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The Scores at Half Time

An update on the international discussions on
the governance of marine biodiversity in areas
beyond national jurisdiction

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* *The last meeting of the UN Working Group on marine biological diversity beyond areas of national jurisdiction took place during the group stages of the 2014 World Cup, resulting in a number of light-hearted exchanges amongst delegations.*

Executive Summary

One of the key questions in global environmental policy currently discussed at the United Nations is whether or not States should start negotiations for a new international agreement under the United Nations Convention on the Law of the Sea (an “Implementing Agreement”) on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ). These areas are often simply referred to as “high seas” and cover around half of the Planet’s surface. A strong majority of States now support the opening of negotiations for such an agreement and agree that these negotiations should be based on the “Package Deal” agreed in 2011, covering (1) marine genetic resources, (2) area-based management tools, including marine protected areas; (3) environmental impact assessments; and (4) capacity-building and the transfer of marine technology. There are however controversies about whether an UNCLOS Implementing Agreement should fill only legal gaps (e.g. on access and benefit sharing, ABS), or have a broader vision, e.g. by enumerating guiding principles for the management of ABNJ, strengthening existing agreements and institutional arrangements, and enhancing co-operation and coordination. Supportive States and civil society will need to continue to advocate for a decision by the UNGA to open the negotiations for an ambitious UNCLOS Implementing Agreement between now and the end of the 69th session in September 2015.

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Introduction

Marine areas beyond national jurisdiction (ABNJ) represent around half of the Planet's surface and a significant amount of its biodiversity. Over the past decades, the international community has become increasingly cognisant of the growing threats to ABNJ. To address this issue, the United Nations General Assembly (UNGA) created an Ad-Hoc Open-ended Informal Working Group ("BBNJ Working Group")¹ to engage in discussions on the conservation and sustainable use of marine biodiversity in ABNJ.

While the Working Group's purpose was originally fairly broad (identify: past and present activities related to BBNJ; scientific, technical, economic, legal, environmental, socio-economic, and other aspects of the issue; questions and issues that require more background studies; and options for international cooperation for conserving and sustainably using BBNJ),² the focus since the commencement of discussions in 2006 has mainly been on gaps in the current international framework and whether these necessitate the adoption of a new instrument. 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 (UNCLOSIA).

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. This decision making process spans three meetings of the BBNJ Working Group, specifically convened to discuss "the scope, parameters and feasibility of an international instrument under UNCLOS".

Two of these meetings have already taken place, in April 1–4 and June 16–19 2014. This paper presents the current status of the discussions leading up to the decisive third meeting in January 2015, and highlights the remaining challenges on the long and winding road towards the conservation and sustainable use of marine biodiversity in ABNJ.³

¹ *The acronym comes from the full title of the working group, "The 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".*

² *General Assembly resolution 59/24, Oceans and the Law of the Sea, A/RES/59/24 (04 February 2005).*

³ *Druel E, Rochette J, Billé R, Chiarolla C, (2013), A long and winding road. International discussions on the governance of marine biodiversity in areas beyond national jurisdiction, IDDRI, Study 7/13, 41p.*

1. A solid coalition for the opening of the negotiations

With only a few States and regional groupings actively engaged in prior discussions of the BBNJ Working Group, international support for an UNCLOS IA blossomed at the most recent meeting. It is now clear that a strong majority of States support the opening of negotiations.

The European Union (EU) and the G77 and China, as leading proponents of an IA, continue to argue in favour of an IA to UNCLOS. The EU noted that the April meeting already demonstrated the political will of the majority, and argued that two extant IAs demonstrated the dynamic character of UNCLOS and the feasibility of a new IA.⁴ The G77 and China (represented by Bolivia) reiterated that the status quo is not an acceptable way forward and that an IA is essential for the sustainable use of marine resources.

This position is now also vocally supported by the “new entrants” to the BBNJ discussions, i.e. the States and regional groups that had previously remained silent during the BBNJ discussions. Liberia, speaking on behalf of the African Union, noted that current gaps in the legal regime for ABNJ, and particularly on access and benefit sharing (ABS), mean that technologically advanced States can exploit marine resources without concomitant responsibility to protect the environment. Trinidad and Tobago, speaking on behalf of the Caribbean Community (CARICOM), noted that an IA is the only feasible solution for ensuring that developing States benefit from conservation and sustainable use of resources, including marine genetic resources. Papua New Guinea, speaking for the Pacific States, called for urgent actions to conserve marine biodiversity in ABNJ and expressed its support for negotiating a new IA.

A few States, however, remain reluctant to negotiate a new IA for a variety of reasons. The United States

(US) maintains that the need for such an agreement has not yet been proven and argues that marine genetic resources in ABNJ fall under the freedoms of the high seas regime. The US has engaged strongly in the debate regarding the need to respect the mandates of existing organisations and argues that a new agreement would add little value. Canada also questions the added value of a new IA and its interaction with existing arrangements. Russia does not believe a global IA will meld with existing regional approaches, and argues for negotiations that are limited to clear legal gaps and consensus issues. In its view, this excludes environmental impact assessments (EIA) and fisheries from the discussions. Iceland, Japan and Korea expressed similar opinions.

Despite continued reticence, some of these States appeared to be more open during the June meeting. Norway in particular, while taking a firm stance on respecting the mandate of existing organisations, showed willingness to advance the negotiations in other respects.

The openness and transparency at the previous two meetings of the BBNJ Working Group is a stark contrast to earlier meetings, which were largely conducted behind closed doors and excluded civil society groups, the scientific community and even representatives from international organisations and competent management bodies. In April and June, statements from observer organisations were welcomed and provided valuable input into the debate and helped to clarify points of discussion.

The positive outcomes of the June BBNJ Working Group meeting evidences the value of broad engagement of previously silent States, particularly developing countries, as well as civil society.

⁴I.e. the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) and the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

2. Emerging consensus and ongoing debates

The June meeting saw some convergence on an increasing number of issues. There was broad support for maintaining the deadline set at Rio+20 and avoiding the prolongation of the current process. In terms of negotiating an eventual IA, States agree that UNCLOS provides the authority for such an agreement and that it should form the basis of negotiations. States also agree that the possible future negotiations should be based on the Package Deal agreed in 2011 covering (i) marine genetic resources, including questions on the sharing of benefits; (ii) measures such as area-based management tools, including marine protected areas; (iii) environmental impact assessments; and (iv) capacity-building and the transfer of marine technology.⁵

There is also an emerging consensus that the debate regarding the legal principle applicable to marine genetic resources from the international seabed Area, i.e. the choice between common heritage of mankind and freedom of the high seas, should be suspended in favour of focussing on the equitable and practical realities of enhancing access and benefit sharing of marine genetic resources from the Area and the high seas as the two realms are inextricably interconnected from a biological and ecological perspective. The International Seabed Authority (ISA) could serve as a model or could itself be given an expanded mandate, as suggested by a number of States.

Beyond these elements of convergence, a number of debates on substantive issues intensified and demonstrated the likely 'battle lines' of future negotiations. Firstly, States disagree on whether an IA should fill only legal gaps or whether it should have a broader vision. Some delegations argue that filling discrete legal gaps is the only legitimate role for an IA, while others argue for a much broader role in enumerat-

ing guiding principles for the management of ABNJ, strengthening existing agreements and institutional arrangements, enhancing cooperation and coordination, and catalysing the political will to better address important regulatory and governance gaps. The 1995 United Nations Fish Stocks Agreement on straddling and highly migratory fish stocks (UNFSA), another implementing agreement to UNCLOS, serves as an example of how these functions might be incorporated, but this time with the goal of integrating biodiversity considerations into ABNJ management.

All delegations agree that an IA should respect the mandates of existing organisations, such as the International Maritime Organisation (IMO) for shipping, Regional Fisheries Management Organisations (RFMOs) for fisheries and the ISA for deep sea mining. However the question of what this means in practice has proved particularly divisive and will likely continue to be a point of significant debate. In this context, much attention was given to the role of regional organisations (i.e. RFMOs and Regional Seas programmes). Some delegations, most notably the EU, the G77 and China, and New Zealand, have argued that an IA would act as a mechanism to enhance cooperation and coordination by, for example, advising existing institutions, communicating information and formulating recommendations. The unstated concern is that some of the sectoral organisations have not done enough to integrate biodiversity into their decision-making processes. Most delegations feel that mechanisms for enhancing cooperation and coordination could be best determined in the course of negotiations. On the other hand, delegations such as the US and Russia consider that a new IA with a strong mandate for proactive intervention would inevitably encroach on other organisations' mandates and would therefore be unacceptable, while also ar-

⁵ See: Document A/66/119, Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, and United National General Assembly, Resolution 66/231, Oceans and the law of the sea, 5 April 2012.

guing that a new body with only weak powers for coordinating activity would not add value and would therefore not be worth the lengthy negotiation process necessary for its establishment. IUCN sought to clarify by saying that States parties could be called upon, as part of any new agreement, to strengthen existing institutions to reflect priorities and principles spelled out in such agreement. For example, the UNFSA spelled out ways for States to implement their duty to cooperate with respect to conservation and sustainable use of highly migratory and straddling fish stocks. At that same time, the UNFSA also elaborated standards to guide the performance of RFMOs that were left to States Parties to implement within and through those organisations.

This debate has been particularly pronounced in relation to fisheries. A number of fishing States argued strongly that there is no place for fisheries in a new IA as this is already covered by the UNFSA and RFMOs and that these arrangements already provide sufficient protection of marine biodiversity in ABNJ. Conversely, many States argue that as fish form part of the biodiversity of the high seas, and as fishing impacts on biodiversity are currently the greatest threats, fisheries management should be implicated by any agreement on high seas biodiversity. In a similar vein, the role of a new IA in implementing and enforcing EIA and MPAs was discussed. While some States questioned how an IA could add value to existing agreements, others argued that an IA could provide a truly ecosystem-based approach to these processes. An IA could have a strong cooperation and coordination role, as well as providing guiding principles, oversight and improving enforcement. As such, it could help to integrate biodiversity conservation and sustainable use into the activities of sectoral organisations, without undermining their sectoral mandates.

The distinction between the regional and global approaches to oceans governance was also implicated by many of these discussions. Some States consider that the global nature of an IA is in conflict with the regional nature of existing governance arrangements. Other States do not see a need to choose between approaches, but rather see them as complementary elements of a comprehensive governance

framework. For example, the EU spoke of a collaborative approach, rather than a strict regional/global distinction. Norway underlined the good examples at a regional level that could be a starting point for a possible agreement, e.g. in the North-East Atlantic through complementary action by the North East Atlantic Fisheries Commission (NEAFC) and the OSPAR Commission. These States envisage that an IA may stimulate coordination between regional and global bodies, incentivise States to participate in regional efforts, and provide for global endorsement of regional MPA activities.

A further question exists as to the eventual institutional arrangements of an IA, in particular whether the IA will require its own institutional structure to achieve the goal of enhancing cooperation and coordination, such as a new international body, or whether a Conference of Parties might provide more flexibility. Expanding the mandate of the ISA has been mentioned as a possibility. Some States noted that existing regional organisations, such as the OSPAR Commission, could be given a stronger role through an IA to help coordinate activities at a regional level. Other States and organisations pointed out that a Conference of Parties would be the logical nexus for coordination and cooperation and that global level endorsement would be needed to secure global level cooperation on MPAs. Some States argued that parties to a possible new agreement could for instance be obliged to cooperate to achieve the objective of a new agreement through their participation in relevant bodies such as IMO, RFMOs, Regional Seas programmes and the ISA.

Finally, there is a practical issue that arose at the June meeting. A number of States highlighted the fact that negotiations should not commence prematurely during the three initial meetings, but rather that States should focus on the broad scope and parameters of any new international instrument under UNCLOS as a prelude to launching negotiations in 2015.⁶ Such States favour beginning the negotiations with all issues on the table, while others, which favour 'marching orders', plead for commencing negotiations with a narrow focus, specifically on legal gaps and excluding aspects such as fisheries.

⁶ *Druel E, Rochette J, Billé R, Chiarolla C, (2013), A long and winding road. International discussions on the governance of marine biodiversity in areas beyond national jurisdiction, IDDRI, Study 7/13, 41p.*

3. What's next?

The Co-Chairs will now elaborate a “convergence report”, highlighting the main elements of agreement that have emerged in the Working Group. States are invited to make further additional written statements, which will be discussed during the next meeting (20–23 January 2015).

This will likely be the final meeting as the majority of States expressed their reluctance to hold an additional meeting. There will therefore be no ‘extra time’ and the Working Group will have to decide, by consensus, whether or not to recommend to the UNGA that negotiations be opened. In the event that no consensus is reached, the Co-Chairs could instead submit a statement to the UNGA summarising the different positions and issues under consideration. A decision could then be adopted in the UNGA during its 69th session with a majority vote.

In the meantime, it is crucial for delegations to continue informal meetings and identify possible elements of convergence on such a recommendation to the UNGA. Civil society can play a critical role in mobilising States that are yet to be involved in the discussions, galvanising support, informing the substantive debate, and calling for an ambitious approach to any future agreement.

Finally, it is worth noting that an UNCLOS IA would not supplant the existing role of regional governance mechanisms and institutions; it is not a question of “either/or”.⁷ Existing instruments must be implemented and reinforced as any new regime for ABNJ will depend on strong and well-coordinated action of competent management bodies at different levels. The sectoral⁸ and regional⁹ organisations with mandates in ABNJ should therefore not wait for the UNGA decision before taking ambitious actions for the conservation and sustainable use of marine biodiversity in ABNJ. ■

⁷ Ardron J., Druel E., Gjerde K., Houghton K., Rochette J., Unger S., (2013), *Advancing governance of the high seas*, IDDRI-IASS, Policy Brief N°6/13, 8p.

⁸ Ardron JA, Rayfuse R, Gjerde K, Warner R. 2014. *The sustainable use and conservation of biodiversity in ABNJ: what can be achieved using existing international agreements?* *Marine Policy* 49: 98–108.

⁹ Rochette J., Unger S., Herr D., Johnson D., Nakamura T., Packeiser T., Proelss A., Visbeck M., Wright A., Cebrian D., (2014), “The regional approach to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction”, *Marine Policy, Special Issue on Advancing Governance of areas beyond national jurisdiction*, 49, pp.109–117.



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