



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

Exploring Different Elements to Consider

PAPER II

Enhancing Cooperation and Coordination*

By Kristina Gjerde, with Elisabeth Druel and Duncan Currie

Commissioned by the German Federal Agency for Nature Conservation with funds from the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety.



* DISCLAIMER: The views expressed in this paper do not necessarily reflect those of the German Federal Agency for Nature Conservation or the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety.

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**, one of the issues to be discussed under 'scope' could be 'enhancing cooperation and coordination'. The following paper aims to provide an overview of the challenges to securing cooperation and coordination for the conservation and sustainable use of marine biodiversity in ABNJ as well as different approaches for improving cooperation and coordination through an international instrument for ABNJ under the United Nations Convention on the Law of the Sea (UNCLOS).

2. Existing Legal and Policy Framework

The duty to cooperate for the protection and preservation of the marine environment and the conservation of marine biodiversity in ABNJ is evidenced in multiple legal instruments and called for in many declarations.

UNCLOS in Article 197 provides: *'States shall cooperate 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.'* UNCLOS Article 118 further calls for cooperation with respect to the conservation and management of living resources: *'States shall co-operate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in*

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.

the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. [...]'

The Convention on Biological Diversity (CBD), currently with 193 Contracting Parties, contains an explicit reference to cooperation in ABNJ. Article 5 provides that each Contracting Party *'shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.'*

The Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement) also contains a complementary duty in Article 5 (g), requiring coastal States and States fishing on the high seas, in giving effect to their duty to cooperate, to *'protect biodiversity in the marine environment,'* amongst other actions for the conservation and sustainable use of straddling fish stocks and highly migratory fish stocks.

Goals and objectives for this cooperation have also evolved in more recent declarations, resolutions and commitments. At the 2002 World Summit on Sustainable Development (WSSD), governments committed to improving ocean conservation and management through actions at all levels, giving due regard to the relevant international instruments. Specifically, they committed to *'[d]evelop and facilitate the use of diverse approaches and tools, including the ecosystem approach, the elimination of destructive fishing practices, the establishment of marine protected areas consistent with international law and based on scientific information, including representative networks by 2012 and time/area closures for the protection of nursery grounds and periods, proper coastal land use and watershed planning and the integration of marine and coastal areas management into key sectors.'*⁴ In 2002 the UNGA welcomed the WSSD commitments and called upon States and relevant international organizations at all levels urgently to consider ways of integrating and improving, on a scientific basis, the management of risks to vulnerable marine biodiversity within the framework of the UNCLOS, consistent with international law and the principles of integrated ecosystem-based management.⁵ The UN Working Group on ABNJ was established in 2004, to indicate, among other things, *'possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.'*⁶ At the 2012 UN Summit on Sustainable Development (Rio+20), government leaders in paragraph 158 committed to *'protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, and to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities impacting on the marine environment, to deliver on all three dimensions of sustainable development.'*

⁴ World Summit on Sustainable Development. (2002). Agenda 21 Plan of Implementation. Paragraph 32(c).

⁵ UNGA resolution 57/141. *'Oceans and the Law of the Sea.'* UN doc. A/RES/57/141, of 12 December 2002.

⁶ UNGA resolution 59/24. *'Oceans and the Law of the Sea.'* UN doc. A/RES/59/24, of 17 November 2004.

3. Challenges

However, currently *‘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.’*⁷ As such, sectoral organizations are not sufficiently cooperating towards the common goals.

As is recognized in the political science literature, interplay amongst institutions is possible but it requires institutions to be interacting based on a *‘common purpose and set of principles in a non-hierarchical way.’*⁸ An integrated, ecosystem-based approach accordingly requires the involvement of all sectors, compatibility between policies and activities, as well as a balance of uses.⁹ While there has been some progress towards fostering the cooperation and coordination in ABNJ, many challenges remain. Based on the experiences of existing regional processes, challenges include:¹⁰

- **Lack of common principles**

To date, it has been difficult to agree on a shared interpretation of governance principles at a regional or global level, such as ecosystem-based management, the precautionary principle vs. approach, or even transparency and public participation. Owing to the different histories of each sectoral and regional organization, there are no commonly shared principles or shared interpretation of them.

- **Limited substantive and geographic mandates**

International organizations can only act within the specific terms of their respective jurisdictions and mandates (principle of speciality).¹¹ Some regional fisheries management organizations (RFMOs), for example, have mandates pre-dating the UN Fish Stocks Agreement with single species mandate.¹² RFMO mandates may thus not explicitly include the protection or conservation of marine biodiversity in ABNJ, or the obligation to cooperate for these purposes. The geographic ambit of most regional seas conventions (RSCs) is limited to marine areas within national jurisdiction, thus few have a direct mandate for biodiversity conservation in ABNJ.

⁷ 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.

⁸ Orsini, A., J.-F. Morin and O. Young. (2013). *‘Regime complexes: a buzz, a boom, or a boost for global governance?’* *Global Governance* 19. P. 27–39.

⁹ Earth Summit. Agenda 21: The United Nations Action Programme from Rio. Paragraph 17.5(a). Available at: www.un.org/esa/dsd/agenda21/res_agenda21_17.shtml

¹⁰ Freestone, D., Johnson, D., Ardron, J., Killerlain Morrison, K., and Unger, S. (2014). *‘Can existing institutions protect biodiversity in areas beyond national jurisdiction? Experiences from two on-going processes’*. *Marine Policy*.

¹¹ International Court of Justice, advisory opinion of 8 July 1996, *Legality of the threat or use of nuclear weapons*, p.16, ‘international organisations are governed by the ‘principle of speciality’ that is to say they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them’.

¹² See Ardron, J., Rayfuse, R., Gjerde, K. and Warner, R. (2014). *‘The sustainable use and conservation of biodiversity in ABNJ: what can be achieved using existing international agreements?’* *Marine Policy*.

- **Difficulty integrating science across sectors**

Sectoral bodies may be reluctant to accept the results of scientific research and peer review originating outside their respective organizations. For example, the CBD has initiated a process to help States and competent organizations identify ecologically or biologically significant areas (EBSAs), but this status has so far had little impact on dealings with sectoral bodies.¹³

- **Lack of specific coordinating mechanisms, policies or incentives**

Specific mechanisms, policies or incentives to coordinate activities and impacts across sectors or even within sectors beyond national jurisdiction are currently lacking.¹⁴ For example, bottom contacting gear used for deep sea bottom fishing in the high seas could interfere with seabed mining operations and damage areas closed to seabed mining (as impact reference areas or preservation reference areas). Pollution from ships in eddies, gyres or other areas of low circulation could impair the health of high seas fish stocks and other forms of marine life. Additionally, seabed mining and deep sea bottom gear could adversely impact areas of importance for spawning of commercially important fish stocks.

Similarly lacking are mechanisms, to coordinate activities affecting areas across national and international boundaries.¹⁵ Activities such as seabed mining in the Area, for example, could have far reaching effects on water quality that might impact adjacent exclusive economic zones (EEZ). Similarly, deep seabed mining on the extended continental shelf could impact the high seas water column above. As well, the dumping of wastes from seabed mining is excluded from the London Convention¹⁶ and the London Protocol¹⁷ as disposal of '*wastes or other matter directly arising from, or related to the exploration, exploitation and associated off-shore processing of sea-bed mineral resources*' is not covered by their provisions. This is because it was envisaged that seabed mining waste would be addressed by the International Seabed Authority (ISA). However, the exclusions are not limited to the Area. The terms '*directly arising from, or related to*' are very broad and leave little room for doubt.

- **Limited resources**

International organizations that do have a mandate for both conservation and cooperation may lack the technical or human resources, time, funding or information to collaborate with other regional or sectoral organizations. To achieve any progress towards cooperation between conservation and

¹³ Ibid.

¹⁴ Gjerde, K.M, Ardron, J., Gotheil, S., Hanich, Q., Simard, F., Warner, R., Bernal, P., Garcia, S., Lee, J. Lodge, M., Meliane, M. Rice, J., Sanders, J., and Vestergaard, O. (2010). '*Modalities for advancing cross-sectoral cooperation in managing marine areas beyond national jurisdiction.*' Report for UNEP's 12th Global Meeting of the Regional Seas Conventions and Action Plans, 27 pp..

¹⁵ Golytsyn, V. (2010). '*Major Challenges of Globalisation for Seas and Oceans: Legal Aspects.*' In Vidas, D. (ed.). '*LAW, TECHNOLOGY AND SCIENCE FOR OCEANS IN GLOBALISATION.*' Martinus Nijhoff, Leiden, Boston. P. 68.

¹⁶ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. Adopted 30 November 1972, entered into force 30 August 1975. Art III.1(c).

¹⁷ Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, adopted 7 November 1996, entered into force 11 March 2008, (as amended in 2006). Art 1.4.

sectoral organizations to date, a great deal of time and effort has been required to align external and internal processes and actors, attend the various meetings required and get new items onto agendas.¹⁸ Very few ocean regions currently have such capacity or resources to extend their sphere of activity absent either added resources or a high-level global mandate.

4. Possible Future Options and Approaches for Enhancing Cooperation and Coordination

While a potential future international instrument for ABNJ should build on existing regional and sectoral institutions, the above described challenges in ABNJ need to be overcome. A central feature of any new instrument would therefore be mechanisms for securing cooperation and coordination for integrated, ecosystem-based management, capacity-building and marine technology transfer as well as for questions related to benefit-sharing of marine genetic resources. Options for enhancing cooperation and coordination include:

- **Common governance principles**

Despite their very general nature, modern governance principles are fundamental and basic to more specific and concrete rights and obligations for cooperation, coordination and coherency. They would constitute a general framework within which the measures to achieve the objectives of the instrument would need to be taken. Such principles do not need to be developed from scratch but are already included in UNCLOS as well as different multilateral environmental agreements and international court decisions¹⁹ (see *Paper IV* on governance principles). As in the UN Fish Stocks Agreement and other instruments, such principles could be made operational as specific articles of the main text of the international instrument.²⁰

- **Expansion of mandates**

Contracting Parties could specifically commit to cooperate to achieve the objectives of a new instrument, including through their participation in, and in cooperation with, competent international organizations such as the ISA, the International Maritime Organization, RFMOs and RSCs and through promotion of institutional reform and consistency with the governance principles as necessary to achieve the purposes of the instrument. Article 10 of the UN Fish Stocks Agreement provides a potential model, as it details the duties of States in exercising their duty of cooperation through RFMOs. However, based on recent experience, such a provision could more clearly call for Contracting Parties to proactively promote the implementation of the principles and objectives of the new instrument inside relevant competent organizations, and include a provision for regular review of implementation at the global level.

- **An institutional framework**

¹⁸ Freestone, D., Johnson, D., Ardron, J., Killerlain Morrison, K., and Unger, S. (in press). *'Can existing institutions protect biodiversity in areas beyond national jurisdiction? Experiences from two on-going processes'*. Marine Policy.

¹⁹ Freestone, D. A. (2009). *'Modern Principles of High Seas Governance: The Legal Underpinnings.'* 39/1 Environmental Policy and Law. P. 44-49

²⁰ Druel, E., 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.

A future international instrument could create an efficient, effective and transparent institutional framework to bring coherence and consistency to the currently fragmented governance system in ABNJ and to implement cooperation systematically. This would include the establishment of mechanisms to make sure that States as well as existing sectoral and regional organizations cooperate and coordinate their activities, and ensure the implementation of the regime and its principles and instruments in all regions. Institutional mechanisms could include a conference of parties, with a mandate to review and assess implementation and take decisions as necessary to promote effective cooperation, reform and compliance; a permanent secretariat, and a global scientific body (see *Paper XI* on basic ideas for a possible institutional structure and *Paper XII* on international procedures to ensure science-based decision-making). Provisions would need to be developed to address existing disincentives for cooperation such as the current imbalance of power between RFMOs and RSOs. The mandate of RFMOs and RSCs, for example, could be enhanced or established to facilitate such cooperation, coordination and coherency. At the same time, cooperation and coordination amongst and between sectoral organizations and RSCs would need to be enhanced to ensure that networks of marine protected areas (MPAs) are well-managed, connected and ecologically representative.

- **Compliance mechanisms and procedures**

Mechanisms for compliance, verification, implementation, monitoring, and enforcement are often critical to ensuring cooperation and coordination in successful international legal instruments. They can build confidence and a shared understanding between the parties to the instrument; improve prospects for future cooperation; produce information to inform future multilateral environmental agreements; and provide measures to address non-compliance.²¹ Many multilateral environmental agreements now have some form of compliance procedures, including specific compliance review panels. Typical non-compliance mechanisms are non-adversarial, include procedural safeguards, and take the totality of circumstances (i.e. the state, history, nature of violation, etc.) into consideration. *Paper XIII* analyses compliance and verification mechanisms under different multilateral environmental agreements, including relevant safeguards. In addition, States and the relevant organizations could enter into cooperative agreements for activities such as monitoring, surveillance and enforcement, as has been done in the South West Pacific region.²² States, for example, could enter into agreements to pool resources, technologies and data, and authorize others to act on their behalf in enforcement actions in port and at sea. Such systems of mutual assistance are already common in the context of customs and taxes.

- **Conservation and management tools**

EBSAs, MPAs, environmental impact assessments (EIAs) and strategic environmental assessments (SEAs) can be very effective tools for enhancing cooperation, coordination and coherency. They can provide a platform for all sectors and stakeholders to contribute effectively and to take cumulative

²¹ Jabour, J. et al. (2012). *'Internationally agreed environmental goals: A critical evaluation of progress.'* Environmental Development 3: 5-24. P. 20.

²² Gjerde, K.M., Ardron, J., Gotheil, S., Hanich, Q., Simard, F., Warner, R., Bernal, P., Garcia, S., Lee, J. Lodge, M., Meliane, M., Rice, J., Sanders, J., and Vestergaard, O. (2010). *'Modalities for advancing cross-sectoral cooperation in managing marine areas beyond national jurisdiction.'* Report for UNEP's 12th Global Meeting of the Regional Seas Conventions and Action Plans.

impacts into account. However, this only works if the various bodies operate based on common goals, principles, criteria and objectives and benefit from a shared scientific basis. The criteria and guidance developed by the CBD for EBSAs, the design of representative MPA networks and the conduct of biodiversity-inclusive EIAs and SEAs could help create a shared science basis, but to date have not been accepted by any sectoral body. Thus a new instrument could establish a common science-based approach for EBSAs, MPAs, EIAs and SEAs as well as access to scientifically credible and independent information that takes into account the complex relationships between biodiversity, ecosystem services, and the various ongoing and emerging activities in ABNJ. A science-based decision-making approach, fostered for example by a global scientific body, could be an important means to minimize the potential influence of non-science-based interests promoted by individual States or stakeholder groups (see *Paper XII* on international procedures to ensure science-based decision-making).

- **Dedicated funding mechanism**

To provide a common glue to enhance cooperation, and to support the costs of new activities to promote conservation and sustainable use, the question of funding would need to be addressed. The determination as to how funding could be raised and equitably allocated is key. A targeted portfolio under the Global Environment Facility (GEF) is one option to consider. GEF's International Waters portfolio is the only project area that is not currently associated with an existing international instrument. GEF is already funding several ABNJ related projects related to sustainable management of fisheries and biodiversity conservation.²³ A global fund could also be established to support capacity-building projects, conservation initiatives as well as to fund the development of a possible Clearing House for marine scientific research technology transfer.²⁴

5. Conclusion

Cooperation is an integral and crucial aspect of UNCLOS, and the improved implementation of coordination is essential. A new international agreement could implement institutional arrangements, shared governance principles, encourage the expansion of mandates of regional seas organizations and RFMOs, and put into place compliance mechanisms and procedures.

²³ <http://www.thegef.org/gef/ABNJ>

²⁴ Druel, E., Gjerde, K. M. (2014) *'Sustaining marine life beyond boundaries: the need for and potential content of an UNCLOS Implementing Agreement for marine biodiversity beyond national jurisdiction.'* Marine Policy. Druel and Gjerde suggest that such a fund could be funded for example by a tax on activities in ABNJ.

List of Papers

Paper I: Introduction on Scope, Parameters and Feasibility

Paper II: Enhancing Cooperation and Coordination

Paper III: Options and Approaches for Access and Benefit-sharing

Paper IV: Governance Principles

Paper V: Understanding Area-based Management Tools and Marine Protected Areas

Paper VI: Options and Approaches for Establishing and Managing MPAs

Paper VII: Relation between Environmental Impact Assessments, Strategic Environmental Assessments and Marine Spatial Planning

Paper VIII: Options for Environmental Impact Assessment Elements

Paper IX: Technology Transfer and Capacity-building

Paper X: Existing Regulatory, Institutional and General Governance Gaps

Paper XI: Basic Ideas for a Possible Institutional Structure

Paper XII: International Procedures to Ensure Science-based Decision-making

Paper XIII: Compliance and Verification Mechanisms