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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

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Abstract

The legal regime for the high seas is fragmented both sectorally and geographically and is incomplete. Governance, regulatory, substantive and implementational gaps in the legal framework serve to limit the effectiveness of the high seas regime in securing a sustainable future for the conservation and use of the high seas environment and its resources. A global approach to further developing the high seas regime based on the concept of international public trusteeship for the oceans beyond national jurisdiction could foster environmentally responsible use of of the high seas and its resources and ensure the application of modern conservation principles and management tools to human activities on the high seas. In view of escalating threats to the oceans from existing and emerging uses and form the impacts of climate change, transformation to a legal regime better suited to integrated, cross-sectoral management and preservation of vital ocean ecosystem services and resilience may no longer be a luxury, but rather a necessity.

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Protecting the Marine Environment: High Seas Governance for the 21st Century

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1. Introduction

In 1608 Hugo Grotius published his now famous treatise '*Mare Liberum'* or 'Freedom of the Seas' in which he argued that the seas could not be occupied or appropriated by anyone and that freedom of navigation and exploitation of the high seas and its resources could not be interfered with or restricted in any way. To Grotius the seas were vast, limitless, inexhaustible of use and of resources, and because they could not be occupied by anyone, neither were they subject to appropriation by anyone. The sea, he said, was 'a public thing'; 'the common property of all'.[2] 'Viewed either as a whole or in its principal divisions, [the sea] cannot become subject to private ownership'.[3] The principle of 'freedom of the seas' with its corollary of 'exclusive flag state jurisdiction' has been the clarion call of the law of the sea since.

It is widely acknowledged that even as Grotius was expounding his famous postulate, restrictions on the freedom existed or were being claimed. Indeed, the entire history of the law of the sea has been one of oscillation between freedom and restriction. Today it is generally accepted that some restrictions do exist on the freedom, which is no longer one of the seas in general but is confined to waters beyond national jurisdiction including the exclusive economic zone and the high seas. On the high seas all states are entitled to enjoy the freedoms of navigation, overflight, laying of submarine cables and pipelines, construction of artificial islands or installations, fishing, and marine scientific research. However, these freedoms are subject to the conditions laid down in the 1982 Law of the Sea Convention (LOSC)[4] and other rules of international law.

The LOSC imposes specific restrictions on the exercise of these freedoms as well as the general conditions that they are to be exercised for peaceful purposes and with due regard for the interests of other states in their exercise of their high seas freedoms. Specific restrictions include the duty to protect and preserve the marine environment

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[2] Hugo Grotius, *Mare Liberum* or *The Freedom of the Seas of the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (1608), Translated by Ralph Van Deman Magoffin (1916) 28.

[3] *De Jure Belli ac Pacis Tres*, Book II, ch II, iii (190-1) *The Laws of War and Peace in Three Volumes,* 1624. Translated by Francis Kelsey (1995 reprint).

[4] 1982 *United Nations Convention on the Law of the Sea*, 1833 UNTS 3 (LOSC).

and to conserve marine living resources, and to cooperate for these purposes. Numerous other treaties regulate various other aspects of high seas uses such as dumping, discharge of marine pollution by shipping, safety of navigation, and fishing. Nevertheless, it is generally recognised that the high seas legal regime is far from comprehensive. A number of regulatory gaps exist and new and intensifying uses are placing the system under stress. Questions are therefore increasingly being raised as to the ability of the current legal regime to adequately protect the marine environment and the sustainability of its resources, and the legitimate interests of the international community, from existing, new, and emerging activities in and uses of ocean areas beyond national jurisdiction. As Scheiber and Caron put it, '[T]he need for fashioning well-designed and smoothly functioning, if not to say "seamlessly' integrated, mechanisms that overcome sectoral narrowness in the governance of ocean resources and activities is [thus] an issue at the forefront of current-day discussion'.[5]

This article examines the possible juridical basis for an integrated, cross-sectoral regime for high seas governance and identifies some of the key elements needed to fulfil that goal. Part 2 provides a brief overview of the existing shortcomings in the regime for the protection of the marine environment of the high seas. Part 3 then provides a brief overview of recent discussions in international fora on possible new arrangements for high seas governance. Part 4 outlines the normative challenge posed by the common property, open access regime of the high seas, while Part 5 suggests that this challenge can be met by reconceptualising the juridical basis of the high seas regime on the basis of the concept of the public trust. Part 6 outlines possible approaches to operationalising the trust concept in high seas governance and suggests a number of mechanisms and tools that might assist in the achievement of an integrated high seas legal regime that is responsive to the needs and interests of all states in the 21st century.

2. Shortcomings in the Current Regime for the Protection of the Marine Environment of the High Seas

The marine environment is complex, dynamic and vast and knowledge of its processes and components is rudimentary. While the oceans have traditionally been considered inexhaustible, unlimited and capable of supporting any human activity or use, it is now clear that marine resources are exhaustible and that increasing and intensifying human activities and uses are pushing the oceans to the limits of their ecological carrying capacity. More than 75 percent of the world's fish stocks are reported as already fully exploited or overexploited (or depleted and recovering from depletion)[6] and increasing numbers of marine species are considered threatened or endangered.[7] Inadequate management, destructive fishing practices such as bottom trawling, and illegal, unregulated and unreported fishing (IUU fishing) are to blame for a whole range of adverse effects on fish stocks and dependent and associated species and ecosystems. In addition, existing and emerging ocean uses pose other threats to the marine environment from, for example, marine debris and noise pollution, ocean fertilisation, CO2 sequestration, acoustic thermometry, construction of artificial islands and pipelines, offshore oil and gas exploration, seabed mining,

[5] D. Caron and H. Scheiber (eds.), *Bringing New Law to Ocean Waters* (Martinus Nijhoff, 2004) 4.
[6] FAO, 2006 State of World Fisheries and Aquaculture (SOFIA) (FAO, Rome, 2007), available at http://www.fao.org/docrep/009/A0699e/A0699e00.htm.
[7] IUCN, 2007 Red List of Threatened Species, available at http://www.iucnredlist.org/.

bioprospecting, and marine scientific research which perturbs the marine environment.

Effective protection of the marine environment and conservation and sustainable use of its resources requires greater knowledge and understanding of all aspects of the marine environment and its uses. However, beyond that, effective protection of the marine environment requires an integrated governance structure which adequately protects not only the interests of individual users but also of the international community as a whole.

High seas management is, however, currently fragmented among a variety of sectoral and geographically based bodies including the treaty regimes established under the International Maritime Organisation (IMO) and regional fisheries management organisations (RFMOs). This decentralised, fragmented regime gives rise to a number of difficulties and gaps in both governance and regulation, not to mention in implementation. Governance gaps include those arising from the effects of sovereignty on lack of participation in and implementation of relevant legal regimes and difficulties engendered by consensus decision making, and the lack of application of powers by competent international organisations. Regulatory gaps include gaps in high seas coverage with regional management fisheries organisations (RFMOs) and arrangements, the inadequate global coverage of regional high seas conventions and the lack of coordination and cooperation between the fisheries and environmental sectors. Substantive gaps relating to the non-applicability of the UN Fish Stocks Agreement[8] to discrete high seas fish stocks, and lack of clarity on the interaction between the regime of the high seas and the regime of the outer continental shelf have also been identified.[9] In addition, no regulatory regime exists for a large number of existing and emerging high seas activities including marine scientific research, bioprospecting, the laying of cables and pipelines, military activities, CO2 sequestration, floating installations and deep sea tourism. Finally, there are no global rules elaborating on the basic requirements in the LOSC and the Convention on Biological Diversity[10] (CBD) for environmental impact assessment (EIA) relating to any of the existing or emerging activities and uses. All of these gaps hinder achievement of integrated ecosystem based oceans governance on the high seas.

3. Current Discussions on New Arrangements for High Seas Governance

The main impetus for considering new arrangements for high seas governance has emerged from the annual meetings of the United Nations Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) which has deliberated on an eclectic mixture of oceans issues since its inception in 1999. These discussions have generated a range of initiatives at the global level designed to address, in particular, the conservation of high seas biodiversity and related issues such as IUU fishing and marine genetic resources.

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[8] 1995 *Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 2167 UNTS 3 (*UN Fish Stocks Agreement*).

[9] IUCN Gap Analysis

[10] 1992 *Convention on Biological Diversity*, 31 ILM 822 (*CBD*).

The principal initiative has been the establishment by the United Nations General Assembly (UNGA) of the Working Group on Conservation of High Seas Biodiversity in Areas beyond National Jurisdiction to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ Working Group). Within the BBNJ Working Group states have agreed on the need for improved implementation of current global and regional agreements relevant to biodiversity beyond national jurisdiction, including the LOSC and the CBD. The Summary of Trends prepared by the Working Group at its first meeting in 2006,[11] recognises the fundamental importance of building on established international environmental law principles, including the precautionary and ecosystem approaches, and the importance of using the best available science and prior environmental impact assessments. The integral role of sectoral and regional organisations in improving conservation of marine biodiversity beyond national jurisdiction is accepted as is the need to strengthen the management of these bodies and to develop and strengthen mechanisms for their accountability. Destructive fishing practices are singled out as one of the major threats to marine biodiversity beyond national jurisdiction and it is agreed that these practices should be addressed on an urgent basis by the UN General Assembly (UNGA), FAO and RFMOs. IUU fishing is also considered to be a major impediment to conservation and sustainable use of marine biodiversity requiring an integrated and accelerated approach across all relevant fora to address such issues as flag state responsibilities, port state measures, compliance and enforcement.

Nevertheless, while there is consensus among states on the need to promote international cooperation and coordination to achieve long term conservation of high seas biodiversity, there is no agreement on the legal and institutional mechanisms required to meet this objective. Indeed, dispute exists over the fundamental question of whether any governance or regulatory gaps exist in the legal framework and, if they do, as to how they should best be filled. Suggestions range from doing nothing to proposals for the adoption of an implementing agreement under the LOSC, either to address the establishment and regulation of multi-purpose marine protected areas, or other related issues. Moreover, no consensus exists on the legal status of marine genetic resources and whether existing legal arrangements and management tools sufficiently cover their conservation and sustainable use. In particular, no agreement exists over rights of access to and benefit sharing of marine genetic resources.

The intractability of the debate over the legal status of marine genetic resources is particularly evident in the division of opinion evidenced during the eighth meeting of UNICPOLOS (ICP-8) held in June 2007, and which resulted in the failure to adopt a consensus text on the outcome of the meeting.[12] China and the G77 group of developing countries argue that marine genetic resources should be regarded as part of the common heritage of mankind and subject to a similar access and distribution regime as that which applies to the mineral resources of the Area under the LOSC and

[11] *Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction*, UN Doc A61/65, 20 March 2006. The Summary of Trends is attached as Annex I to the Report.
[12] See *Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its eighth meeting,* UN Doc A/62/169, 30 July 2007 *(UNICPOLOS Eighth Meeting Report).*

the Part XI Implementing Agreement.[13] These states anticipate potentially lucrative returns from the exploitation of marine genetic resources and would like to see a benefit sharing agreement put in place. To support their argument they point to UNGA Resolution 27/49 of 1970 which declares all resources of the Area to be "the common heritage of mankind" and assert that this should include living resources as well as mineral resources. These states also argue that Article 133 of the LOSC can not be interpreted as excluding marine genetic resources in the deep seabed beyond areas of national jurisdiction from the umbrella of the common heritage of mankind.[14]

Developed countries including the USA, the Russian Federation, Australia, Iceland and Norway, however, strongly resist the extension of the "common heritage of mankind" principle beyond the mineral resources to which they say it currently applies under Part XI of the LOSC. Instead they assert that the high seas regime for marine living resources under Part VII of the LOSC should also apply to the living resources of the Area including marine genetic resources.[15] They take the position that the LOSC is a carefully balanced package deal of rights and obligations which the international community should be wary of destabilising. Indeed, they do not even agree that a dispute exists over the current provisions of the LOSC.[16]

Discussions in the BBNJ Working Group have also canvassed the problems arising from the inter-linkages between the marine genetic resources of the deep seabed, the biodiversity of the deep sea water column and the non-living resources beyond national jurisdiction. It has been suggested that an international code of conduct is needed to guide responsible marine scientific research, which includes guidelines and impact assessments that take into account all these facets of the marine environment beyond national jurisdiction.[17]

Beyond the United Nations, other multilateral bodies such as the Convention on Biological Diversity Conference of the Parties (CBD COP) and the FAO Committee on Fisheries (COFI) are also playing a role in the debates on the protection of high seas biodiversity and the marine environment. The eighth meeting of the CBD COP in March 2006 agreed that the CBD has a key function to perform in supporting the BBNJ Working Group by providing scientific and technical information and advice relating to marine biodiversity, the application of the ecosystem and precautionary approaches and the delivery of the 2010 target set by the 2002 World Summit on

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[13] *UNICPOLOS Eighth Meeting Report*, paras 71-73; *Summary Report by the Earth Negotiations Bulletin of the Eighth Meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea 25-27 June 2007,* available at http://www.iisd.ca/oceans/icp8/compilatione.pdf. *(*Earth Negotiations Bulletin *Summary Report on UNICPOLOS Eighth Meeting)*; 1994 *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (1994) 33 ILM 1309 (*Part XI Implementing Agreement*).

[14] *UNICPOLOS Eighth Meeting Report,* para 73. See also Earth Negotiations Bulletin, *Summary Report of UNICPOLOS Eighth Meeting,* Article 133(a) of the LOSC defines 'resources' of the Area to mean 'all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules'. Article 133(b) goes on to say that 'resources, when recovered from the Area, are referred to as "minerals"'.

[15] *UNICPOLOS Eighth Meeting Report*, para 74 and Earth Negotiations Bulletin *Summary Report of UNICPOLOS Eighth Meeting*.

[16] Earth Negotiations Bulletin *Summary Report of UNICPOLOS Eighth Meeting.*

[17] Ibid.

Sustainable Development for ecosystem based management of the world's oceans.[18] The CBD Secretariat has commissioned the World Conservation Monitoring Centre to develop a report and an interactive map of current high seas marine protected areas, key habitat and species distributions, ecological regions and coverage by different management regimes such as RFMOs. The report will also elaborate on technical requirements, institutional partnerships and the long term funding needs for collating and disseminating such information and relevant research initiatives that include a focus on the high seas.[19]

COFI has also been proactive in requesting the FAO to provide the UNGA with information and technical advice on the impacts of destructive fisheries practices on high seas biodiversity. This information formed the basis for UNGA Resolution 61/105 adopted in December 2006 which called upon member states and RFMOs to take specific measures to protect high seas marine biodiversity from destructive fisheries practices. In March 2007, the 27th meeting of COFI agreed that the FAO should convene an expert consultation to prepare draft technical guidelines, including standards for the management of deep sea fisheries in the high seas, to be finalized at a technical consultation in early 2008.[20] These guidelines are to include standards and criteria for identifying vulnerable high seas marine ecosystems and the impacts of fishing activities on these ecosystems so that RFMOs and flag states can implement the conservation and management measures contained in UNGA Resolution 61/105.

It is clear that threats to the high seas environment and its resources have been the main impetus behind these discussions. The problems of overfishing, the drain on global resources which may be needed for future generations, and uncertainties in relation to marine pollution caused by increased global shipping density and the lack of any real assessment of the effects of that increase on marine biodiversity, together with the threat of unregulated climate change mitigation and adaptation schemes, has alerted global political fora to the issues. Nevertheless, little substantive progress has been made, to date, on improving and coordinating high seas governance mechanisms to ensure adequate protection of the marine environment. The reasons for this are rooted in the underlying normative structure of the existing legal regime for the high seas.

4. The Challenge of High Seas Governance

The central challenge for effective high seas governance stems from the nature of the high seas as a common property, open access regime with equal right of user and exclusive flag state jurisdiction. A common property regime is, by definition, one that is open for legitimate and reasonable use by all states and may not be appropriated to the exclusive sovereignty of any one state. No single user can have exclusive rights over any of the common property resources and no state can prevent any other state from joining in the exploitation of these resources. Once 'captured' a common property resource becomes the exclusive property of the exploiter who then derives any commercial or other benefit therefrom. High seas fisheries are the quintessential

[18] *Report of the Eighth Meeting of the Parties to the Convention on Biological Diversity,* UN Doc UNEP/CBD/COP/8/31, 15 June 2006.
[19] Ibid.
[20] *Report of the 27th Meeting of the Committee on Fisheries*, 5-9 March 2007, FAO Fisheries Report No. 830, FIEL/R830.

example of a common property resource – and the shortcomings of a common property regime. However, all high seas uses have the potential, whether realised or not, to interfere with the rights and interests of other users and potentially to harm, whether purposely or not, the marine environment.

The current high seas regime has given rise to two fundamental problems. First, the freedom of open access leads inexorably to the tragedy of the commons. Second, flag state jurisdiction is ineffective in halting or addressing this tragedy. In the past, this has led states to attempt to arrogate to themselves increasing areas of ocean space. These assertions of jurisdictional control over ocean areas have traditionally been initiated by coastal states anxious to secure their economic and security interests. Many of these assertions have already been concretised in the LOSC regimes relating to territorial waters, the contiguous zone, the exclusive economic zone and the continental shelf. However, while renewed assertions of 'creeping jurisdiction' by coastal states, such as the Chilean claim to a 'presential sea'[21] and the Canadian claim to 'custodial management'[22] are made from time to time, they are hotly contested as fundamentally inconsistent with the LOSC on the basis that further encroachment of coastal state interests into the high seas fundamentally undermines the interests of the rest of the international community in the high seas. Instead, the international community has begun to adopt other mechanisms, such as port state control, by which non-flag states can take action against vessels whose flag states are unwilling or unable to comply with their flag state responsibilities in order to ensure protection and preservation of the marine environment and the sustainability of high seas resources.

In view of the shortcomings of the current high seas regime it is arguable that the time has come for a more communitarian approach to high seas regulation, based neither on further extension of coastal state jurisdiction nor on complete unregulated freedom of user, but on accommodation of the multiple and complex competing political, economic, social, technological, scientific, biological and other interests through integrated, holistic and comprehensive regulation of all high seas uses and activities in the common interest of all states. The question is whether any principles exist on which to construct an international regime, consistent with the LOSC, which adequately protects the interests of the international community while simultaneously protecting and preserving the marine environment for present and future generations?

5. The Juridical Basis for a New Approach to High Seas Governance?

Expansion of the application of the common heritage of mankind principle (CHM) is often posited as a starting point for discussion of a new high seas governance paradigm which moves beyond the existing common property paradigm. Usually referred to in the context of regulatory regimes for resources in global commons' the principle has most famously been applied in respect of the deep seabed in Part XI of the LOSC which gives jurisdiction over all rights in the resources, defined as 'solid,

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[21] For a discussion of the concept see F. Orrego Vicuña, 'The 'Presential Sea': Defining Coastal States' Special Interests in High Seas Fisheries and other Activities' (1992) 35 *German Yearbook of International Law* 264-311.

[22] See, eg, 'Harper vows to extend custodial management' CBC News online, 6 December 2005, available at http://www.cbc.ca/canada/newfoundland-labrador/story/2005/12/06/nf_harper_fish_20051206.html#skip300x250.

liquid or gaseous resources, *in situ* in the Area at or beneath the seabed'[23] to mankind as a whole.[24] Activities in the Area are to be organised and controlled by the International Seabed Authority which is responsible for administering the resources of the Area.[25] The major characteristics of the CHM principle are generally identified as the elements of non-appropriation, international management, shared benefits and reservation for peaceful purposes.[26] A CHM regime therefore differs fundamentally from a common property regime in that it allows all states to participate in the benefits gained from exploitation of a resource even if they do not or can not participate in that exploitation.

However, expanding the application of the CHM regime to the high seas in general is a difficult proposition. Both the definition and the scope of the principle are matters of deep contention and its legal status is doubtful, particularly given the revision of Part XI by the 1994 Implementing Agreement which effectively removed the benefit-sharing provisions for deep seabed mining.[27] While state practice and *opinio juris* clearly evidence acceptance of the elements of non-appropriation, international management and peaceful purposes,[28] it is the aspect of benefit-sharing which is in direct opposition with the exclusive ownership notion inherent in the capture based common property regime, which makes application of the principle so objectionable to so many.

Nevertheless, while to a casual observer the divide between the common property and CHM camps seems irreconcilable, commentators such as Tladi,[29] Scovazzi[30] and Leary[31] suggest that the divide can be bridged without direct application of, but with reference to, the CHM principle and other principles of international law relating to cooperation and sustainable development. As Birnie and Boyle note, the CHM principle is important 'in providing one of the most developed applications of

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[23] LOSC Art 133.
[24] LOSC Art 137.
[25] LOSC Art 157.
[26] P. Birnie and A. Boyle, *International Law and the Environment* (2nd Ed.) (Oxford University Press, 2002) 143.
[27] Ibid., See also, K. Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff, 1998) 1-2; D. Leary, *International Law and the Genetic Resources of the Deep Seabed* (Martinus Nijhoff, 2007) 98 – 101; and N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997) 468.
[28] The role and powers of the International Seabed Authority, established in 1994, in managing exploration for deep seabed minerals beyond national jurisdiction is generally accepted by states.
[29] D. Tladi, 'Genetic Resources, Benefit Sharing and the Law of the Sea: the need for clarity' (2007) 13 *Journal of International Maritime Law* 183-193.
[30] T. Scovazzi, Scovazzi, 'Some Considerations on Future Directions for the International Seabed Authority' *Proceedings of the Tenth Anniversary Commemoration of the Establishment of the International Seabed Authority* (Kingston, 2005) 162; Scovazzi, 'Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority' (2004) *International Journal of Marine and Coastal Law* 383; Scovazzi, 'Bioprospecting on the Deep Seabed: A Legal Gap Requiring to Be Filled' in Francioni & Scovazzi (eds.), *Biotechnology and International Law*, (Oxford, 2006) 81; and Scovazzi, 'The Concept of Common Heritage of Mankind and the Genetic Resources of the Seabed beyond Limits of National Jurisdiction' Paper submitted to the Workshop on High Seas Governance for the 21st Century (New York, 17-19 October 2007), available at http://www.iucn.org/themes/marine/high-seas-workshop-oct07.html.
[31] D. Leary, above n. 26 at 174 – 181.

trusteeship or fiduciary relationship in an environmental context'.[32] While a strict invocation of the pure CHM principle may be too controversial for application to all high seas resources and uses, by redefining some of the elements of the trust it may be possible, to devise a regime that straddles the divide between the common property and CHM principles in a manner that protects not only the common interests but also the common concerns of all humanity in protection and preservation of the marine environment. This common ground might be found in the concept of 'public trusteeship'.

The use of the trust analogy is reflected in the proposals for, *inter alia*, a Global Commons Trust Fund,[33] a high-seas fisheries trust,[34] and a World Ocean Public Trust,[35] and the recommendation, in 1998, by the Independent World Commission on the Oceans that "the 'high seas' be treated as a public trust to be used and managed in the interests of present and future generations".[36] According to Sand,[37] the idea of a public trusteeship in international law is nothing new and, indeed, we may have long been practising international public trusteeship, even in some aspects of high seas governance, without realising or admitting it. The FSA, for example, purports to make RFMOs the stewards, custodians or trustees of high seas fisheries resources not only for their members but for the entire international community.[38] There is thus no inherent reason why the concept cannot be applied as the juridical basis for establishment of a 21st century coherent, integrated, global system of fiduciary oceans governance which regulates *access* and *use* (as opposed to access and benefit-sharing) in the common interest/concern of all. Indeed there is even support in existing state practice and *opinio juris* for it.[39] It is just a matter of identifying the elements of the trust, and of operationalising it.

Importantly, the trusteeship model does not presuppose that all revenues and benefits *must* be shared on a CHM basis. In other words, it does not require the redistribution of revenues back to individual states to do with as they please. Need to say something here about how an open access regime for high seas resources can still exist but with rules for those who seek to access the resources and proper sustainable management by the regional stewards. Thus, it seems to straddle the divide between the CHM and

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[32] Birnie and Boyle, above n. 25 at 144.
[33] C.D. Stone, 'Mending the Seas through a Global Commons Trust Fund' in J.M. Van Dyke, D. Zealke and G. Hewison (eds) *Freedom for the 21st Century: Ocean Governance and Environmental Harmony* (1993).
[34] R. Shotton, 'Managing the World's High Seas Fisheries: A Proposal for the High Seas Fisheries Trust', Paper submitted to the Workshop on High Seas Governance for the 21st Century (New York, 17-19 October 2007), available at http://www.iucn.org/themes/marine/high-seas-workshop-oct07.html.
[35] M. Gorina-Ysern, K. Gjerde and M. Orbach, 'Ocean Governance: A New Ethos through a World Ocean Public Trust' in L. Glover, S.A. Earle, and G. Kelleher, *Defying Oceans End; An Agenda for Action* (Island Press, 2004) 197 – 212.
[36] Independent World Commission on Oceans, *The Ocean: Our Future* (Cambridge University Press, 1998) 17.
[37] P. Sand, 'Public Trusteeship for the Oceans' in T. M. Ndiaye and R. Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff, 2007) 521 – 544.
[38] Articles 8-17 of the UN Fish Stocks Agreements institutionalise and operationalise the provisions of the LOSC relating to cooperation through regional fisheries management organisations and arrangements for both member and non-member states who, unless they agree to abide by the rules of the relevant organization or arrangement are to refrain from fishing.
[39] Sand, above n. 36 at 537 – 541.

common property principles, providing a workable juridical underpinning for current and future governance of the high seas.

6. The Shape of a 21st Century Regime for High Seas Governance

Building on the underlying concept of 'international public trusteeship' it is possible to identify a range of mechanisms and tools that might be adopted by the international community to address the shortcomings that have been identified in high seas governance.

6.1 Improving global coordination and cooperation

In the case of the high seas, since all states have a duty to cooperate in the protection and preservation of the high seas marine environment and the conservation and sustainable use of its resources,[40] the trustee of the high seas is, *prima facie*, the international community as a whole. The international community may, however, delegate the role of trustee to sub-groupings as has been done in the case of regional fisheries organisations or arrangements.[41] In other contexts, states parties to global sectoral agreements relating to the prevention of marine pollution such as the London (Dumping) Convention,[42] London Protocol,[43] and MARPOL[44] fulfil the role of trustee. Other regional agreements such as the Antarctic Treaty[45] and its Environmental Protocol[46] and regional seas agreements[47] are also relevant.

However, it is precisely this delegation that has led to fragmentation among a wide variety of sectoral and geographical bodies. To overcome this fragmentation there is a need to forge stronger horizontal and vertical links between regional environmental

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[40] LOSC Articles 117 and 192.

[41] In the high seas fisheries context, the duty to cooperate includes the duty to cooperate in the establishment of regional and sub-regional fisheries organisations: LOSC Article 118. See also note 39 above.

[42] 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* 1046 UNTS 120 (*London Convention*).

[43] 1996 *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (1997) 36 ILM 1 *(London Protocol)*.

[44] 1973 *International Convention for the Prevention of Pollution from Ships (as amended by the 1978 Protocol)* 1340 UNTS 61 *(MARPOL 73/78)*.

[45] 1959 *Antarctic Treaty* 402 UNTS 11.

[46] 1991*Protocol on Environmental Protection to the Antarctic Treaty* (1991) 30 ILM 1455.

[47] 1995 *Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean* text at <http:www.unep.ch/regionalseas/regions/med/t_barcek.htm> *(Barcelona Convention)*; 1978 *Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Marine Pollution* 17 ILM 511 (1978) *(Kuwait Convention)*; 1981 *Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region* 20 ILM 746 (1981) *(Abidjan Convention)*; 1981 *Convention for the Protection of the Marine Environment and Coastal Areas of the South East Pacific* 33 International Digest of Health Legislation (1982) 96 *(Lima Convention)*; 1982 *Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment* Comp.2282 - 58 *(Jeddah Convention)*; 1983 *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention)* 22 ILM 221(1983); 1985 *Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi Convention)* Official Journal of the European Community 1986, C253/10 - 58; 1986 *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention)* 26 ILM 41 (1987); 1992 *Convention on the Protection of the Black Sea against Pollution (Bucharest Convention)* 32 ILM 1110 (1993); 1992 *Convention for the Protection of the Marine Environment of the Northeast Atlantic* 32 ILM 1069 (1993) *(OSPAR Convention)*.

protection organisations and other global and regional bodies with sectoral responsibilities for activities in the high seas areas such as RFMOs, regional Port State authorities, IMO, ISBA and FAO. This might be achieved through establishing an intergovernmental 'steering committee' to enhance coordination and cooperation among states as well as relevant intergovernmental organisations and bodies, industry and civil society. This could be a role which is taken up by UN Oceans. Alternately, coordination could be enhanced through the development of memoranda of understanding and joint programs of work between and among sectoral and regional bodies and existing multilateral environmental agreements.

Beyond the fragmentation issue, shortcomings in current regimes could be addressed through the strengthening or, where necessary, developing regional or sectoral agreements. Regional arrangements could be developed, expanded or enhanced through the development of integrated oceans management bodies which build on existing regional arrangements for marine environmental protection, conservation of resources and maritime surveillance and enforcement. The limited examples of high seas governance and policy in areas such as the North East Atlantic[48] and the Mediterranean[49] provide some guidance for other regional groupings to develop their

[48] The *OSPAR Convention* applies in the marine area of the North East Atlantic which includes all the maritime zones of the Contracting Parties and substantial areas beyond national jurisdiction. Annex V to the Convention deals with the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area covered by the Convention. It requires Contracting Parties to take the necessary measures to protect and conserve the ecosystems and biological diversity of the maritime area, to restore marine areas which have been adversely affected and to cooperate in adopting programmes and measures for those purposes and for the control of human activities. Since Annex V entered into force, the OSPAR Commission has conducted extensive preparatory work to implement the Annex pursuant to its Biological Diversity and Ecosystems Strategy adopted in 1998. The strategy is based on four elements:

- The development of ecological quality objectives in support of the Commission's declared ecosystem approach to the management of human activities;
- The assessment of species and habitats that are threatened or in decline and the development of protection measures and programmes;
- The creation of an ecologically coherent network of well managed marine protected areas;
- The assessment of human activities which may adversely affect the marine environment of the OSPAR maritime area and the development of programmes and measures to safeguard against such harm.

Under the first element, a pilot project has been conducted in the North Sea which has resulted in the identification of 10 ecological quality objectives to guide the development of environmental protection programmes and measures. Under the second element, criteria have been adopted for the selection of threatened and declining species and habitats and an initial list of threatened and /or declining species was adopted in January 2003. Under the third element, guidelines have been developed for the identification, selection and management of marine protected areas (MPAs) with the aim of achieving, by 2010, an ecologically coherent network of well managed MPAs across the whole of the OSPAR maritime area. OSPAR Recommendation 2003/3 adopted in June 2003 confirms the Commission's general intention to consider the declaration of MPAs beyond national jurisdiction and since 2004 Parties to Annex V have been asked to consider which high seas areas should be proposed to the OSPAR Commission for inclusion in the OSPAR network of MPAs. Under the final element of the Strategy, eight human activities which may adversely affect the marine environment of the OSPAR maritime area have been assessed. In particular, the OSPAR Commission has assessed the effects of fisheries activities within its maritime area on ecosystems and biological diversity and has drawn this to the attention of the North East Atlantic Fisheries Commission (NEAFC) suggesting that action be taken on a range of issues. NEAFC has subsequently implemented some fisheries closures in high seas areas which are also part of the OSPAR maritime area.

[49] Under the 1995 *Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (SPAMI Protocol)* to the *Barcelona Convention* the Parties may establish specially

own high seas governance regimes. With respect to sectoral regimes, the current initiative to develop a legally binding instrument on minimum standards for port state measures in the IUU fishing context[50] provides a useful precedent.

Nevertheless, since responsibility rests with the international community as a whole, an argument exists for the adoption of a global instrument or mechanism either charged with the power to review and endorse conservation and management programs and measures for marine areas beyond national jurisdiction initiated at the regional or sectoral level or which provides criteria against which such regional or sectoral measures can be assessed. At the very least, this instrument should establish some sort of default mechanism for the interim regulation of new and emerging activities pending the establishment of formal regulatory measures. This instrument could take a number of forms with an implementing agreement to the LOSC being one possibility that has been discussed in the BBNJ Working Group.

6.2 Improving participation and compliance by all states

Since all states have the equal right to use and enjoy the high seas,[51] the beneficiaries of the trust must also be all states in both their individual and collective capacities. This, however, presupposes the equal enjoyment by all beneficiaries of their right to participate in high seas activities subject to the management terms established by the trustee.[52]

Discrepancies in ability to participate between developed and developing states lie at the root of debates over, for example, participation in RFMOs, regulation of exploitation of marine genetic resources, and the phenomenon of flags of

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protected areas of Mediterranean importance (SPAMIs) in marine areas which are within national jurisdiction or wholly or partly on the high seas. These areas may include sites which are important for conserving the components of biological diversity in the Mediterranean, which contain ecosystems specific to the Mediterranean area or which are of special interest at the scientific, aesthetic, cultural or educational levels. The *SPAMI Protocol* commits its Parties to drawing up a list of SPAMIs, to complying with the measures applicable to the SPAMIs and not to authorise activities which might be contrary to the objectives for which the SPAMIs are established. Two or more neighbouring Parties may propose a SPAMI which is located partly or wholly on the high seas or in an area where the limits of national sovereignty have not yet been defined. In these cases the neighbouring parties must consult on proposed protection and management measures and the Parties to the SPAMI Protocol must agree on the inclusion of the area in the SPAMI List and on the proposed protection and management measures. One of the SPAMIs in the *Barcelona Convention* Area, the Sanctuary for Marine Mammals in the Ligurian Sea established by France, Italy and Monaco in 1999. The waters of the Sanctuary include the internal and territorial waters of the three proponent states as well as adjacent areas beyond national jurisdiction. The Agreement establishing the Sanctuary commits the Parties to protecting eight marine mammal species from negative impacts both direct and indirect. It prohibits the deliberate killing or harassment of the species in the sanctuary, other than for urgent situations or for *in situ* scientific research. A management plan has been developed for the Sanctuary which applies an ecosystem based approach to its management. While not enforceable against flag vessels of states not party to the *Barcelona Convention,* the establishment of the Sanctuary in a marine area beyond national jurisdiction constitutes a deterrent for potentially delinquent third party vessels.

[50] See E.J. Molenaar, 'Port State Jurisdiction: Towards Comprehensive, Mandatory and Global Coverage' (2007) 38 *Ocean Development and International Law* 225 – 257 and the *Report of the Expert Consultation to Draft a Legally-Binding Instrument on Port-State Measures*, FAO Fisheries Report No. 846, September 2007.

[51] LOSC Article 87 provides that the high seas are open to all states whether coastal or land-locked.

[52] LOSC Article 116 stipulates that all states have the right for their nationals to fish on the high seas subject to their treaty obligations, the rights, duties and interests of costal states and the duty to cooperate in the conservation and management of high seas living resources.

convenience. Mechanisms are therefore required to assist developing, and indeed all, states to participate fully in the enjoyment of their rights and to meet their duties and responsibilities vis-à-vis their vessels and nationals. Capacity building may be enhanced through provision of assistance from international financial institutions, private donors or other states. Alternately, funding mechanisms utilising some of the revenues generated by activities permitted under the trust might be used to fund capacity building,[53] conservation efforts, enforcement activities, or remediation and repair of the commons areas for the benefit of both current and future generations.[54] The Catch Documentation Scheme Fund established by the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR) serves as an example of this sort of mechanism. Where contracting parties of CCAMLR have seized or confiscated illegally caught Patagonian toothfish, all or part of the proceeds of sale may be transferred to the fund to be used for capacity building purposes in developing contracting party states. [55]

Of course, along with rights come duties. 'Only those who play by the rules' should be permitted to participate in the conduct of high seas activities. Failure to play by the rules constitutes a breach giving rise to international responsibility, which responsibility may be invoked by any other state. This has implications for the actions beneficiaries can take to enforce the trust either against each other or as against the trustee. While collective action may be preferable, this cannot preclude the right of individual action. This, however, presupposes a clear articulation of the customary rights and duties binding on all states together with a clear articulation of the consequences of failure to meet those obligations.

In other words, an effective high seas governance regime requires the articulation of clear criteria and standards against which the conduct of beneficiaries/flag states can be judged and the nature of the response determined (ie arrest, port denials, licence denials, trade measures, etc). Further, it requires global acceptance of a non-flag state enforcement paradigm which recognises a secondary jurisdiction to be exercised by or on behalf of the international community in cases where flag states have shown themselves unwilling or unable to comply with internationally agreed rules and standards or conservation and management measures Non-flag state enforcement is already recognised in the adoption of port state measures in relation to vessel source pollution[56] and in certain circumstances in the context of high seas fisheries.[57] Current discussions on a global port state agreement to combat IUU fishing,[58] on establishment of criteria for assessing flag state performance, audit and evaluation, and on identification of the full range of measures non-flag states can take against

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[53] Sand, above n. 36 at 541 – 542.
[54] Leary, above n. 26 at 177.
[55] Annex B to CCAMLR Conservation Measures 10-05 (2006) 'Catch Documentation Scheme for *Dissostichus* spp.'
[56] See E.J. Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution* (Kluwer Law International, 1998).
[57] See R. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff, 2004); Rayfuse, "Regulation and Enforcement in the Law of the Sea: Emerging Assertions of a Right to Non-Flag State Enforcement in the High Seas Fisheries and Disarmament Contexts" 25 *Australian Yearbook of International Law* 181-200 (2005); and Rayfuse, "Countermeasures and High Seas Fisheries Enforcement" 51(1) *Netherlands International Law Review* 41-76 (2004).
[58] The discussions are currently taking place under the auspices of the FAO. See *Report of the Expert Consultation to Draft a Legally-Binding Instrument on Port-State Measures*, above n. 49.

recalcitrant flag states and their vessels[59] all serve to evidence growing international acceptance of the non-flag state enforcement paradigm. Nevertheless, the precise parameters of this paradigm have yet to be fully articulated.

6.3 Improving assessment, evaluation and regulation of existing and new uses

The ultimate objective of the trust is to ensure protection and preservation of the marine environment of the high seas and the conservation and sustainable utilisation of high seas resources by current and future generations.[60] Fundamental to the successful achievement of this goal is a knowledge and understanding of the marine environment, its resources and it processes. In this respect scientific initiatives such as the Census of Marine Life are invaluable in assisting in understanding the functions, processes and services provided by the marine environment, as well as the historic, ongoing and potential future consequences of human uses and impacts on that environment. However, the establishment of a global mechanism to coordinate this research and its dissemination could better inform the oceans policy-making agenda.

Also fundamental to the goal of marine environmental protection is the ability to assess and, where necessary, regulate and conduct on-going monitoring of all existing and new uses to ensure no undue interference with existing uses and no adverse effects on the marine environment. As noted above, a cross-sectoral approach involving enhanced coordination and cooperation, within, between and across sectors is necessary to adequately deal with the issues confronting ocean space. Key to achieving this is implementation of an ecosystem-based approach which transcends sectoral interests such as those of the IMO, RFMOs, and the FAO to provide for integrated oceans management taking into account the impacts of all human activities. This requires implementation of modern conservation principles and management tools.

With respect to the former, it is important to remember that the freedom of the seas is a conditioned one subject to: the obligation to protect and preserve the marine environment; the obligation to conserve and sustainably manage and use biodiversity; the obligation to cooperate both between states and between institutions and organisations; the requirements of inter- and intra-generational equity; the precautionary approach including the requirement of prior environmental impact assessment; the ecosystem approach; the polluter pays principle; and the general principles of state responsibility and accountability.

With respect to the latter it is similarly important to remember that ocean systems are not stable, but are rather dynamic, unstable and non-linear systems, subject to sudden changes and tipping thresholds. Flexible, risk-based, integrated but adaptive management under uncertainty is therefore essential?. Achievement of this requires incorporation of a range of strategies including environmental impact assessment, spatial planning, and cross-sectoral coordination mechanisms. Importantly it also

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[59] See Report of the FAO Committee on Fisheries, Twenty-Seventh Session, Rome, Italy, 5 – 9 March 2007, FAO Fisheries Report R830 para 71, and High Seas Task Force, *Closing the Net: Stopping Illegal fishing on the high seas*, Final Report of the Ministerially-led Task Force on IUU Fishing on the High Seas, March 2006, available at http://www.high-seas.org.

[60] This would not include the non-living mineral resources of the Area which are governed under Part XI of the LOSC and subject to the CHM regime, but would include non-living resources of the water column such as salt, wave power, and the water itself.

requires states to exercise adequate control over their nationals and the enforcement by non-flag states of responsible flag state behaviour through such things as performance assessment, port state controls, trade and other measures.

Beyond the responsibility of individual states, there is a collective responsibility incumbent on trustees to manage effectively for the benefit of all current and future beneficiaries. Failure to do so will enliven the international responsibility of the collective, not just vis-à-vis the members of that particular regional or sectoral regime but vis-à-vis all members of the international community. Global standards, guidelines and requirements of best practice, such as those suggested in the case of RFMOs,[61] as well as oversight mechanisms are therefore needed to monitor the performance of the global, regional and sectoral agreements, arrangements and organisations. In addition, the consequences of a failure by such a trustee to adequately fulfil its mandate need to be carefully defined. Where the trustee fails, or is perceived to have failed, in its duty, challenges to its legitimacy can be expected, as in the ongoing debates over the legitimacy and competence of the International Whaling Commission[62] and the Indian Ocean Tuna Commission.[63] While such challenges may be infrequent and may, in general, be expected to lead to internal reform, the possibility of termination of the 'trust mandate' cannot be completely ignored.

6.5 Institutional arrangements

In terms of institutional design for a comprehensive integrated high seas regime, at least two approaches are possible: a decentralised model and a centralised model. A decentralised regime would see the adoption of a new global 'trust instrument' clearly setting out the terms of the trust and the principles for its enforcement and review, but leaving specific authority for implementation of the trust terms to the mandates of regional and global sectoral agreements. These would include existing RFMOs and the International Seabed Authority, as well as global sectoral agreements such as the London Convention, London Protocol and MARPOL, and regional agreements such as the OSPAR Convention and the Antarctic Treaty. The instrument could also require the establishment of other integrated regional oceans management organisations (ROMOs) where none exist. The instrument would set out the principles and criteria to be adopted and applied by these various agreements and the terms of the coordination and cooperation between them. This new instrument would supplement existing (and new) agreements, not by making their specifics binding on all states, but rather by making it a breach of international law not to comply with their rules. In other words, since the corollary of a right to do something is the right not to do something, states would still retain the right not to utilise the high seas. However, if they chose to do so, the exercise of their right to utilise the high seas would have to be in accordance with the rules adopted by the relevant regional or sectoral organisation. Enforcement would be the responsibility of the various regional

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[61] *Recommended Best Practices for Regional Fisheries Management Organisation*, Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organisations (The Royal Institute of International Affairs, Chatham House, 2007), available at http://www.oecd.org/dataoecd/2/33/39374297.pdf.

[62] See, eg, D. Currie, 'Whales, Sustainability and International Environmental Governance' 16(1) Review of European Community and International Environmental Law (2007) 45 – 57.

[63] See, W. Edeson, 'Article XIV of the FAO Constitution, International Legal Personality and the Indian Ocean Tuna Commission' in Ndiaye and Wolfrum (eds) above n. 36, 735 – 750.

and sectoral regimes and all parties to those regimes would exercise an enforcement power on behalf of the international community as a whole.

A centralised model would see the establishment by global agreement of a new International Oceans Authority (IOA) to act as the overall trustee for all high seas uses and activities. Adoption of a global mechanism with both legal and institutional elements could be used to coordinate and integrate the parallel strands of sectoral and regional marine environmental protection activity. In this respect the IOA would act as the institutional focal point to provide best practice guidance and global endorsement of decisions and measures adopted by regional or sectoral agreements. It would be responsible for progressing coordination and cooperation between these regional and sectoral agreements and would have the ultimate power of oversight to ensure their efficacy and compliance with best management practices. Where regional or sectoral organisations and their members failed to enforce compliance the IOA could step in to do so. It would also be responsible for assessing and monitoring the environmental impact of existing, new and emerging uses and activities to ensure they do not cause damage to the marine environment or unduly interfere with the rights of other users. The IOA could be empowered either to take measures directly or to recommend the taking of measures by relevant regional or sectoral bodies.

Whichever model is adopted, however, there is a fundamental need to provide a mechanism for the prompt resolution of disputes both between users in the same sector and cross-sectorally. The instrument establishing the IOA could adopt the compulsory dispute resolution provisions of the LOSC making use of the existing institutional infrastructure and expertise which resides in bodies such as ITLOS.

7. Conclusion

The legal regime for the high seas is fragmented and incomplete. To be effective the law of the sea must overcome the existing systemic high seas malaise of non-comprehensiveness, lack of applicability to non-participating states, and lack of enforceability. This paper has tried to identify a number of mechanisms which might be adopted to rectify these deficiencies and has suggested the invocation of a global approach based on the concept of international public trusteeship as a potential juridical basis for a new approach to high seas governance in the 21st century. This is not a radical approach, Rather it seems to accord with state practice and the need to ensure the protection of the high seas environment and the sustainability of its resources for current and future generations. An international public trust for the oceans beyond national jurisdiction would foster environmentally responsible use of the high seas and through a closely linked network of sectoral and regional organisations ensure the application of modern conservation principles and management tools to existing, emerging and new activities on the high seas. While not denying open access to those states with the capability to conduct resource related and other activities on the high seas, it would establish and monitor best practice standards for sustainable use of the oceans beyond national jurisdiction.

The achievement of an international trust for the oceans beyond national jurisdiction will need concerted political will among the international community and a long term commitment to sustainable use and management of the resources and biodiversity of this vast global commons which eschews over-consumption of high seas resources,

profligate discharge of marine pollutants in high seas areas and scientific experimentation without environmental safeguards. Reversing the neglect of the marine environment and the depletion of marine resources which are an inevitable result of unregulated use of the high seas would be an enduring legacy for the effort expended by the international community in reaching this objective.