## 8. Summary of the Legal and Regulatory Regime of the Sargasso Sea Area of Collaboration

### Background and Introduction

The SEDA- SAP process (as defined above under Chapter ??) identifies two principal 'connecting' documents that act as 'stepping-stones' from the SEDA to provide further guidance and foundation for the development of the Strategic Action Programmes. One of these is the 'Review of the Legal and Regulatory Regime of the Sargasso Sea Area of Collaboration'. This Chapter of the SEDA provides a summary of the findings and observations from that document[1].

### Summary of the Review

The Geographical Area of Collaboration for the Sargasso Sea was agreed by the Governments that signed the 2014 Hamilton Declaration.[2] It is an area which is made up entirely of the high seas.[3] The regulatory regime for the high seas is set out in Part VII of the 1982 UN Convention on the Law of the Sea (LOSC).[4]

The High Sea regime has been called an "unfinished Agenda."[5] Article 87 of LOSC provides for "Freedom of the high seas" making it clear that the high seas are open to all States, whether coastal or landlocked. It then itemizes six specific freedoms, namely: freedom of navigation; freedom of overflight; freedom to lay submarine cables and pipelines, subject to Part VI;[6] freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; freedom of fishing, subject to the conditions laid down in section 2;[7] and freedom of scientific research, subject to Parts VI and XIII.[8] Article 87(1) also makes the point reiterated in detail in other provisions that these freedoms are not unconditional. They may only be exercised "under the conditions laid down by this Convention and by other rules of international law." Article 87(2) reinforces the point that these freedoms:

> shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the seas, and also with due regard for the rights under the Convention with respect to the Area.[9]

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[1] See 'The Legal and Regulatory regime of the Sargasso Sea' (op cit.)
[2] See op cit.
[3] Although it is not entirely an Area beyond nation jurisdiction (ABNJ) as extended continental shelf claims cove some to the sea floor (op cit.).
[4] With some "clarifications" provided by the 2023 BBNJ Agreement.
[5] David Freestone, "Governance of Areas beyond National Jurisdiction: An Unfinished Agenda?" in Law of the Sea: UNCLOS as a Living Treaty, (Eds., Jill Barrett and Richard Barnes) London: British Institute of International and Comparative Law, 2016, pp. 231-266.
[6] On the Continental Shelf.
[7] UNCLOS Arts 116–120.
[8] Part VI places limits on research activities on the continental shelf where it extends under the high seas. Part XIII sets out general provisions and co-operative requirements concerning the conduct of marine scientific research.
[9] The Area is defined by Art 1(1) LOSC '"Area" means the seabed and ocean floor and subsoil thereof,

Therefore, the only specific additional restrictions that can be made to the exercise of these rights are by an international agreement that would be binding only on the States which are party to it.

In relation to the Protection and Preservation of the Marine Environment, Part XII of the Convention does impose general obligations which extend to the high seas and the international seabed area. Article 192 obliges all States to "protect and preserve the marine environment"[10] and Article 194(5) specifies that measures under Part XII are to include "those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."[11] Article 197 further obliges States to:

> [C]o-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

The Convention also establishes an international regime for the exploration and exploitation of seabed mineral resources in "the Area" overseen by the International Seabed Authority ("ISA").[12] It designates the Area and its mineral resources as the Common Heritage of Mankind and mandates the ISA to administer the resources for the benefit of mankind. In addition to provisions for the sharing of financial and other economic benefits from mining activities, it also envisages the development of detailed rules and regulations for the prevention of damage from mineral exploration and extraction activities and for the conservation of the flora and fauna of the seabed.[13]However, these rules do not apply to activities such as deep-sea bottom fishing, marine scientific research, cable-laying or potential new activities such as ocean fertilization and other forms of marine geo-engineering.[14]

A range of other global and regional treaties do regulate specific activities that take place in ABNJ, such as fishing, dumping and navigation. But these detailed sectoral treaties are only binding on States Parties. So, the problem of proper (ie integrated and generally applicable) governance in ABNJ is exacerbated by the patchwork of treaties that exists. Detailed reviews of existing

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beyond the limits of national jurisdiction;'

[10] LOSC Art 192.

[11] LOSC Art 194(5).

[12] Under Art 133, "'resources' means all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed including polymetallic nodules". This is important given debates about the extent to which living resources comprise part of the regime for the Area, or are subject to the freedom of the high seas.

[13] UNCLOS Art 145.

[14] See, eg: R Rayfuse, M Lawrence and K Gjerde, 'Ocean Fertilisation and Climate Change: The Need to Regulate Emerging High Seas Uses' (2008) 23 IJMCL 297; K Scott, 'Regulating Ocean Fertilization under International Law: The Risks' (2013) 2 CCLR 108.

organizations with jurisdiction over activities in ABNJ show that there are serious gaps in coverage.[15]

In relation to sectoral activities, these gaps are both functional as well as geographic. This is not necessarily a defect in the basic Convention regime itself, but it is a serious constraint on its implementation.

The *lacunae* in implementation are vividly shown by the Convention's provisions relating to the monitoring and reporting of potentially polluting activities. These provisions, which are quite rigorous, are based entirely on good faith implementation by States Parties; there is no international process for receiving or reviewing these reports or even for publicizing them.[16] The Convention provides as follows:

> Article 204(2): "… States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment."
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> Article 205: "States shall publish reports … or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States."
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> Article 206: "When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments...".

The 2023 BBNJ Agreement – covered in more detail in the full report - establishes, inter alia, a more rigorous process for EIAs for high sea activities (Part II) and provides for the international recognition of area-based management tools (ABMTs) in ABNJ (part III).

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[15] K Gjerde et al, *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction* (IUCN 2008) http://cmsdata.iucn.org/downloads/iucn_marine_paper_1_2.pdf. See also: D Freestone, 'Problems of High Seas Governance' and K Gjerde, 'High Seas Fisheries Governance: Prospects and Challenges in the 21st Century' in D Vidas and PJ Schei (eds) *The World Ocean in Globalisation: Challenges and Responses* (Martinus Nijhoff 2011). For an excellent wider discussion of the ABNJ legal regime, see: R Warner, *Protecting the Oceans beyond National Jurisdiction: Strengthening the International Law Framework* (Martinus Nijhoff 2009).

[16] Although there are international treaty requirements for prior environmental impact assessment for the permitting of human activities in some areas of the ocean, such as the Southern Ocean under the Madrid Protocol ( The Protocol on Environmental Protection to the Antarctic Treaty (signed in Madrid on October 4 1991 and entered into force in 1998), (1991) 30 ILM 1455. Annex 1 is on Environmental Impact Assessment. For text see http://www.ats.aq/documents/recatt/Att008_e. pdf.) And for some activities such as ocean dumping, this is very much the exception rather than the rule.