



Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction

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e designation of geographical entities in this book, and the presentation of the material, do not imply the expression of any opinion whatsoever on the part of IUCN, the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU) or the Dutch Ministry of Agriculture, Nature and Food

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Executive Summary

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- agreement on measures to ensure transparency, consultation, and accountability for all major stakeholders in ocean use and conservation.

An Implementation Agreement containing these elements could significantly improve the co-ordination and integration of measures to ensure the sustainable and equitable use of resources and the conservation of biodiversity in ABNJ.

None of this affects the need for progress to still be made within regional and sectoral bodies and organisations or on much needed efforts to improve implementation of existing instruments. What is most important at this time is to raise awareness and to initiate action, to alter attitudes and to guide decision-makers to invest in achieving conservation and equitable use objectives for ABNJ.

List of Acronyms

ABNJ	areas beyond national jurisdiction
CBD	Convention on Biological Diversity
CMS	Convention on the Conservation of Migratory Species of Wild Animals
EIA	Environmental Impact Assessment
EU	European Union
FAO	United Nations Food and Agriculture Organization
IMO	International Maritime Organisation
ISA	International Seabed Authority
IUU	Illegal, unreported and unregulated (fishing)
JAMP	Joint Assessment and Monitoring Programme
MGR	Marine Genetic Resources
MPAs	Marine Protected Areas
MSR	Marine Scientific Research
NAFO	Northwest Atlantic Fisheries Organisation
NEAFC	North-East Atlantic Fisheries Commission
NGOs	Non-Governmental Organisations
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic

Introduction

1 Where we are now: The current policy and regulatory position for biodiversity in ABNJ

UNCLOS provides the legal framework for all oceans activities. Inter alia, it obliges States to protect and preserve the marine environment (including rare or fragile ecosystems), with particular requirements on co-operation between States on a global and regional basis for formulating and elaborating the necessary international rules (UNCLOS Articles 192, 194 and 197).

Currently less than 1% of the global ocean is formally protected through establishment of marine protected areas (MPAs), with almost all of these occurring under areas of national jurisdiction. Our knowledge of the species, habitats and ecosystems within ABNJ and of the e

1.2.4 Reliance on flag State jurisdiction for enforcement

Under UNCLOS 'flag States' have primary responsibility for enforcement of international rules and exclusive jurisdiction over vessels flying their flag.

Those States that do not exert effective control over ships flying their flag in accordance with UNCLOS are often referred to as 'flag of convenience' or 'flag of non-compliance' States. Some fishing vessels continue to change their flag State confirming that the use of 'flags of convenience' continues. An enforcement regime that relies 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 or nationals.

At the 6th meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) it was recognised that the *'lack of effective implementation and enforcement of flag State responsibilities is still a critical shortcoming in the effectiveness of overall oceans governance.'* This has serious consequences for not only regulation of fisheries but more broadly for the application and effectiveness of conservation measures and an ecosystem-based approach through the range of sectors operating in marine ABNJ.

Under UNFSA, flag States have responsibility to ensure that their vessels comply with regional conservation measures agreed by RFMOs, and provision is made for monitoring, compliance and enforcement. In addition a Contracting Party which is not a member of a RFMO/A is not discharged from the obligation to cooperate with the conservation measures established by the RFMO/A. In addition to its provisions for non-access to non-cooperating States Parties, the UNFSA regime is significant in that it provides for actions by member States and port States to enforce obligations on vessels of other flag States. Nevertheless, States have seen the need to further develop the role of port States in monitoring, control and enforcement.

The 1993 Food and Agriculture Organization of the United Nations (FAO) Agreement to Promote

Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) is intended to address Flag State responsibility and outlines provisions in relation to non-parties. These include the obligation on Parties to encourage non-parties to adopt laws and regulations consistent with the Agreement; to cooperate consistent with international law to ensure that non-parties do not engage in activities that undermine the effectiveness of conservation and management measures; and to exchange information regarding non-party vessels. Ratification of the Agreement has been limited.

1.2.5 Difficulties with enforcement provisions in ABNJ

ABNJ are remote which makes enforcement of activities logistically difficult and expensive for a State to manage activities of its nationals operating in an area (often) well outside its national jurisdiction. As described in the previous section, due to reliance of the compliance and enforcement regime on flag State jurisdiction, where legal measures do exist, lack of political will or a lack of adequate capacity to monitor and control the activities of flag vessels also compromises the effectiveness of enforcement in ABNJ. In addition for coastal States enforcement activities in their own offshore zones will take priority over high seas enforcement activities particularly if they have limited resources and capacity for offshore enforcement activities.

1.2.6 Limited capacities of developing countries

Developing countries often do not have sufficient resources to fulfil their obligations which, compromises the effectiveness of regional or international instruments. For example, RFBs with most members from highly developed countries in North America and Europe (eg, Northwest Atlantic Fisheries Organisation (NAFO) and Northeast Atlantic Fisheries Commission (NEAFC)), have relatively well-funded and effective enforcement programs compared to RFBs with a significant proportion of members from developing countries such as the Fishery Committee for the Eastern Central Atlantic.

1.2.7 Conclusions

There are internationally agreed measures that seek to mitigate at least some of the impacts of activities such as shipping, fisheries and dumping. Other activities have not yet been addressed at the global level or the detail of the legal regime is insufficient.

Apart from the general obligations under UNCLOS to protect and preserve the marine environment and the general obligations relating to the high seas and the Area, the mitigation and regulation of potential threats in ABNJ from activities such as the use of submarine cables and pipelines, bio-prospecting and MSR have not yet been resolved by the international community. In addition some potential activities in the oceans to mitigate climate change were not recognised when UNCLOS was initially drafted. It is likely that further activities to exploit or utilise marine resources ABNJ will be proposed in the future.

There is a need for improved implementation of, and better coordination between, current legal instruments applicable to ABNJ. Additionally, there are gaps and shortcomings in the current legal framework and in the institutional governance structures, especially in relation to the consideration and assessment of measures to conserve marine biological diversity to fully reflect the evolving understanding of ecosystem-based approaches.

There would appear to be no global instrument or organisation that is competent to consider effectively the range of threats impacting on biodiversity conservation in ABNJ in a global and cross-sectoral manner. And there would appear to be no governance structure in place to facilitate co-operation and coordination of activities across ABNJ. In the light of this, it is worth considering the utility of an additional, complementary instrument, such as an Implementation Agreement to fill these needs.

2.4 Guiding principles

An Implementation Agreement could incorporate and

to provide for assessment of cumulative impacts (EIA is discussed in more detail below).

Principle of Common but Differentiated Responsibilities: There is a common responsibility of all States to protect the marine environment in ABNJ. Nevertheless, there are real differences in the capacities and current exploitation of the resources in marine ABNJ by different States and private entities. Although the principle provides for asymmetrical rights and obligations between developed and developing countries regarding environmental standards, the critical component will be to ensure that developing countries can come into compliance with the regime over time. This will require international assistance, including financial aid and technology transfer and support through capacity building initiatives.

Polluter or user pays principle: The principle is a mechanism by which those benefiting from exploitation of a resource pay for the associated costs

are relatively new such as in relation to MGR, where the opportunity is taken to explore some emerging considerations and thinking.

(i) Implementation of an integrated ecosystem-based approach

An ecosystem-based approach is recognised as a key mechanism for biodiversity conservation and sustainable development and was highlighted in the EU proposal as one of the elements that should be included in an Implementation Agreement. Such an approach requires that impacts and cumulative effects of various activities impacting on an ecosystem are considered and managed in an integrated manner across different sectors. Implementation of the approach in ABNJ under the current legal regime is hampered by insufficient cross-sectoral coordination. Although EIA

stakeholders to consider and plan for impacts of new and emerging activities.

(ii) Strategic Environmental Assessment and Environmental Impact Assessments

SEA is a tool for the assessment of not only environmental but also social and economic impacts of projects, programmes and policies on a broad scale.

The International Association of Impact Assessment has developed performance criteria for SEA that set out the main principles of good practice. SEA could be provided for in an Implementation Agreement as a mechanism to facilitate implementation of conservation measures and to promote sustainable development.

EIA prior to approval of an activity in national jurisdictions is a fundamental component of sustainable resource use and development. The process gives scope for denying an activity or more usually determines conditions for how such an activity can be conducted to mitigate any potential impacts and to provide for monitoring and reporting.

Despite the basic requirements in UNCLOS and the CBD, there are very few international instruments that require the identification and prior assessment of potential threats from high seas activities before they are conducted. The process for prior impact assessment of seabed activities in the Area is formalised and the ISA has developed and is continuing to develop regulations and guidelines with respect to its activities. In fisheries, UNFSA Parties are required to assess the impact of fishing, other human activities and environmental factors on target stock as well as those species that depend on the target stocks or are within the same ecosystem and to adopt conservation measures where required. Special considerations are required for new or exploratory fisheries including the adoption of cautious conservation and management measures (including catch limits) and application of the precautionary approach to ensure the long-term sustainability of stocks.

The EIA provisions under the CBD and those under UNCLOS relating to pollution are quite general and open to interpretation. In ABNJ, CBD Parties are

required to assess the consequences of their actions and to conduct EIA of proposed projects under their jurisdiction or control *'likely to have significant adverse effects'* on biodiversity, and *'to introduce appropriate arrangements'* for programmes and policies likely to have significant adverse impacts on biodiversity, to ensure that environmental consequences on biodiversity *'are duly taken into account.'* The lack of clarity in Article 14 regarding the scope of the assessment, the activities to be assessed and the extent of the obligation (ie, *'as far as possible and appropriate'*) is left to the individual judgement of Parties (see [Annex 6](#) (with internal reference to Paragraph 4 of the [Annex 6](#))).

[http://www.unep.org/sea/010001.htm](#)

e ISA may also carry out MSR concerning the Area and its resources; shall promote and encourage the conduct of MSR in the Area; and shall coordinate and disseminate the results of such research and analysis when available. e ISA carries out this responsibility through workshops, seminars, and a new trust fund to promote participation by developing countries in MSR. In the high seas, MSR is a high seas freedom and may be conducted by

- 2) the extent to which there should be sharing of financial and other benefits arising from the utilisation of MGR;
- 3) Potential environmental impacts that may occur in the collection of biological samples for genetic research.

A range of possibilities exist for addressing the concerns highlighted above and stakeholder interests, including inclusion of these issues within an Implementation Agreement.

Potential inclusion of bio-prospecting within an Implementation Agreement

It is thought that bioprospecting and exploitation of MGRs in the water column falls under the regime of the high seas, whereas there is debate as to the extent that the Part XI regime for the Area applies to MGRs of the deep-sea bed. The ISA under Part XI has no direct authority to regulate the exploitation of biological resources in the Area because the term 'resources' is defined as being non-living resources. If the issue of bioprospecting is to be included within an Implementation Agreement, the potential role of the ISA in such a regime also needs to be discussed. Legally it would be possible to broaden the mandate of the ISA which would reduce the need for development of a new institutional structure for regulation of bioprospecting for MGRs sourced from the deep seabed.

Potential sharing of financial benefits

It is argued that financial and economic benefits derived from the utilisation of MGR should be shared on an equitable basis rather than kept for the benefit of the few technologically advanced States or entities that are in a position to undertake bioprospecting activities (especially of the deep seabed). A number of States have suggested that a benefit sharing regime for deep-seabed genetic resources could be included in the mandate of the ISA given the symbiotic relationship of the biodiversity with the deep seabed and its mineral resources.

If bioprospecting for MGR is considered within the scope of an Implementation Agreement, the interests of developing countries regarding the sharing of

financial benefits arising from the exploitation and utilisation of such resources should be considered, while recognizing the need to also stimulate investment and innovation in scientific research. Under a financial benefit sharing system, it might be necessary to draw a distinction between 'pure' scientific research and applied scientific research (bioprospecting) activities and this distinction may prove difficult. Another option would be to simply provide for financial or profit-sharing arrangements if and when commercial products are ultimately developed from bioprospecting activities from ABNJ.

In this context, the International Treaty on Plant Genetic Resources for Food and Agriculture, in particular through its Standard Material Transfer Agreement provides an example of benefit sharing system that, inter alia, provides for payment into an international fund to help farmers to conserve and sustainably utilize the source material. Equally, if it is possible to trace the origin of genetic material to ABNJ, applicable instruments might be the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure and Regulations. Moreover, a condition of the grant of a patent could be that a percentage of royalties from profitable

States to relevant technology (under fair and reasonable terms and conditions) and providing opportunities for developing States with regards to training so that they can fully participate in activities.

Management of potential impacts of bioprospecting

Potential adverse environmental impacts from bioprospecting could be addressed through:

- (a) prior impact assessment, regardless of differences between bioprospecting and 'pure' scientific research, or
- (b) self-regulation by industry and research-associated groups. An example is the Code of practice for scientific activities at and near hydrothermal vents developed by the Inter-Ridge community of marine researchers, which could contribute to minimizing environmental impacts. This is a voluntary instrument only at this stage but such initiatives could inform development of regulations.

2.6 Conclusion

The previous sections have outlined what an Implementation Agreement might look like with a focus on its role as a co-ordinating and co-operative mechanism, which by embodying principles, processes and tools such as precaution, impact assessment and ecosystem management could also act as a catalyst for improvements generally in oceans governance.

However, if this role and focus is to be successful an effective relationship will need to be described with other bodies. This will also require decisions to be made as to the most appropriate institutional arrangements - whether there is a need for a global body to administer an Implementation Agreement or whether the Agreement will be implemented through existing arrangements. This is the subject matter of the next part.

3 Institutional arrangements and relationships between an implementation agreement and other bodies

3.1 Overview

The key to implementing an ecosystem-based approach is horizontal and vertical integration and coherency of the institutional framework. The added value of an Implementation Agreement could be to reduce the fragmentation and sectoral approach that currently exists by formalising coordination and collaboration between key organisations and instruments. For example, co-operation with specific instruments or organisations such as the CBD or FAO could be explicitly stated within the text of an Agreement. Co-operation will be required at various levels (global-global, global-regional and regional-regional interactions) and an Implementation Agreement would need to have provisions regarding such relationships.

Apart from ensuring that actions under an Implementation Agreement are more efficient and effective, co-ordination ensures that those States which may not be party to the UNCLOS regime would still be informed, involved and contributing to the conservation and protection of the marine environment in ABNJ through other mechanisms.

There would also need to be consistency and coherence regarding regional agreements that may be developed to implement the objectives of an Implementation Agreement at the regional level.

States might need to take into account the relevant provisions of an Implementation Agreement when interpreting or applying other treaties to which they are parties or when entering into other international obligations. An Implementation Agreement, moreover, as per UNFSA could be open to all States without the necessity to become a party to UNCLOS.

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enhanced protection: implementation of management measures would then be conducted by sectoral organisations. Requirements for reporting to a global body on outcomes of conservation and area-based measures could provide a useful mechanism for sharing of information and experiences between regions.

Regional delivery

In practice international marine environment agreements are generally implemented by States or groups of States at a regional level and this could be the likely situation for an Implementation Agreement.

is could work by the institutional mechanism under an Agreement being able to endorse biodiversity conservation measures recommended by regional bodies for ABNJ. is would assist in securing widespread commitment to biodiversity conservation measures in ABNJ. It could be supported by regional agreements and institutions responsible for the implementation of conservation and sustainable use objectives, taking into account the region-specific issues and the different environments, stakeholders and activities. Regional arrangements could apply 'model agreements' to maintain some levels of consistency between regions and regional organisations could undergo independent performance assessments.

Another aspect to regional delivery is the potential role for the regional seas arrangements. The Regional Seas Programme was established in 1974 to encourage sustainable management and use of the marine environment by engaging neighbouring countries in comprehensive and specific actions to protect their shared marine environment. More than 140 countries participate in 13 Regional Seas programmes established under the auspices of the United Nations Environment Programme (UNEP), with 6 of these directly administered by UNEP. There are also five independent Regional Seas Conventions, which participate in the global meetings of the Programme to share experiences and exchange policy advice.

Four of the regional seas arrangements/conventions have high seas areas, and there is clear scope for these to assist in the work of an Implementation Agreement. Moreover, it is recognized that there should be strengthened integration, coordination and cooperation between RFBs and regional seas arrangements (as well

as with other international and fisheries organizations).

The regional seas arrangements may be able to provide a forum for coordination and integration of the activities of not just fisheries bodies but also other sectors as well. Potentially where current regional seas arrangements and regional fisheries jurisdictions overlap, greater collaboration could be formalised under the auspices of an Implementation Agreement.

UNEP could be given the mandate to work to establish new organisations in areas where there are gaps in geographic coverage to manage biodiversity conservation.

Scientific and technical input:

Scientific monitoring, assessment and reporting are required to inform decision-making and to assess the effectiveness of conservation measures. Currently such scientific activities are undertaken through a disparate range of instruments at a range of levels but usually with a focus on sector-based objectives and implementation. As highlighted above, existing institutional arrangements should be used wherever possible but in some cases establishment of new bodies may be required. For example the Intergovernmental Oceanographic Commission (IOC), part of the United Nations Educational, Scientific and Cultural Organization (UNESCO), could potentially contribute regarding international scientific cooperation, scientific monitoring, scientific information and scientific issues.

The CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) is also a possible option for a scientific/technical advisory body.

The functions of a Scientific and Technical body or committee may include: review of EIA (if included in an Agreement); further work on how to make operational ecosystem-based approaches; and promoting international collaboration and exchange of information on MSR activities and findings in ABNJ. Its key roles could be to guide research where it is lacking; review conservation measures and minimum standards; review environmental impact statements; collate and synthesise scientific advice from relevant bodies; and to determine how scientific and technical information can be applied to progress the objectives of an Implementation Agreement. The committee could advise parties or report to an existing or new institution.

