Protecting the Deep Sea Under International Law

Legal Options
for Addressing
High Seas
Bottom Trawling

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Protecting the Deep Sea Under International Law: Legal Options for Addressing High Seas Bottom Trawling

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Duncan E.J. Currie LL.B. (Hons.) LL.M.

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EXECUTIVE SUMMARY

The recent expansion of fishing effort to the deep sea has given rise to increasing concern about the impacts of deep-sea fishing on the marine environment of the deep sea. Due to the demersal nature of most targeted deep-sea species, the extensive use of bottom trawling has had serious and probably irreversible effects, including destruction of coral reefs and associated vulnerable species. There is concern about the effect on the fish stocks targeted and about the impacts on the biodiversity of the deep-sea marine environment, including in particular the destructive effects of such fishing on the coral reefs, sponges and related biodiversity of seamounts. Such fishing not only adversely impacts on targeted species and on sedentary species attached to the coral reefs, but also impacts on mobile species dependent on the reefs for food and shelter.

The problem has highlighted gaps in the international legal regime of such fishing on the high seas. In addition, the limited coverage and lack of management action by regional fisheries management organizations (RFMOs), compounded by illegal, unregulated and unreported (IUU) fishing, as well as the vulnerability of target species and ecosystems damaged by the fishing, has lead to serious depletion of deep-sea targeted species and damage to biodiversity.

The law of the sea has evolved to regulate fishing primarily within exclusive economic zones (EEZs) which generally extend 200 nautical miles from the shorelines. Where fishing takes place on the high seas, international regulation is vague, international governance is minimal or non-existent, and reporting is patchy. This gap in current international law is exacerbated by a focus on the target fisheries, whereas many of the immediate impacts of deep-sea bottom trawling are upon the coral and sedentary species on the ocean floor. While coastal states have sovereign rights to explore and exploit sedentary species on their continental shelf, they are given no ability to regulate fishing outside their EEZs which may impact on that continental shelf.

There are numerous relevant obligations under the United Nations Law of the Sea Convention and the United Nations Fish Stocks Agreement, and there are relevant principles set out in various 'soft law' documents which are discussed in this paper. The Law of the Sea Convention lays down the general duty to protect and preserve the marine environment and specifically requires measures to be taken to protect and preserve rare or fragile ecosystems, the habitat of depleted, threatened or endangered species and other forms of marine life. States are required to take into account the interdependence of stocks and effects on associated and dependent species when managing stocks, both in the EEZ, and on the high seas. The obligations also include taking, or cooperating with other States in taking, measures necessary for their nationals to conserve the living resources of the high seas.

The Fish Stocks Agreement applies to straddling stocks, which are often the subject of deep-sea bottom trawling. States are required to protect biodiversity in the marine environment. The precautionary approach is expressly required to be followed, as is an ecosystem approach. Specific duties include minimising the catch of non-target species, including non-fish species, and minimising impacts on associated or dependent species. Named measures specifically include the development and use of environmentally safe fishing gear and techniques. Plans should be developed to protect habitats of special concern, and, for new or exploratory fisheries, States are to adopt, cautious

[1] The author is grateful to Karen Sack for her helpful suggestions on this paper. All errors are those of the author. All internet references are as at 28 September, 2004.

conservation and management measures. The failure of States to implement these provisions of the Fish Stocks Agreement in itself constitutes a breach of that Agreement where such fisheries involve straddling stocks.

The Fish Stocks Agreement places a great deal of reliance on the implementation of its provisions through regional fisheries management organisations, or RFMOs. The paper canvasses RFMOS, which notably are NAFO, NEAFC, CCAMLR and the new SEAFO. As the UN Secretary-General has reported, discrete high seas fish stocks generally remain outside existing regulatory frameworks. The coverage of RFMOs is very patchy, and even where RFMOs do have competence, measures addressing bottom trawling are extremely limited. Identified gaps in coverage by RFMOS include the southeast Pacific Ocean for all fish stocks, and the south-west Atlantic, south-east Pacific, west-central Pacific, Indian Ocean and the Caribbean for straddling fish stocks and discrete high seas fish stocks.

Without an international moratorium or similar broad-based measure, even if RFMOs were to implement appropriate conservation and management measures to address bottom trawling, without widespread coverage by RFMOs and without widespread adherence to RFMOs, the effect of such measures are likely to be patchy at best. RFMOs would need to be in place to cover all fished areas, there would need to be universal or at least widespread adherence by fishing States, measures would need to be implemented and enforced by RFMOs, there should be effective coordination among RFMOs, between RFMOs and States and between States, and States must indeed implement the measures and have taken enforcement monitoring and enforcement action themselves. None of this is likely to happen without strong international direction, such as that which would be given in a General Assembly resolution.

Among other relevant agreements, the United Nations Food and Agriculture Organisation's (FAO) Compliance Agreement requires flag states to authorise vessels to fish on the high seas and to give information to the FAO about such vessels. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has relevance where species caught are listed on one of its Appendices.

The Convention on Biological Diversity also includes clear obligations for States to ensure that activities within their jurisdiction or control do not cause damage to areas beyond the limits of national jurisdiction, which include seamounts beyond the continental shelf, and requires States to cooperate for the conservation and sustainable use of biodiversity in areas beyond national jurisdiction.

A recent experience with a deep-water fishery in the Southwest Indian Ocean highlights both current gaps in the international regulation of high seas fishing and the need for urgent action. Even though experience had already shown that the targeted species had to be managed carefully to prevent depletion, fishing was carried out for three years with no active fisheries management and no reporting of catches by some usually responsible countries, with no apparent effort to sustainably manage the fishery, either on a national basis or through a RFMO or international arrangement. The result was that most of the stocks or populations of fish targeted appeared to have been depleted or to have collapsed by the end of the third year, and this is without taking into account collateral effects on the deep-sea ecosystem.

While currently a relatively small number of countries are involved in high seas bottom trawling, and the current total value of high seas bottom trawl fisheries is estimated at well below 1% of the fish catch worldwide, fishing effort appears likely to continue to move to the deep sea as stocks closer to shore become depleted. When taken into consideration with the known impacts on biodiversity and the gaps in scientific knowledge, there have increasingly been demands both for reform of international governance of the high seas and for a moratorium on the practice of deep-sea bottom trawling until such a regime is put in place.

This problem was addressed in 2002, when the United Nations General Assembly called upon intergovernmental organizations including the FAO, Secretariat of the CBD and the UN Secretariat to consider urgently ways to integrate and improve the management of risks to the marine biodiversity of seamounts and certain other underwater features within the framework of the Law of the Sea Convention. This call was repeated in 2003, with a request by the UN General Assembly for a report including a range of potential approaches and tools for protection and management.

The Parties to the Convention on Biological Diversity responded in February 2004, specifically calling on the General Assembly and other organizations to take the necessary short-term, medium-term and long-term measures to eliminate/avoid destructive practices. The resolution suggested, by way of example, an interim prohibition of destructive practices adversely impacting the marine biological diversity associated with the vulnerable marine areas of the deep sea: in effect, a moratorium on deep-sea bottom trawling. The same resolution also made a recommendation to individual States. It recommended that State parties also urgently take the necessary short-term, medium-term and long-term measures to respond to the loss or reduction of marine biological diversity associated with marine areas beyond the limits of national jurisdiction.

A moratorium on deep-sea bottom trawling was discussed at the United Nations Open-Ended Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) in June 2004 which, however, failed to reach agreement on such a moratorium. This paper analyses the legal environment of such a moratorium and evaluates some of the arguments given against such a moratorium against applicable international law.

A United Nations General Assembly resolution establishing a moratorium on deep-sea bottom trawling could call on States not only to prohibit its nationals and vessels from engaging in bottom trawling on the high seas, but also not to assist or encourage bottom trawling on the high seas, and to take measures consistent with international law to restrict bottom trawling on the high seas, including and not limited to prohibiting the use of trawls designed to make contact with the sea bottom on vessels and in areas under its jurisdiction (to include the continental shelf). Enforcement possibilities include control of nationals, actions by RFMOs, port state control measures and trade related measures. The Treaty of Wellington, which banned driftnetting in the South Pacific, is examined to draw out examples of how a similar measure addressing a destructive fishing practice defined and addressed the problem.

CONCLUSION

There is growing scientific evidence that high seas bottom trawling is harmful to deep-sea marine biodiversity and that it has adverse effects on vulnerable marine ecosystems, such as seamounts and cold and deep water corals. The clear acknowledgement in UNICPOLOS that it was generally agreed that this is the case, together with the statements of concern of the General Assembly and the recent CBD Decision VII/5 leads the conclusion that it is encumbent on States to take urgent action.

Both the CBD and the Law of the Sea Convention contain strong obligations to cooperate and require specific measures to be taken. The necessity to cooperate to protect the deep-sea marine environment arises in the CBD in the context of the obligation to co-operate for the conservation and sustainable use of biological diversity in respect of areas beyond national jurisdiction, and in the Law of the Sea Convention to co-operate in the conservation and management of living resources in the areas of the high seas, and to cooperate for the protection and preservation of the marine environment.

The need to take urgent action arises in the context of the specific obligations of Parties to the CBD, which include the duty to take action to ensure that activities within Parties' jurisdiction or control do not cause damage to areas beyond the limits of national jurisdiction. Similarly, it arises in the context of the Law of the Sea Convention requirements to protect and preserve the marine environment and to take measures to protect and preserve rare or fragile ecosystems, and the habitat of depleted, threatened or endangered species and other forms of marine life. Similar duties, both to cooperate and to take action, are contained in the Fish Stocks Agreement, which implements the precautionary approach and adopts an ecosystem approach towards fisheries management.

In CBD Decision VII/5, the Parties stressed the need for rapid action to address the problem and called upon the General Assembly and others to urgently take short-term, medium-term and long-term measures. The Parties to the CBD are also Members of the United Nations, and thus by their resolution have named the General Assembly as a means of the fulfilment of their obligation to cooperate. They have also by the Decision acknowledged their own responsibility to take action as individual States. In their Decision, they gave the example of a moratorium on deep-sea bottom trawling.

There are two clear precedents for such a moratorium: the driftnets moratorium in 1992 and the seabed mining moratorium in 1969. Both issues have parallels with the bottom trawling issue, as well as differences from it. Obvious parallels include the recognition of a pressing problem, a determination to address it urgently and in the General Assembly, and the necessity to act on a global basis to ensure compliance and enforcement. Differences include the added dimension in the current problem of a necessity to address governance issues, which were at issue in the seabed mining moratorium, and which took decades to resolve. With the two moratoria, there are clear precedents for action by the General Assembly to address an issue of urgency relating to the deep sea in this way.

Various arguments against such a moratorium have been advanced, as they were at UNICPOLOS, including that a global moratorium would put unnecessary restrictions on the interests of the fishing industry, questions on enforcement of the legal regime, concerns on the scope of the proposed measures and questions about balancing such measures with States' rights and obligations on the high seas, and concern that any ban should be part of a larger regime for the conservation of high seas marine living resources, including the role of RFMOs. These objections were considered in this paper, and it was concluded that in light of the obligations and provisions of the Law of the Sea Convention, Fish Stocks Agreement and CBD, each of the arguments cited in the UNICPOLOS report are unfounded as objections to such a moratorium. The conclusion is inescapable that a moratorium on high seas bottom trawl fishing would, in fact, be the course which is most consistent with the obligations of the Parties under applicable international law to address the issue of the destruction of biodiversity from deep-sea bottom trawling on a short term basis.