An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction

Exploring Different Elements to Consider

PAPER X

Existing Regulatory, Institutional and General Governance Gaps*

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1. Background

At the 2012 United Nations Conference on Sustainable Development (Rio+20), States committed themselves '*to address, on an urgent basis, building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea.'*[1] This commitment was recalled and reaffirmed by the United Nations General Assembly (UNGA) in its 67th and 68th session.[2] In its resolution 68/70, the UNGA also requested the United Nations Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (UN Working Group) to make recommendations to the UNGA '*on the scope, parameters and feasibility of an international instrument under the Convention'*.[3] These recommendations shall help to prepare for the decision to be taken at the 69th session of the UNGA in 2015, whether to start the negotiation of an international instrument on the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (ABNJ).

The International Union for Conservation of Nature (IUCN) in collaboration with different partners has prepared a series of policy briefs to provide technical input to the ongoing ABNJ discussions, and thereby support the UNGA decision-making process. As indicated in ***Paper I***, the general need for a new instrument is one of the issues to be discussed under 'feasibility'. The following paper aims to briefly summarize the existing regulatory, institutional and general governance gaps related to the conservation and sustainable use of biodiversity in ABNJ.

2. Regulatory Gaps

The United Nations Convention on the Law of the Sea (UNCLOS) is the cornerstone of the currently existing international legal framework governing the oceans and the sea. However, important gaps still exist in the regulation of conservation and sustainable use of biodiversity in marine ABNJ, which can be summarized as follows:[4]

- **Lack of comprehensiveness**

The exercise of a number of existing high seas activities, such as marine scientific research, bioprospecting, cable and pipeline laying, or the construction of artificial installations, is lacking specific international rules governing their operation or their potential impacts on marine biodiversity.

There is also no mechanism yet in place to guide the development and regulate the implementation of potential and emerging activities in ABNJ, such as climate engineering, marine tourism, offshore mariculture, or installations for energy production.

[1] UNGA resolution 66/288. *'The future we want.'* UN doc. A/RES/66/288, of 11 September 2012. Paragraph 162.
[2] UNGA resolution 67/78. *'Oceans and the law of the sea.'* UN doc. A/RES/67/78, of 11 December 2012. Paragraph 181. UNGA resolution 68/70. *'Oceans and the law of the sea.'* UN doc. A/RES/68/70, of 9 December 2013. Paragraph 197.
[3] UNGA resolution 68/70. *'Oceans and the law of the sea.'* UN doc. A/RES/68/70, of 9 December 2013. Paragraph 198.
[4] See Gjerde, K.M. (2007). *'Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction.'* IUCN Marine Series No. 1.

- **Fragmentation**

There is a lack of rules which could create a framework to address the increasing cumulative pressures and threats to ABNJ from marine activities, traditional ones (such as shipping, military activities, etc.) as well as emerging ones.

Furthermore, activities occurring in the high seas water column and those occurring on the extended continental shelf of coastal States, or in the Area are not regulated in an integrated and coordinated way due to different rules for various maritime zones, and due to a lack of a sufficient legal mandate for ecosystem-based management, biodiversity conservation, cooperation and coordination in sectoral bodies in ABNJ.[5]

- **Lack of concrete instruments**

The UNCLOS contains general obligations to protect and preserve the marine environment (Article 192), and to take measures to protect and preserve rare or fragile ecosystems (Article 194.5). Furthermore, States are obliged to assess and monitor the potential effects of activities under national jurisdiction and control (Article 204-206). However, these obligations have not yet been implemented on a consistent basis in ABNJ, as global procedures and standards for applying modern conservation instruments or instruments promoting sustainable use are missing. Such instruments, including marine spatial planning, marine protected areas, environmental impact assessments, or strategic environmental assessments, would be applicable to all human activities in or having an impact on biodiversity in ABNJ.

There are also currently no mechanisms for monitoring compliance and ensuring enforcement of conservation instruments in ABNJ. Effective compliance and enforcement instruments are lacking at the global as well as regional levels, in particular, a legal framework for non-flag enforcement.[6]

Standards, procedures and guidance are further missing for capacity-building and marine technology transfer.[7]

- **Limited scope**

Relevant legal regimes which already exist have a limited geographical and/or substantive scope. International agreements regulating the conservation of biodiversity, such as the Convention on

[5] Druel, E. and Gjerde, K.M. (2013). *'Sustaining marine life beyond boundaries: Options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea.'* Marine Policy. P. 3.

[6] Under UNCLOS 'flag states' have primary responsibility for enforcement of international rules and exclusive jurisdiction over vessels flying their flag. An enforcement regime that relies only on flag states can be ineffective when the interests of States conflicts with conservation and sustainable use objectives, where there is lack of political will or when States have limited capacity or resources to manage the actions of their vessels/nationals. S. Hart, S. (2008). *'Elements of a possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction.'* IUCN Marine Series No. 4. P.4.

[7] Druel, E. and Gjerde, K.M. (2013). *'Sustaining marine life beyond boundaries: Options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea.'* Marine Policy. P. 3.

Biological Diversity, have only little regulatory authority with regard to ABNJ.[8] Other legal instruments and their rules only apply in particular regions (e.g. regional seas agreements), or to specific sectors (e.g. fishing or shipping) and their pressures. Therefore, the existing legal regimes do not support the application of an ecosystem approach which requires a more holistic, integrated and cross-sectoral approach in regulating and managing ABNJ ecosystems.

3. Institutional Gaps

A major challenge to effective and efficient conservation and sustainable use of biodiversity in ABNJ is having the appropriate institutional capacity. Today, a number of international and regional organisations already have a mandate for managing activities in ABNJ. They include *inter alia* the International Seabed Authority (ISA) for the prospection, exploration and exploitation of mineral resources in the Area; regional fisheries management organisations (RFMOs) for fisheries; through several conventions, the International Maritime Organisation (IMO) for vessel-source pollution and dumping of wastes; and a few regional seas conventions which have a mandate over the protection of the marine environment in ABNJ.[9] However, the existing institutional setting still has a number of limitations, including:

- **Sectoral mandates**

So far no institutional framework or process exists which would provide a comprehensive assessment of existing and emerging uses of biodiversity and their potential environmental impacts in all ABNJ; assist and oversee the application and implementation of modern conservation instruments as well as management tools in all ocean regions; support a coherent application of modern environmental governance principles; and ensure worldwide coordination and cooperation within and across sectors, regions, States and existing institutions. Instead, the existing institutions are operating independently based on sectoral mandates without an overarching framework that could provide an efficient and effective structure, and without the necessary mechanisms ensuring coordination, consistency and coherence.[10]

- **Geographic gaps**

The absence of a sufficient institutional framework at the global level is not compensated by regional institutions. Most ABNJ lack regional management organizations for protection and sustainable development with respect to activities other than fisheries. Currently only four regional agreements include ABNJ: the Antarctic Treaty and its Madrid Environment Protocol, the OSPAR Convention, the Barcelona Convention, and the Noumea Convention.[11]

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[8] Ardron, J., Druel, E., Gjerde, K.M., Houghton, K., Rochette, J., Unger, S. (2013). *'Advancing Governance of the High Seas.'* IDDRI Policy Brief n° 06/13. P. 4

[9] Ban, N.C., Bax, N.J., Gjerde, K.M., Devillers, R., Dunn, D.C., Dunstan, P.K., et al. (2013). *'Systematic conservation planning: a better recipe for managing the High Seas for biodiversity conservation and sustainable use.'* Conservation Letter 2013.

[10] Tladi, D. (2011). *'Ocean governance – a fragmented regulatory framework.'* In: Jacquet, P., Pachauri, R., Tubiana, L., ed. Oceans: the new frontier – a planet for life. Delhi: Teri Press. P. 99-111.

[11] Kimball, L. (2005). '*The International Legal Regime of the High Seas and the Seabed Beyond the Limits of National Jurisdiction and Options for Cooperation for the Establishment of Marine Protected Areas (MPAs) in Marine Areas Beyond the Limits of National Jurisdiction.'* Secretariat of the Convention on Biological Diversity, Montreal, Technical Series No. 19.

4. Overall Governance Gaps

General governance gaps in the international legal framework for ABNJ also have to be recognized, including:

- **Lack of common governance principles**

The lack of harmonized standards for the implementation of modern conservation and sustainable use instruments has already been mentioned before. In addition, common governance principles providing general norms to regulate new and existing human activities in ABNJ are not yet compiled into one legally binding instrument. This leads to their rather dispersed and inconsistent application.

- **Lack of transparency**

Good oceans governance requires transparency and public participation. One important instrument to ensure transparency is a State obligation to report regularly on ABNJ activities with an impact on marine biodiversity, measures applied to ensure its conservation and sustainable use, and experiences in their implementation. Such an obligation is so far missing at the global level.

Furthermore, processes of civil society participation in ABNJ-related decision-making are regulated differently, and observer rights may be subject to State discretion. For example, non-governmental organizations may generally participate as observers only at the consent of RFMO members, and in many RFMOs it just takes one State to block admission.

- **Partial membership**

Another governance gap is that not all States are parties to the existing regional and sectoral regimes. While under the UN Fish Stocks Agreement non-members of RFMOs are obliged to comply with the conservation and management measures established by such organizations (Article 17), the regulations set up for example under regional seas agreements are not binding for so called non-parties, which limits their effectiveness.

5. Conclusion

The currently existing regulatory, institutional and general governance gaps show that threats to marine biodiversity in ABNJ are not sufficiently addressed by existing frameworks, and thus cannot be dealt with solely through their enhanced implementation. While in some regions these gaps could be at least partly filled through regional instruments and institutions, it is important to recognize that not all ocean regions have adopted legally binding instruments, or have the same institutional capacity.

As a consequence, there is a need for a more comprehensive and stringent set of rules at the global level. An international instrument could first of all clarify and strengthen the common global mandate for conservation and sustainable use of biodiversity in ABNJ. Furthermore, it could establish a comprehensive legal, institutional and governance framework that builds on the existing regional and sectoral institutions but addresses and closes all existing gaps. Once into force, such an instrument could provide for a set of shared and more specific binding obligations that would greatly improve conservation efforts, and provide clear procedures and mechanisms for cooperation and coordination.

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