Introduction

This short paper is based on the spoken commentary provided by the author at the Fourth J.W.H. Verzijl Memorial Symposium on 21 November 2008, with some subsequent elaboration. Professor Treves’ paper proposes “some ideas of a very general character” relevant to the governance of areas beyond national jurisdiction (ABNJ). This commentary focuses on just two matters. The first is one of the ideas raised by Professor Treves, namely that of making the “due regard” concept in international law more precise. The second is the matter of stakeholder participation in decision-making.

The “Due Regard” Concept

In his paper, Professor Treves states that:

In light of the law of the sea rule that the freedoms of the high seas shall be exercised “with due regard” to the interest of other States in exercising such freedoms (Article 87(2) of the LOS Convention), the new instrument should strive to make the “due regard” concept more precise. It should state specific criteria for ensuring coexistence of different activities, and, if necessary, establish priorities, or mechanisms for dealing with conflicts. If a plurality of machineries is to be set up, each regime should make provision for the possibility of efficient contacts and cooperation between them.

In the Convention on the Law of the Sea (LOS Convention), as indicated by Professor Treves, reference to “due regard” in the context of the exercise of high

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1 Paper by T. Treves in this volume at 21.
2 Ibid., 22.
3 Adopted on 10 December 1982; 1833 UNTS 396.
seas freedoms can be found in Article 87(2). In the specific context of “activities in the Area”, as defined in Article 1 of the LOS Convention, Article 147 provides that “[a]ctivities in the Area shall be carried out with reasonable regard for other activities in the marine environment” and, reciprocally, “[o]ther activities in the marine environment shall be conducted with reasonable regard for activities in the Area”. It is not clear what, if anything, accounts for or flows from the difference in terminology in Article 87 (“due regard”) and Article 147 (“reasonable regard”).

Professor Treves, in the extract from his paper provided above, considers that any new instrument, in seeking to make the “due regard” concept more precise, “should state specific criteria for ensuring coexistence of different activities, and, if necessary, establish priorities, or mechanisms for dealing with conflicts”. In addition, the various regimes involved “should make provision for the possibility of efficient contacts and cooperation between them”. These specific points, and particularly the first, bring to mind the concept of marine spatial planning (MSP).

MSP is a tool that is increasingly being adopted and developed by coastal States to deal with growing competition for the use of ocean space. Marine internal waters, territorial seas, continental shelves and exclusive economic zones (EEZs) are becoming more and more crowded with human activities. Some of these activities are actually or potentially incompatible with each other (for example activities that each require unimpeded access to the seabed of a given area). MSP involves the making of strategic decisions about the use of marine space, whether in relation to the surface, water column, seabed or subsoil. Whilst the desire may be to make the best overall use of such space, perhaps with a view to achieving sustainable development, there will be instances where difficult choices have to be made about which of two or more incompatible activities (including nature conservation) should take priority in a particular area.

Under the LOS Convention, many of the activities in a coastal State’s waters are, in broad terms, under the exclusive competence of that State. Examples include fisheries (subject to duties of cooperation in respect of certain stocks and species), extraction of non-living resources (such as aggregates or oil and

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4 LOS Convention, Article 147(1) and (3) (emphasis added).
5 Paper by T. Treves in this volume at 22 (emphasis added).
6 Ibid., 22 (emphasis added).