

**INTERGENERATIONAL STEWARDSHIP AND
THE NEW HIGH SEAS TREATY,
OR,
HOW TO STOP WORRYING AND LEARN TO
LOVE POLYCENTRIC MARINE
GOVERNANCE**

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Abstract

Recently a new High Seas Treaty (officially titled an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction) was adopted by the United Nations General Assembly in June 2023, after nearly twenty years of what have been described as “The most important talks no one has heard of.” If ratified, it would offer important new tools for marine conservation. Yet little notice has been taken either of the negotiations or their conclusion in the environmental ethics literature, especially in North America.

I discuss possible reasons why the High Seas treaty has garnered so little attention from environmental philosophers. I then go on to illustrate the gaps in current polycentric marine governance regimes with the plight of the American Eel. After discussing a mechanism the High Seas Treaty provides that would permit protection of the eels’ spawning grounds in the Sargasso Sea, I will go the objection that the High Seas Treaty does too little to unify our current polycentric nature of ocean governance and thus

too little to ensure just and equitable marine stewardship. I will argue that on Jonathan Wolf's 'layers of justice' approach to norms of international cooperation, it need not be. Assuming the High Seas Treaty is ratified, we could stop worrying and learn to love (or at least live with) polycentric marine governance.

Keywords

Marine Stewardship, Environmental Justice, Ethics, High Seas Treaty, Sargasso Sea, American Eels

Resumen

Recientemente, la Asamblea General de las Naciones Unidas adoptó un nuevo Tratado de Alta Mar (titulado oficialmente Acuerdo en el marco de la Convención de las Naciones Unidas sobre el Derecho del Mar relativo a la conservación y el uso sostenible de la diversidad biológica marina de las zonas situadas fuera de la jurisdicción nacional) en junio de 2023, tras casi veinte años de lo que se ha descrito como "Las conversaciones más importantes de las que nadie ha oído hablar". Si se ratificara, ofrecería nuevas e importantes herramientas para la conservación marina. Sin embargo, en la literatura sobre ética medioambiental, especialmente en Norteamérica, se ha prestado poca atención a las negociaciones o a su conclusión.

Analizo las posibles razones por las que el Tratado de Alta Mar ha suscitado tan poca atención entre los filósofos del medio ambiente. A continuación ilustraré las lagunas de los actuales regímenes policéntricos de gobernanza marina con la difícil situación de la anguila americana. Tras analizar el mecanismo que ofrece el Tratado de Alta Mar para proteger las zonas de desove de la anguila en el Mar de los Sargazos, plantearé la objeción de que el Tratado de Alta

Mar hace muy poco para unificar la actual naturaleza policéntrica de la gobernanza de los océanos y, por tanto, muy poco para garantizar una gestión marina justa y equitativa. Argumentaré que, según el enfoque de Jonathan Wolf de las “capas de justicia” de las normas de cooperación internacional, no tiene por qué ser así. Suponiendo que se ratifique el Tratado de Alta Mar, podríamos dejar de preocuparnos y aprender a amar (o al menos a convivir con) la gobernanza marina policéntrica.

Palabras clave

Gestión marina, justicia medioambiental, ética, Tratado de Alta Mar, Mar de los Sargazos, anguilas americanas

When Singapore’s Ambassador for Oceans and United Nations Conference president, Rena Lee, announced the successful conclusion of negotiations on a new treaty to update the United Nations Convention on the Law of the Sea with the heartfelt words, “The ship has reached the shore,” her delight was palpable. This treaty, officially titled an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (henceforth the High Seas Treaty), was adopted by the United Nations General Assembly in June 2023 after nearly twenty years of what were described as “The most important talks no one has heard of.”¹ Currently open

¹ Karen McVeigh, “High seas treaty: historic deal to protect international waters finally reached at UN,” *The Guardian* (online): <https://www.theguardian.com/environment/2023/mar/05/high-seas-treaty-agreement-to-protect-international-waters-finally-reached-at-un>. Posted Sun 5 Mar 2023 04.38.

for signatures, the Treaty will come into effect 120 days after receiving its 60th official national ratification or approval, acceptance, or accession.

Yet little notice has been taken either of the negotiations or their conclusion in the environmental ethics literature, especially in North America.² This is particularly surprising as we are now several years into the United Nations Educational, Scientific and Cultural Organization (UNESCO)'s global initiative, a Decade of Ocean Science for Sustainable Development (2021-2030), intended to focus researchers' attention on maritime issues. It would be reasonable if the Treaty's provisions were insignificant, environmentally or philosophically. But nothing could be further from the truth. If ratified, this Agreement would make the hitherto impossible possible – creation of marine protected areas anywhere in the area of the High Seas. And it does so in a conceptually interesting way, invoking notions of stewardship and intergenerational equity to amend what up to now has been the single most comprehensive treaty governing human exploitation of the marine environment, the 1982 United Nations Convention for the Law of the Sea (UNCLOS). The new treaty would protect marine species and ecosystems for anthropocentric reasons rather than respect for nature or concern for marine species welfare, which some will find objectionable. But if it comes into force, it will offer important new tools for marine conservation.

² See the United Nations General Assembly, Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. Text available at <https://treaties.un.org/doc/Publication/CN/2023/CN.203.2023-Eng.pdf>. Posted 20 July 2023.

This is vital because the health of the world's oceans is critical for sustaining all life on earth. Ocean plankton is the source of 50 percent of the world's oxygen. Ocean waters absorb 25 percent of emitted carbon dioxide and store 90 percent of the heat that greenhouse gases, such as carbon dioxide, are adding to the global climate.³ Oceans are also crucial for human food security and employment. Marine resources provide billions of people with employment and at least 20 percent of their annual intake of animal protein.⁴ Yet the oceans remain largely unexplored. Some estimate that less than 10 percent of marine species have been classified.⁵ But while we do not know precisely how much damage careless human exploitation is doing to marine ecosystems, it is becoming clear that we are doing a great deal.

Agricultural runoff is polluting coastal zones, causing imbalances in their microbial life, which may cause "dead" (i.e., hypoxic) zones where marine life dies for lack of oxygen. Dumping and marine shipping are contributing to the pollution of ocean waters, driving up rates of heavy metal and microplastic contamination of fish and other marine life. Climate change is warming ocean waters, damaging coral reefs which are crucial nurseries for many species of fish on which humans depend. Accidental species introductions, damage from mineral and petrochemical exploration, overfishing and destructive fishing practices are further threats. Many important fisheries are in decline, which is

³ United Nations, "The ocean - the world's greatest ally against climate change." <https://www.un.org/en/climatechange/science/climate-issues/ocean>.

⁴ Spalding, Mark J. (2016) "The New Blue Economy: the Future of Sustainability," *Journal of Ocean and Coastal Economics*: 2#2 (2016) Article 8.

⁵ U.S. National Ocean and Atmospheric Administration, "How Many Species Live in the Ocean?", <https://oceanservice.noaa.gov/facts/ocean-species.html> (Last updated: 08/24/23)

increasing inequality in access to them by small and developing coastal nations, who are often more reliant on fishing to feed their populations and less able to support ocean-going vessels capable of chasing remaining stocks around the world.⁶ These same communities are often most effected by contaminants introduced into the flora and fauna on which they rely by plastic and chemical pollution. The social inequities created by declining ocean health have led to calls for “rapid, systemic and transformative actions ...at all scales, of different types, and by all actors to address environmental justice in the ocean.”⁷

In what follows, I will discuss some possible reasons why the High Seas treaty has garnered so little attention from environmental philosophers. I will then go on to illustrate the gaps in current polycentric governance regimes by examining threats to the survival of the American Eel. After discussing how the High Seas Treaty provides a mechanism that may substantially promote eel conservation, I will go on to consider whether the polycentric nature of ocean governance, which the High Seas Treaty does not eliminate, is as disadvantageous for achieving just and environmentally effective outcomes as is sometimes suggested. I will argue that on Jonathan Wolf’s ‘layers of justice’ view of the norms of international cooperation, it need not be. Assuming the High Seas Treaty is ratified, we can stop worrying and learn to love (or at least live with) polycentric marine governance.

⁶ Chris Armstrong, “Ocean justice: SDG 14 and beyond,” *Journal of Global Ethics*: 16#2 (2020) 239-255.

⁷ N. J. Bennett, et al, “Environmental (in)justice in the Anthropocene ocean,” *Marine Policy*: 147#105383 (2023) 1-19, 10-11.

Apathy towards Ocean Governance

Why then have most North American environmental philosophers shown so little interest in this treaty or in lobbying for its adoption? A number of reasons suggest themselves. One may be the long-standing association of North American environmentalism with aesthetically pleasing scenic landscapes and the charismatic megafauna and fauna that traditionally inhabited them. A second may be the absence of what Roger Scruton calls *oikophilia*, and which others call attachment to place, from most North Americans' attitudes towards the seas and oceans bordering the continent, which relatively few North Americans think of as 'home.'⁸ The magnitude of human ignorance of the biota living beneath the waves is very likely a third obstacle to developing an appreciation comparable to appreciation for their terrestrial counterparts. A fourth may be a sense of powerlessness when surveying the bewildering array of institutions, regional, national, transnational, and international, that govern human exploitation of marine species and resources. So even when people do become knowledgeable and concerned about threatened marine species, identifying practical ways by which to express that concern, let alone take action to protect them, may seem depressingly difficult or impossible. No single treaty or

⁸ Scruton, Roger, *Green Philosophy: How to Think Seriously about the Planet*. (London: Atlantic Books 2012); Bryan G. Norton and Bruce Hannon, "Environmental Values, A Place-Based Approach", *Environmental Ethics* 19#3(1997)227-245; Anja Kanngieser and Zoe Todd, "From Environmental Case Study to Environmental Kin Study," *History and Theory: Studies in the Philosophy of History*: 59#3 (2020), 385-393.

institution governs their use.⁹

This would matter less if ocean environments were not interconnected in ways that allow fish and marine mammals to move among and across them so freely. Take the case of the American Eel, a fresh water fish whose remarkable life cycle ends with migration to the Sargasso Sea, where adult eels spawn and presumably die. Their larvae slowly drift towards the river mouths of Caribbean coastal nations and the Eastern Atlantic Seaboard, arriving as tiny transparent 'glass eels' or 'elvers,' to recolonize fresh water bodies from which their predecessors came.¹⁰ Until recently, there was no significant fishing for glass eels in these regions. American eels faced all the usual pressures migratory fresh water fish encounter pollution, habitat disruption, and dams blocking their passage, but not overfishing. This changed after populations of freshwater eels began crashing in other parts of the world, reducing the availability of their young to Asian aquaculture facilities. These facilities raise the eels to adulthood to be marketed as sushi. And since they will not normally breed in captivity, these facilities are continually seeking fresh stock. As fresh stock becomes increasing scarce, prices go up. American Glass Eels are now the world's most expensive fish per pound. As they are easy to catch, poaching has become rampant. The Canadian government was forced to close its Glass Eel fishery entirely for a period during the 2023 season, due in part to violent

⁹ Catharine Blanchard, "Fragmentation in high seas fisheries: Preliminary reflections on a global oceans governance approach," *Marine Policy* Volume 84, October 2017, Pages 327-332

¹⁰ José Benchetrit, James D. McCleave, "Current and historical distribution of the American eel *Anguilla rostrata* in the countries and territories of the Wider Caribbean," *ICES Journal of Marine Science*, 73#1 (2016) 122-134.

clashes among fishers and poachers.¹¹

What can concerned citizens do to help conserve the American Eel? As with any other fresh water fish, lobbying for tighter restrictions on water pollution, habitat restoration, and removing or reconfiguring dams to improve free passage are possibilities worth pursuing. But there is one important intervention no one can now pursue, i.e., protection of their spawning grounds in the Sargasso Sea, because of the nature of our current decentralized, polycentric system of marine governance.

The single most comprehensive international agreement on the subject, UNCLOS, distributes governance of different regions of the oceans to different actors, ranging from coastal nations to transnational cooperatives and treaty organizations.¹² Coastal nations are assigned sovereignty over their territorial waters, which extend twelve miles beyond their shore lines. Coastal nations are also accorded sovereign rights over an exclusive economic zone, extending a further 200 miles beyond their shores, a distance typically including the continental shelf or in the case of archipelagos, such as Japan and the Philippines, all the region within their outermost islands.

The area of the High Seas begins where nations' exclusive economic zones leave off. This area is designated a global commons that states are free to exploit, provided they do so peacefully and in a manner consistent with two broad principles. One is the Freedom of the High Seas, i.e.,

¹¹ Paul Withers, "DFO halts baby eel fishery in N.S., N.B for 45 days over escalating conflict," CBC News online, <https://www.cbc.ca/news/canada/nova-scotia/dfo-halts-elver-fishery-nova-scotia-45-days-1.6811971>. Posted: Apr 15, 2023.

¹² David Freestone, "International governance, responsibility and management of areas beyond national jurisdiction," *International Journal of Marine and Coastal Law*: 27#2 (2012) 191-204.

freedom of peaceful navigation and transit, fishing, cable-laying, and marine research by fleets of any nation willing and able to put ships to sea. The second principle is that the seafloor and its resources are “the Common Heritage of Mankind;” to be developed for the benefit of all in ways that do not (unduly) impede other nations’ peaceful exercise of the High Seas Freedoms. The justification for these two governing principles was equity. The Freedom Principle meant that more powerful and coastal nations could not legitimately bar less powerful or landlocked nations from making use of desirable shipping routes, fishing grounds, sites for telecommunications cables, and so forth. And the Heritage of Mankind Principle meant that more powerful, developed nations with the capacity for deep water mining or research could not legitimately benefit from exploiting their capacities in ways destructive or detrimental to the interests of other nations nor withhold the results of scientific research regarding resources on the ocean floor.

Not long after UNCLOS was adopted, it became apparent that the framers had been short-sighted in three key respects. The first was that the framer’s conception of ‘equity’ was narrowly geographical. All nations were to have the opportunity to share in the ‘common heritage’ of the high seas, “irrespective of the geographical location of States whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations.”¹³ On this understanding of equity, provided no nation was barred by geography from participating in the collapse of a High Seas fishery through overfishing or in the

¹³ See UNCLOS Article 140(1), text available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

depletion of non-renewal resources of the ocean floor, the present generation's exploitation of the marine environment at the expense of future generations would not be inequitable under UNCLOS.

A second was their failure to foresee the need for protecting environmentally sensitive areas in the area of the High Seas. It is now widely recognized that marine environments need protection. At the tenth Conference of the Parties to the international Convention on Biodiversity (COP), the parties agreed it was necessary to aim to protect 10 percent of the oceans by 2020. More recently, at COP 15 (2022), the parties agreed to the Kunming-Montreal Global Biodiversity Framework, which sets the more ambitious target of protecting at least 30 percent of marine and terrestrial environments.¹⁴ Almost all of these created to date are in the territorial waters or exclusive economic zones of coastal nations. Only a handful have been established anywhere in the two-thirds of the oceans that comprise the High Seas. The largest of these, in Antarctica's Ross Sea, was established by the Commission for the Conservation of the Antarctic Marine Living Resources (CCAMLR), a multinational partnership of 26 states and the European Union.¹⁵ Nevertheless, illegal fishing continues in the region, as fishers can land their catches in ports of non-CCAMLR countries that do not enforce the CCAMLR agreements.¹⁶ CCAMLR's effectiveness is further limited because it

¹⁴ For the text, visit <https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>. Last accessed November 16, 2023.

¹⁵ For information about CCAMLR, visit <https://www.ccamlr.org>.

¹⁶ The only other such organization is OSPAR Convention the Protection of the Marine Environment of the North-East Atlantic, which is another such regional agreement for cooperation on environmental protection that protects sensitive areas. It has a mere fifteen nations as signatories in addition to the European Union.

operates on consensus. As unanimity is rarely achievable, it has succeeded in protecting only two areas in the Antarctic.

The third was their failure to anticipate the value marine genetic resources might come to have, especially the genetic resources of biota whose exploitation was not covered by provisions related to fishing.¹⁷ One might suppose that these would be resources to which the Common Heritage Principle would apply. However, UNCLOS defines those resources as solid, liquid, or gaseous minerals on or below the ocean floor. Governance of the development of what it henceforth collectively refers to as ‘minerals’ is assigned to the International Seabed Authority, to ensure benefits accrued would be mutual and/or shared. Consequently, countries competing to do research into marine genetic materials are currently able to do so free of any oversight and without obligation to practice conservation or share the results of their bio-prospecting, not even with nearby nations whose people had traditionally relied on the resources.

This is not to say that states have no conservation obligations under UNCLOS. On the contrary, UNCLOS requires coastal nations to conserve marine species within their territorial waters, archipelagos and exclusive economic zones. All nations are exhorted to cooperate with other states “in the conservation and management of living resources in the areas of the high seas.”¹⁸ The most effective action this provision has brought about has been the adoption of a sub-convention to UNCLOS in 1994, which allows states to create Regional Fisheries Management Organizations with the authority to establish catch limits for

¹⁷ Penelope Ridings, “Redefining environmental stewardship to deliver governance frameworks for marine biodiversity beyond national jurisdiction,” *ICES Journal of Marine Science*, 75#1 (2018) 435-443.

¹⁸ UNCLOS, Article 118.

valuable migratory species, such as tuna, in areas of the High Seas adjacent to their exclusive economic zones and to ban fishing by fleets from nations that do not respect their catch limits. But such measures only protect a few commercially valuable fish, not environmentally sensitive regions beyond nations' exclusive economic zones. Unfortunately for American eels, they have not proved effective means for protecting the eels' spawning grounds in the Sargasso Sea.

The Sargasso Sea

The Sargasso Sea is a distinct body of salt water, hence a 'sea,' located within the North Atlantic Ocean, the majority of which is located in the High Seas east of Bermuda's exclusive economic zone. Unlike other seas, ocean currents rather than coastlines form its boundaries. These currents form a gyre which keeps the sargassum weed growing within it from drifting away, forming the extensive mats for which the sea is named. The Sargasso Sea supports many endangered species of birds, fish, and marine mammals, albeit in ways not yet fully understood.¹⁹ It is a spawning ground for commercially valuable species of fish, such as albacore tuna, swordfish, wahoo, dolphin fish, freshwater eels, and blue and white marlin.²⁰ The mats also act as nurseries for these and other species, including endangered

¹⁹ Laffoley, D.d'A., et al. *The protection and management of the Sargasso Sea: The golden floating rainforest of the Atlantic Ocean. Summary Science and Supporting Evidence Case.* (Washington, D.C.: Sargasso Sea Alliance, 2011.)

²⁰ See, e.g., M. Béguier-Pon, et al. "Direct observations of American eels migrating across the continental shelf to the Sargasso Sea." *Nature Communications*: 6 #8705 (2015) 1-9, and B.E. Luckhurst and F. Arocha 2016. "Evidence of Spawning in the Southern Sargasso Sea of Fish Species managed by ICCAT - Albacore Tuna, Swordfish and White Marlin," *Collective Volume of Scientific Papers, ICCAT*, 72#8 (2016): 1949-1969.

Loggerhead, Hawksbill, Green, and Kemp's Ridley sea turtles. Several shark species appear to pup there, including porbeagle sharks, whose Northeast Atlantic populations are critically endangered. Twenty-four species of birds make regular use of the biotic richness of the Sargasso Sea, as well as thirty species of whales, dolphin, and other migratory species who use the area to fuel their peregrinations. It's likely that its deep-water corals are supported in part by biotic material falling from sargassum mat communities down to the ocean floor. It's certain that sargassum mats sequester significant amounts of carbon, making the region an important carbon sink. So great is its ecological significance that a multinational association, the Sargasso Sea Commission, successfully campaigned for its recognition as an Ecologically or Biologically Significant Area by the parties to the UN Convention on Biodiversity.²¹

Where does this leave the Sargasso Sea in terms of environmental protection? Not much better off. Recognition as an Ecologically or Biologically Significant Area has no standing when it comes to UNCLOS. Two Regional Fisheries Management Organizations have limited authority over portions of the Sargasso Sea; the Northwest Atlantic Fisheries Organization (NAFO) and the International Commission for the Conservation of Atlantic Tuna (ICCAT). NAFO has agreed that a series of underwater seamounts within its jurisdiction are ecologically important habitat for the commercial fish stocks it manages and has closed them to trawling and other fishing techniques that could harm the sea mounts' biotic communities. To date ICCAT has not agreed to impose any special restrictions on the fishing of tuna and or related

²¹ David Freestone, "The Sargasso Sea Commission: An Evolving New Paradigm for High Seas Ecosystem Governance?," *Frontiers in Marine Science*: 8 (2021)1-10.

species within its jurisdiction. This leaves the bulk of the Sargasso Sea unprotected.

The High Seas Treaty

The ship which Ambassador Lee helped steer to the shore was developed to address the oversights of UNCLOS' framers by providing legally binding means of protecting ecologically sensitive marine areas and ensuring equitable development of marine genetic resources. But their options were limited by the United Nations General Assembly's preference that the new treaty amend UNCLOS rather than replace it. This meant any solutions devised had to be consistent with the central principles of the original treaty, including the two High Seas principles. The simplest solution would be to let one take precedence over the other when conflicts arose. But there was no agreement about which this should be.

Understandably, nations already equipped to commercialize the results of marine genetic research resisted giving priority to the Common Heritage Principle, as this would require their developments contribute to 'the benefit of mankind as a whole,' not merely their own private industries. For similar reasons, they were disinclined to approve of the creation of protected zones in the High Seas if these would be off limits to shipping, fishing, and scientific research. They argued that the High Seas principle should govern. Pacific, small island states, and developing coastal states argued instead that the Common Heritage principle should govern. Being heavily reliant on small scale artisanal fisheries for food security, it was in these states' interest to limit High Seas Freedoms in order to protect marine habitat on which their fisheries relied. It was also in their interest to ensure that richer nations better able to conduct and quickly commercialize successful bio-prospecting would be obliged

to share what they discovered as humanity's common heritage. As neither side was willing to agree to the other's preferred principle taking precedent, the pragmatic solution adopted was to import a principle from other widely accepted UN conventions that could provide a framework for balancing the two High Seas principles should they conflict. As it was the Pacific, Small Island, and developing coastal states that had the greatest interest in seeing that High Seas Freedoms should not prevail, their ambassadors argued repeatedly, and ultimately successfully, for adoption of principles of intergenerational equity and recognition of states as stewards of the ocean environment.²²

Interestingly, although the point of the whole endeavor was to create an enforceable treaty "on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction," early draft language did not define 'sustainability.' And some parties continued to advocate for understanding 'equity' in purely geographic terms, with no requirements to consider the interests of future generations. Presumably they would also have been resistant to incorporation of a commitment to 'stewardship,' as to be a steward is to be a trustee or fiduciary charged with the care of things or persons in the interests of others. Earlier drafts often have as little to say about what stewardship involves as about "sustainable" use of marine resources. But gradually, the parties came to see the value of invoking a duty of equity owed to future generations as providing a principled basis for limiting High Seas Freedoms.

²² This began with the first Preparatory Committee meetings in 2016, through development of the final text of the new High Seas Treaty. See Ridings, and the Chair's overview of the first and subsequent Preparatory Committee meetings, as well as preliminary drafts of the Treaty at <https://www.un.org/bbnj/>.

This at any rate is the position taken in the preamble of the new treaty, in which the parties declare themselves:

Desiring to act as stewards of the ocean in areas beyond national jurisdiction on behalf of present and future generations by protecting, caring for and ensuring responsible use of the marine environment, maintaining the integrity of ocean ecosystems and conserving the inherent value of biodiversity of areas beyond national jurisdiction.²³

Similarly, in the statement of the agreement's general objective, they declare their desire to "ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term."²⁴ And sustainability is defined accordingly:

"Sustainable use" means the use of components of biological diversity in a way and at a rate that does not lead to a long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

The generations in question are clearly human and the needs to be protected are their needs for "food security and other socioeconomic objectives, including the protection of cultural values."²⁵ To protect these, the Treaty includes new provisions for Environmental Impact Assessments prior to large scale development projects in the area of the High Seas, requiring consultation with indigenous peoples, a mechanism to ensure that monitoring results are centrally collected and shared, and a Scientific and Technical

²³ High Seas Treaty, Preamble.

²⁴ High Seas Treaty, Article 2: General Objective.

²⁵ High Seas Treaty, Article 14.

committee to assess proposals for marine protected areas in areas of the High Seas. These provisions would be established at conventions of the parties to the new treaty. These decisions would be made by consensus if possible, or failing that, a two-thirds vote, which would ensure no single nation could block the creation of protected areas.

Concerns

From a pragmatic point of view, these seem like excellent reasons for environmentalists and environmental ethicists to champion the High Seas treaty to their respective audiences, despite what many will consider its regrettably speciesist conception of the future generations for whose welfare we are supposed to act as stewards. That said, ocean governance would remain decentralized, with multiple actors making decisions for particular regions or particular kinds of ocean exploitation, only weakly constrained by requirements to coordinate their efforts with others. They would not even be constrained to make use of the new mechanism for creating High Seas marine protected areas for ecologically sensitive areas such as the Sargasso Sea. This remains purely voluntary. To some this will suggest that the treaty is not the kind of improvement we need. It would leave the current system of polycentric marine governance still “hopelessly fragmented” and “suffering from dysfunctionality arising not only from regulatory lacunae, but also from a lack of coordination and coherence across instruments and institutions shaping the regime.”²⁶ Christopher Armstrong has argued that “justice

²⁶ Lucia Fanning & Robin Mahon (2020) “Governance of the Global Ocean, Commons: Hopelessly Fragmented or Fixable?,” *Coastal Management*, 48:6, 527-533; 527, and Catherine Blanchard, Fragmentation in high seas fisheries: Preliminary reflections on a global

likely requires that we transcend, rather than treating as inviolate, the fragmented nature of governance on the ocean.”²⁷ Lucia Fanning & Robin Mahon take a different view, that what many refer to as “fragmented ocean governance” would be better interpreted as “an outcome of poorly managed polycentrism.”²⁸ Their solution is not to do away with the multiplicity of institutional arrangements currently responsible for ocean governance, but to coordinate their activities into “a single interconnected system, with vertical and lateral linkages,” under the auspices of a “lead UN-Oceans agency with the mandate and resources needed to coordinate this initiative.”²⁹

I can well believe that a single global agency would do a better job of overseeing human exploitation of the oceans and coordinating environmental protections, if it were impartial, science driven, took the precautionary approach, and if it could displace what Armstrong decries: “the exclusive role of states as the primary – or even sole – enforcers of the Law of the Sea on the High Seas.”³⁰ But I cannot believe that nation states are likely to agree to their authority being displaced anytime soon. If, however, the new High Seas treaty comes into effect, I believe it will be possible to love, or at least live with, the polycentric system we would then have.

While coordination poses ongoing challenges, polycentric governance can be advantageous when it provides more than one source of guidance for equitable environmental decision making and more than one source of

oceans governance approach, *Marine Policy*, Volume 84, 2017, Pages 327-332.

²⁷ Armstrong, 250.

²⁸ Fanning & Mahon,

²⁹ Fanning & Mahon,

³⁰ Armstrong, 249

authority to which to appeal for relief. And while the different sources may offer conflicting guidance, often they will overlap. Let us return to the question of whether and why any state should feel bound as a matter of equity to make the effort to see some or all of the Sargasso Sea become a marine protected area.

Applying Wolf's Layers of Justice View

In theory, any party can propose an area of the High Seas for protection. Realistically, the burdens of doing studies and assembling sufficient data to make a case for protecting sensitive areas and of designing management plans for maintaining them will be onerous, time-consuming, and costly; and thus beyond the means of many nations, even assuming they have the technical capacity required. Of the signatories to the Declaration that established the Sargasso Sea Commission (the Azores, the Bahamas, Bermuda, the British Virgin Islands, Canada, the Cayman Islands, the Dominican Republic, the United Kingdom, and the United States), three stand out as being better equipped financially, politically, and scientifically to bear the burdens involved. But does it follow any or all of these three nations should step up if others do not or cannot?

We should resist the temptation to make this an occasion for debating the merits of the principles of distributive justice that cosmopolitan theorists of justice will want to use to settle this question, non-anthropocentric or anthropocentric, egalitarian or non-egalitarian. Interesting as such philosophical debates are, they can have no practical application to this situation because there is currently no incentive for any nation to endorse the application of a global principle of distributive justice with which it disagrees. But this state of affairs does not entail the conclusion some anti-cosmopolitan statist may want to draw; that duties of

distributive justice are always and only duties owed by members of political states to one another. On the contrary, because the ocean governance is polycentric, there are many, often overlapping, ‘centres’ of authority – nation states, transnational unions, and treaty organizations – each bound to distributions of resources in accordance with its own standards.

The most suitable approach to take, in the circumstances, is a version of what Jonathan Wolff calls the ‘layers of justice’ view. On the layers of justice view, what counts as just and equitable in any given context is understood to be “relative to norms of co-operation, and norms of co-operation differ in the contexts of domestic and global cooperation.”³¹ He illustrates his view with the example of the European Union. The European Union is a confederation whose policies enjoin some redistribution of resources from richer to poorer members. But what counts as a just distribution among the member states is not necessarily what counts as a just distribution, domestically, within those states. The different norms of cooperation yield different principles of distributive justice for these different spheres of action.

The High Seas Treaty specifies norms of cooperation for its members that commit them to doing more for each other than enlightened self-interest might suggest. Like many other UN agreements, this one is (relatively) egalitarian regarding recognition of human rights, including the rights of indigenous peoples, and the right of people to form states entitled to determine for themselves what domestic principles of justice to adopt. Regarding welfare,

³¹ Jonathan Wolff, 2009. “Global Justice and Norms of Co-operation: The ‘Layers of Justice’ View” in De Wijze, Stephen, Matthew H. Kramer, and Ian Carter. 2009. *Hillel Steiner and the Anatomy of Justice: Themes and Challenges*. New York: Routledge. 34-50.

this, like many other broad UN agreements, is broadly speaking sufficientarian. It does not propose that states should benefit equally from their agreements, rather they recommend assistance to states whose economic development is insufficient to sustain a decent level of welfare for all their citizens.

Being signatories to the new Treaty, Canada, the United Kingdom, and the United States would each have obligations to assist disadvantaged nations in ensuring their citizens have access to sufficient ocean resources to satisfy their needs. As there are underdeveloped communities all around the Atlantic whose tenuous food security relies in part on American eels and their European cousins (which also spawn in the Sargasso Sea), all three nations would have some obligation to cooperate in ensuring the survival of this resource. Canada and the United States would have further obligations given other norms of cooperation to which they are subject as a member of the Organization of American States (OAS). According to the norms expressed in the Charter of the OAS, members are committed to “eradicate extreme poverty” within their own and other member states and to *prioritize* “relatively less-developed countries” through “technical and financial cooperation that seeks to promote regional economic integration ...on the principle of harmonious, balanced, and efficient development.”³² The norms of cooperation here add weight to the case for Canada and the United States to take action specifically to protect the American Eels (as opposed to all eels spawning in the Sargasso Sea), as a means of satisfying their duty to prioritize the interest of any underdeveloped American states which

³² Articles 2 and 44 of the Charter of the Organization of American States, available at https://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-4I_charter_OAS.pdf. Last accessed November 14, 2023.

rely on American Eels to address extreme poverty suffered by their citizens.³³ This layer of justice would not apply to the United Kingdom, although counterpart obligations to protect the European eels spawning in the Sargasso Sea might arise from the United Kingdom's other transnational collaborations.

Canada and the United States are each subject to a third layer of obligations of justice and equity relevant to the question of whether to accept the burden of acting to protect the Sargasso Sea; duties of reconciliation with the indigenous first nations within their borders. Indigenous communities are already economically and politically challenged in the United States and Canada thanks to oppressive colonial practices which have yet to be wholly eradicated. As such they may have the most to lose if eel populations in North America were to go the way of their European and Asian cousins. Eels were an important part of traditional diets of the Mi'kmaq, Innu, Abenaki, Passamaquoddy, Maliseet, Haudenosaunee, Wampanoag, Piscataway, and Delaware peoples, among many others.³⁴ Many communities continue to rely on eels for food security and maintain their cultures.³⁵ If a sustainable glass eel trade cannot be established, indigenous communities, who had never been guilty of overfishing the species themselves,

³³ Daniela Quintero Díaz, "From a Caribbean Island to Sushi Plates: The Million-dollar Business of Eel Fishing," Earth Journalism Network, at <https://earthjournalism.net/stories/from-a-caribbean-island-to-sushi-plates-the-million-dollar-business-of-eel-fishing>, posted February 9 2022.

³⁴ Cecilia Engler-Palma, et al., "Sustaining American Eels: A Slippery Species for Science and Governance," *Journal of International Wildlife Law & Policy*: 16# # 2-3, (2013) 128-169.

³⁵ CBC News, "Ottawa 'Eel Walk' advocates for endangered American Eel" at <https://www.cbc.ca/news/canada/ottawa/ottawa-eel-walk-endangered-1.4671966>. Last Updated: May 21, 2018

would be unjustly denied the opportunity to improve the welfare of their members.

In light of the damage done to indigenous communities by the colonization of what is now Canada and the United States, both nations have special duties of restorative justice as well as distributive justice to indigenous peoples who have had a historical relation with American Eels. There is much that Canada and the United States can do within their own borders and in cooperation with one another to reduce pressures on eels. These include clearing culverts, modifying dams, and creating eel ladders to increase free passage along eel migration routes. Pollution of lakes, rivers, and streams should be reduced. As much as possible, riparian and coastal eel habitat disrupted by industrialization and other forms of development should be restored. And sustainable management plans incorporating traditional environmental knowledge of indigenous peoples along the Atlantic seaboard should be developed in order to create a sustainable fishery in which indigenous fishers can safely participate.

But we know that eels face other threats during their migration to and from the Sargasso Sea among these are pollution, ocean acidification, and the effects of climate change. Maritime shipping plowing through the sargassum mats disrupting these nurseries for young of many species spawning is yet another. Both nations have contributed and continue to contribute to creating the challenges eels face beyond their national borders as well as within them. So each has duties of justice and equity, owed to the present and future generations of the native and first nations within their own borders, to reverse this state of affairs. Obtaining marine protected status for the Sargasso Sea would fulfill all these overlapping layers of obligation, so both Canada and

the United States ought to take action to achieving global protection for the Sargasso Sea once this becomes possible.

Conclusion

The layers of justice view apply to individuals as well as nation states. Each of the three layers of justice and equity just discussed applies to Canadian and North American philosophers as well as their governments. We also have duties to ensure present and future generations have enough for their needs as well as to assign priority to the present and future needs of least developed countries in Americans over the most developed, and to take steps to rectify past injustices from which indigenous communities within our borders have suffered. Some philosophers of the environment will be subject to yet more layers of obligation, depending on their philosophical commitments. If one believes that eels have intrinsic value in their own right or that they are constituents of natural systems that possess this value, then one would have reason to consider oneself obliged to take appropriate steps to reduce threats to their present and future generations' survival and welfare.

Very likely many are already doing so, albeit indirectly, through supporting anti-pollution measures, river clean ups, reducing plastic waste, and so forth. Awareness of the threats to ocean species and environments is growing, as is interest in marine justice and stewardship. But for our polycentric system of marine governance to allow us to fulfill our obligations appropriately, the High Seas Treaty, or something like it, must come into effect. Public support will be necessary. Garnering that support requires the public to become informed about this most important treaty that "no one has heard of." As educators with the skills to communicate the importance of the High Seas Treaty, philosophers are surely under yet another layer of obligation

to help ensure that people at least *hear* about this Treaty and ideally come to appreciate the reasons they themselves may have to support its passage in order to protect sensitive marine areas such as the Sargasso Sea.

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