



SARGASSO SEA
COMMISSION

NEXT STEPS TO STRENGTHEN STEWARDSHIP OF THE SARGASSO SEA

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Commission and Hamilton Declaration Signatories**

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BACKGROUND PAPER:

STRENGTHENING STEWARDSHIP OF THE SARGASSO SEA

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STRENGTHENING STEWARDSHIP OF THE SARGASSO SEA

Introduction

In 2014, five governments signed the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea, which created the Sargasso Sea Commission (“the Commission”) to act as a steward of this extraordinary part of the ocean. To date, five additional governments have signed the Declaration, and others may follow. The Commission has undertaken initial steps in promoting conservation of the Sargasso Sea, including through interactions with other regional bodies, such as regional fisheries management organizations, and sectoral organizations, such as the International Seabed Authority.

In the few years since the establishment of the Commission, the international community has significantly increased its attention on the serious, interrelated challenges facing the ocean, including unsustainable fisheries, marine pollution, and a range of climate-related threats to the marine environment. The 2017 United Nations Oceans Conference on implementation of Sustainable Development Goal 14, the Our Ocean Conference series, and similar high-level events, have prompted unprecedented commitments from world leaders, philanthropies, the private sector, intergovernmental organizations and civil society groups to enhance the protection of ocean space. This movement will almost certainly continue; the United Nations Ocean Conference will reconvene in 2020 and the Our Ocean Conferences will occur at least through 2021.

At the United Nations, after almost a decade of preliminary discussions, negotiations have also begun on an international legally binding agreement on the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction (“BBNJ”). Although the outcome of these negotiations may not become clear for some time, they nevertheless demonstrate a seriousness of purpose by the international community to address the challenges facing the ocean more effectively.

In this context, the time may be ripe to build on the success of the Hamilton Declaration and the Commission it created with a view to strengthening the stewardship of the Sargasso Sea. This paper outlines a number of possible approaches to achieve this objective, each of which would entail reestablishing the Sargasso Sea Commission as an international organization based on a binding international agreement that confers on the Commission a more robust mandate and international legal personality. One possible model of such an organization is the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR). Another possible model is the OSPAR Commission.¹ This paper will examine each of these models in turn. It will also consider the possibility of reestablishing the Sargasso Sea Commission based on a hybrid model,

¹ OSPAR owes its name to the fact that its founding agreement, the 1992 Convention for the Protection of the Marine Environment in the North-East Atlantic, represented a merging of two agreements from the 1970s, the Oslo Convention for the Prevention of Marine Pollution by Dumping for Ships and Aircrafts, and the Paris Convention for the Prevention of Marine Pollution from Land-Based Sources.

or even a completely new model, tailored to the unique circumstances of the Sargasso Sea.

This initiative to strengthen stewardship of the Sargasso Sea is intended to complement, and not to undermine, the ongoing BBNJ negotiations at the United Nations. Indeed, a successful effort relating to the Sargasso Sea could provide useful lessons on how to implement ecosystem-based management, how to use environmental impact analyses, and how to develop and apply spatial and temporal measures in a specific ocean area beyond national jurisdiction. It may also have lessons to teach in relation to marine genetic resources, and regional marine science capacity building.

Background on the Hamilton Declaration and the Sargasso Sea Commission

The Sargasso Sea project began almost a decade ago with the Sargasso Sea Alliance promoting the protection and management of the Sargasso Sea, the “Golden Floating Rainforest of the Atlantic Ocean.” The Science Case produced by the Alliance demonstrated that the Sargasso Sea constitutes a unique marine ecosystem, home to numerous endemic species and essential habitat for countless others, including endangered sea turtles, whales and other marine mammals, seabirds and invertebrates, as well as commercially valuable fish such as billfish and tunas.² It is also the only known spawning ground of the critically endangered European eel (*anguilla anguilla*) and the endangered American eel (*a. rostrata*).³

The Science Case also identified various threats to the ecosystem, including overfishing and destructive fishing practices, shipping-related impacts, pollution, potential sea-bed mining and commercial extraction of *Sargassum*. A variety of organizations have mandates to address some of these threats. While some have taken action others have not. Actions by individual organizations are also not taking account of cumulative impacts from all human activities affecting the Sargasso Sea. Moreover, significant gaps exist in the ways in which the mandates of these organizations relate to the Sargasso Sea. These include the lack of any international regime for managing fisheries in most of the Sargasso Sea, with the exception of tuna and tuna-like species managed by the ICCAT, and for fisheries managed by the Northwest Atlantic Fisheries Organization in a small Northern area of the Sargasso Sea. Gaps also exist in the regulation of shipping impacts on the marine environment in the Sargasso Sea, including on the *Sargassum* and the habitat protection it provides for many fish and marine mammal species and the lack of specific mitigation measures to address the impacts of shipping in the Sargasso Sea.

The idea to develop and sign a political declaration on the conservation of the Sargasso Sea arose in the early days of the Sargasso Sea project in 2010. The choice of a declaration, rather than a binding international agreement, was essentially pragmatic, in that it was seen as a more effective way of developing initial support from concerned governments than attempting a treaty negotiation. Binding agreements can take a long

² See The Protection and Management of the Sargasso Sea, Summary Science and Supporting Evidence Case (Sargasso Sea Alliance, 2009).

³ Ibid.

time to negotiate and to enter into force. Moreover, governments tend to negotiate softer language to reflect their commitments in a text that will be legally binding. Those involved in the early days of the Sargasso Sea project also recognized that it might be possible to start with a political declaration and move to a binding agreement in the future, a scenario that has worked well in other contexts.⁴

Having chosen to develop a political declaration rather than a binding agreement, those involved next turned their attention to the *content* of what was to become the Hamilton Declaration. Once again, they chose to begin with a gentle approach, in hopes of attracting maximum support from relevant governments. This approach emphasized voluntary cooperation between governments in protecting the Sargasso Sea, working within the accepted framework of the 1982 United Nations Convention on the Law of the Sea, and engaging with existing regional and sectoral regimes such as OSPAR, the Cartagena and Abidjan Conventions, regional fisheries management organizations, and the International Seabed Authority, among others. The Hamilton Declaration would not establish a new international organization with the authority to adopt binding measures, nor would it include mandatory financial commitments. The Commission to be created would have an essentially custodial and educative role, would operate under Bermudian law rather than international law, and would receive support solely through voluntary contributions.

This approach attracted initial support of five governments that signed the Hamilton Declaration in 2014: the Azores, Bermuda, Monaco, the United Kingdom and the United States. Five additional governments have signed the Declaration subsequently: the British Virgin Islands, the Bahamas, Canada, the Cayman Islands, and the Dominican Republic.

The approach described above has yielded significant early benefits. The Sargasso Sea initiative has gained widespread recognition of the need to protect and preserve “the golden floating rainforest.” In recent years, the United Nations General Assembly has included regular references to the Sargasso Sea in its annual resolutions on the ocean. The Sargasso Sea received a dedicated chapter in the first United Nations Ocean Assessment. Representatives of the Commission have attended eight annual meetings of the International Convention for the Conservation of Atlantic Tunas (ICCAT), which has adopted two resolutions relating to the Sargasso Sea. The Commission has established itself as a leader in eel conservation and received a mandate to negotiate an instrument within the framework of the Convention on Migratory Species to coordinate conservation measures for the European eel – “including protection for the spawning grounds in the

⁴ For example, governments concerned with marine environmental issues in the Northeast Atlantic first developed and signed declarations in the 1980s and early 1990s regarding the North Sea which were a precursor to the Convention for the Protection of the Marine Environment of the North-East Atlantic, which established OSPAR. Also in the 1990s, governments concerned with reducing the mortality of dolphins in the tuna purse seine fisheries in the Eastern Pacific first developed the Panama Declaration before negotiating the Agreement on the International Dolphin Conservation Program. More recently, several governments signed the 2015 Oslo Declaration as a first step toward negotiating the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean.

Sargasso Sea.” The Commission has also secured observer status or signed memoranda of understanding with key sectoral organizations.

On the other hand, in eight years the project has secured only one binding measure to protect the Sargasso Sea—the closure by the Northwest Atlantic Fisheries Organization (NAFO) of seamounts to deep-sea bottom fishing as well as restrictions on the use of certain types of midwater trawling gear in the area near those seamounts.

More generally, the threats to the Sargasso Sea have not diminished, nor has the Sargasso Sea Commission been able to mitigate the major sources of those negative threats. Since the publication of the Science Case, human activities have changed in ways that have adversely affected the Sargasso Sea.⁵ Satellite surveillance using AIS records has found increases in fishing activity, primarily in the northeastern part of the Sargasso Sea, and marked increases in shipping frequency, primarily in the southern part.⁶

The Sargasso Sea will also likely feel the effects of a previously rare form of *Sargassum* (*natans VIII*) that has created huge inundations on beaches in the Caribbean, the USA, West Africa and South America since 2011.⁷ While this form of *Sargassum* remains rare in the Sargasso Sea, these inundations in nearby areas are likely to affect the Sargasso Sea by, for example, preventing endangered sea turtles that spend their “lost years” in the Sargasso Sea from nesting on the affected beaches. Such changes emphasize the importance of maintaining conservation over as wide an area as possible.⁸

The Sargasso Sea Commission has also been unable to prevent the continued decline of the European and American eels, two of the most iconic species in the Sargasso Sea. Both species remain endangered, both have suffered major drops in recruitment, and both show marked declines in numbers of larvae in the Sargasso Sea.⁹ The causes of these declines are complex, involving factors within and outside the Sargasso Sea. As currently configured, the Sargasso Sea Commission lacks the mandate to develop and implement conservation measures within the spawning area of these species in the Sargasso Sea, which could complement conservation measures elsewhere and greatly enhance protection of both species.

The other marked change in recent years is increased pollution, particularly the level of plastic pollution in the Sargasso Sea. Plastic is now ubiquitous in the ocean and because of the concentrating effect of ocean circulation patterns it accumulates in the ocean gyres, one of which is the Sargasso Sea. An estimated 56,000 tons of floating plastic existed in the Sargasso Sea in 2014,¹⁰ which has almost certainly grown since.¹¹ The impacts of

⁵ Thanks to Professor Howard Roe for his advice and help with the science in the following section.

⁶ Preliminary Report for Sargasso Sea Secretariat from Ocean Mind (Didcot, Oxford, UK).

⁷ L A Amural-Zettler, *et al.*, 2016 *Ecol.Evol.* 7: 516-525

⁸ T.Sehein, *et al.*, 2014 *J Plankton Res* 36(6):1408-1412; C L Huffard, *et al.*, 2014 *Mar Biol* DOI 10.1007/s00227-014-2539-y

⁹ R. Hanel, *et al.*, 2014 *Naturwissenschaften* 101(12):1041-54; M J Miller, *et al.*, 2016 *ICES J Mar Sci* 73(1)43-56

¹⁰ M.Eriksen, *et al.*, 2014, *PloS One* 9(12):e111913.doi:10.1371/journal.pone.0111913

¹¹ J R Jenner, *et al.*, 2015 *Science* 347(6223):768 DOI.

plastics, especially microplastics, on oceanic ecosystems are not fully understood, but the effect of this on already reduced eel populations and other species is unlikely to be positive.

In this sense, the limitations of the Hamilton Declaration, and the limited mandate of the Sargasso Sea Commission, are becoming more obvious. The Commission's lack of authority to adopt binding decisions means that it cannot truly act as a steward of the Sargasso Sea directly, as more robust international regimes have done for other areas of the ocean. The Commission can only seek to influence other organizations that do have such authority, organizations that, by their own terms, have missions that do not focus on the stewardship of the Sargasso Sea. Hence, it seems likely that the ability of the Commission to broker comprehensive solutions working in partnership with existing organizations would be strengthened if it had a legally binding mandate. A new mandate could also address the gaps not covered by other organizations.

If the governments concerned wish to strengthen stewardship of the Sargasso Sea by using the Commission as a vehicle through which to collaborate on more effective governance of the region, they would need to institute a number of changes to the legal stature and mandate of the Commission. The most significant changes would entail replacing the Hamilton Declaration with a legally binding agreement that would give its Parties, acting through the Commission, certain authorities that are presently lacking.

The material below offers three options for recasting the Sargasso Sea Commission to make it a more robust body through which to strengthen stewardship of the Sargasso Sea. Other options may, of course, also exist.

Options for Strengthening Stewardship of the Sargasso Sea

Several different types of international bodies exist through which States exercise certain forms of governance over ocean regions, including over areas beyond national jurisdiction. Some of these bodies—regional fisheries management organizations, or RFMOs—have mandates focused on fisheries management. Other bodies are devoted to marine environmental protection, marine scientific research or capacity building for developing States. Accordingly, those interested in strengthening stewardship of the Sargasso Sea have a number of models to consider.

A. CCAMLR as a Possible Model

CCAMLR was established by international convention that entered into force in 1982 with the objective of conserving Antarctic marine life.¹² The ocean space that is within the purview of CCAMLR, known as the CCAMLR Convention Area, covers more than 35 million square kilometers—roughly 10 percent of all ocean space on the planet. The

¹² The Convention on the Conservation of Antarctic Marine Living Resources was adopted at the Conference on the Conservation of Antarctic Marine Living Resources, which met at Canberra, Australia, 7–20 May 1980.

definition of the Convention area refers to the Antarctic Convergence as one of its limits – making it the first to be defined by a moveable ecosystem.¹³

CCAMLR currently has 25 Members.¹⁴ Additional States may join CCAMLR by acceding to the CCAMLR Convention. CCAMLR Members meet at least annually to consider and adopt conservation measures for the CCAMLR Convention Area, based on the best available scientific information. The primary focus of CCAMLR relates to fisheries conservation and management, particularly fisheries for krill and toothfish, but CCAMLR differs from traditional RFMOs in that it has a mandate to conserve a wide array of marine living resources—and the marine ecosystem as a whole—within its Convention Area.¹⁵ Using its broad authority, CCAMLR has on more than one occasion established marine protected areas, including the Ross Sea Marine Protected Area—the largest MPA in the world.

Although the CCAMLR Convention was adopted as a distinct treaty, it constitutes part of a suite of treaties and other arrangements and understandings that, together, form the Antarctic Treaty System. The Convention has 33 articles and an Annex concerning the resolution of disputes through an arbitral tribunal. The Convention establishes the Commission and authorizes the Commission, *inter alia*, to:

- engage in scientific research on Antarctic marine living resources and the Antarctic marine ecosystem;
- collect and disseminate relevant data;
- identify conservation needs and analyze the effectiveness of its conservation measures;
- adopt conservation measures on the basis of the best scientific evidence available; and
- implement a system of observation and inspection.

In practical terms, CCAMLR has succeeded in developing and adopting science-based measures to manage Antarctic fisheries and to protect the affected ecosystems from

¹³ Specifically, the CCAMLR Convention applies to the Antarctic marine living resources of the area south of 60° South latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem.

¹⁴ CCAMLR's current Members are Argentina, Australia, Belgium, Brazil, Chile, China, the European Union, France, Germany, India, Italy, Japan, the Republic of Korea, Namibia, New Zealand, Norway, Poland, the Russian Federation, South Africa, Spain, Sweden, Ukraine, United Kingdom, United States, and Uruguay.

¹⁵ Art 1(3) CCAMLR provides that “The Antarctic marine ecosystem means the complex of relationships of Antarctic marine living resources with each other and with their physical environment.” CCAMLR has authority to manage all Antarctic populations of finfish, mollusks, crustaceans and seabirds within the Convention Area. Its authority does not include the management of whales or seals, or other human activities, such as shipping or seabed mining. As part of the Antarctic Treaty System, CCAMLR contributed to efforts to secure a ban on the use and carriage of heavy fuel oil by ships sailing in waters south of 60° adopted by the IMO in 2011, but has otherwise not had much interaction with the IMO. Unlike the Sargasso Sea, the Southern Ocean has very little vessel activity unrelated to fishing (managed by CCAMLR) or tourism (managed under the Antarctic Treaty). Also unlike the Sargasso Sea, there is little near-term prospect for deep seabed mining in the CCAMLR Convention Area.

illegal, unreported and unregulated (IUU) fishing and other unsustainable fishing practices. It has advanced approaches to ecosystem-based management and, as noted above, created several marine protected areas, including the world's largest MPA.

CCAMLR has created a series of Working Groups, including on ecosystem monitoring and management, fish stock assessment, statistics and modeling, and incidental mortality. CCAMLR adopts conservation measures and other substantive decisions by consensus, often on the recommendation of one or more of its Working Groups. CCAMLR members must implement adopted measures, although the Convention does permit individual members to “opt out” of specific decisions (a right that CCAMLR members have rarely exercised).

The Convention also establishes a Scientific Committee as a forum for consultation and cooperation concerning the collection, study and exchange of information with respect to Antarctic marine living resources. The Scientific Committee has a mandate, *inter alia*, to:

- assess the status and trends the populations of Antarctic marine living resources;
- analyze data concerning the effects of harvesting on those populations;
- assess the effects of proposed changes in the harvesting and other proposed conservation measures;
- transmit assessments, analyses, reports and recommendations to the Commission; and
- formulate proposals for the conduct of programs of research into Antarctic marine living resources.

CCAMLR maintains a Secretariat at its headquarters in Hobart, Australia. CCAMLR members share the costs of the Secretariat and other elements of the CCAMLR budget in accordance with a formula based in part on the value of living marine resources each member harvests and in part on equal sharing among all Members. The annual budget for CCAMLR in 2017 was approximately 4 million USD.

1. Comparing the CCAMLR and Sargasso Sea Contexts

The most obvious similarity between the CCAMLR Convention Area and the Sargasso Sea is that both ocean spaces are highly productive ecosystems that are particularly vulnerable to degradation through human activity. CCAMLR, like the Sargasso Sea Commission, operates within the international framework of the 1982 UN Convention on the Law of the Sea and interacts with other international bodies that have mandates extending into the CCAMLR Convention Area, such as the International Maritime Organization. In addition, two of the governments that signed the Hamilton Declaration—the United Kingdom and the United States—are also involved in CCAMLR.¹⁶

¹⁶ Canada has also attended CCAMLR meetings as an observer.

As noted above, CCAMLR has broad legal authority to act as a steward for almost all living marine resources in its Convention Area, and in a sense for Antarctic marine ecosystems as a whole, authority that the Sargasso Sea Commission presently lacks. Mostly, however, CCAMLR exercises its authority by engaging in fisheries management. In doing so, CCAMLR does not face any challenge from other entities with responsibilities for living marine resources, *as it is the only international body in its region with a mandate for fisheries management.*

The circumstances of the Sargasso Sea are quite different in this regard. At least two existing RFMOs—ICCAT and NAFO—already have responsibility for fisheries management in some or all of the waters within the Sargasso Sea.¹⁷ Were the Sargasso Sea Commission to become a “CCAMLR for the Sargasso Sea” and seek to manage fisheries taking place in those waters, its mandate would likely come into conflict, or at least overlap, with the mandates of ICCAT and NAFO.

One solution to this overlap would be to limit the fisheries management authorities of an enhanced Sargasso Sea Commission to those that are outside the respective mandates of ICCAT and NAFO—*i.e.*, to fill the “gap” in fisheries management left open by the respective mandates of ICCAT and NAFO. For example, if the fisheries management responsibilities of the Sargasso Sea Commission were restricted to fisheries for species other than tunas and tuna-like species, there would be no conflict with ICCAT, at least in principle.¹⁸ Similarly, if the enhanced Sargasso Sea Commission had responsibility for managing fisheries only in the waters south of the NAFO Convention Area, once again there would be no conflict with NAFO, at least in principle.

In any event, the CCAMLR model could prove useful in the Sargasso Sea context inasmuch as an enhanced Sargasso Sea Commission could take on the other aspects of CCAMLR’s role. For example, the Commission could assume more robust authorities to:

- engage in scientific research on all marine living resources in the Sargasso Sea and on the Sargasso Sea ecosystem as a whole;
- collect and disseminate relevant data;
- identify conservation needs and analyze the effectiveness of conservation measures;

¹⁷ In theory, the North Atlantic Salmon Conservation Organization has responsibility for managing salmon resources in the North Atlantic north of 36 degrees north latitude, which covers a portion of the Sargasso Sea. However, there are no actual salmon fisheries taking place within the Sargasso Sea.

¹⁸ At its 2018 annual meeting, ICCAT approved in principle certain amendments to the ICCAT Convention, with a view to final adoption of those amendments in 2019. Assuming those amendments subsequently enter into force, ICCAT’s mandate will become marginally broader in that it will have express authority to manage fisheries for tuna and tuna-like species as well as for elasmobranchs that are oceanic, pelagic, and highly migratory (mostly certain sharks and rays). ICCAT will also have a mandate to promote the conservation of other species that are associated with, or dependent on, tuna and tuna-like species and the covered elasmobranchs.

- except as noted above in relation to ICCAT and NAFO, adopt conservation measures with respect to human activities, including the establishment of marine protected areas, on the basis of the best scientific evidence available; and
- implement a system of observation and inspection.

An enhanced Sargasso Sea Commission could have a number of subsidiary bodies similar to the Working Groups of CCAMLR. It could also have a formal Scientific Committee and a larger Secretariat to deal with the additional administrative matters that its broader mandate would entail.

2. Implementing the CCAMLR Model

To transform the Sargasso Sea Commission into an international organization similar to CCAMLR, governments concerned would need to negotiate a binding international agreement with at least certain basic elements:

Objective. The objective of the agreement should be broad enough to provide a mandate for the strengthened Commission to fill current gaps in protection and management (*e.g.*, for fisheries taking place south of the NAFO Convention Area for species not within ICCAT’s mandate, such as dorado, wahoo and most sharks; also for non-fish species such as turtles and marine mammals), and to deal with cumulative impacts of other human activities.¹⁹ One approach would be to borrow language from the CCAMLR Convention, which has as its object “the conservation of Antarctic marine living resources.” Another approach would be to use even broader language, *e.g.*, an objective “to protect and preserve the marine ecosystem(s) of the Sargasso Sea.”

Agreement Area. Many international agreements establishing regional organizations contain specific language identifying the area in question. For the Sargasso Sea, such language could draw from Annex I of the Hamilton Declaration. At present, the Hamilton Declaration defines the Sargasso Sea to exclude any area under national jurisdiction, including around Bermuda. In negotiating a new international agreement to replace the Hamilton Declaration, one issue would be whether the agreement would also apply to waters under national jurisdiction around Bermuda and/or other areas under national jurisdiction.

Establishment and Mandate of the Sargasso Sea Commission and Possible Subsidiary Bodies. The agreement could formally reestablish the Commission as an international organization with legal personality under international law. The Commission could have a precise mandate, along the lines discussed above, set forth in the agreement. The agreement could also establish one or more subsidiary bodies, such as a Scientific Committee with its own mandate, or simply authorize the Commission to establish such subsidiary bodies as the Parties may agree in the future. The agreement could also formally establish a Secretariat.

¹⁹ As noted the ICCAT Convention is in the process of being amended, and will include some sharks and rays, in its mandate, but not all species. These amendments may take some time to come into force.

Commitments of the Parties. The agreement would presumably commit its parties to attend regular meetings, implement agreed measures, share in the financing of the Commission and its Secretariat, and settle any disputes amicably through agreed means.

Relationship with Other International Bodies. Given the complex relationships that the enhanced Commission could expect to have with other existing (and possibly future) organizations, the agreement could contain provisions outlining the nature of those relationships.

Final Clauses. Like other international agreements, provisions would be necessary to identify eligible parties and to address issues concerning signature and entry into force, amendment, withdrawal and/or termination, and identification of a depositary, among other things.

3. Advantage of pursuing this approach

The primary advantage of using CCAMLR as a model arises from the general recognition that CCAMLR is one of the most successful ocean governance regimes in existence today. CCAMLR's actions in conserving the marine environment around Antarctica based on sound science deserve very significant credit. CCAMLR also boasts the creation of the world's largest marine protected area, and pioneered certain fisheries management approaches (such as catch documentation schemes) that States have later adopted through RFMOs covering other ocean areas.

4. Disadvantage of pursuing this approach

The primary disadvantage of using CCAMLR as a model has to do with the reality that, due to the pressing need to manage growing fisheries in its Convention Area, CCAMLR is primarily a fisheries management organization, albeit one with broader responsibilities. If the governments concerned with strengthening the stewardship of the Sargasso Sea wish to start with a different premise—that an enhanced Sargasso Sea Commission should not focus primarily on fisheries management but rather on the full range of human activities affecting the Sargasso Sea—the CCAMLR model may prove less than fully satisfactory or fitting.

B. OSPAR as a Possible Model

Beginning in the 1970s, nations concerned with particular areas of the ocean started to create “regional seas programmes” through which to collaborate. Many of these programmes operate under the auspices of the United Nations Environment Programme, but others exist outside, or largely outside, the UNEP framework. The activities of these programmes vary considerably, as a consequence of the different challenges facing particular regions and due a divergence in available resources, both financial and human.

One of the more successful regional seas programmes is the OSPAR Commission, which focuses on the North-East Atlantic region. More specifically, its area of responsibility

includes the internal waters, territorial seas and other maritime zones over which its Contracting Parties exercise sovereign rights and jurisdiction in parts of the Baltic Sea, the Mediterranean Sea and the North-East Atlantic, as well as the high seas portions of that region.

OSPAR has at present 16 Contracting Parties.²⁰ Other States may join OSPAR by acceding to the OSPAR Convention.

The basic obligation of an OSPAR Contracting Party is to take steps to prevent and eliminate marine pollution and to protect the OSPAR area against the adverse effects of human activities.²¹ The OSPAR Commission, which includes a variety of Committees, serves as the venue through which the Contracting Parties agree on programmes and measures preventing and eliminating pollution and for controlling activities that may adversely affect the CCAMLR area. The Commission has the authority to adopt binding decisions, as well as recommendations and other non-binding decisions. Contracting Parties may “opt out” of binding decisions, though this rarely happens. The Commission also issues numerous publications about the state of the marine environment, many of which result from evaluations or assessments based on reports of its Contracting Parties.

OSPAR has six general “work areas”:

- Biological Diversity & Ecosystems
- Hazardous Substances & Eutrophication
- Human Activities
- Offshore Industry
- Radioactive Substances
- Cross-Cutting Issues

and operates on the basis of four principles:

- the ecosystem approach
- the precautionary principle
- the polluter pays principle
- best Available Techniques (BAT) & Best Environmental Practices (BEP)

OSPAR has been on the cutting edge of efforts to protect the marine environment. It served as an early forum in which to develop and implement marine protected areas, undertook innovative studies on water quality, established standards for environmental impact assessments, and issued groundbreaking guidelines relating to submarine cables.

²⁰ OSPAR’s Contracting Parties are: Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and United Kingdom, as well as the European Union.

²¹ Specifically, OSPAR’s Contracting Parties have the obligation to “take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.”

For these and other accomplishments, OSPAR has earned a reputation as an effective and proactive international body.

OSPAR exists essentially outside the UNEP framework. The OSPAR Commission nevertheless engages very actively with other international bodies, often through memoranda of understanding or cooperative agreements. The ocean area within the purview of OSPAR is essentially the same as the Convention Area of an RFMO known as the North-East Atlantic Fisheries Commission, necessitating a close collaboration between the two organizations. OSPAR also regularly interacts with the International Council for the Exploration of the Sea, other regional seas programmes that cover adjacent ocean areas, and the Arctic Council, to name just a few.

OSPAR maintains a Secretariat at its headquarters in London, UK. OSPAR members share the costs of the Commission and its Secretariat through a formula set forth in the OSPAR Financial Regulations, which takes account of the members' GNP and other factors. The current annual budget for OSPAR is approximately 2 million USD.

1. Comparing the OSPAR and Sargasso Sea Contexts

At first blush, the OSPAR and Sargasso Sea contexts seem quite similar. Both are large and essentially adjacent areas of the North Atlantic Ocean. Two major oceanic features—the Gulf Stream and the North Atlantic Gyre—carry water, living marine resources, nutrients and pollutants through both regions. The world's largest mountain range—the mid-Atlantic ridge—also runs through the OSPAR region and an area adjacent to the Sargasso Sea.

But the two regions also differ in some significant respects. One difference is that the coastal States of the OSPAR region are all OECD members—wealthy nations with considerable human and financial resources. By contrast, the States with territory in or nearby the Sargasso Sea are more heterogeneous, some wealthy and some not. A regional seas programme for the Sargasso Sea would presumably reflect this difference in a number of ways. For example, it might need to devote some of its efforts to capacity building and technology transfer to assist its members who are developing States in implementing their commitments.

One other significant difference between OSPAR and the Sargasso Sea Commission as currently configured is that the former includes marine areas under national jurisdiction, while latter does not. As discussed further below, governments concerned with the Sargasso Sea would have the opportunity to reconsider whether to change this configuration if they chose to create a regional seas programme modeled on OSPAR.

2. Implementing the OSPAR Model

To replace the Sargasso Sea Commission with an international organization similar to OSPAR—or to transform the Commission into such an organization—the governments concerned would need to negotiate a binding international agreement similar in many

respects to the hypothetical agreement described in Section A.2, above, (“Implementing the CCAMLR Model”). The primary differences of using OSPAR as a model rather than CCAMLR stem from the fact that OSPAR’s main purpose and mandate—controlling marine pollution—differs from CCAMLR’s main purpose and mandate—managing fishing activities. Accordingly, an international agreement to create a regional seas programme for the Sargasso Sea modeled on OSPAR would presumably have an objective primarily relating to the control of marine pollution and would establish a related mandate for the new international organization to be created.²²

But many of the other aspects of the international agreement might be the same as, or at least similar to, the agreement described in Section A.2 above, including the need for an Agreement Area, some of the basic commitments of the Parties, relationships with other international bodies, and final clauses.

One fundamental question that would arise in pursuing this approach would be whether to establish the regional seas programme for the Sargasso Sea within the UNEP framework. As noted above, OSPAR exists essentially outside the UNEP framework. Although there may be a number of reasons why OSPAR’s Contracting Parties made this choice, one might have been their belief that they would enjoy greater control over the direction and activities of OSPAR if they created it outside the UN system. The nations concerned with the Sargasso Sea would also need to consider this question carefully.

A second fundamental question would be whether to include marine areas of the Sargasso Sea under national jurisdiction within the geographic scope of the new organization. To do so would be to adopt the approach of OSPAR. But there may be political sensitivities entailed that would need to be taken into account.

3. Advantages of pursuing this approach

If the governments concerned with the Sargasso Sea chose to create a regional seas programme for that region modeled on OSPAR, the two organizations would have similar mandates for adjacent areas of the Atlantic Ocean. This, in turn, would likely mean that a close working relationship between the two organizations could be expected to arise, which would be a significant advantage. In such a situation, some additional OSPAR Contracting Parties might also consider it a natural step to join a regional convention for the Sargasso Sea, further strengthening the new organization.

4. Disadvantages of pursuing this approach

The primary disadvantage of using OSPAR as a model may have to do with a mismatch between the main focus of OSPAR—controlling marine pollution—and the primary threats to the Sargasso Sea, of which marine pollution is only one of many. Indeed, given that an estimated 80 percent of marine pollution originates on land, and given that the

²² Like OSPAR, most other regional seas programmes focus on marine pollution issues. Some programmes, such as the Caribbean Environment Programme, have broader authorities, *e.g.*, to identify “specially protected areas and wildlife.”

Sargasso Sea has very little land area within it, controlling land-based marine pollution may not be a particularly high priority for an enhanced Sargasso Sea Commission.

C. Considering a hybrid model—or even a completely new model

The foregoing sections suggest that neither the CCAMLR model nor the OSPAR model may be a perfect fit for the circumstances facing the Sargasso Sea. CCAMLR, which prides itself with some justification as having engaged in “ecosystem-based management” even before that term became well-known, nevertheless devotes most of its attention to developing and implementing relatively routine fisheries conservation and management measures, particularly to combat overfishing and IUU fishing. In other words, CCAMLR in reality performs functions similar to most RFMOs, despite having a mandate wider than most RFMOs. Two existing RFMOs—ICCAT and NAFO—already have responsibility for managing certain fishing activities over some or all of the Sargasso Sea. Creating another organization that focused primarily on fisheries management would not address the full spectrum of threats to the Sargasso Sea, some of which are arguably more pressing than overfishing and IUU fishing.

OSPAR, though perhaps the most effective regional seas programme in existence, lacks two features that may be quite important elements of a comprehensive regime for the Sargasso Sea. First, OSPAR has no express mandate to manage fisheries. Within the OSPAR area, those functions are instead the responsibility of several RFMOs, principally the North-East Atlantic Fisheries Commission. The Sargasso Sea, by contrast, faces a fisheries management “gap” described above insofar as there is no effective RFMO managing fisheries other than for tuna and tuna-like species in much of its area, *i.e.*, the portion of the Sargasso Sea south of the NAFO Convention Area. Second, OSPAR has no real mandate to provide technical or other assistance to developing States, none of whom are members of OSPAR. States with significant interests in the Sargasso Sea include both developed and developing States, which suggests that an enhanced Sargasso Sea Commission might need, as part of its mandate, some way to assist its developing State members in carrying out agreed commitments.

1. What a hybrid or new model might entail

Governments concerned with strengthening stewardship of the Sargasso Sea could consider a hybrid model, borrowing elements of both the CCAMLR approach and the OSPAR approach, to meet the specific needs of the Sargasso Sea. It may also be possible to add to this hybrid model certain elements that are not formally part of either the CCAMLR or OSPAR approach, thus creating a truly new model.

For example, a strengthened Sargasso Sea Commission could have a mandate to fill the fisheries management “gap” mentioned above—*i.e.*, to manage fisheries in the Sargasso Sea that are not under the purview of any existing RFMO. A decision to create such a mandate for the Commission would not be novel. The North Pacific Fisheries Commission, established in 2015, filled a similar “gap” in fisheries management in that part of the ocean, having responsibility only for managing fisheries for marine species

that are not “covered by pre-existing international fisheries management instruments within the area of competence of such instruments.”²³ For the Sargasso Sea Commission, such a mandate would presumably cover fisheries other than for tuna and tuna-like species and for species that occur south of the NAFO Convention Area.

A strengthened Sargasso Sea Commission could also perform some, and possibly most, of the functions of OSPAR. More precisely, it could serve as the forum in which its members agree on steps to prevent and eliminate marine pollution, both land-based and ship-based, as well as to protect the Sargasso Sea against the adverse effects of human activities writ large, in partnership perhaps with organizations such as the International Maritime Organization (IMO) and the International Seabed Authority (ISA). The Commission would presumably have the authority to adopt binding decisions on such matters, as well as non-binding decisions where its members felt those to be more appropriate.

In addition, the strengthened Sargasso Sea Commission could retain certain of its existing functions. Like both CCAMLR and OSPAR, it could commission scientific research relating to the Sargasso Sea and disseminate the results of such research. It could also continue to develop and present proposals for consideration and adoption by other regional and sectoral bodies, such as NAFO, ICCAT, the IMO and the ISA.

As noted above, the Sargasso Sea Commission will continue to have both developed and developing members, perhaps more of each in the future. A strengthened Commission—one that was capable of adopting measures binding on its members—might also include among its functions some type of capacity-building program to assist its developing State members in implementing their commitments.

If the governments concerned launch the process to strengthen the Sargasso Sea Commission in these suggested ways, the effort could also create possible synergies with the negotiation and expected entry into force of a new BBNJ Agreement. For example, the Sargasso Sea could become a model with which to demonstrate how governments can, in respect of a given area beyond national jurisdiction, develop and implement area-based management tools, conduct environmental impact assessments, and improve knowledge related to marine genetic resources. Moreover, the BBNJ Agreement may rely on regional bodies to implement at least some aspects of its provisions once it enters into force. The strengthened Commission could serve as such a body for the Sargasso Sea.

2. Implementing the hybrid or new model

Once again, a binding international agreement would be necessary to reestablish the Sargasso Sea Commission to play the kind of roles described above. Many of the elements of such an agreement would also be similar to the agreement outlined in Section

²³ Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, article 1(h)(iv).

A.2, above, with necessary adjustments to the provisions dealing with the Commission's purpose and mandate.

The governments concerned would also face some of the same choices noted above in connection with implementing the OSPAR model. Those include whether to place the new Commission within the UNEP framework and whether to include any marine areas within national jurisdiction as part of the geographic scope of the new Commission.

In considering a hybrid or new model, governments concerned with the Sargasso Sea may benefit from experiences of "Large Marine Ecosystem" initiatives that have been undertaken in other parts of the world. These initiatives have been supported through the Global Environment Facility in areas such as the Caribbean Sea, the Benguela Current (in the Southeast Atlantic Ocean), and the Canary Current (in the Eastern Central Atlantic), to name just a few.

Typically, the GEF provides initial funds for a "diagnostic analysis" of a given Large Marine Ecosystem (LME) to determine the challenges it faces and possible means to meet those challenges. Based on the outcome of that analysis, the GEF then seeks both political support and co-financing from relevant governments to implement measures to improve stewardship of the LME. In some cases, such as the Benguela Current, this has resulted in the establishment of an intergovernmental Commission with features similar in some respects to the strengthened Sargasso Sea Commission contemplated in this paper.

3. Relationship between a hybrid/new model and other international bodies and regimes

Another key question in considering a hybrid or new model for the Sargasso Sea would be how precisely to articulate the relationship of the new regime with other international bodies and regimes. As currently configured, the limited mandate and authority of the Sargasso Sea Commission give it only limited influence over such other bodies and regimes. The Commission has used its influence to good effect to date, but might be able to secure greater cooperation if it worked on a level playing field with other entities—*i.e.*, as a full-fledged international organization with a clearly defined mandate, legal personality and a reasonable budget. Among other things, these new attributes would likely give the Commission greater standing to make its voice heard in other international fora, including the United Nations.

In negotiating the international agreement that would reestablish the Commission in this way, the governments concerned would need to give careful attention to a number of questions that will likely arise in this regard. For example, how would the measures that the Commission might adopt regarding fisheries south of the NAFO Convention relate to measures adopted by NAFO itself? An examination of the ways in which other RFMOs in neighboring ocean areas relate to one another, such as NAFO and NEAFC and the two tuna RFMOs that cover the Pacific (the Inter-American Tropical Tuna Commission and the Western and Central Pacific Fisheries Commission) might provide answers to this

question. Similarly, if the Sargasso Sea Commission had the authority to establish marine protected areas, how would such a decision affect, or relate to, the mandates of sectoral bodies such as the IMO and ISA? While the experiences of other ocean governance organizations, such as OSPAR, might suggest answers to this question, guidance on the issue might ultimately depend on the provisions of a new BBNJ Agreement.

4. Advantages of pursuing this approach

The chief advantage of pursuing a hybrid or new approach would be that it would give the governments concerned the greatest ability to tailor the strengthened Sargasso Sea Commission to the needs of the Sargasso Sea. As noted above, the unique ecosystem of the Sargasso Sea faces challenges from a wide array of human activity. A new international agreement for the Sargasso Sea could help address each of these challenges, either directly through a strengthened Sargasso Sea Commission or through the enhanced influence that a strengthened Commission would have with other international bodies and regimes.

5. Disadvantages of pursuing this approach

Perhaps the greatest disadvantage of this approach is simply that it contemplates something new and somewhat ambitious, an approach that cautious governments may resist, at least at first. The hybrid or new model suggested also raise some novel questions about the precise scope of the mandate to be given to the reestablished Sargasso Sea Commission and the manner in which it would interact with existing regional and sectoral regimes.

Conclusion

Governments concerned with the Sargasso Sea face a choice. They can continue to interact with each other through the mechanism of the Sargasso Sea Commission as currently configured—a known and flexible entity with a growing, if limited, presence on the international stage. Or they can take the next step to build a regime to safeguard the Sargasso Sea in a more robust fashion by re-establishing the Commission on the basis of an international agreement. This paper has laid out several options for doing this; other options may also exist.