

Brief for GSDR 2015

Advancing governance of marine areas beyond national jurisdiction

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Introduction

Marine areas beyond national jurisdiction (ABNJ) — the high seas and the deep seabed located beyond the limits of States' continental shelves covering almost two-thirds of the global ocean — represent around half of the Planet's surface. In ABNJ, biodiversity is at significant risk. Threats to biodiversity include the intensification and expansion of human activities into previously inaccessible locations as well as the growing impacts of climate change and ocean acidification (Census of Marine Life, 2011). This requires an urgent action from the international community at several levels.

The need for an UNCLOS Implementing Agreement

In 2004, the United Nations General Assembly (UNGA) created an Ad-Hoc Open-ended Informal Working Group ("BBNJ Working Group") to engage in discussions on the conservation and sustainable use of marine biodiversity in ABNJ. Since the commencement of discussions in 2006, the focus has mainly been on gaps in the current international framework and whether these necessitate the adoption of a new instrument (Druel et al., 2013). In particular, States have discussed the possible adoption of an Implementing Agreement to the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biodiversity in ABNJ (UNCLOS IA). At the 2012 United Nations Conference on Sustainable Development ("Rio+20"), States agreed to decide by the end of the 69th session of the UNGA (September 2015) whether or not to launch the negotiations for the conclusion of such a new global agreement.

A new UNCLOS Implementing Agreement is needed to implement and update the environmental protection and conservation provisions of UNCLOS in order to address new

threats and intensifying uses which are undermining the health, productivity and resilience of the oceans in general and marine biodiversity beyond national jurisdiction, in particular. In order to accomplish this crucial task, the Implementing Agreement should address gaps and weaknesses of the current system, including the lack of a global framework for the establishment of marine protected areas (MPAs), for the conduct of environmental impact assessments (where cumulative impacts could also be addressed) and strategic environmental assessments (EIAs/SEAs), or for the fair and equitable access to and sharing of the benefits from marine genetic resources obtained from ABNJ.

Improving and better utilizing global instruments and institutions

A large number of institutions and agreements are currently mandated to regulate sectoral issues in ABNJ, including shipping (the International Maritime Organisation – IMO), fishing (the global network of regional fisheries management organisations – RFMOs) and mining (the International Seabed Authority). However, transparency, accountability, and compliance reporting mechanisms are often weak in sectoral agreements. Moreover, issues pertaining to the conservation and sustainable use of marine biodiversity are not systematically integrated in these arrangements. The agreements concerning conservation of biodiversity, on the other hand, have little regulatory authority and generally rely upon voluntary measures (e.g. the Convention on Biological Diversity (CBD) or the Convention on Migratory Species).

One of the greatest strengths of institutions mandated to work in ABNJ – their established internal working relationships – is also one of their greatest weaknesses. There are very few information-sharing mechanisms in place to exchange scientific information between institutions. Cross-cutting issues, such as the

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protection of biodiversity or the emerging issue of climate engineering, require the integration of the work of distinct institutions. In particular, although global conservation commitments, such as establishing MPAs, are well established, institutional responsibility for meeting these targets is often unclear. State Parties and civil society must therefore continue to 'champion' and promote biodiversity commitments within appropriate institutions.

Strengthening regional initiatives improve conservation and sustainable use of marine biodiversity in ABNJ

The regionalisation of international environmental law has emerged as an important trend in recent decades (Chabason and Rochette, 2011). In the field of the marine environment, it has taken place through Regional Seas Conventions and Action Plans, with now more than 143 participating countries around the world, as well as RFMOs aimed at ensuring the sustainable management of fish stocks. In addition, other regional initiatives, such as Large Marine Ecosystems (LMEs) projects, have been developed to engage neighbouring countries in protecting and sustainably managing their shared marine environment (Billé et al., 2014).

Recently, some regional seas frameworks have progressively extended their activities into ABNJ (Rochette et al., 2014), particularly through the use of area-based management tools, reflecting the interconnection between waters under national jurisdiction and ABNJ. These emerging examples (Freestone et al., 2014) have demonstrated that the protection of ABNJ can be achieved to some extent regionally within the framework of existing agreements. Although there is no "one-size fits all" solution, these approaches could provide guidance and inspiration for other regions.

However, most regional seas bodies still focus on areas within national jurisdiction and similarly, high seas fisheries in some regions are currently not regulated by RFMOs at all. In this context, processes initiated by the CBD to describe EBSAs including in ABNJ (Dunn et al., 2014) and by individual RFMOs to identify VMEs based on criteria adopted by the Food and Agriculture

Organisation (FAO) (Wright et al., 2014) could provide the scientific basis and rationale to extend the geographic scope of regional organisations and initiatives to ABNJ.

Concerning the conservation and sustainable use of marine biodiversity in ABNJ, a number of general principles have evolved out of customary international law and have informed the development of most international environmental treaties, both globally and regionally. Most of these principles have also been incorporated in the UNCLOS or non-binding "soft law" declarations, such as the 1972 Stockholm and 1992 Rio Declarations. Efforts are now being made to identify groups of principles with particular applicability to the oceans, and most specifically to ABNJ. Such principles include: (1) the conditional freedoms of the high seas, (2) the protection and preservation of the marine environment, (3) international cooperation, (4) science-based management, (5) the precautionary approach, (6) the ecosystem approach, (7) sustainable and equitable use of natural resources, (8) public access to information, (9) transparency in decision-making processes, and (10) the responsibility of States as stewards of the global marine environment (Freestone, 2009). The recognition of overarching principles, for example in the activities of the COPs of existing treaties and as a chapeau to a possible new UNCLOS Implementing Agreement, would serve to guide the implementation of substantive rules of treaty law.

Issues for further consideration/Key messages

- Message 1: Start negotiating an international instrument under the United Nations Convention on the Law of the Sea (UNCLOS) as soon as possible. This new international instrument is, however, not an "either/or" with the use and reinforcement of existing instruments.
- Message 2: At the same time, strengthen existing regional and sectoral organisations by creating mechanisms for coordinated action.
- Message 3: Establish overarching principles of ocean governance, either as a chapeau to the new legal instrument or as a declaration of the United Nations General Assembly (UNGA).

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