION OF THE INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER, AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (IPOA-IUU) (2004). <ftp://ftp.fao.org/FI/DOCUMENT/IPOAS/national/japan/NPOA-iuu.pdf>; MINISTRY OF FISHERIES, NEW ZEALAND PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREGULATED & UNREPORTED FISHING (2004) http://www.apfic.org/uploads/smartsection/378_iuufishing.pdf.

180. *Fisheries Digest*, GREEN FACTS DIGEST (2008), ¶ 7.3, <http://www.greenfacts.org/en/fisheries/1-2/07-regulation.htm#2>.

181. Compliance Agreement, *supra* note 172, Preamble.

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the time such measures come into effect. As a result, these measures do not contribute to the goal of biodiversity or the restoration of stocks in the immediate future. MPAs “build resilience in the marine ecosystem,” specifically by “allowing ocean biodiversity in targeted areas to replenish and flourish” in a way that market measures do not.¹⁸² Further, enforcement is dependent upon flag state cooperation. If a State has not adopted the FAO agreements, the state is still entitled to open access to the high seas fisheries.¹⁸³ Dependence on flag state jurisdiction to govern the vast spaces of the open ocean essentially allows each State to write their own rules on fishing in the high seas.¹⁸⁴

As part of a larger sustainability program for the oceans, a market-based approach has merit. The FAO published a Code of Conduct for Responsible Fisheries (Code), which is recognized as a general system of best practices. A certification program for fisheries can be established, using guidelines based on the Code.¹⁸⁵ This program can potentially have significant economic and environmental impact. The Code can ensure that fish certified as caught using practices in keeping with the Code be sold at a premium. Thus “certification can be used as an incentive to bring about improved fisheries management.”¹⁸⁶ As a market-based approach, profits made from premium pricing as a result of selling certified fish can be an important companion to any new agreement on the high seas.

A market approach can also play an important role in changing international norms about policing IUU methods. IUU fishing is regarded as stealing the natural resources of the ocean,¹⁸⁷ and thus can be analogized to piracy. Piracy is litigated under universal jurisdiction, a principle that is justified “because the acts that fall under this jurisdiction are ‘of an international character and are of serious concern to the

182. *Freedom for the Seas: Now and for the Future*, GREENPEACE, 4 (March, 2008) <http://www.greenpeace.org/international/Global/international/planet-2/report/2008/4/freedom-for-the-seas-now-and.pdf>.

183. Joyner, *supra* note 11, at 284.

184. *See id.* at 286 (“[I]t is clear that national governments are given the preeminent role for enforcing international fisheries law.”).

185. U.N. ENVIRONMENT PROGRAMME, CERTIFICATION OF SUSTAINABLE FISHERIES, 23 (2009), <http://www.unep.ch/etb/publications/FS%20certification%20study%202009/UNEP%20Certification.pdf>.

186. *Id.*

187. *Digest, supra* note 77, at n. 39.

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international community as a whole.”¹⁸⁸ The loss of marine biodiversity due to IUU methods, and the subsequent crash in fish stocks, has a legitimate claim to being an act “of international character and of serious concern to the international community as a whole.”¹⁸⁹ If the freedoms of the sea are applicable universally, then “acts *hostis humani generis* (hostile to humanity) infringing on that right, namely piracy, could be universally punished.”¹⁹⁰ Acts that infringe on the freedom to fish, namely unsustainable IUU methods on the high seas, could result in investigations and prosecutions under universal jurisdiction. This approach could be a useful paradigm for fighting IUU.

Perhaps the best effort at effective regulation on high seas fisheries was the UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks agreement).¹⁹¹ It mandated a reformation of international customary law, specifically the establishment of a custom of sustainable fishing. The Fish Stocks agreement took two approaches to strengthening high seas governance. The Fish Stocks agreement gave authority to the flag State, or a State party to a RFMO, to board and inspect fishing vessels in order to look for illegal conduct.¹⁹² It also gave power to port States, the State where the fishing vessel unloads, to inspect and investigate cargo. If illegal fishing is found to have occurred, then the flag State must take measures that ensure that vessel cannot fish again, and take punitive measures against the owner and crew that deter future transgressions.¹⁹³ The Fish Stocks agreement also reiterated the importance of RFMOs as regulatory agencies, in an attempt to reduce conflict over fisheries.¹⁹⁴ In this way, it hoped to make strong strides against

188. Rebecca Fantauzzi, *Rascals, Scoundrels, Villains, and Knaves: The Evolution of the Law of Piracy from Ancient Times to the Present*, 39 INT'L J. LEGAL INFO. 346, 358 (2011).

189. *Id.* at 358.

190. *Id.* at 359 (explaining how Grotius based his theory of universal jurisdiction on piracy on the notions of universal freedoms of the sea).

191. Erickson, *supra* note 5, at 296.

192. *Id.* at 296.

193. *Id.* at 296.

194. Joyner, *supra* note 11, at 292; Erickson, *supra* note 5, at 296; G.A. Res. 51/35, U.N. Doc. A/RES/51/35 (Jan. 17, 1997), [hereinafter *Fish Stocks Agreement*]; FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, GLOBALISATION AND FISHERIES: PROCEEDINGS OF AN OECD-FAO WORKSHOP 148 (OECD PUBLISHING 2007) (“[RFMOs are the] appropriate medium through which states are to cooperate to achieve and enforce conservation

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illegal, unreported and unregulated fishing.

Unfortunately, the Fish Stocks agreement is not widely adopted by the States. In 2008, States party to the Fish Stocks agreement noted that a lack of capacity in developing countries was a significant barrier to its wider acceptance and implementation.¹⁹⁵

The Fish Stocks agreement does require States who neither join relevant RFMOs nor agree to abide by its conservation regulations to nevertheless cooperate by requiring vessels flying its flag to act in accordance with the RFMO regulations.¹⁹⁶ However, this has the paradox of relying on an unwilling State party to enforce non-national law against its own economic interest. This, then, is the basic problem with maintaining the freedom to fish as international law: it is fundamentally based on the idea that the ocean is unlimited in its resources. That is the only paradigm in which codifying the sovereign right of every State to fish make sense. It is, however, an outdated paradigm that no longer corresponds to reality.

C. THE FUTURE FOR MPAS IN AREAS BEYOND NATIONAL JURISDICTION

Even under the current governance vacuum, States and NGOs are moving forward on MPA creation. The Pelagos preserve in the Mediterranean, large areas of the Southern Sea around Antarctica, and sections of the North Atlantic are now protected, thanks largely to strong NGO pressure on States.¹⁹⁷ The success of establishing these few MPAs on the high seas shows both the strength and weakness of the current UCLOS structure: when States cooperate, it is possible to create MPAs, but relying solely on this cooperation means protection manifests too slowly to affect global biodiversity. As some States try to move forward with MPA creation, the continuing lack of an implementation structure remains an ongoing obstacle.¹⁹⁸ The following analysis will show why the mere fact

objectives . . . on the high seas.”)

195. *Digest*, *supra* note 77, ¶ 7.4 (noting that developing countries lack the infrastructure and resources to adequately enforce any regulations that are passed).

196. *Fish Stocks Agreement*, *supra* note 194, at 2.

197. Jesse Hastings et al., *Safeguarding the Blue Planet: Six Strategies for Accelerating Ocean Protection*, 18 PARKS MAGAZINE 1 (2012).

198. *Management and Enforcement: Existing Management Regime*, SARGASSO SEA ALLIANCE, <http://www.sargassoalliance.org/management-and->

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that MPAs can be created under the current structure is not sufficient to provide the kind of worldwide, connected protections that a majority of fishery activists agree is needed to restore biodiversity to sustainable levels.¹⁹⁹

As a relatively successful RFMO, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) is a case study that presents the possibilities of the current high seas MPA framework. It has twenty five members, including the European Union, Russia and the United States, and it works well with environmental NGOs.²⁰⁰ As the RFMO for the Southern Ocean, the CCAMLR has the authority to establish and enforce regulations on its numerous member States. In 2009, the CCAMLR approved a no-take and no-disposal zone south of the South Orkney Islands.²⁰¹ The CCAMLR continues to build a network of MPAs around Antarctica by utilizing the same process.²⁰² As one of the rare RFMOs that established MPAs on the high seas, the CCAMLR is a shining example of the potential of political goodwill.

The CCAMLR is also a cautionary tale about the limitations inherent in UNCLOS' dependence on State cooperation and RFMO involvement. It is well behind its own set schedule of MPA establishment. Recently, a US- and New Zealand-backed proposal to establish a preserve in the Ross Sea failed to pass.²⁰³ The preserve was aimed at protecting the Arctic tooth fish, also known as the Chilean sea bass, but faltered on Russian and Chinese desires to keep this fishery

enforcement (stating that there “is, as yet, no global legal framework for the establishment of MPAs” on the high seas, a fact that worries Bermuda as it is currently working to establish a MPA in the Sargasso Sea, an area in the central Atlantic).

199. Earle, *supra* note 3; Sala, *supra* note 71.

200. *Members*, COMMISSION FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES, (Jan. 20, 2012), <http://www.ccamlr.org/en/organisation/members>.

201. *CCAMLR Strengthens Marine Conservation in Antarctica*, COMMISSION FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES, <http://www.ccamlr.org/en/organisation/ccamlr-strengthens-marine-conservation-antarctica>.

202. *Report of the Workshop on Marine Protected Areas*, COMMISSION FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES, ¶¶ 3.1–3.4 (Aug. 29 2011), www.ccamlr.org/en/system/files/e-sc-xxx-a06.pdf.

203. David Jolly, *Group Adjourns Without Acting on Antarctic Reserve*, N.Y. TIMES (Nov. 1, 2012), <http://green.blogs.nytimes.com/2012/11/01/group-adjourns-without-acting-on-antarctic-reserve/?src=recg>, (reporting that Russia and China shot down the proposal supported by numerous NGOs and 1.2 million people around the world).

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open to their national fishing fleets.²⁰⁴ Despite these setbacks, the CCALMR provides an instructive model for high seas MPAs. The CCALMR is authorized to make *and* enforce MPAs in the Southern Ocean. The CCALMR also wields a large membership, experience in scientific investigations aimed at identifying areas in need of protection, and a good rapport with NGOs and scientists. It has regular meetings of the parties, a scientific committee with the ability to initiate new research projects,²⁰⁵ and the regulatory framework to implement its own findings.²⁰⁶ Structurally, the CCALMR is a useful model for a global governance scheme.

Using RFMOs in general to set up MPAs on the high seas, however, has a distinct limitation. The freedoms contained in UNCLOS mean that “if a State or group of States were to declare a high seas MPA within the framework of the [UNCLOS], this could only be legally binding on those nations setting up the MPA.”²⁰⁷ In other words, any State that was not part of creating the MPA would not be bound by its rules. On a global scale, this has two serious drawbacks. First, it is a disincentive for States interested in MPAs to create one through a RFMO, and thus place restrictions on themselves that would not apply to potential competitors. Second, individual RFMOs can only create MPAs in areas under their jurisdiction. This limitation means there is no coordination between RFMOs on determining which areas need protection or on creating corridors between MPAs to allow safe passage for migrating animals. A high seas governance system that depends on RFMOs will result in a patchwork of MPAs and MPA establishment procedures.

The need for coordinate global action has led a number of NGOs and States to call for a new implementation agreement under UNCLOS.²⁰⁸ This agreement would bolster the

204. *Id.*

205. *Scientific Committee*, CONVENTION FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING, <http://www.ccamlr.org/en/science/scientific-committee>.

206. *Commission*, CONVENTION FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES, <http://www.ccamlr.org/en/organisation/commission>.

207. Drankier, *supra* note 68, at 295.

208. See *The Convention on Biological Diversity Brings Focus to the Remote Ocean*, IUCN, (OCT. 19, 2012), http://www.iucn.org/about/union/secretariat/offices/usa/about_usa/marine_programme/?11310/The-Convention; Policy Statement on the U.N. Ad Hoc Open-Ended Informal Working Group to Study Issues Relating to the

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environmental safeguards present in UNCLOS, *Agenda 21*, the CBD, and the numerous reports and findings that have come out of those treaty bodies. A majority of States at the Conference of the Parties to the CBD in Hyderabad, India agreed in October 2012 that a new legal instrument, subject to UNCLOS, is needed to provide the “framework for the conservation and sustainable use of biodiversity in the ocean beyond national jurisdiction.”²⁰⁹ However, a final decision on whether to proceed with negotiations is not due until 2014.²¹⁰ Any new agreement would contain some of the following regulations: environmental impact statements for use of the open ocean, a structure to recommend and establish MPAs, fishing equipment restrictions, and increased funding for scientific research. Satellite technology can play an important role in enforcement, given the difficulty that comes with regulating a vast open space on the high seas. GPS trackers in ships can keep track of where those ships fish and inspections upon returning to port can reveal if any ship entered MPA territory. The Hyderabad conference has already approved voluntary guidelines for environmental impact statements and assessments, which provide “specific guidance on how to assess plans, policies and projects that may undermine marine biodiversity.”²¹¹ This momentum warrants the forging of a new implementation agreement, which should end the governance gap that has hindered serious conservation efforts on the high seas. The push for a new implementation agreement reflects the global recognition that the ocean’s resources are limited and must be used wisely. No State is advocating for a new UNCLOS that would functionally implement environmental promises, rather than the right of open access. The ultimate goal is to exert enough of “a ‘gravitational pull’ on the formation of custom”²¹² to create a new custom of the sea – sustainable exploitation. A basic rethink of the custom of freedom of the seas that protects States’ sovereign rights is necessary before international agreements can effect

Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction, PEW ENVIRONMENT GROUP, (May 7, 2012), http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Other_Resource/PEW_PolicyState_BBNJ_CRA_web1.pdf.

209. *Id.*

210. *Id.*

211. *Id.*

212. Serdy, *supra* note 108 at 389.

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substantial enforcement of new conservation norms.²¹³ “[T]he ocean is bankable, if the governance frameworks are the right ones.”²¹⁴

III. CONCLUSION

There is support in the international community for a new implementation agreement. A new agreement that would restructure and more firmly obligate States to implement the conservation principles in UNCLOS is the best path forward.²¹⁵ This would enable a system of MPAs that is connected and coordinated, the preferable system to ensure biodiversity. There is political support for such a network, evidenced in the most recent Conference of the Parties to the CBD and the June 2012 Work Group report to UNGA. In combination with other movements, such as universal jurisdiction over ships that commit IUU and a certification scheme for sustainable fisheries, such an agreement could have a significant impact on restoring and maintaining marine biodiversity.

213. Joyner, *supra* note 11, at 282.

214. *Is Governance the Issue? Experts Weigh In*, GLOBAL PARTNERSHIP FOR OCEANS, (2013), <http://www.globalpartnershipforoceans.org/key-issues/governance-issue-experts-weigh>.

215. *BBNJ GA Recommendations*, *supra* note 131, ¶¶4–46.