Coordination and Capacity in Ocean Governance

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Abstract

The last decade has seen increasing attention to institutional arrangements and policy outcomes (governance) affecting the management of seas and oceans at national, regional and international levels. At the international level Australia has made important contributions to, *inter alia,* the moratorium on commercial whaling, ballast water management and related problems of introduced marine pests, illegal, unreported and unregulated fishing, and (through APEC) regional support for 'integrated ocean management'. Australia's international actions have been matched by the development of national oceans governance initiatives including a national Oceans Policy framework. Governance is clearly linked to policy capacity. While policy capacity can be conceptualised in different ways, two key elements are first the ability to make decisions–a process or procedural dimension and second the quality of policy decisions–the substance of policy. Both elements of policy capacity are linked to developing effective ocean governance. Key agencies need to be able to maintain and extend their own capacity, and be able to display leadership in this area, but they also need to be able to work effectively with the range of other actors engaged in work that will contribute such responses. This paper examines coordination and capacity as significant variables in ocean governance.

Introduction

The last decade has seen increasing attention to institutional arrangements and policy outcomes affecting the management of the world's seas and oceans (Vallega 2001). Attention to 'ocean governance' has occurred at national, regional and international levels, most recently with the Oceans Summit in Lisbon in October 2005 (IISD 2005). Australia has taken a high profile lead in these areas, developing marine protected area management in the 1970s, supporting stronger initiatives against marine pollution in the 1980s, and taking significant action against illegal, unreported or unregulated (IUU) fishing in the 1990s (Haward 2004) at both international and regional arenas. Australia's international actions have been matched by the development of oceans governance initiatives including a national Oceans Policy framework (Bergin & Haward 1999; Haward 2001; Vince 2006).

Governance Exploring the Concept

The World Bank links governance to institutional capacity and to effectiveness of public organisations (World Bank 2000) drawing attention to tools and approaches underpinning effective and efficient institutional arrangements (Kjær 2004: 189). Governance is clearly more than government and as a process involves a number of instruments and actors, with the "search for new tools" seen as a key element (Rhodes 1996: 666). Traditional institutional analysis "cover[ed] the rules, procedures and formal organisation of government" (Rhodes 1995: 48). Public sector reform in the 1970s-80s shifted focus to problems government overload and government or regulatory failure and increased use market models, including privatisation, inviting new approaches to the analysis of political institutions dealing with common pool resources (see Ostrom 1987 and 1990), and at the same time encouraging the emergence of the term 'governance' (see for example Pierre 2000: Kjær 2004).

Ocean Governance: From Sovereign Rights to Ecosystem Management?

The United Nations Law of the Sea Convention (LOSC) provides a cornerstone for ocean governance. It is a comprehensive instrument covering a range of topics, including marine environmental protection. In addition to this convention other 'hard law' instruments, chiefly the UN Fish Stocks Agreement (UNFSA) and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the Compliance Agreement) have been developed to fill lacunae identified in the provisions of LOSC. In parallel, and nested within these instruments, are voluntary, hortatory, instruments such as the Rio Declaration and Agenda 21 and the Code of Conduct for Responsible Fisheries. The Code of Conduct provides opportunities for the development of subsidiary, specialist, instruments – International Plans of Action (IPOAs) – that are key elements of oceans governance.

The Law of the Sea Convention provides sovereign rights for coastal states and has been criticised for a developmental rather than conservation approach to marine resources. LOSC encapsulates 1960s and 1970s world-views, predating ideas such as the precautionary approach and ecosystem-based management that developed in the 1980s and 1990s. While lacunae in the Law of the Sea Convention, the inclusion of these principles in the UNFSA and in the soft law IPOAs shows that the regime established and supported by the LOSC can adapt to new and emergent customary practice, if not yet accepted as customary law.

A number of other relevant international instruments can anchor coastal and marine environmental protection, and contribute to governance, see Kimball (2001). The Convention on Biological Diversity (CBD), developed under the auspices of the UN Environment Program (UNEP) came into force in December 1993. This convention was developed in recognition of the present and future value of biological diversity, including marine biodiversity and concerns over its significant reduction around the world. Biological diversity is defined in the convention as "the variability among living organism from all sources including terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are a part: this includes diversity within species, between species and of ecosystems". Each party to the convention has responsibility for the conservation and sustainable use of its own biological diversity, and are to co-operate in implementing the convention in areas beyond national jurisdiction such as the high seas. The CBD gave more explicit focus to marine and coastal issues through the "Jakarta Mandate" negotiated at the second meeting of states

parties to the CBD in 1995 that provided a program of action that would focus on implementing the provisions of the Convention as they related to marine and coastal environments.

The outcomes of the United Nations Conference on Environment and Development (UNCED) in 1992, most notably, the Rio Declaration and Agenda 21 (particularly Chapter 17) as well as the Biodiversity Convention and the Framework Convention on Climate Change have had significant impacts in the development of oceans governance (Haward & VanderZwaag 1995). A decade and a half later, key post-Rio principles – sustainable development, integration, the precautionary principle/approach, and intergenerational equity – have introduced new approaches to the management of marine living resources. These approaches are appearing in a number of national policy documents; for example the Canadian *Oceans Act* 1995 and Australia's *Oceans Policy* 1998 (Haward & VanderZwaag 1995; Haward 2003). Australia has also been an active participant in the Asia Pacific Economic Cooperation (APEC) forum that has seen increased attention to trade and market based approaches to ocean governance being championed through APEC's Marine Resource Conservation (MRC) Working Group (Bache et al 2003).

One indication of the scope and direction of these legal and policy developments can be seen from the outcomes achieved at the World Summit on Sustainable Development (WSSD) held in Johannesburg in August-September 2002. WSSD outcomes include:

- encouraging the application of an ecosystem approach to sustainable development of the oceans by 2010;
- maintaining or restoring depleted fish stocks to levels that can produce the maximum sustainable yield 'on an urgent basis' by 2015;
- putting into effect FAO international plans of action by the agreed dates;
- establishing marine protected areas consistent with international law by 2012;
- establishing a regular process under the United Nations for global reporting and assessment of the state of the marine environment; and
- eliminating subsidies that contribute to IUU fishing and overcapacity, (see, among others, Shotton & Haward 2005).

Coordination and Capacity

Effective oceans governance will build on what has been termed 'operational interplay' between instruments. As Stokke (2000) notes where "activities impinge on similar or connected activities, operational interplay can be a way to avoid normative conflicts or

wasteful duplication of problem-solving activities". One key element of such operational interplay is the application of relevant conservation and management measures whether a state is a member of a regional fisheries management organization (RFMO) or not. Despite the broadening of ocean governance through the development and entry into force of hard law instruments and soft law agreements, the effectiveness of governance remains unclear while key distant water fishing states reject key provisions of UNFSA. Effectiveness is further weakened by a lack of agreement over the reach of provisions that extend compliance and enforcement regimes away from the traditional 'flag state' regime embedded in LOSC, identified as having status as a 'sacred text' by Johnston & VanderZwaag (2000:143).

The Oceans Policy Summit, held in Lisbon, Portugal October 2005 provides a review of current issues and approaches, but also noted that policy capacity is an important element in ocean governance both at national and international levels (IISD 2005). While policy capacity can be conceptualised in different ways, two key elements are the ability to make decisions–a process or procedural dimension; the second relates to quality of policy decisions–the substance of policy. Both elements of policy capacity are linked to developing effective ocean governance. Organisations need to be able to maintain and extend their own capacity, and be able to display leadership in this area, but they also need to be able to work effectively with the range of other actors engaged in work that will necessarily contribute to governance. Policy capacity is affected by a number of factors including the relative size of organisations and resources, both human and financial available to them.

Australia and IUU Fishing: 'Hard' and 'Soft' Solutions

Australia is middle power with extensive ocean domain, responsible for an EEZ approximately twice the landmass of the country. Over the fifteen years Australia has played a major part in the reordering the international high seas fisheries regime (see Bergin & Haward 1994; Haward, 2004), with considerable impact on contemporary oceans governance. Most recently Australia's efforts have been directed at action to tackle the problem of what is now known as illegal, unregulated and unreported (IUU) fishing. This effort has involved active engagement in regional fisheries management organisations (RFMOs), support for key instruments and institutions. Australia has actively sought to encourage the development of emergent tools in the battle against IUU fishing, with a particular emphasis on bolstering port state and trade-related instruments. In addition active monitoring, control and surveillance within the extended Australian EEZ (including an extended hot-pursuit of a vessel prior to its

arrest) has been undertaken. Australia has also worked bilaterally to further the campaign against IUU fishing. A final element has been reform to national legislation that *inter alia* reinforced Australia's use of 'port state' controls.

IUU fishing has come to represent a formidable political challenge for national governments, international organisations and non-government groups. Australia, as a coastal state with small (but growing) distant water operations under strong national control providing sophisticated fisheries management systems, has defined and definite interests in ensuring appropriate oceans governance. For these reasons Australia while a minor 'player' in world fisheries has been able to play a constructive brokerage role in international fisheries diplomacy. This role is also reinforced by Australia's strong commitments to regional and/or bilateral arrangements.

Australia has current interests in demersal stocks in the Tasman Sea and Indian Ocean, tuna fishing in the West-Central Pacific, and in the Patagonian toothfish fishery in sub-Antarctic waters. This latter fishery highlighted the problems that became labelled as IUU fishing. Australia raised the problem of IUU fishing at the United Nations Food and Agriculture Organisation's Committee on Fisheries (COFI) meeting in February 1999. At the FAO Ministerial Conference in Rome between 10–11 March 1999 following COFI, FAO declared that it would develop a global plan of action to deal effectively with all forms of IUU fishing, that eventually resulted in the IPOA-IUU. The IPOA was adopted by 'more than 110 countries' and was seen as providing 'the international community [with] a powerful tool' to fight IUU fishing. The IPOA-IUU, linking traditional flag-state responsibilities with port state and market or trade-related measures reflects significant developments in the high seas fisheries regimes in the ten years from the Cancun Conference in 1992 to the conclusion of the IPOA.

Australia has also undertaken important national actions to combat IUU fishing within its EEZ, and including straddling stocks in the Tasman Sea. Australia and New Zealand entered into an understanding at officer level concerning the need to manage the orange roughy stock in the Tasman Sea in 1991. This understanding, initiated by New Zealand, included an agreement to exchange information, conduct research into the stock and to cooperate in management. The MOU governing fishing on the South Tasman Rise (STR) ended in February 1999. The entry of foreign vessels (registered in South Africa and Belize) believed to be undertaking IUU fishing off the STR in mid 1999 saw Australia take action against the flag states of these vessels. This action saw Belize deregister the vessel under its flag, which moved away from the STR before

further action could be taken by Australia. These incidents were given wide publicity on the Australian Broadcasting Corporation Television documentary 'Sea of Trouble' screened on *Four Corners* on 30 August 1999 and reinforced the broader problems of regulating IUU fishing on the high seas.

The establishment of Australia's Southern Ocean fishery off Heard and McDonald Islands (HIMI) is a significant milestone. It marks a key element in the evolution of Australian industry moving from a focus on fisheries within the EEZ towards a distant water capability. The development of Australian fisheries in the Southern Ocean and off HIMI in particular has also posed particular challenges for Australia in combating IUU fishing. Concern over the level and scope of IUU fishing led to Australian enforcement activity that saw vessels arrested in 1997-98, 2001 and 2002. The Royal Australian Navy vessel *HMAS Anzac* arrested two vessels for illegal fishing within the Australian HIMI EEZ on 21 October 1997. These vessels were escorted to Fremantle, Western Australia. A second RAN frigate, *HMAS Newcastle* undertook an arrest of a third vessel in on 21 February 1998. *HMAS Canberra* arrested the *Lena* and *Volga* in February 2002. In addition to these RAN actions (Letts 2000) Australia has undertaken regular civilian patrols of the HIMI EEZ, and responded to information provided to it by its licensed fisheries vessels operating within this area. These patrols have also involved enforcement actions, most notably in the lengthy 'hot pursuits' of *South Tomi* (6,100 km in duration) in March-April 2001 and the *Viarsa* (7,000 km) in September 2003 and the arrest of the *Taruman* for allegedly illegally fishing within the Australian EEZ off Macquarie Island in 2005.

Australia's commitment to tackling the problem of IUU fishing has also seen it undertake reform to national legislation. The *Fisheries Legislation Amendment Act 1999* provided new measures for monitoring, control and surveillance of domestic and foreign fishing operation. This act also closed loopholes related to Admiralty proceedings that had resulted in seized vessels escaping forfeiture or penalties. This legislation also strengthened the ability of Australian governments to take action against Australian flagged vessels on the high seas. These, and subsequent, amendments to the *Fisheries Management Act 1991* contains a number of provisions related to the UNFSA and the Compliance Agreement. These latter provisions enable Australia to fully assert its rights and obligations as a party to UNFSA. UNFSA and th Compliance Agreement are included as Schedules to the *Fisheries Management Act 1991.* Australia has used the provisions of this legislation to act against IUU fishing vessels

by prohibiting entry to the port of Fremantle to two vessels suspected of unregulated fishing for Patagonian toothfish in 2000.

Ocean Governance and Maritime Security: Challenges and Opportunities

Australia's commitment to action against IUU fishing provides insights into the emergent trends in oceans governance and maritime security. Action against IUU fishing, initiated by Australia, reflects the possibilities (and some of the constraints) provided by initiatives such as the UNFSA that is centred on, but extending, the LOSC as well as those provided by the soft law approach established by the Code of Conduct. The establishment of the IPOA-IUU is an important element in the development of the high seas governance, and indicates opportunities for 'softer' instruments, but its negotiation reflects on-going tensions over traditional flag state responsibilities and emergent tools such as port state and trade-related measures. The establishment of the IPOA-IUU reinforces the role of regional arrangements and the importance of collaboration between members of RFMOs.

Examination of Australia's actions against IUU fishing highlights a number of issues that link ocean governance and the maritime security agenda. It also reinforces the linkage between different security discourses, from protection of sovereignty to environmental security. Tackling problems of IUU fishing involves considerable effort–internationally, regionally and bilaterally. It also involves domestic legislative reform and commitment. It is apparent that effective responses to the problem of IUU fishing needs to build on international and regional instruments, and the national initiatives that both support and flow from them. These actions need to be reinforced by bilateral action aimed at strengthening compliance with regional and international instruments and increased coordination and capacity between institutions – leading to increased attention to ocean governance.

References

Bache, S., L. Munz, S. Rajkumar, & M. Tsamenyi. 2003. *Current Developments in Integrated Oceans Management & Governance in APEC Member Economies*. Final Report to the Marine Resources Conservation Working Group, Asia Pacific Economic Cooperation (APEC) - Australia, January 2003.

Bergin, A., & M. Haward. 1994. "Australia's Approach to High Seas Fishing", *International Journal of Marine and Coastal Law*, 10, 3: 349-367.

Bergin, A., & Haward, M. 1999. "Australia's New Oceans Policy*" International Journal of Marine and Coastal Law,* 14, 3: 387-398.

Haward, M., & D. VanderZwaag. 1995. "Implementation of UNCED Agenda 21 Chapter 17 in Australia and Canada: A Comparative Analysis", *Ocean and Coastal Management,* 29, 1-3: 279-295.

Haward, M. 2003. "The Ocean and Marine Realm" in S. Dovers and S. Wild River, eds. *Managing Australia's Environment*, Sydney; Federation Press: 35-52.

Haward, M. 2004. "IUU Fishing: Contemporary Practice" in A.G Oude Elferink and D. R Rothwell, eds. *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, Leiden, Martinus Nijhoff Publishers: 87-106.

IISD [International Institute for Sustainable Development] 2005. *The Oceans Policy Summit 2005 Bulletin,* www.iisd.ca./SD/TOPS2005/.

Johnston, D., & D. VanderZwaag. 2000."The Ocean and International Environmental Law: Swimming, Sinking, and Treading Water at the Millennium", *Ocean and Coastal Management,* 43: 141-161.

Kjær, A. M. 2004. *Governance*, Cambridge, Polity Press.

Kimball, L. A. 2001. *International Oceans Governance: Using International Law and Organisations to Manage Marine Resources Sustainably*, , Gland Switzerland and Cambridge, UK, IUCN-The World Conservation Union.

Letts, D. J. 2000. "The Use of Force in Patrolling Australia's Fishing Zones", *Marine Policy*, 24: 149-157.

Ostrom E. 1987 "Institutional Arrangements for Resolving Commons Dilemmas: Some Contending Approaches' in B. M McCay & J. M Acheson (eds.) *The Question of the Commons,* Tucson, University of Arizona Press.

Ostrom, E. 1990 *Governing the Commons: The Evolution of Institutions for Collective Action* Cambridge, Mass. MIT Press.

Pierre, J (ed.) 2000. *Debating Governance*, Oxford, Oxford University Press.

Rhodes, R. A. W. 1995. "The Institutional Approach" in D. Marsh and G. Stoker, (eds) *Theory and Methods in Political Science*, London, Macmillan.

Rhodes R. A. W. 1996. "The New Governance: Governing without Government" *Political Studies,* XLIV: 652-667.

Shotton, R. & M. Haward, 2005. "Requirements for Managing Deep-Seas Fisheries" *Deep Sea 2003 Proceedings*, Rome, FAO.

Stokke, O. S. 2000. "Managing Straddling Stocks: The Interplay of Global and Regional Regimes", *Oceans and Coastal Management*, 43: 205 –234.

Vallega, A. 2001. "Ocean Governance in Post-Modern Society – A Geographical perspective", *Marine Policy*, 25: 299-414.

Vince, J. Z. 2005 'Policy Transfer in Ocean Governance: Australia, Canada and New Zealand' *Proceedings of the Australasian Political Studies Association Conference*, Dunedin, New Zealand, Tasmania, September.

Vince J. Z. 2006 "The South East Regional Marine Plan: Implementing *Australia's Oceans Policy*", *Marine Policy* 30. [in press].

World Bank 2000. World Development Report 2000-01, *Overview Attacking Poverty: Opportunity, Empowerment and Security*.