

Overview of Legal and Regulatory and Implementation Gaps in the Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction

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June 9, 2014

Introduction

This paper describes legal and regulatory gaps and implementation gaps in the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction (ABNJ) following the discussions in the April 2014 BBNJ meeting¹ and the 2013 workshops.² It draws on a previous gaps analysis based on those two workshops.³ Following BBNJ practice to date, this paper distinguishes between legal or regulatory gaps on the one hand and implementation gaps on the other. This paper interprets a ‘legal or regulatory gap’ to mean an issue which is currently unregulated or insufficiently regulated at a global, regional or subregional level, either in a substantive or geographical sense or both. A legal gap describes the absence of a rule or norm and a ‘regulatory gap’ describes the absence, or failure, of an institution to regulate an issue or matter. The term ‘legal or regulatory gap’ conveniently describes a situation where, due to legal or institutional deficiencies, an issue is not adequately addressed. The term ‘governance gap’ is sometimes used as well: This describes a gap in the international institutional framework, such as an absence of an institution or legal mechanism (at a global, regional or sub-regional level). An implementation gap, on the other hand, denotes the failure of an existing institution or an applicable legal mandate or rule to regulate an issue or matter properly, or to reach a desired goal where there are no legal or regulatory barriers or issues preventing implementation.⁴

Overall objective and starting point

The Package⁵ agreed in 2011 constitutes the starting point for defining the scope:⁶ “together and as whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology.” The identification of possible gaps is seen by many as the starting point for determining the scope of an implementing agreement.⁷ These include the need to address gaps (particularly legal/regulatory gaps)⁸ in relation to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction⁹ and to address fragmentation in relation to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction.¹⁰ But in addition to addressing legal or regulatory gaps,¹¹ an international instrument could promote a more comprehensive approach, and strengthen implementation of existing obligations and therefore also address implementation gaps.¹²

The goal is not to change the existing legal regime for the oceans as set out in UNCLOS, but rather to fill existing gaps and avoid fragmentation through an implementing agreement¹³ in fact to strengthen UNCLOS and elaborate on its principles and provisions.¹⁴ Without an implementing agreement, it would be difficult to establish marine protected areas (MPA) networks, assess cumulative impacts or develop a benefit-sharing regime for marine genetic resources.¹⁵ An overarching legally binding mandate and framework setting out goals and purposes¹⁶ could provide for integrated MPAs in ABNJ,¹⁷ providing international support for areas in need of protection, complemented by measures adopted at the regional level.¹⁸ An implementing agreement would also facilitate holding States accountable for implementation.¹⁹

Scope *ratione materiae*

Marine Genetic Resources, including questions on the sharing of benefits

It is clear that a legal or regulatory gap existed in respect of marine genetic resources (MGRs), including the sharing of benefits.²⁰ There is a legal gap with regard to access to MGRs of ABNJ and the sharing of benefits arising from their exploitation.²¹ Another view is that the principle of the common heritage of mankind applies to MGR in the Area, but that provisions relating to the implementation of those principles are currently lacking, leading to a regulatory gap instead of a legal gap.²²

Implementation gaps identified in the 2013 workshops include a lack of fair and equitable and physical access to ABNJ, access to samples and data²³ and the ability to use the resources,²⁴ as well as capacity building and transfer of technology in scientific research, access to marine genetic resources (MGRs) and development of MGRs, including molecular biology and oceanographic skills.²⁵ Also needed is traceability for the geographical origin of MGRs in patent applications.²⁶ The disclosure of the origin of genetic resources is often not required.²⁷ Checkpoints are needed to determine geographical origin including the stage at which a product is approved for commercialization.²⁸ Also needed are funding mechanisms²⁹ and improved collaboration between countries.³⁰ Baseline information³¹ and monitoring of loss of MGRs³² is needed.

Area-based management tools, including marine protected areas (MPAs)

Governments have already called for a representative network of MPAs to be established by 2020, and this goal is linked with other efforts to address impacts on the marine environment and the provision of ecosystem services.³³ Area-based management is a clear legal gap, including with regard to the establishment of MPAs,³⁴ in the absence of an overarching framework, the absence of global criteria and a global framework for the selection and establishment of MPAs in ABNJ.³⁵ An implementing agreement could provide a global framework for the identification, designation and establishment of marine protected areas in areas beyond national jurisdiction and establishment of global network of marine protected areas.³⁶ Important are large areas to support ecosystem processes in the open oceans, representative networks based on bioregionalization,³⁷ and mobile MPAs for pelagic species.³⁸

A framework for regional cooperation similar to that in place for RFMO/As under the United Nations Fish Stocks Agreement could be contemplated for regional seas organizations.³⁹ Such a global framework would legitimise area-based management tools, including marine protected areas,⁴⁰ and help legally bind non-parties to respect measures adopted by regional organizations.⁴¹ There is also a need to ensure effective responses to information on areas of ecological or biological significance.⁴²

Ecologically or biologically significant marine areas (EBSAs): EBSAs need to be incorporated into sectoral and MPA planning, with an obligation to assess prior impacts and not authorize actions to go forward unless managed to prevent significant adverse impacts (SAIs).⁴³ An implementing agreement would help with systematic assessments and the sharing of data and expertise across sectors,⁴⁴ capacity-building,⁴⁵ improvements in data quality and increased scientific research.⁴⁶ It could also result in better collaboration between EBSA⁴⁷ and VME⁴⁸ assessments through the input of science across sectors.⁴⁹

Environmental Impact Assessments and Strategic Environmental Assessments

The obligation under article 206 of UNCLOS⁵⁰ to carry out impact assessments needs to be operationalized beyond areas of national jurisdiction.⁵¹ The conduct of environmental impact assessments, for which no overarching global framework or mechanism exists, is a clear gap.⁵²

All activities impacting marine biodiversity in ABNJ need to be addressed, as well as issues of competing jurisdictions and uses and cumulative effects of current and future activities.⁵³ Both environmental impact assessments and strategic environmental assessments need to address cumulative impacts⁵⁴ and to address the aggregate impacts of human activities.⁵⁵ These are clear legal or regulatory gaps where cumulative impacts are not adequately regulated and strategic environmental assessments are not carried out. An example is potential cumulative adverse impacts on seamounts resulting from cobalt-crust mining combined with bottom trawling.⁵⁶

Other needs to be addressed include:

- criteria to identify the activities that might require environmental impact assessments and threshold for environmental impact assessments;⁵⁷
- standards or guidelines for conduct of environmental impact assessments drawing on guidance developed by international organizations, including the Convention on Biological Diversity and International Seabed Authority,⁵⁸ and
- procedures for reporting, assessment, and monitoring of environmental impact assessments.⁵⁹

Another legal and regulatory gap is required follow-up action following environmental impact assessments.⁶⁰ This is both a legal and regulatory gap, since article 206⁶¹ of UNCLOS does not specify follow-up action. There is no mechanism to assess or regulate the implementation of potential and emerging activities in ABNJ, such as climate engineering,⁶² marine tourism, offshore mariculture (aquaculture carried out in seawater),⁶³ offshore energy production, or underwater noise⁶⁴ including seismic testing.⁶⁵ Conflicting existing uses of ABNJ such as fishing, seabed mining and the laying of submarine cables⁶⁶ need to be addressed by conducting cross-sectoral environmental impact assessments.⁶⁷

The need to engage in monitoring of ongoing activities⁶⁸ can be seen as a regulatory gap to the extent that a framework needs to be put in place to implement article 205⁶⁹ of UNCLOS, or a legal gap to the extent that it is monitoring more than risks or effects of pollution.

A number of specific gaps exist with relation to environmental impact assessment, including the need to share information and data,⁷⁰ and independent verification of EIAs conducted in ABNJ.⁷¹ Trigger points for requiring EIAs need to be found, taking into account uncertainties in ABNJ that do not exist for assessments on land.⁷² Regional capacity must be developed, including for monitoring and the conduct of impact assessments.⁷³

Conservation and Management Tools, Marine Science, Technology Transfer and Capacity Building

Conservation tools and management tools: Improved conservation of marine biodiversity in ABNJ,⁷⁴ and a coordinated management approach in ABNJ,⁷⁵ is needed. Other legal or regulatory gaps include the lack, in many regions, of an organisation with a mandate for the conservation and sustainable use of marine biodiversity in ABNJ or with regulatory capacity for ocean uses not regulated elsewhere,⁷⁶ and the absence of an instrument or mechanism to ensure that modern conservation principles such as ecosystem-based management and the precautionary principle are incorporated and applied by existing global regional and sectoral bodies and that the bodies engage in co-operation and co-ordination,⁷⁷ particularly on a cross-sectoral basis. Specific issues include the governance of climate-related geo-engineering,⁷⁸ and to establish the responsibility of States for activities in ABNJ, especially concerning rogue States.⁷⁹ Also needed is improved compatibility of measures in ABNJ.⁸⁰

Cross-Sectoral Regulation: It is necessary to address potential conflicting uses of ABNJ, such as bottom fishing activities and seabed mining, and coordination among competent bodies,⁸¹ cross-sectoral co-ordination among sectoral bodies, and to address all activities impacting marine biodiversity in ABNJ, as well as issues of competing jurisdictions and uses.⁸² There needs to be co-ordination of the implementation of measures at the sectoral and regional levels.⁸³ It is necessary to prevent cumulative impacts⁸⁴ and manage user conflicts,⁸⁵ and to develop cross-sectoral integrated management approaches.⁸⁶ The accelerating impacts from various pressures as well as manage conflicting uses need to be addressed. Management measures are needed that would address possible future impacts in addition to those already taking place.⁸⁷

Marine Science: Gaps include the lack of a centralized data repository for the results of research in ABNJ,⁸⁸ the need to increase South-South cooperation, including in relation to MGR,⁸⁹ and the need for further scientific research in ABNJ to fill data gaps.⁹⁰

Technology Transfer and Capacity Building: In light of the limited implementation of Part XIV of UNCLOS on the development and transfer of marine technology, there are difficulties in achieving technology transfer.⁹¹ In light of the fact that several research initiatives are independent, there is a need for global mechanisms for technology transfer and data sharing, as well as to protect commercially confidential data and address data access, including through data protocols.⁹² Capacity-building should not be considered as a single activity but as complex series of inter-related activities. Sustainable capacity-building activities are needed.⁹³

Transparency: Transparency in oceans governance is required. The Rio+20 Outcome Document *The Future We Want* stated that “We need institutions at all levels that are effective, transparent, accountable and democratic,”⁹⁴ and for effective governance called for an institutional framework that will enhance coherence, reduce fragmentation and overlap and increase effectiveness, efficiency and transparency, while reinforcing coordination and cooperation, promote full and effective participation of all countries in decision-making processes and enhance the participation and effective engagement of civil society and other relevant stakeholders in the relevant international fora, and promote transparency and broad public participation and partnerships to implement sustainable development.⁹⁵ Some recent global initiatives related to oceans, including in relation to ABNJ, need to be more transparent and to take better account of the interests of, and the need for involvement of, developing countries.⁹⁶

¹ Advance and unedited Co-Chairs’ summary of discussions at the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond national jurisdiction (2014). At <http://www.un.org/depts/los/biodiversityworkinggroup/documents/Advance%20and%20Unedited%20BBNJ-AHWG-7.pdf> (“2014 Co-Chairs’ Summary”).

² Intersessional Workshops aimed at improving understanding of the issues and clarifying key questions as an input to the work of the Working Group in accordance with the terms of reference annexed to General Assembly resolution 67/78: Summary of proceedings prepared by the co-Chairs of the Working Group (Advance, Unedited version). At http://www.un.org/depts/los/biodiversityworkinggroup/documents/BBNJ_Worshops.pdf (“Workshops Report”).

³ Duncan Currie, Synthesis of Gaps Identified in Co-Chairs’ BBNJ Workshop. July 2013. At <http://highseasalliance.org/sites/highseasalliance.org/files/BBNJ%202013%20Gaps%20analysis%20with%20exsummary%20final%20text-2.pdf>.

⁴ Where relevant, the legal or regulatory gap is discussed in the context of the applicable agenda item for the June BBNJ meeting: the scope and parameters of an international instrument under the Convention (5(a) or the feasibility of such an international instrument (5(b)), and identified as: (i) overall objective and starting point; (ii) legal framework for an international instrument; (iii) relationship to other instruments; (iv) guiding approaches; (v) guiding principles;

(vi) scope *ratione personae*; (vii) scope *ratione loci*; (viii) scope *ratione materiae*; (ix) enabling elements and means of implementation.

⁵ The Package is to “address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology”. UNGA resolution 66/231 (2011) paragraph 167. At http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/66/231. Package in the Annex to that resolution: “The Ad Hoc Open-ended Informal Working Group, having met from 31 May to 3 June 2011 in accordance with paragraph 163 of General Assembly resolution 65/37 A of 7 December 2010, recommends that:

(a) A process be initiated, by the General Assembly, with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under the United Nations Convention on the Law of the Sea;¹

(b) This process address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology;

⁶ 2014 Co-Chairs’ para 27 and Summary – Appendix.

⁷ 2014 Co-Chairs’ Summary para. 33.

⁸ 2014 Co-Chairs’ Summary para. 34.

⁹ 2014 Co-Chairs’ Summary: Appendix : Informal Co-Chairs’ overview of issues raised during the first round of discussions on the scope, parameters and feasibility of an international instrument under the United Nations Convention on the Law of the Sea (UNCLOS) (“Appendix”).

¹⁰ 2014 Co-Chairs’ Summary – Appendix.

¹¹ 2014 Co-Chairs’ Summary para. 34.

¹² 2014 Co-Chairs’ Summary para. 34.

¹³ 2014 Co-Chairs’ Summary para. 22.

¹⁴ 2014 Co-Chairs’ Summary para. 22.

¹⁵ 2014 Co-Chairs’ Summary para. 22.

¹⁶ Workshops Report, para. 117.

¹⁷ Workshops Report, para. 117.

¹⁸ Workshops Report, para. 119. It was noted that it is challenging to conserve and sustainably use marine biodiversity in ABNJ without an overarching legally-binding mandate and framework setting out goals and purposes. Workshops Report, para. 117.

¹⁹ 2014 Co-Chairs’ Summary para. 22.

²⁰ 2014 Co-Chairs’ Summary para. 17 and Appendix.

²¹ 2014 Co-Chairs’ Summary para. 49.

²² 2014 Co-Chairs’ Summary para. 49.

²³ Workshops Report, para. 53.

²⁴ Workshops Report, para. 53.

²⁵ Workshops Report, para. 13.

²⁶ Workshops Report, paras. 15, 36 47.

²⁷ Workshops Report, para. 46.

²⁸ Workshops Report, para. 47.

²⁹ Workshops Report, para. 28.

³⁰ Workshops Report, para. 13.

³¹ Workshops Report, para. 23.

³² Workshops Report, para. 23.

³³ Workshops Report, para. 108.

³⁴ 2014 Co-Chairs' Summary para. 17.

³⁵ 2014 Co-Chairs' Summary para. 59.

³⁶ 2014 Co-Chairs' Summary: Appendix.

³⁷ Workshops Report, para. 109.

³⁸ Given the migratory nature of pelagic species, mobile MPAs should be considered. MPAs could not be enough on their own if measures to address the impacts of activities taking place outside of the areas, but which could affect the ecological integrity of the areas, are not also adopted. Workshops Report, para. 109.

³⁹ 2014 Co-Chairs' Summary para. 55.

⁴⁰ 2014 Co-Chairs' Summary: Appendix.

⁴¹ Workshops Report, para. 90. An implementing agreement to UNCLOS could be drafted so as to legally bind non-parties to regional organizations by the measures adopted by these regional organizations. Thus, at the global level, there would be an obligation to comply with the decisions of regional bodies. Workshops Report, para. 90.

⁴² Workshops Report, para. 113.

⁴³ See for instance the procedures established for vulnerable marine ecosystems (VMEs) in UNGA resolutions 61/105 and 64/72.

⁴⁴ Workshops Report, para. 76.

⁴⁵ Workshops Report, para. 76.

⁴⁶ Workshops Report, para. 76.

⁴⁷ The EBSA process aims at providing scientific information to enhance protection of specific areas, but does not have consequences in terms of policy or management. Whether an EBSA should be the basis for an MPA depends on whether an activity is causing damage to that area. An EBSA could be protected by tools other than a MPA. Conversely, the identification of a VME has consequences in terms of policy and management. Workshops Report, para. 112.

⁴⁸ Both the EBSA and VME processes are informed by the best available science and the EBSA process could play a part in the selection of VMEs. Benefits could be gained from the input of science across sectors, through a bottom-up contribution, as this would reduce duplication in research efforts and enhance coordination among policy-making processes. Workshops Report, para. 113.

⁴⁹ Workshops Report, para. 113.

⁵⁰ The need to operationalize article 206 also appears in the appendix: 2014 Co-Chairs' Summary Appendix.

⁵¹ 2014 Co-Chairs' Summary para. 63.

⁵² 2014 Co-Chairs' Summary para. 17.

⁵³ Workshops Report, para. 116.

⁵⁴ 2014 Co-Chairs' Summary paras. 63, 97 and Appendix.

⁵⁵ Workshops Report, para. 97.

⁵⁶ Workshops Report, para. 55.

⁵⁷ 2014 Co-Chairs' Summary: Appendix.

⁵⁸ 2014 Co-Chairs' Summary: Appendix.

⁵⁹ 2014 Co-Chairs' Summary: Appendix.

⁶⁰ 2014 Co-Chairs' Summary: Appendix.

⁶¹ Article 206 Assessment of Potential Effects of Activities

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

⁶² Workshops Report, para. 84.

⁶³ Workshops Report, para. 78.

⁶⁴ Workshops Report, para. 78. Several sectoral bodies addressed noise pollution in the marine environment. Convention on Migratory Species of Wild Animals (Bonn Convention) and CBD recommendations on assessments of noise pollution. Workshops Report, para. 83. Noise pollution from seabed mining in ABNJ could fall within the competence of the ISA. Para 83.

⁶⁵ Workshops Report, para. 83.

⁶⁶ Workshops Report, para. 79.

⁶⁷ Workshops Report, para. 80.

⁶⁸ 2014 Co-Chairs' Summary: Appendix.

⁶⁹ Article 204 Monitoring of The Risks or Effects of Pollution

1. States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.

2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

⁷⁰ Workshops Report, para. 81.

⁷¹ Workshops Report, para. 99.

⁷² Workshops Report, para. 100.

⁷³ Workshops Report, para. 110.

⁷⁴ Workshops Report, para. 53

⁷⁵ Workshops Report, para. 55.

⁷⁶ 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*. Page 3. Druel and Gjerde identified the following regulatory gaps: Absence of global procedures and standards for applying modern conservation tools such as marine protected areas (MPAs), environmental impact assessments (EIAs) and strategic environmental assessments (SEAs).

Absence of a global instrument or mechanism to ensure that modern conservation principles such as ecosystem-based management and the precautionary principle are incorporated and applied by existing global and regional bodies

Lack of a sufficient legal mandate for ecosystem-based management, biodiversity conservation, cooperation and coordination in sectoral bodies in ABNJ Lack of compliance and enforcement mechanisms to provide incentives for effective flag State performance.

Lack of standards, procedures and guidance for capacity-building and marine technology transfer.

They identified the following governance gaps:

Absence of mechanisms to enable coordination and cooperation within and across sectors, States, regions and institutions.

Lack of a global institution or process to oversee progress, verify compliance, adopt binding decisions and provide assistance in the application of modern conservation principles and tools.

Lack, in many regions, of organisations with a mandate for promoting conservation and sustainable use of marine biodiversity in ABNJ or with regulatory capacity for oceans uses not regulated elsewhere.

Lack of clarity regarding the applicable regime relating to the access and the utilisation of marine genetic resources (MGRs) in ABNJ.

⁷⁷ Druel and Gjerde (2013). Page 3.

⁷⁸ Workshops Report, para. 84.

⁷⁹ Workshops Report, para. 85.

⁸⁰ Workshops Report, para. 122.

⁸¹ Workshops Report, para. 115.

⁸² Workshops Report, para. 116.

⁸³ Workshops Report, para. 116.

⁸⁴ Workshops Report, para. 116.

⁸⁵ Workshops Report, para. 73.

⁸⁶ Workshops Report, para. 74.

⁸⁷ Workshops Report, para. 74.

⁸⁸ Workshops Report, para. 121.

⁸⁹ Workshops Report, para. 124.

⁹⁰ Workshops Report, para. 123.

⁹¹ Workshops Report, para. 126.

⁹² Workshops Report, para. 128.

⁹³ Workshops Report, para. 128.

⁹⁴ *The Future We Want* para. 10. UNGA resolution 66/288 (2012). At http://www.un.org/en/ga/66/resolutions.shtml?utm_source=ISHR+Publications+and+News&utm_campaign=5c82fc08a8-RSS_Email_Campaign_General_Assembly&utm_medium=email.

⁹⁵ *The Future We Want* para. 76.

⁹⁶ Workshops Report, para. 94.