

UNDP and Ocean Governance Chapter 4 IMLI Treatise

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Introduction

The United Nations Development Programme (UNDP), at first glance, may appear to be an unusual institution to include within a treatise on ocean governance. Its vision is “to help countries achieve the simultaneous eradication of poverty and significant reduction of inequalities and exclusion”.¹ One might assume that an organization with the word “development” in its title will not be focused on issues to do with the marine environment and ocean governance. Indeed the literature on the law of the sea shows little reference to the role of the UNDP in ocean governance. This may also be because the UNDP does not immediately appear to have played a direct role in the establishment of legal regimes relating to the oceans.

UNDP's role is to help build developing State capacity. While its aims have been modified across time, so that at present it is focused on assisting with delivery of the Millennium Development Goals, its key role has remained the same – to help build developing State capacity. In this it plays a facilitative role – looking for best practice to share, bringing potential partners together to work on projects, acting as a conduit for funding² and providing policy advice. What law anticipates is institution building with concrete examples of the UNDP (or any given actor) developing a treaty regime, or norms, principles or policies. UNDP's activities do not easily fit with this model and so are easily overlooked by law and legal academics as it does not appear to play a direct role in establishing treaty regimes. UNDP has, however, been a key player in establishing some of the newer regimes: regimes dealing with Large Marine Ecosystems (LMEs). When one reviews UNDP's work in this area, the rather limited discussion of it in the context of ocean governance begins to appear odd.

The oddity of the fact that UNDP appears to have been overlooked by the literature is exacerbated by the fact that UNDP focuses on sustainable development, democratic governance and peace-building and climate and

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¹ UNDP “Changing With the World: UNDP Strategic Plan 2014-17” (UNDP, New York).

² Article 24 Agreement for the Implementation of the Provisions of the United Nations 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 1995 (2001) 2167 UNTS 3 (Fish Stocks Agreement).

disaster resilience. All three of these areas have relevance for ocean governance, and one might assume that this would have led to UNDP being discussed to a greater degree than it has in the existing literature. It may be, however, that the fact that UNDP's contribution to ocean governance does not fit with traditional approaches to ocean governance obscures it from view. Whereas, for example, the law of the sea starts from the premise that governance is tied to jurisdictional rights, UNDP's approach to ocean governance starts from the premise that governance is attached to ecosystems. Thus the role played by UNDP is made doubly challenging for law by the fact that the regimes it facilitates follow neither jurisdictional lines, nor disciplinary constraints. Nor indeed do they follow sector specific approaches. Instead UNDP has been engaged in the establishment of interdisciplinary and transnational governance mechanisms (though not every mechanism is transnational). The route to their establishment has followed a regime building approach – starting with soft law agreements and moving through the building of consensus around particular norms and courses of action to, at times, the adoption of binding treaties. In the initial stages these are regimes that lawyers are less likely to feel comfortable with and which some would argue do not count as “proper legal” regimes. As will be demonstrated below, they are, without doubt, however, oceans governance regimes.

This paper begins with a discussion of the history of UNDP and its basic approach to ocean governance– exploring the way in which its history has shaped UNDP's relationship with ocean governance. The second substantive section discusses the UNDP's current and former activities relating to ocean governance and the paper finishes with the conclusions and a brief discussion of next steps.

History of UNDP and Basic Approach to Governance

The United Nations General Assembly established the UNDP in 1965 in a process that saw the UN Expanded Programme of Technical Assistance merged with the UN Special Fund. These origins give some insight into the UNDP's personality and objectives. It is, like all the UN programmes, financed through voluntary contributions. Its focus is on the provision of technical assistance to aid the socio-economic development of States (and regions) and oceans are but one of the areas upon which the UNDP directs its attention. UNDP's broader remit focuses on helping “countries achieve the simultaneous eradication of poverty and significant reduction of inequalities and exclusion.”³ Its work spans both marine and terrestrial ecosystems and is focused on those activities or issues that aid or impede reductions in poverty, inequality or exclusion. In other words, UNDP is not concerned with such things as the protection of biodiversity, or the protection of the marine environment *per se*. It will only address these issues if they are relevant to achieving its wider objectives. One may assume that this narrow focus would be problematic in that it would prevent UNDP from

³ UNDP Strategic Plan supra n.1 p.11.

engaging with the full range of issues pertinent to ocean governance. As will be demonstrated in the next section, however, that does not appear to be the case. The focus does shape UNDP's activities, but it does not appear to hinder its engagement with ocean governance. UNDP appears instead to have recognized the linkages between, for example, conservation of biodiversity and the eradication of poverty. That it has done so is quite remarkable when one considers the objectives that underpin UNDP's work:

1. Development should be inclusive of all
2. Democratic governance systems should be strong enough to meet the demands of citizens to participate in them
3. Gender inequality should be reduced more quickly than currently happens
4. Institutions to ensure universal access to basic services should be strengthened within countries.
5. The risks of conflict and of natural disasters should be lowered
6. After any conflict or disaster sustainable development pathways should be quickly returned to
7. Poverty, inequality and exclusion, are prioritized in policy debates at all levels.

These objectives may be described as the overarching principles that UNDP brings to any project. To some degree they meet the objectives for ocean governance set out in this project. For example, they technically satisfy the first objective of ocean governance as defined in this project – that is “the establishment of overriding principles and objectives relevant to maintain productive socio-ecological systems” and should also “ensure that societal interests are fairly represented in decision making”, but they can in no way be described as being designed to ensure the implementation of UNCLOS's objectives. That said, it is possible to see a fit between UNDP's objectives and some of UNCLOS's. Thus the aim to reduce gender inequality fits with UNCLOS's objective of promoting “the equitable ... utilization of ... resources”.⁴ Similarly, UNDP's objective of lowering the risk of natural disasters and conflicts, maps to UNCLOS's objective of promoting “the peaceful uses of the seas and oceans”.⁵

UNDP's objectives do not, however, particularly promote environmental concerns and, on the face of it, only a few of the elements of ocean governance identified in this project appear to be directly addressed by UNDP. This may mean that UNDP is a long way from following an approach that is also utilized by other institutions. Thus, for example, the UNDP's approach does not appear, at first sight, to address any of the following: develop policies and regulatory frameworks; harmonize individual, sectoral and societal perspectives; maintaining coherence across jurisdictional, space and time scales; defining the rules for allocation of power, resources and benefits; ensuring interaction with other governance systems; enforcing decisions and regulations; and, maintaining

⁴ United Nations Convention on the Law of the Sea 1982 1833 UNTS 397(UNCLOS) preamble

⁵ *Ibid.*

the capacity to learn and change. As will be demonstrated in the following section, UNDP has, however, been able to embrace environmental issues and undertake a range of actions, which do map to both the conception of ocean governance presented in this project and UNCLOS's objectives. That it has been able to do so is due to one of its most important characteristics. Throughout its history UNDP has not been constrained by its official remit. Instead, UNDP has taken a pragmatic approach – taking action even when that action did not fit with its standard remit. For example, it provided assistance through the Programme of Assistance to the Palestinian People – repairing and rebuilding roads, hospitals and other buildings. This has been done despite the fact that normally the implementation of UNDP projects is delegated to other agencies or in country bodies. In this instance its top official, Mark Malloch Brown, recognised that there was no alternative body able to implement the required projects and so sanctioned UNDP's actions.⁶ UNDP has also tended to be “ahead of the curve” in working out which approaches and policies will work and which will not as compared to other international organisations. Thus it realised early on that development had to be environmentally sustainable and democratic if it was to be effective.⁷ This willingness to embrace new approaches underpins UNDP's current approach to ocean governance and its focus on LMEs in particular.

One may question why it is that UNDP has been so willing to embrace new approaches where other organisations have perhaps been more restrained in their approach. In part UNDP's ability to change is due to the fact that it lacks a core or fixed epistemic community. It functions more in the fashion of a consultancy firm – pulling in experts or cooperating with other agencies as required – than as an agency with a fixed theoretical root in the way that, for example, the World Bank functions. This means then that UNDP operates on the basis of “incompletely theorized agreement” and because theorization is incomplete it is possible for UNDP to change course relatively easily.⁸ Thus, in approaching ocean governance, UNDP has not brought with it a preconceived method of working. It has instead been able to develop a method to fit the problems. In other words, UNDP has proved to be less constrained by the transaction costs associated with switching course⁹ than other organisations may be, because it does not have quite such a fixed course to follow. Had UNDP followed the same method of working as other organisations it would likely have adopted a fixed view of what is meant by development. It could, for example, have chosen to view development as leading to greater efficiency, or as creating greater freedom for individuals or as creating growth. Choosing between these meanings would have dictated the approach to development promoted by UNDP.

⁶ Craig N. Murphy *The United Nations Development Programme: A Better Way?* (Cambridge University Press, 2006) pp11-12.

⁷ Murphy *ibid* p16.

⁸ Murphy *ibid* p16 and pp.347-348.

⁹ W. Brian Arthur “Competing Technologies, Increasing Returns, and Lock-in by Historical Events” (1989) 99 *Economic Journal* 116; W. Brian Arthur, *Increasing Returns and Path Dependence in the Economy* (University of Michigan Press, 1994); E. Woerdman “Path-dependent Climate Policy: The history and future of emission trading in Europe” (2004) 14 *European Environment* 261

Rather than choosing a particular definition of development, UNDP has tended to steer a path between development as efficiency and development as freedom. This has enabled it to tailor its approach to the particular project in question. Thus in some contexts UNDP has provided advice to governments, in others it has worked with local stakeholders and in others it has done both.

This history is key when considering UNDP's approach to ocean governance. While in theory UNDP does not have a leading role to play in this area, it has in fact played such a role. Once again it has stepped outside of its remit and taken a flexible approach to the meaning of development. As will be demonstrated, UNDP has taken on the role of coordinating action and it has focused on capacity building – both for local actors and for States. As such its role and activities may not have been immediately obvious to those looking at actors active in ocean governance. Although acting as a coordinator on ocean governance may appear to be a large step outwith UNDP's remit, it can also be understood as fitting within UNDP's ways of working. UNDP has played the role of coordinator throughout its history - coordinating actions across the UN agencies where they have been working in the same area; leading in the establishment of new agencies and ensuring that development was a priority for all UN agencies.¹⁰ Thus, it is a small step for UNDP to take on a coordinating role in oceans governance. In this context then UNDP works with agencies, such as the Global Environment Fund (GEF) and the International Maritime Organisation (IMO). UNDP also works closely with States (both those in receipt of assistance and those that can help in the provision of assistance) and it partners on occasion with civil society actors. As seen, for example, in the cooperation between UNDP, UNOPS, GEF, and Conservation International in relation to the Sulu-Celebes Sea.¹¹ In so doing the UNDP meets another element of the concept of ocean governance that underpins this research – ensuring “close cooperation by States, inter-governmental institutions and other actors”.

Such cooperation both magnifies the ability of each agency to contribute to ocean governance and has the potential to reduce fragmentation in the approaches taken by different institutions and States to the same issues. For fragmentation to be reduced, or to put it another way, for harmonization of approaches to happen and institutions be able to work with each other effectively, they must be influenced to some degree by the governance objectives of those bodies they cooperate with. This requirement of effective working may explain how it is that UNDP has come to see the linkages between its own primary objectives and the need to protect the marine environment and conserve marine biodiversity. For example, GEF focuses on mainstreaming biodiversity through

- “developing policy and regulatory frameworks that remove perverse subsidies and provide incentives for biodiversity-friendly land and resource use that remains productive but that does not degrade biodiversity;

¹⁰ Murphy *supra* n.6 p.6.

¹¹ See < <http://ssme.iwlearn.org/about> > accessed 27 October 2016.

- spatial and land-use planning to ensure that land and resource use is appropriately situated to maximize production without undermining or degrading biodiversity;
- improving and changing production practices to be more biodiversity friendly, with a focus on sectors that have significant biodiversity impacts (e.g., agriculture, forestry, fisheries, tourism, extractive industries);
- piloting an array of financial mechanisms (e.g., certification, payment for environmental services, access and benefit sharing agreements) to help incentivize actors to change current practices that may be degrading biodiversity.”¹²

For GEF and UNDP to work together effectively, the manner in which each implements their own objectives must, inevitably, be influenced by the objectives of the partner institution. In this case, the most obvious way in which GEF’s objectives may influence UNDP might be through elaborating on UNDP’s fifth objective: that the risks of conflicts and natural disasters should be lowered. By protecting the environment, the risks of certain natural disasters, such as stock collapses, occurring will be lowered. Similarly the objectives should help reduce conflicts over resources, by ensuring that they are managed effectively. Like the UNDP objectives, GEF’s objectives also support the implementation of UNCLOS’s objectives, from those focused on management of fisheries such as the provisions of Part V to those protecting the environment such as Articles 192 and 193. In some ways, however, GEF’s objectives reflect the provisions of the Convention on Biological Diversity¹³ (CBD) more than the objectives in UNCLOS. For example, the provisions of part V of UNCLOS on fishing in the Exclusive Economic Zone (EEZ) are more focused on ensuring optimum utilization of the resource than on providing incentives to ensure that activities do not degrade biodiversity. By contrast, these provisions fit well with the objectives and provisions of the CBD. The four elements outlined above are encapsulated in the objectives of the CBD on the conservation of biodiversity and sustainable use of its components.¹⁴ Removing perverse incentives and incentivizing land-use practices that are biodiversity friendly, follows the CBD’s provisions on incentive measures found in its Article 11. Situating resource use so as not to undermine biodiversity reflects the ethos if not the language of the obligation to establish protected areas under Article 8 of the CBD. This, coupled with the fact that UNDP appears to focus more on equality of access and preservation of biodiversity than on preserving jurisdictional interests and ensuring optimum utilization of resources points to a potential divergence between the approach to ocean governance taken by the UNDP/GEF and approaches that may be thought to

¹² B.J Huntley and K.H. Redford, “Mainstreaming Biodiversity in Practice: a STAP advisory document” (Global Environment Facility, 2014) p.20.

¹³ Convention on Biological Diversity 1992 (1993) 1760 UNTS 79 (CBD).

¹⁴ CBD Article 1.

accord more closely with the provisions of UNCLOS.

The apparent divergence of approach between UNCLOS on the one hand and that of UNDP/GEF when coupled with the history and general objectives of UNDP may explain why it is that the role of UNDP in ocean governance tends not to be discussed greatly. Yet as this section indicates, there is a fit between UNDP's work and ocean governance. That fit is explored more fully in the following section.

Current and Former Activities

Introduction: From Jurisdiction and Sector Specific Approaches to Large Marine Ecosystems

The role of UNDP in ocean governance is best understood by contrasting it with traditional legal approaches to ocean governance. The law of the sea has largely developed along sector-specific lines. For example, within the UN Convention on the Law of the Sea specific laws apply to fisheries,¹⁵ different ones to the control of pollution¹⁶ and another set to navigational rights.¹⁷ This separation of functions is mirrored in the international institutions tasked with overseeing the development and implementation of governance regimes applicable to these areas. The IMO oversees navigation, regional seas bodies address marine pollution issues while regional fisheries management organisations govern either species specific fisheries or region specific fisheries. This is an approach that lawyers are comfortable with as it mirrors the legal approach to socio-economic affairs in general – breaking life down into sectors of activity such as criminal law, contract law, property law and so on. But as lawyers know these areas are interdependent, the distinction of subjects artificial – property law is dependent upon contract law to function; the law of theft is predicated on rights under property law being breached. In the same way the artificiality of the sectoral distinctions in ocean law is accepted by lawyers and by those engaged in oceans governance activities. The acknowledgment that this artificial division is problematic in practice has led to more coordinated approaches within individual States and to some collaboration between international bodies to provide a more integrated approach to ocean governance. OSPAR provides one of the best examples of such integration – it cooperates with the neighbouring regional sea programme – HELCOM,¹⁸ and has Memoranda of Understanding

¹⁵ UNCLOS Articles 61-73.

¹⁶ UNCLOS Part XII, Articles 192-237.

¹⁷ UNCLOS Articles 17-26, 34-45, 52-54, 58, 87 and 90.

¹⁸ See, for example, the Joint HELCOM/OSPAR Task Group on Ballast Water Management Convention Exemptions < www.helcom.fi/helcom-at-work/groups/maritime/tg-ballast > accessed 27 October 2016.

with a neighbouring regional fisheries body¹⁹ and with the International Seabed Authority in relation to the deep-sea bed.²⁰ These efforts go a long way to address fragmentation, but they are still limited, or, rather, limiting. The process of developing MOUs may be likened to forming chain-links connecting one regime to another. In this way these linked regimes may address pertinent ecosystem issues, but it is as likely that they will be unable to address relevant ecosystems as a whole rather than as a sum of connected issues. Thus gaps in how the ecosystem is managed are likely to exist.

A different form of disconnection between ocean governance regimes and the ocean ecosystems is caused by the jurisdictional arrangements in the law of the sea which grant States sovereignty or sovereign rights in their territorial sea,²¹ exclusive economic zone,²² continental shelf²³ and (as appropriate) archipelagic waters.²⁴ These zones may, but frequently do not accord with oceans ecosystems²⁵ and so management measures adopted by States, even if well designed for the particular ecosystem, may once again fail to be fully effective as they can only be applied in that portion of the ecosystem within the State's jurisdiction. The results can be both problems in managing oceans resources²⁶ and disputes between States.²⁷ Collaborative efforts between neighbouring States or with/within regional organisations may ameliorate such problems, but are unlikely to completely eradicate them, for the reasons alluded to above.

¹⁹ See, for example, Memorandum of Understanding between the North-East Atlantic Fisheries Commission and the OSPAR Commission, 2008, <www.ospar.org/site/assets/files/1357/mou_neafc_ospar.pdf>.

²⁰ Memorandum of Understanding with the International Seabed Authority (the Authority) OSPAR 10/23/1, Annex 12.

²¹ UNCLOS Part II.

²² UNCLOS Part V.

²³ UNCLOS Part VI.

²⁴ UNCLOS Part IV.

²⁵ See E.A. Kirk 2015 "The Ecosystem Approach and the Search for An Objective and Content for the Concept of Holistic Ocean Governance" 46 *Ocean Development and International Law* Kirk; E.A. Kirk 1999 "The Mismatch of Jurisdictional Zone and Ecosystems" 8 *Review of International and European Community Environmental Law* pp.67-72.

²⁶ See Churchill, R. R. "The Management of Shared Fish Stocks: The Neglected "Other" Paragraph of Article 63 of the UN Convention on the Law of the Sea" in A. Strati, M. Gavouneli and N. Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea* (Martinus, Nijhoff 2006), pp. 3-19.

²⁷ See for example, *Icelandic Fisheries Case (UK v Iceland)* ICJ Rep (1974) 3 reference the Icelandic Fisheries case and the *Fisheries Jurisdiction Case (Spain v Canada)* ICJ Rep (1998) 432. See also P.G.G. Davies, "The EC/Canadian Fisheries Dispute in the Northwest Atlantic" (1995) 44 *ICLQ* pp. 927-939; D. Freestone, "Canada and the EU Reach Agreement to Settle the Estai Dispute" (1995) 10 *TIJMCL* pp. 397-411; and C.C. Joyner & A. Alvarez von Gustedt, "The 1995 Turbot War: Lessons for the Law of the Sea" (1996) 11 *TIJMCL* pp. 425-458.

Many of the initiatives supported by UNDP appear, however, to champion a different approach focussing instead on the concept of LMEs or on integrated coastal zone management.²⁸ There are around 65 such LMEs in the world. UNDP/GEF define²⁹ LMEs as areas of the ocean extending to a minimum of around 200,000 km². They are generally located in the same areas as coastal States territorial seas and EEZs: areas, which normally have greater productivity in terms of fisheries and other resources, than the high seas beyond. An indication of their productivity is given by the percentage of the annual global marine fisheries catch LMEs contribute. These areas contribute around 80 percent of that catch. For example, the Guinea Current LME was, in 2009, estimated to give rise to more than \$49,941.4 million worth of goods (fisheries, minerals etc.).³⁰ While these areas provide significant revenue streams they are often also under significant threat from pollution, over fishing and illegal and unregulated fishing.³¹

UNDP in conjunction with other bodies such as GEF use the concept of LMEs to promote “sustainable, ecosystem-based management”.³² The approach is also “in line with Chapter 17 of Agenda 21”.³³ As such, the boundaries of LMEs are not drawn with an eye to ocean governance *per se*, but upon those areas that contribute most to our socio-economic systems. The boundaries are therefore based upon ecological criteria: depth, hydrography, productivity and trophic relationships. In this then they differ from the “legal” zones of the territorial sea and EEZ, which have their roots as much in political as geographical criteria. As a result of this focus on geographical rather than legal criteria, about 55 percent of the identified LMEs are shared between two or more countries. For example, the Humboldt Current LME brings together Chile and Peru to manage the Peruvian anchovy (the world’s largest fishery).³⁴

²⁸ The discussions in this paper focus primarily on the management of large marine ecosystems, in part due to constraints on space and in part because it has proved difficult to find sufficient materials relating to UNDP’s role in relation to integrated coastal zone management on which to base any analysis.

²⁹ UNDP-GEF “International Waters Delivering Results” (UNDP, 2016) p.9.

³⁰ N.A. Chukwuone, C.N. Ukwue, A. Onugu, C.A. Ibe “Valuing the Guinea Current Large Marine Ecosystem: Estimates of Direct Output Impact of Relevant Marine Activities” (2009) 52 *Ocean & Coastal Management* 189–196. See also, for example, Mary Power and Anama Solofa “The Pacific Islands Regional Ocean Policy and the Framework for a Pacific Oceanscape: ‘Many islands – one ocean’” chapter 19 in David VanderZwaag, Biliiana Cicin-Sain and Miriam C. Balgos (eds) *Routledge Handbook of National and Regional Ocean Policies* (Taylor and Francis 2015) p 504 for details of the value fisheries, tourism etc. around the Pacific Islands.

³¹ See for example, Indumathie Hewawasam, Bernice McLean and with contributions from Leopoldo Maraboli and Magnus Ngoile, ‘Ocean and Coastal Policy Processes in Sub-Saharan Africa: Issues, Opportunities, and Strategic Options’ in David VanderZwaag, Biliiana Cicin-Sain and Miriam C. Balgos (eds), *Routledge Handbook of National and Regional Ocean Policies* (chapter 21 p.543, Taylor and Francis 2015)

³² GEF, UNDP, UNU-INWEH, IW Learn “From Coast to Coast: Celebrating 20 Years of Transboundary Management of Our Shared Oceans” (GEF, 2015) p.6

³³ Hewawasam, McLean, Maraboli and Ngoile *supra* n. 31 at p.554.

³⁴ “From Coast to Coast” *supra* n. 32 p.96.

Given their productivity and the fact that jurisdiction may fall across more than one State, these are the areas of the sea in which most competition between users occurs. They are therefore the most complicated areas to manage.³⁵ For example, while the resources of the Guinea Current LME are extremely important for the local population, some are the target of, at times unregulated, industrialized fishing which reduces the availability of fish for the local population.³⁶ In these circumstances the governance arrangements become extremely important. The approach promoted by UNDP working with GEF and other institutions is to assist the coastal States to develop governance arrangements through the Transboundary Diagnostic Analysis/Strategic Action Programme (TDA/SAP) process. As described below, the process generally follows a regime building approach and it has the potential to not only ensure that UNCLOS's objectives are met, but that a range of ocean governance objectives are met – from harmonizing societal and sectoral perspectives, to maintaining productive socio-ecological systems.

Developing Principles, Objectives and Regulatory Frameworks: Following a Regime Building approach in the development of oceans governance regimes

The Transboundary Diagnostic Analysis/Strategic Action Programme (TDA/SAP) planning approach - was developed through GEF and adopted by UNDP. The process fits well with understandings of regime building³⁷ according to which States first develop shared understandings. These shared understandings create space in which a common practice may emerge, with that practice gradually crystallising into binding norms over time. The TDA/SAP process was developed to help neighbouring States to work together over transboundary issues – issues which often result in disputes.³⁸ It is designed as “a multi-country, long-term integrated planning approach that helps governments to prioritize issues, identify barriers and agree upon and implement regional and national governance reforms and investments aimed at addressing the root causes of

³⁵ Hanling Wang “Ecosystem Management and Its Application to Large Marine Ecosystems: Science, Law, and Politics” (2004) 35 ODIL 41074 at 46

³⁶ Chika N. Ukwe, Chidi A. Ibe, Kenneth Sherman “A Sixteen-Country Mobilization for Sustainable Fisheries in the Guinea Current Large Marine Ecosystem” (2006) 49 Ocean & Coastal Management 385–412

³⁷ See, for example, J. Brunnée and S. J. Toope, ‘Environmental security and freshwater resources: ecosystem regime building’ 91 *The American Journal of International Law* 26-59 Jutta Brunnée and Stephen J. Toope, ‘International Law and Constructivism: Elements of An Interactional Theory of International Law’ 39 *Columbia Journal of Transnational Law* 19-7 Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990) A. Hasenclever, P. Mayer and V. Rittberger, *Theories of International Regimes* (Cambridge University Press 1997) Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ 52 *International Organization* 887-917

³⁸ GEF-UNDP “Catalyzing Ocean Finance II: Methodologies and Case Studies” (UNDP, 2012) p.11

aquatic ecosystem degradation.”³⁹ The process begins with the TDA - a scientific analysis of the state of the environment and issues with it. This analysis creates the space in which shared understandings can arise. For example, in the Caribbean Large Marine Ecosystem Project three TDAs were carried out - one for each of the LMEs that is important to the production of fisheries in the region – coral reef ecosystems, pelagic ecosystem and the continental shelf ecosystem. The TDAs identified certain common threats - pollution, over fishing and habitat degradation – and that the impact of these threats were exacerbated by weaknesses in the governance systems and in the way those systems are implemented.⁴⁰ The SAP that followed built on these findings. Similarly, the Sulu-Celebes Sea SAP addressed the weak governance and gaps in governance found in the TDA by including recommendations to strengthen existing institutions and to ensure that coordination across institutions was addressed⁴¹ and the South Pacific Regional Environment Programme reformed its structure following its TDA/SAP process.⁴²

The TDA process enables the States involved to pinpoint problem issues to be addressed. The SAP then is a political document⁴³ in which the parties identify the priority areas for action. It demonstrates a general agreement as to the principles that should guide the management of the LME. Both the conduct of the TDA and the implementation of the SAP enable a practice to develop around these priorities and principles and from there it can be possible for the parties to go on to develop binding norms in the form of a treaty. For example, the Benguela Current States – Angola, Namibia and South Africa – approached UNDP for assistance in developing cooperation in the mid-1990s. This led to a TDA being carried out (and completed by 1999). The findings of the TDA formed the basis for a SAP to be adopted in 2002. Implementation of the initial SAP led the States to the adoption of the Benguela Current Convention, signed in 2013.⁴⁴ To ensure entrenchment of the norms agreed in the Benguela Current Convention UNDP has been providing support for implementation of the BCC SAP through the reform of law and policy at national and regional levels since 2015.⁴⁵

³⁹ UNDP “Support to the Implementation of Sustainable Development Goal 14” p. 6 < <http://un.info.np/Net/NeoDocs/View/6140> > accessed 27 October 2016

⁴⁰ Similar findings have been reported in other areas. See, for example, Sulu-Celebes Sea Sustainable Fisheries Management Project 2014 “Report on the Transboundary Diagnostic Analysis of the Sulu-Celebes (Sulawesi) Large Marine Ecosystem”.

⁴¹ Sulu Sulawesi Marine Ecoregion Tri-National Committee 2013 “Strategic Action Program for the Sulu-Celebes Sea Large Marine Ecosystem”.

⁴² Secretariat of the Pacific Regional Environment Programme “SPREP Annual Report: 2012” (SPREP, 2013)

⁴³ GEF-UNDP 2012 supra n.38 p.11.

⁴⁴ The Benguela Current Convention between the Government of the Republic of Angola and the Government of the Republic of Namibia and the Government of the Republic of South Africa 2013 (entered into force 10 December 2015) < <http://www.benguelacc.org/> > accessed 27 October 2016.

⁴⁵ “From Coast to Coast” supra n. 32.

Whether a treaty or a SAP alone is adopted, the net result is that the GEF/UNDP process meets the ocean governance objectives of developing policies and regulatory frameworks for ocean governance and of maintaining coherence across jurisdictional, space and time scales. Where a treaty is adopted, the objectives of defining the rules for allocation of power, resources and benefits may also be met. These, however, do not appear to be the immediate goals of the UNDP process. The focus is instead on bringing together States with either a poor record of cooperating together, or little record of cooperating in the particular area in question. In this last - bring States together – the results of UNDP’s efforts have been quite remarkable. For example, under the GEF/UNDP Yellow Sea LME project China and the Republic of Korea worked together on LME assessment cruises. This was the first time they had conducted joint LME assessments. The assessments then led to the agreement of a Strategic Action Programme to address ecosystem problems identified during the assessment cruises. The SAP contained some quite significant measures – agreement to reduce fishing effort by 30% and to reduce nutrient discharges by 10% every five years.⁴⁶ Given the fact that China is a (rapidly) developing country, and given the relationship between these two States, these commitments to reduce fishing effort and nutrient discharges are highly significant.

Similarly the Partnerships in Environmental Management for the Seas of East Asia (PEMSEA) evolved from a GEF/UNDP/IMO project - the Prevention and Management of Marine Pollution in the East Asian Seas (MPP-EAS) Project. The UNDP/GEF through this (and other projects such as the GEF/UNDP Building Partnerships for the Environmental Protection and Management of the East Asian Seas and GEF/UNDP Implementation of Sustainable Development Strategy for the Seas of East Asia (SDS SEA)) facilitated cooperation between the States. This in turn enabled the members of PEMSEA to adopt the Sustainable Development Strategy for the region in 2003 (Sustainable Development Strategy for the Seas of East Asia SDS-SEA). In 2006 support for the implementation of the SDS-SEA was found in the establishment of the East Asian Seas (EAS) Partnership Council by the cooperating States. The cooperation between States continued to strengthen to the extent that eight States recognised PEMSEA as an independent legal entity in 2009. Developments continued so that

“in 2011, the PEMSEA Network of Local Governments for Sustainable Coastal Development (PNLG) adopted the Dongying Declaration by which the countries committed to ocean governance actions and targets; and, in 2012, country partners adopted the Changwon Declaration, which serves as the region’s response to the Rio+20 outcomes by promoting the development of an ocean-based blue economy through strengthened implementation of the SDS-SEA.”⁴⁷

In addition, PEMSEA has facilitated the adoption of certain regional agreements such as the Framework Programme on Partnerships in Oil Spill Preparedness

⁴⁶ *Ibid* p.7.

⁴⁷ *Ibid* p.45.

and Response in the Gulf of Thailand.⁴⁸ These examples point to the development of regional regimes by focussing on the use of practice to develop shared understandings – the regime building approach. These shared understandings may also draw on existing understandings in global instruments,⁴⁹ but the key element appears to be the creation of common understandings at the regional level.

In keeping with UNDP’s flexible approach to development in general, the regime building approach is not the only way in which it promotes ocean governance. A different approach was taken in the Caribbean Integrated Watershed and Coastal Area Management Programme. That programme addressed fragmentation in the approaches to ocean governance by the 21 States in the region caused in part by the wildly different economic capacities of the States, but also due to different cultural contexts. It helped ensure coherent approaches across jurisdictions and harmonize societal perspectives by ensuring interaction with the global governance systems. That interaction took the form of aid to countries to enable ratification of “key legal agreements such as the Protocol on Land-Based Sources of Pollution of the Cartagena Convention”.⁵⁰ In the Black Sea a third approach appears to be taken – one in which cooperation on particular projects is given priority though these projects may be designed to support implementation of the existing Bucharest Convention.⁵¹

All of these approaches cause some problems for lawyers in identifying UNDP’s efforts in ocean governance. In this context, the discussion of the development of ocean governance mechanisms in the lexicon of regime building points to the cause of the problem for lawyers. Although the

“LME approach promotes the creation of new and reformed institutions, the reform and implementation of marine resource management policies and legislation, and the leverage of public and private sector investment for LME restoration and protection”,⁵²

the institutional structures adopted tend not to follow the traditional institutional structures associated with oceans governance by lawyers. For

⁴⁸ See Craig Forrest “State Cooperation in Combating Transboundary Marine Pollution in South East Asia” (2016) 30 *Australia and New Zealand Maritime Law Journal* 78

⁴⁹ Stella Regina Bernad and Chua Thia-Eng “The Sustainable Development Strategy for the Seas of East Asia” Policy implications at local national and regional levels” chapter 20 in in David VanderZwaag, Biliana Cicin-Sain and Miriam C. Balgos (eds) *Routledge Handbook of National and Regional Ocean Policies* (Taylor and Francis 2015) p527 et seq.

⁵⁰ “From Coast to Coast” *supra* n.32 p.7.

⁵¹ See generally

<http://archive.iwlearn.net/www.bsepr.org/www.bsepr.org/Text/Project/default.html> . Bucharest Convention on the Protection of the Black Sea Against Pollution 1992 (1994) 1764 UNTS 4.

⁵² “From Coast to Coast” *supra* n.32 p.6.

example, the GEF/UNDP Caribbean LME centred on a 10 year SAP agreed by 22 States and focused on key issues for the region. The SAP is a non-binding soft law document, containing political, rather than legal commitments. A similar approach was followed in the GEF/UNDP supported Partnerships in Environmental Management for the Seas of East Asia (PEMSEA). PEMSEA adopted the Sustainable Development Strategy for the Seas of East Asia. The Strategy fits with the idea of establishing policies and a regulatory framework in that it provides a stage upon which policy development can take place. It also promotes the objective of maintaining productive socio-ecological systems through provision for an investment work package managed by the World Bank. This package is not just about investment to create jobs, but aims to protect the ecosystem through tackling coastal pollution.⁵³ Despite these fits with ocean governance objectives, the Strategy remains a soft law instrument and as such may not be recognised as having legal validity by parts of the legal academy.⁵⁴ Similarly, the type of work undertaken by UNDP in the Caribbean and Black Sea do not fit with traditional legal notions of ocean governance activities.

It is perhaps because of these types of approaches, and the fact that they lack formal legal structures, that UNDP's work has attracted so little attention from legal academics. It might appear at first sight that this "antipathy" may also be mutual. UNDP's work does not always draw in legal insights. For example, its work on global public goods, so central a concept to ocean governance, was absent contributions from lawyers.⁵⁵ In reality, however, many of the projects with which the UNDP is involved focus on precisely the type of issues that legal discourse and ocean governance are concerned with. For example, the UNDP/GEF supported Benguela Current Large Marine Ecosystem Programme was established with the aim of *inter alia* ensuring that a Benguela Current Commission (BCC) was set up to facilitate cooperation⁵⁶ because there was an identified lack of governance structures in place. Indeed the "BCC constitutes the first fully institutionalized and operational intergovernmental, multi-sectoral LME commission in the world. It is also the first ever inter-governmental commission based on the LME concept for ocean governance".⁵⁷ Similarly, the UNDP/GEF supported the Pacific Islands Oceanic Fisheries Management Project, which ran from 2005-2011 and focused on the establishment of institutions of governance.⁵⁸ It supported the participating States in the negotiation and adoption of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPF Convention). The WCPF convention implements many of the provisions of the 1995 Fish Stocks Agreement and was one of the first to do so. In addition the WCPF Commission has agreed MoUs with other RFMOs including the Inter-American Tropical Tuna Commission, the Commission for the Conservation of

⁵³ *Ibid* p.7.

⁵⁴ See also, for example the Sulu Sulawesi Marine Ecoregion Tri-National Committee 2013 *supra* n.41.

⁵⁵ Gregory Shaffer "International Law and Global Public Goods in a Legal Pluralist World" (2012) 23 EJIL 669-693.

⁵⁶ "From Coast to Coast" *supra* n.32.

⁵⁷ *Ibid* p.18.

⁵⁸ *Ibid*.

Southern Bluefin Tuna, the Indian Ocean Tuna Commission and the Commission for the Conservation of Antarctic Marine Living Resources. In this way then it could be said that the UNDP/GEF action did not just work to strengthen and develop institutions at the regional level, but also to support and strengthen global instruments and institutions relevant to ocean governance.

By supporting the adoption of legal instruments such as those described above, and in identifying weaknesses in existing governance structures, UNDP's work promotes ocean governance in the sense understood by lawyers. It fits with the objective of establishing overriding principles and objectives to maintain productive socio-ecological systems and with the objective of harmonizing societal and sectoral perspectives. It also fits with the objective of maintaining coherence across jurisdictional and spatial scales and with the objective of ensuring interaction with other governance systems, but, as should be evident from the discussion above, it does not ensure that all of these objectives are met in every project. Instead and in keeping with its flexible approach, UNDP adopts the objectives suited to the problem in question in each particular project. In this context, one of the key tasks that UNDP will have to address in most projects is capacity building. This is particularly so given UNDP's focus on working with developing States. As might be anticipated UNDP's work prioritizes learning and the capacity to change both in the form of training for actors and in terms of the creation of adaptive organisations.

UNDP's role in supporting the development of adaptive organisations again fits with the conception of regime building and, as might be anticipated, it is at its most obvious in relation to the SAP. It is intended that the SAP be reviewed and revised at regular intervals⁵⁹ as happened in, for example, the Benguela Current LME where the 2001 SAP was revised in 2009. A partial revision also took place for the period 2014/15 to 2018-19 when the causal chain analysis for the SAP was revised.⁶⁰ On occasions these reviews lead to restructuring of the SAP or of the organisations charged with implementing it. As noted earlier, the Sulu-Celebes Sea SAP addressed the weak governance and gaps in governance found in the TDA by including recommendations to strengthen existing institutions and to ensure that coordination across institutions was addressed⁶¹ and the South Pacific Regional Environment Programme reformed its structure following its SAP.⁶²

Training and capacity building is also built in to the SAP. For example the 2015-19 SAP adopted by the Benguela Current Commission⁶³ provides for oceans

⁵⁹ *Ibid* p.22.

⁶⁰ *Ibid*.

⁶¹ Sulu Sulawesi Marine Ecoregion Tri-National Committee 2013 *supra* n. 41.

⁶² "SPREP Annual Report: 2012" *supra* n.42.

⁶³ Benguela Current Commission, *Strategic Action Programme 2015-2019: A Coordinated Regional Approach to the Long-term Conservation, Protection, Rehabilitation, Enhancement and Sustainable Use of the Benguela Current Large Marine Ecosystem to Provide Economic, Environmental and Social Benefits* (Benguela Current Commission, 2014)

capacity building in a variety of areas such as ocean governance and maintenance of marine transport facilities as strategic responses to the challenges outlined in the earlier chapters of the report:⁶⁴

“Training and capacity building to bolster sound environmental governance has also been at the forefront of the BCC’s agenda, while complementary initiatives include an extensive science program funded by the government of Norway, and a comprehensive training and capacity building initiative supported by Iceland.”⁶⁵

In addition, the Secretariat is tasked with coordinating capacity building programmes run jointly with external partners.⁶⁶ Similar provisions are found elsewhere, such as in the draft Western Indian Ocean SAP.⁶⁷

UNDP also supports training in a number of ways unconnected to the SAP process. For example, it worked with collaborators to organize a course on conservation of coastal ecosystems in Cuba in 2008⁶⁸ and in 2012 UNDP and GEF launched a Clean Coast and Beach competition in the Lower Volga Delta to help educating and training of locals.⁶⁹ It also works on the production of guidelines on implementation of policies. For example, it cooperated in the development of the Guidelines for Development of a National Ballast Water Management Strategy⁷⁰ under the GloBallast programme.

A further way in which UNDP’s work promotes regime building is through supporting fair representation in decision-making. UNDP’s approach to ocean governance actively engages stakeholders at various stages of the governance process. The TDA, which often forms the starting point for the project is designed to be “part of a process of engaging stakeholders through the initial TDA steps and the subsequent development of alternative solutions during the formulation of the SAP.”⁷¹ This means that “Stakeholder identification and consultation and studies of institutional capacity, governance, and investment are all essential

⁶⁴ Ibid p.23.

⁶⁵ “From Coast to Coast” *supra* n.32 p.19

⁶⁶ Benguela Current Commission 2014 *supra* n.63 p. 9

⁶⁷ A Strategic Action Programme For Sustainable Management of the Western Indian Ocean Large Marine Ecosystems Building a Partnership to Promote the Sustainable Management and Shared Governance of WIO Ecosystems for Present and Future Generations, 2013

<<http://www.asclme.org/asclme-project/strategic-action-programme.html>> accessed 27 October 2016.

⁶⁸ “Annual Report of the International Ocean Institute” (2010) 224 *Ocean Yearbook* 557-592 at 565.

⁶⁹ See “Annual Report of the International Ocean Institute” (2011) 27 *Ocean Yearbook* 569-590 at 577

⁷⁰ J. Tamelander, L. Riddering, F. Haag, J. Matheickal, “Guidelines for Development of National Ballast Water Management Strategies” *GloBallast Monographs* No. 18 (2010, GEF-UNDP-IMO GloBallast, and IUCN)

⁷¹ GEF-UNDP 2012 *supra* n.38 p. 12

components of the TDA process.”⁷² This process, bringing stakeholders and civil society more generally together with policy makers and experts in the process leading towards the adoption of the SAP is designed to ensure that sound science assists “policy making within a specific geographic location for an ecosystem-based approach to management that can be used to engage stakeholders.”⁷³ It also has the potential benefit of enabling common understandings to emerge in line with regime building.

The process generally begins with a consultation with stakeholders, followed by a review of existing data. The next step is to gather and analyse any data necessary to fill gaps in the existing data. This is done through a four part modular process addressing: pollution and ecosystem health, productivity, fish and fisheries and socio economics. A fifth module addresses governance and feeds into the SAP process and review of it.⁷⁴ Experts carry out the gathering and analysis of data, but at each stage of the process relevant stakeholders are invited to review and comment on the findings or proposals.⁷⁵ For example, in the lead up to the adoption of the PEMSEA SDS-SEA consultations were held with national and regional stakeholders over a period of more than three years.⁷⁶

Although each TDA process is designed to follow the same process in terms of the five modules to be followed, the stakeholders involved will vary from one LME assessment to another to reflect the problem(s) on which the TDA/SAP process is focussed. Thus for example, the TDA for the Benguela Current LME brought together representatives from fishing (both industrial and artisanal), tourism, oil, gas and mining as well as representatives from port authorities, governmental and non-governmental stakeholders more generally and experts drawn both from the region and internationally. By contrast the Humboldt Current LME engages primarily with artisanal fishermen and local communities as the TDA and SAP are focussed very much on the preservation of the anchovy fisheries.

At first sight it may appear, however, that the process is not designed to support the emergence of shared understandings. The shaping of the stakeholder groups to reflect the problem on which the TDA is focussed, points to the TDA aiming not so much at participatory democracy⁷⁷ as at ensuring that the decisions and

⁷² Ibid p. 12

⁷³ Ibid p. 13

⁷⁴ “From Coast to Coast” *supra* n.32 pp12-13.

⁷⁵ GEF-UNDP 2012 *supra* n. 38 pp14-16.

⁷⁶ Bernad and Chua Thia-Eng *supra* n. 49 p522.

⁷⁷ See, for example, Allen Buchanan and Robert O. Keohane “The Legitimacy of Global Governance Institutions” (2006) 20 *Ethics and International Affairs* 405; Jonas Ebbesson, ‘Public Participation’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007). See also, Thomas M. Franck, Remarks, in “Non-State Actors As New Subjects Of International Law”, 151, 152 (Rainer Hofmann ed. 1998); Report of the Panel of Eminent Persons on United Nations-Civil Society Relations, 37, 46, UN Doc. A/58/817, (June 11, 2004).

recommendations coming from it are based on the best information possible.⁷⁸ Thus there may be no concern with the understandings stakeholders take away from the process. This conclusion is supported by the fact that, in keeping with the processes used in most international organisations,⁷⁹ decisions on how to respond to the problems identified in the TDA will often be left to the local States and regional bodies, as happened, for example, during the Caribbean LME TDA/SAP process.⁸⁰ However, while this conclusion may apply generally to the TDA process, it is less applicable to the TDA/SAP process as a whole. The fifth module of the TDA/SAP process comprises an analysis of existing national, regional and international governance systems. It feeds directly into establishment or review of the SAP. The overarching objective of the fifth module is to establish where governance problems are arising. Part of this remit involves establishing formal allocation of power. Another part determines where the real power behind decision-making sits rather than the formal power. Once again, however, examples point to the focus being on decision-making power between States. For example, in the Caribbean LME project it was clear that while all States had formal power to participate in relevant organisations such as Western and Central Pacific Fisheries Commission the small island developing States would lack the capacity to do so. Those States were then given support through UNDP's Pacific Oceanic Fisheries Management Project (OFMP) to ensure that they could participate and could have a real voice in the Commission's decisions.⁸¹ The story is, however, somewhat different when one assesses the move from the TDA itself to the SAP. The first stage in the process draws on the stakeholders' objectives for the ecosystem in question and results in the establishment of Ecological Quality Objectives.⁸² At the implementation stage again, stakeholders are actively involved. For example, local communities and stakeholders from the public and private sectors participate in the

⁷⁸ See, for example, Marie Appelstrand, "Participation and Societal Values: The Challenge for Lawmakers and Policy Practitioners" (2002) 4 Forest Policy and Economics 281; Julia Black, "Proceduralizing Regulation: Part I" (2000) 20 OJLS 597-614; John Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press, 2005); Daniel J. Fiorino, "Citizen Participation and Environmental Risk - A Survey of Institutional Mechanisms" (1990) 15 Science Technology & Human Values 226; Kate Getliffe, "Proceduralisation and the Aarhus Convention: Does Increased Participation in the Decision-making Process Lead to More Effective EU Environmental Law?" (2002) 4 ELR 101; Maria Lee and Carolyn Abbot, "The Usual Suspects? Public Participation under the Aarhus Convention" (2003) 66 MLR 80; Jenny Steele, "Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach" (2001) 21 OJLS 415.

⁷⁹ See, for example Elizabeth A. Kirk "The Role of Non-State Actors in Treaty Regimes for the Protection of Marine Biodiversity" Chapter 4 in M. Bowman, P.Davies and E. Goodwin (eds.) *Research Handbook on Biodiversity and Law* Edward Elgar 2016

⁸⁰ "From Coast to Coast" *supra* n. 32 p.31.

⁸¹ *Ibid* p.52.

⁸² GEF-UNDP 2012 *supra* n.38 p. 17

implementation of the Benguela Current SAP⁸³ and are active in the Caribbean LME.⁸⁴ The Guinea Current SAP also provides for the continued involvement of stakeholders⁸⁵ as does the Sulu-Celebes Sea.⁸⁶

What we can take from this then is that the TDA/SAP process begins with a process designed to gain the best quality information on which States can make decisions. At this point it helps engender common understandings between States from which norms of action may emerge. At the implementation stage participation is widened enabling the generation of common understandings across the community of stakeholders. Thus compliance with the aims of the SAP may be hoped to be improved and the emerging regime may be hoped to gain robustness. For example, the process leading to the PEMSEA SDS-SEA is credited with leading to the creation of a shared vision amongst the stakeholders.⁸⁷ That is not to say that the process will be easy – there may be substantial differences in the interests of different stakeholder groups. For example, the interests of stakeholders from South Africa, with the world's 10th largest stock exchange,⁸⁸ may be very different from those from neighbouring Namibia.

There is, however, at least one other way in which the TDA/SAP process promotes harmonization of societal interests. This is through the harmonization of policies across States, which is most clearly seen in the adoption of a regional approach to management of the particular LME. It would, however, be a stretch to say that the UNDP has provided particular guidance as to how harmonization should take place. While it does provide guidance on the issues the TDA should address⁸⁹ and it does provide that the SAP is to implement measures to tackle the key issues identified in the TDA, such as policy or legislative development, it does not give further guidance than that. Instead it is left to the participants of each TDA/SAP process to decide on issues to be harmonized and the way in which such harmonization should be achieved. UNDP's approach has the benefit that it means processes can fit with the cultural norms of the region and can be tailored to fit with or complement (as appropriate) the approaches of existing management regimes in the region. Thus it enables some regions to proceed on the basis of political agreements to harmonize measures (such as PEMSEA) while others adopt binding agreements (such as the Benguela Current Convention.) Whichever approach is taken to the adoption of agreements – soft or hard law – UNDP's efforts often lead to harmonization of a further sort. The agreements will often times embody certain key environmental principles such as the polluter pays and precautionary principles. For example, both the polluter pays and the precautionary principle are found in the Guinea Current SAP.⁹⁰ In so doing, the UNDP sponsored projects not only ensure a consistent (or harmonized)

⁸³ "From Coast to Coast" *supra* n. 32 p.21.

⁸⁴ *Ibid* p.28 et seq.

⁸⁵ Hewawasam, McLean, Maraboli and Ngoile *supra* n. 31 at p.555.

⁸⁶ Sulu Sulawesi Marine Ecoregion Tri-National Committee 2013 *supra* n.41.

⁸⁷ Bernad and Chua Thia-Eng *supra* n.49 p.523.

⁸⁸ Hewawasam, McLean, Maraboli and Ngoile *supra* n. 31 p.543.

⁸⁹ GEF-UNDP *supra* n.38.

⁹⁰ Hewawasam, McLean, Maraboli and Ngoile *supra* n. 31 at p.544

approach to ocean governance within and across regions, but that the regional approaches are consistent with global approaches. Thus minimising the possibility of fragmentation in ocean governance and increasing the possibility of harmonisation.

UNDP also plays a role in global initiatives to harmonize approaches across States. Its activities range from working with other institutions to provide background papers for global events to leading the development of certain global initiatives. For example, it collaborated with the IOC/UNESCO, the IMO and the FAO in writing an inter-agency paper to aid preparation for the UN Conference on Sustainable Development (Rio+20).⁹¹ At the other end of the spectrum of activities is the GloBallast project, which the UNDP, GEF and IMO started in 2000 to tackle the problem of invasive species carried by ship ballast water. “One of the most significant outcomes has been the adoption of the IMO International Convention for the Control and Management of Ships’ Ballast Water and Sediments”⁹² in 2004. It provides a standardized way of dealing with ballast (and any invasive species) and will enter into force in September 2017.

The GloBallast initiative demonstrates how effective efforts to both harmonize policies and involve stakeholders can be in achieving the desired governance results and in bringing additional benefits. Those involved in GloBallast realised that it could only be successful if industry (which could be described as the key stakeholder) was engaged. As a result the Global Industry Alliance was established in 2009 to bring together the IMO and private shipping companies. It has also worked with media to raise awareness of the invasive species issue, partnering with the BBC to produce the prize winning “Invaders from the Sea”⁹³ documentary film.⁹⁴ The results of these efforts are to be seen in governance reforms at global, regional and national levels.⁹⁵ They have also “created substantial economic benefits by promoting the creation of a sizeable ballast water treatment industry valued at over \$35B and spurring the rapid development of innovative technological solutions for the management of ships ballast water”.⁹⁶ This outcome not only fits a number of ocean governance objectives such as maintaining productive socio-ecological systems, establishing overriding regulatory frameworks and maintaining coherence across jurisdictional, space and time frames, it also fits very well with UNDP’s

⁹¹ IOC/UNESCO and others, *A Blueprint for Ocean and Coastal Sustainability* (Paris, IOC/UNESCO, 2011).

⁹² “From Coast to Coast” *supra* n.32 p. 157.

⁹³ <http://globallast.imo.org/resources/the-bbc-imo-invaders-from-the-sea/> accessed 27 October 2016.

⁹⁴ The film won the gold award for the Best United Nations Feature Film at the third annual United Nations Documentary Film Festival and won the Marine BizTV International Maritime Award for “Best Innovative Project” in 2013.

⁹⁵ See, for example, the discussion of reforms in the Guinea Current area as a result of the GloBallast initiative discussed in Godwin Eli Kwadzo Dzah “Toward an Effective Ballast Water Legislative and Implementation Regime: Lessons for Ghana” (2013) 28 *Ocean Yearbook* 526-554

⁹⁶ “From Coast to Coast” *supra* n. 32 p.163.

overarching aim of reducing poverty.

UNDP's activities also have a further benefit. While UNDP's work is not particularly focused on the resolution of disputes in the sense traditionally understood by lawyers. It does help promote UNCLOS's objective of maintaining peaceful use of the seas.⁹⁷ The most obvious indications of this are in the way it has supported cooperation between otherwise "hostile" states. Examples include the successes in the Yellow Sea project referred to earlier and the discussions between the USA and Russia on the Beaufort Sea LME.⁹⁸ It is also seen in the cooperation between Angola, Namibia and South Africa on the Benguela Current where:

"[t]he ability of the three nations to overcome historical tensions to work together for the region's mutual and sustainable benefit provide hope that similar challenges can be overcome to protect the world's vulnerable marine environments."⁹⁹

In some cases there is also the possibility that potential conflicts will be reduced as a common approach to issues such as boundary delimitation is agreed. It is hoped, for example, that this will be one of the outcomes of PEMSEA's Sustainable Development Strategy for South East Asia (SDS-SEA).¹⁰⁰ As these examples show, UNDP's approach to ocean governance may not directly engage States in seeking solutions to disputes, but its work brings together government actors to cooperate on particular activities in a manner akin to track II diplomacy.¹⁰¹

Conclusions

UNDP's role in global ocean governance is somewhat complex. On the one hand its work appears to cut across some key ocean governance objectives. Whereas, for example, UNCLOS provides for the allocation of jurisdiction amongst States, UNDP focuses on transboundary cooperation and its work tends to transcend jurisdictional issues. Similarly, whereas UNCLOS prioritises optimum utilization of fisheries, UNDP's work is more closely focussed on sustainability, in particular sustainable socio-ecological relationships. Depending on one's perspective this may or may not be taken to support implementation of optimum utilization or conservation of marine mammals – another of UNCLOS's objectives. It is also

⁹⁷ Article 301, see also Articles 88 and 141.

⁹⁸ See Protection of the Arctic Marine Environment Working Group, Arctic Council, "PAME Progress Report On The Ecosystem Approach To Arctic Marine Assessment And Management 2006-2008" at 3.

⁹⁹ "From Coast to Coast" *supra* n.32 p.21

¹⁰⁰ *Ibid* p.45.

¹⁰¹ On track II diplomacy see, for example, Esra Çuhadar and Bruce W Dayton, "Oslo and Its Aftermath: Lessons Learned from Track Two Diplomacy" (2012) 28 *Negotiation Journal* 155-179.

difficult to see what UNDP's work has to say to the freedoms of the high seas. If it has anything to say, it would appear to be in the context of the restriction on fishing found in the obligation to cooperate in the conservation and management of marine living resources on the high seas.¹⁰²

At first sight UNDP also appears to fall short of other, accepted ocean governance objectives. Indeed, there are some objectives it clearly does not meet, but these are rather few in number. UNDP does not enforce decisions/regulations, nor does it create mechanism for enforcement. The discussion of the fit between UNDP activities and other ocean objectives, however, has to be more nuanced. For example, while UNDP does not directly define the rules for allocation of power, resources and benefits, its work is designed to support these objectives. UNDP may be viewed as overseeing the allocation of power to particular decision-making mechanisms, rather than to particular actors. Thus it moves decision making into the TDA/SAP process, for example, and away from the purview of States acting on an individual basis. The same type of comments can be made in relation to the allocation of resources. While UNDP is not directly involved in their allocation its work supporting LME projects creates space for allocation activities to take place. Its work in this regard is illustrated by, for example, the reduction of fishing effort agreed through the Yellow Sea LME SAP.

UNDP is also active in the creation of policies and regulatory frameworks and the establishment of overriding principles and objectives, yet as noted above, its work does not appear terribly often in legal literature on ocean governance. This may be because its focus is largely on supporting the development of soft law agreements in the form of the SAP. These may serve as the precursor to the development of binding treaties such as the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, or the establishment of more formal institutions such as the Benguela Current Commission. There is, however, a certain distance between the creation of such formal laws and institutions and UNDP's activities and this distance at times obscures sight of UNDP's role. The same can be said of UNDP's activities at the global level. While it is a key partner in GloBallast, for example, the actual development of an international treaty fell under the IMO's remit rather than UNDP's. Those seeking signs of an agency generating overriding principles and objectives to support productive socio-ecological systems, may therefore be disappointed in UNDP. Such a focus would, however, miss the important supporting role that UNDP plays in the generation of national, regional and global laws and policies. This is a role that can and does lead to the harmonisation of policies across States. For example, by encouraging States to follow the TDA/SAP process in setting up LME arrangements, UNDP ensures that an environment in which consensus around particular norms can emerge exists. In so doing it facilitates the production of regional policies and legal instruments and helps ensure that ecosystems are consistently managed across jurisdictional scales. In playing this supporting role UNDP can be said to active in the creation of oceans governance policies and law as well as in ensuring coherence across jurisdictional, space and time scales.

¹⁰² Article 118 UNCLOS

There are other areas in which the fit between UNDP's activities and global ocean governance objectives is clearer. The TDA/SAP process is, for example, designed to support the fair representation of societal interests. UNDP also supports participation by developing States in relevant treaties. By engaging a range of stakeholders in the production and implementation of the TDA/SAP and supporting States to engage with wider regional and global initiatives, UNDP helps engender increasing understanding of alternative perspectives. This increased understanding helps promote harmonisation of societal interests. UNDP's activities promoting harmonisation within sectors are most clearly seen in the GloBallast project. They are also evident in the LME SAPs where a consistent approach may be encouraged to, for example, particular fisheries as happens in the Humboldt Current LME in relation to Peruvian anchovy. Where a range of sectors are engaged, UNDP's actions go further and also support cross-sectoral harmonisation.

There are also some areas where the fit between UNDP's activities and ocean governance is strong. The TDA/SAP processes rest on the monitoring and assessment of problems. These form the cornerstone of its activities and the foundation on which it can promote harmonisation of perspectives and the development of policies and laws. Similarly, the TDA/SAP process is designed to facilitate capacity building – an objective that matches strongly to UNDP's focus on helping “countries achieve the simultaneous eradication of poverty and significant reduction of inequalities and exclusion.”¹⁰³ The TDA/SAP process also strongly supports capacity building and the creation of systems that maintain the capacity to learn and change. Often times there are also links between the TDA/SAP process and wider governance regimes, with the LME TDA/SAP process supporting the implementation of global obligations and UNDP supporting the participation of States in those wider regimes.

The question that remains then, is where next for UNDP in relation to ocean governance. As with other bodies in the UN family, the UNDP follows “The 2030 Agenda for Sustainable Development” which came into force in January 2016, replacing the Millennium Development Goals, and of which Sustainable Development Goal 14 is particularly relevant here. The UN Development Group (UNDG) developed MAPS (Mainstreaming, Acceleration and Policy Support) to guide the UNDG agencies and partners in implementing the 2030 Agenda. The UNDG MAPS guide¹⁰⁴ provides guidance on a number of activities such as raising public awareness, creating vertical and horizontal policy coherence, monitoring, reporting and accountability, risk assessment and adaptability all of which are of relevance in the context of ocean governance. There is a strong fit with the way in which UNDP already operates in relation to ocean governance,¹⁰⁵ with new activities such as the UNDP/IMO/GEF GloMEEP

¹⁰³ UNDP “Changing with the World UNDP Strategic Plan: 2014-17” (UNDP, 2013) p.11

www.undp.org/content/undp/en/home/librarypage/corporate/Changing_with_the_World_UNDP_Strategic_Plan_2014_17.html accessed 27 October 2016.

¹⁰⁴ UNDG “Mainstreaming the 2030 Agenda for Sustainable Development Reference Guide to UN Country Teams” (UNDG, 2015).

¹⁰⁵ UNDP “UNDP Support to the Implementation of Sustainable Development Goal 14: Ocean Governance” (UNDP, 2016) p.6.

programme¹⁰⁶ tackling additional issues such as lowering the shipping industry's carbon footprint. Thus one might anticipate more of the same, or perhaps an expansion of UNDP's activities in relation to ocean governance.

¹⁰⁶ <<http://glomeep.imo.org/>> accessed 27 October 2016.