FIELD
Foundation for International Environmental Law and Development

PROTECTING THE MARINE ENVIRONMENT IN AREAS BEYOND NATIONAL JURISDICTION

A guide to the legal framework for conservation and management of biodiversity in marine areas beyond national jurisdiction

April 2012

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About FIELD
FIELD is a team of international environmental lawyers based in London. FIELD believes strongly that creating effective international environmental law is an essential part of solving global environmental problems.

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ACRONYMS AND ABBREVIATIONS

ABNJ	Areas beyond national jurisdiction
Antarctic Treaty	*Antarctic Treaty* (1959)
APEI	Area of Particular Environmental Interest
Barcelona Convention	*Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean* (1976)
Bonn Convention	*Convention on the Conservation of Migratory Species of Wild Animals* (1979) – see also 'CMS', below
CBD	*Convention on Biological Diversity* (1992)
CBDR	Common but differentiated responsibilities
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CLCS	Commission on the Limits of the Continental Shelf
CMS	*Convention on the Conservation of Migratory Species of Wild Animals* (1979) – see also 'Bonn Convention', above
EBSA	Ecologically or Biologically Significant Area
EEZ	Exclusive economic zone
EIA	Environmental impact assessment
FAO	Food and Agricultural Organization
Fish Stocks Agreement	*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* (1995)
GEF	Global Environmental Facility
ICES	International Council for the Exploration of the Sea
IMO	International Maritime Organization
IOC	Intergovernmental Oceanographic Commission
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
IWC	International Whaling Commission
London Convention	*Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (1972)
MARPOL	*International Convention for the Prevention of Pollution*

73/78	*from Ships* (1973) *as modified by the Protocol of 1978*
MEA	Multilateral environmental agreement
MPA	Marine protected area
NEAFC	North-East Atlantic Fisheries Commission
NGO	Non-governmental organisation
OSPAR Convention	*Convention for the Protection of the Marine Environment of the North-East Atlantic* (1992)
Part XI Agreement	*Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*
PSSA	Particularly Sensitive Sea Area
RFMO	Regional fisheries management organisation
Rio Declaration	*Declaration of the UN Conference on Environment and Development* (1992)
RSO	Regional seas organisation
SEA	Strategic environmental assessment
SPAMI	Specially Protected Areas of Mediterranean Interest
UNCLOS	*United Nations Convention on the Law of the Sea* (1982)
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNICPOLOS	United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
VME	Vulnerable Marine Ecosystem
Working Group	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
WSSD	World Summit on Sustainable Development

1 WHY THIS GUIDE?

Oceans mean life

The oceans cover more than 70 per cent of the Earth's surface and are estimated to contain more than 90 per cent of its living biomass. Ocean ecosystems are home to a major part of the biodiversity of this planet and support all life. They provide oxygen, rain and food, manage vast amounts of human pollutants, buffer the weather, and regulate global temperatures. But despite the oceans' great natural capacity for self-purification, their functioning, health and productivity are severely threatened by human activities.

Oceans under threat

The unsustainable exploitation of the oceans' living natural resources has brought many stocks to the brink of collapse, with over 80 per cent of the world's fish stocks either fully exploited or overexploited.[1] Destructive fishing practices and the increase in illegal, unreported and unregulated (IUU) fishing severely threaten not only marine biodiversity, but also the fishing industry itself – upon which the livelihoods of some 540 million people, or eight per cent of the world's population, rely.

The exploitation of other natural resources such as hydrocarbons and minerals, together with the laying of pipelines and cables, has damaged vulnerable ecosystems. Pollution from both land-based and marine-based sources continues to increase with the industrialisation and globalisation of world trade. In addition, the oceans bear the accelerating affects of anthropogenic climate change, acting as a huge carbon sink that absorbs around a third of global anthropogenic CO_2 emissions every year. This is leading towards an increase in the warming of the oceans, acidification and anoxia (total oxygen depletion), further undermining marine resilience. Stresses on the world's oceans are greater than ever before and we are at high risk of entering a phase of accelerated extinction of marine species.

Areas beyond national jurisdiction

'Areas beyond national jurisdiction' (ABNJ) cover some 64 per cent of the surface of our oceans and provide over 90 per cent of its volume. They comprise the water column beyond the 200 nautical mile exclusive economic zone (EEZ) of coastal states (or its territorial sea if a coastal state has not exercised its right to an EEZ), i.e., the high seas, but also include areas of the deep seabed, ocean floor and subsoil that are not subject to national jurisdiction (defined as 'the Area' by the *United Nations Convention on the Law of the Sea*).

Marine protected areas

The establishment of marine protected areas (MPAs), where human activities are severely limited, is an important measure for protecting and conserving the oceans. Marine species depend on complex relationships with other species and their habitats; deep sea habitats such as seamounts, cold-water coral formations and hydrothermal vents hold large reservoirs of unknown biodiversity and support highly migratory fish stocks and marine mammals. In ABNJ – where often little is known about the specific features and functioning of ecosystems – MPAs can be an important safeguard against irreversible biodiversity loss. Here MPAs can provide a mechanism for protecting not just what is known at present to be important, but what may turn out to be important in the future.

[1] For further information on the state of the oceans see for example: http://www.stateoftheocean.org, http://www.whoi.edu and the annual FAO reports at: http://www.fao.org/fishery/sofia/en.

Working Group

On 3 June 2011, the United Nation's 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 (the 'Working Group'), recommended that the UN General Assembly (UNGA) initiate a process to ensure that issues relating to the legal framework for the conservation and sustainable use of marine biodiversity in ABNJ are addressed effectively.[2]

Multilateral agreement

This was to be achieved 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* (UNCLOS). The Working Group recommended that the process to address biodiversity issues in ABNJ should adopt a 'package approach', incorporating issues relating to marine genetic resources (including benefit sharing); area-based management tools, including MPAs; environmental impact assessments (EIAs); capacity building; and the transfer of marine technology.

This guide

This guide seeks to help government negotiators, representatives of non-governmental organisations (NGOs), and other policymakers involved in environmental protection efforts at the international level to utilise the political momentum created by this recommendation. It aims to facilitate a better understanding of the legal context, relevant policy processes, and possible solutions for establishing MPAs in ABNJ – with a particular focus on the creation of a new multilateral agreement under UNCLOS.

[2] Adopted by the UN General Assembly in the *Resolution on Oceans and the Law of the Sea* 24 December 2011. Available at: http://www.un.org/depts/los/general_assembly/general_assembly_resolutions.htm

2 AREAS BEYOND NATIONAL JURISDICTION

Maritime zones

UNCLOS provides an area-based legal regime for the world's oceans. Certain areas are beyond national jurisdiction – the high seas and 'the Area'. Coastal states exercise sovereignty over a belt of water adjacent to their territory not exceeding 12 nautical miles. With respect to natural resources, certain economic activities, marine scientific research and environmental protection, they also enjoy sovereign rights and sole jurisdiction on their continental shelf and within a 200 nautical mile EEZ. In a zone within the EEZ and contiguous to the territorial sea, a coastal state has additional rights to enforce its customs, fiscal, immigration, and sanitary laws and regulations.

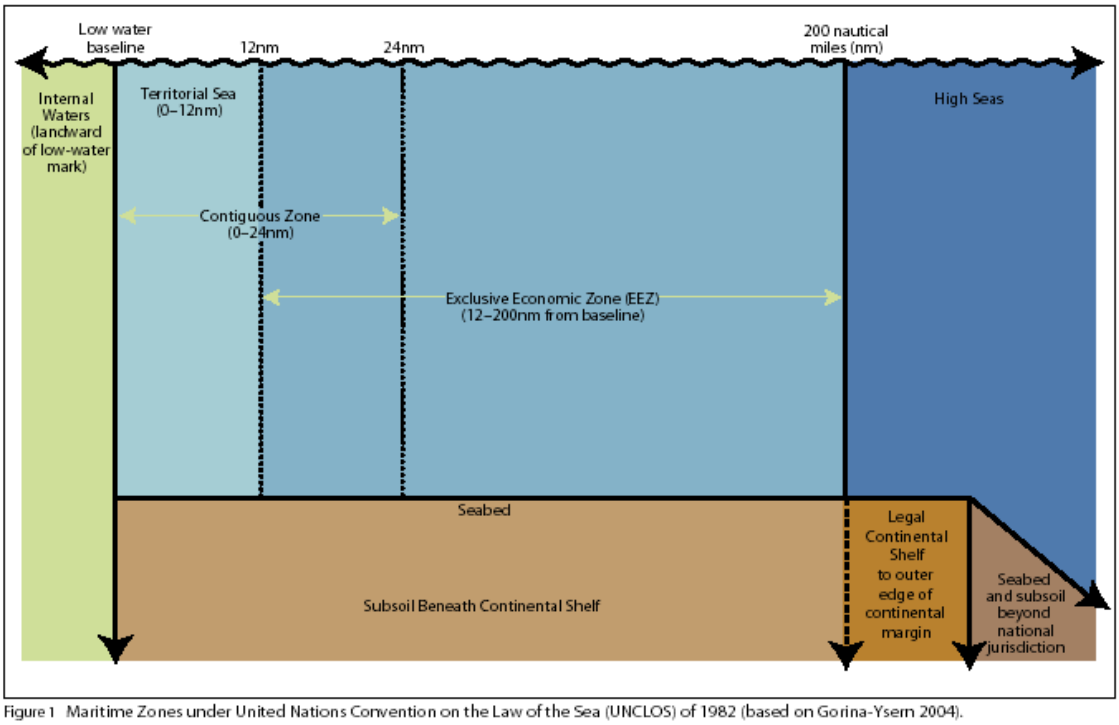


Figure 1 Maritime Zones under United Nations Convention on the Law of the Sea (UNCLOS) of 1982 (based on Gorina-Ysern 2004).

High seas

The water column beyond an EEZ, or the territorial sea where no state claims an EEZ, is the 'high seas'. On the high seas, representing approximately 64 per cent of the ocean's surface, all states – under conditions laid down by UNCLOS and other rules of international law – enjoy the freedom of navigation, over-flight, the laying of submarine cables and pipelines, the construction of artificial islands and other installations, fishing, and scientific research ('high seas freedoms'). In principle, marine resources located in the high seas are treated as a common property resource.

Vessels on the high seas

Ships sailing the high seas are generally under the jurisdiction of the state whose flag they fly. They are required to comply with the laws and safety standards that the flag state enforces. Many fishing nations require fishing vessels to obtain an authorisation, licence or permit before engaging in fishing on the high seas. Some flag states impose gear restrictions, prohibit fishing techniques, or do not allow vessels flying their flags to fish in vulnerable areas of the high seas. Flag states can also allow other states to stop, board, search or arrest its vessels through international agreements or on an ad hoc basis.

The Area

'The Area', as defined by UNCLOS, comprises the deep seabed, ocean floor and subsoil beyond the limits of national jurisdiction. Accordingly, the landward edge of the Area can start at the end of the 200 nautical miles EEZ measured from the coastal state's baseline, or at the outer edge of its legally defined continental shelf (not exceeding certain specified limitations). Under UNCLOS, the Area and its mineral resources are considered to be the common heritage of mankind. This means that no state can claim sovereignty over the Area or its mineral resources. All resource exploration and exploitation activities in the Area are to be carried out for the benefit of mankind as a whole.

International Seabed Authority

The International Seabed Authority (ISA) was established under UNCLOS to organise and control all mineral-related activities in the Area. It is also to ensure that the benefits from those activities are shared equitably, taking into particular consideration the interests and needs of developing states. ISA has the responsibility of ensuring that effective measures are taken in connection with mining and exploration activities, including effective protection of the marine environment. To this end, ISA must adopt appropriate rules and regulations on the prevention, reduction and control of pollution and the protection of natural resources, flora and fauna. These rules and regulations are binding on all parties to UNCLOS.[3]

Continental shelf

According to UNCLOS, the continental shelf of a coastal state comprises the submerged prolongation of the land territory of the coastal state to the outer edge of the continental margin, or to a distance of 200 nautical miles. In this area the coastal state enjoys sovereign rights to explore and exploit all natural resources. UNCLOS also allows states to establish the outer limits of their continental shelf where it extends beyond 200 nautical miles (subject to specified limitations).

Commission on the Limits of the Continental Shelf

To facilitate the process of delineating the outer limits of the continental shelf extensions, the Commission on the Limits of the Continental Shelf ('the Commission', or CLCS) was established under UNCLOS. It makes recommendations and provides scientific and technical advice. The Commission is currently considering submissions from a number of states regarding the extent of their continental shelf. Until these decisions are made, there is uncertainty as to whether certain areas of the deep seabed form part of the Area or fall within the jurisdiction of the coastal states.[4]

Areas beyond national jurisdiction

'Areas beyond national jurisdiction' (ABNJ) comprise the high seas and the Area. ABNJ cover some 64 per cent of the surface of our oceans and provide over 90 per cent of its volume. The pelagic fishing environments of ABNJ support highly migratory fish stocks and are essential to marine mammals such as whales and dolphins. Deep sea habitats in ABNJ, such as seamounts, cold-water coral formations and hydrothermal vents, are home to the largest reservoir of biodiversity on the planet. Yet because of their remoteness and the technical difficulties in gathering data, little is known about ABNJ. It has been estimated that to date scientists have only explored five per cent of ABNJ, and hardly any of it in significant detail.[5]

[3] For further information on the ISA see: http://www.isa.org.jm
[4] For further information on the Commission see: http://www.un.org/depts/los/clcs_new/clcs_home.htm
[5] Henning von Nordheim, Jochen C. Krause and Katharina Maschner (eds), *Progress in Marine Conservation in Europe 2009*, BfN-Skripten 287 (2011) available at: www.bfn.de/habitatmare/de/downloads/PMCE_2009.pdf

Severe anthropogenic impacts on ABNJ can result from the extraction of natural resources, e.g., the use of unsustainable fishing practices (such as bottom trawling at hitherto unprecedented depths, or fishing on spawning aggregations of slow-growing species), or future hydrocarbon and mineral extraction from the deep seabed. For the first time, technology is turning the possibility of the extraction of polymetallic nodules, sulphides and cobalt crusts from the deep seabed into a commercially-viable option. In addition, all areas of the oceans are being adversely affected by the continued rise in anthropogenic greenhouse gas emissions, leading to warming, acidification and the expansion of oxygen-depleted zones in ABNJ.

3 MARINE PROTECTED AREAS

MPA

The term 'marine protected area' (MPA) is used to describe a wide range of marine areas where the environment enjoys a higher degree of protection than in the surrounding area. At present, around 5,800 MPAs cover approximately 4.2 million km^2, or less than 1.5 per cent of the world's oceans. Less than a third of these MPAs have been designated as 'no take' areas, where no fishing or other natural resource extraction is allowed. In comparison, around 12 per cent of the earth's land surface is subject to nature conservation regimes. The vast majority of MPAs are also located along the coasts, whilst less than 0.5 per cent of ABNJ are currently protected.[6]

The establishment of MPAs is an important measure for the protection and conservation of a marine ecosystem, habitat or species. MPAs can enhance the protection of rare or vulnerable habitats and species or historical and cultural sites. Areas where extractive uses and other significant human pressures are removed have also shown the ability to recover from damage. Typical restrictions in MPAs relate to fishing seasons and limitations on the use of equipment. They may also include restrictions on oil and gas extraction, navigation and construction, the use of sonar, or tourist access.

Networks of MPAs

It is impossible, however, to fence off the sea and MPAs are still affected by activities in adjacent areas. Therefore ecologically-coherent networks of MPAs and wider measures controlling the use of the sea as a whole are also crucial. The World Summit on Sustainable Development (WSSD) in Johannesburg, 2002, called for the creation of a global network of representative MPAs by 2012 (the 'Plan of Implementation of the World Summit on Sustainable Development'). Equally, the Convention on Biological Diversity (CBD) aims to ensure that ten per cent of coastal and marine areas are conserved through ecologically-representative and connected systems of MPAs by 2020 (the 'Aichi MPA Target').

MPAs in ABNJ

Individual marine species depend on complex relationships with the habitats in which they live and the other species living in them. Accordingly, marine protection efforts have increasingly focused on an ecosystem approach (rather than on individual species). This is particularly relevant for ABNJ as little is known about the specific features and functioning of these ecosystems – whether in the high seas or the deep seabed. In the face of this uncertainty, it is sensible to use the precautionary principle to safeguard against potentially irreversible biodiversity loss.

Certain species of fish and mammals are highly migratory and some may spend their entire lives in ABNJ. MPAs in these areas are essential to protect these species throughout their range and have been shown to have wider positive effects on the recovery of fish stocks. Deep seabed habitats – including hydrothermal vents, seamounts and cold-water corals – form particularly vulnerable ecosystems that require robust protection regimes. In addition, MPAs are needed to act as scientific reference points to measure the anthropogenic effects on our oceans and, if designated in sufficiently large areas, are expected to have a significant role to play in preventing climate change.

[6] See the World Database on Marine Protected Areas at: http://wdpa-marine.org

Marine spatial planning

The creation of MPAs is one measure that might result from a wider spatial planning process for the management of entire marine areas. Other measures may include the designation of shipping lanes and setting aside tracts for laying undersea cables. Marine spatial planning brings together multiple users of the ocean (e.g., energy, industry, government, conservation and recreation) to make informed and coordinated decisions about how to use marine resources sustainably. It uses maps to create a more comprehensive picture of a marine area – identifying where and how an ocean area is being used and what natural resources and habitats exist. Its principal objective is to plan the equitable and sustainable use of our oceans as a whole, and balance ecological, economic and social interests.

4 THE WORKING GROUP

Working Group

In 2004, the UNGA established 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 (the 'Working Group'). The Working Group's mandate included considering possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity in ABNJ. Subsequently, in 2006, the UNGA extended the Working Group's mandate to specifically consider:

- The environmental impacts of anthropogenic activities on marine biological diversity in ABNJ.
- Coordination and cooperation among states, as well as relevant intergovernmental organisations and bodies, for the conservation and management of marine biological diversity in ABNJ.
- The role of area-based management tools.
- Genetic resources in ABNJ.
- Whether there is a governance or regulatory gap in ABNJ, and if so, how it should be addressed.

2011 meeting

The fourth meeting of the Working Group convened from 31 May to 3 June 2011 at the UN Headquarters in New York. At the meeting the European Union, supported by other countries, called for an implementing agreement under UNCLOS to formalise a 'package approach' for dealing with all aspects of the regulation and governance of ABNJ. This would include a process for the global designation of MPAs. The proposal for an implementing agreement was opposed inter alia by the United States, Canada, Japan and Russia. These countries suggested alternative approaches for the designation of MPAs in ABNJ, such as working with existing regional initiatives and cooperation on pilot projects on a case-by-case basis. After further discussion, the Working Group recommended that:

- The General Assembly should initiate a process to ensure that issues relating to the legal framework for the conservation and sustainable use of marine biodiversity in ABNJ are addressed effectively by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS.
- This process would address the conservation and sustainable use of marine biodiversity in ABNJ in particular: marine genetic resources, including questions on the sharing of benefits; measures such as area-based management tools, including MPAs; EIAs; capacity-building; and the transfer of marine technology.

'Package approach'

The following table provides an overview of the Working Group's 'package approach' to ensuring the conservation and sustainable use of marine biodiversity in ABNJ.

Marine genetic resources (including benefit sharing)	There is a need to establish a system facilitating fair and equitable access to genetic resources in ABNJ and ensuring the fair and equitable sharing of the benefits arising out of their utilisation.
Area-based management tools (including MPAs)	This includes all measures providing for controls on a spatial basis, such as the designation and management of MPAs; marine spatial planning; zoning; fishing gear limitations; and wider economic approaches.
Environmental impact assessments	To determine the potential impacts of activities in ABNJ (for example fishing or mining) before such activities can be approved and/or continued, a regime to ensure that environmental assessments are carried out is required.
Capacity building	A process to ensure the development of the technical skills, institutional capability and personnel necessary to implement regimes in ABNJ effectively should be initiated.
Transfer of marine technology	Closely linked to capacity building, a regime enabling the transmission of knowhow, equipment and products to governments, organisations and other stakeholders in relation to issues in ABNJ should be created.

Next steps

The Working Group recommended not only working within the existing legal framework but also proposed the development of a new multilateral agreement under UNCLOS. Such a multilateral agreement would adopt a 'package approach' to dealing with ABNJ and include area-based management tools such as MPAs. It was envisaged that this process should take place in the Working Group context, assisted by intersessional workshops. The General Assembly endorsed this approach in December 2011. The fifth meeting of the Working Group will be held in May 2012. It will provide further recommendations to the sixty-seventh session of the UNGA in 2012.

5 KEY LAW AND POLICY PROCESSES

For the time being, the UNGA's mandate has put the Working Group at the centre of work by the international community in relation to marine biodiversity protection in ABNJ. However, international law and policy processes do not exist in isolation and are usually shaped by the wider discourse of international negotiations and relationships. This section therefore provides a general overview of other ongoing law and policy processes directly related to area-based management strategies and MPAs in ABNJ. They may support and advance the work of the Working Group.

(a) United Nations

UN

Towards the end of each calendar year, the UNGA adopts an annual resolution on oceans and the law of the sea, accompanied by a specific resolution on sustainable fisheries.[7] These resolutions address a broad range of maritime issues and include recommendations and calls for action. The 2011 *Resolution on Oceans and the Law of the Sea* reaffirms the need for states to continue their efforts to develop a representative network of MPAs by 2012. The 2011 *Resolution on Sustainable Fisheries* encourages states to apply a precautionary and ecosystem approach in adopting conservation and management measures (e.g., on by-catch, pollution and overfishing, and protecting habitats of specific concern).

Vulnerable Marine Ecosystems

The General Assembly has also called upon states and regional fisheries management organisations (RFMOs) to protect Vulnerable Marine Ecosystems (VMEs) in ABNJ – including seamounts, hydrothermal vents and cold-water corals – from destructive fishing practices. In response to increased concerns about the impacts of fishing techniques (such as bottom trawling) on deep sea habitats, RFMOs were asked to identify VMEs and ensure that conservation and management measures are put in place to ensure that there are no significant adverse impacts in areas that contain, or are likely to contain, VMEs.

UNICPOLOS

In 2000 the UNGA established an open-ended Informal Consultative Process on Oceans and Law of the Sea (UNICPOLOS). UNICPOLOS assists the UNGA with its annual review of ocean affairs by identifying issues that require consideration, and facilitating intergovernmental and institutional cooperation. The consultative process studies developments in ocean affairs in a manner consistent with UNCLOS. The most recent meeting took place in June 2011, shortly after the last meeting of the Working Group.

(b) Food and Agriculture Organization

FAO

One of the roles of the Food and Agriculture Organization (FAO) is to ensure the implementation of the resolutions of the UN with regard to fisheries.[8] In August 2008, for example, FAO members adopted the *International Guidelines for the Management of Deep-sea Fisheries in the High Seas*. The guidelines provide countries and RFMOs with a voluntary tool to manage their deep sea fisheries in a more sustainable way and protect Vulnerable Marine Ecosystems (VMEs). The establishment of area-based measures is one of the potential tools to mitigate the impacts on such ecosystems from fishing activities.

[7] UNGA documents are available at: http://www.un.org/depts/los/general_assembly/general_assembly.htm
[8] See: http://www.fao.org for FAO activities and documents

Compliance

The FAO has also produced the 1993 *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (the 'Compliance Agreement') and a *Code of Conduct for Responsible Fisheries* (the 'Code of Conduct'). The Compliance Agreement sets out the responsibilities of flag states in ensuring that fishing vessels flying their flag and engaged in high seas fishing comply with international conservation and management measures. The Code of Conduct is a voluntary set of principles and standards applicable to the conservation, management and development of all fisheries.

MPA Guidelines

The FAO has produced technical guidelines in support of the Code of Conduct, including the *Technical Guidelines on MPAs as a Fisheries Management Tool* (the 'MPA Guidelines'), which will provide information and advice on MPAs in the context of fisheries management. The MPA Guidelines will set out the potential effects of MPAs on fisheries, fish stocks, and on the ecosystem (including biological, physical and socioeconomic aspects), and provide guidance on MPA design, implementation and monitoring.

(c) Meetings of States Parties to UNCLOS

UNCLOS

The meetings of States Parties to UNCLOS are generally limited to budgetary and administrative matters. States Parties to UNCLOS do not have the express mandate to review UNCLOS, its implementation, or new uses of the sea.[9] The UN Secretary-General is required to convene meetings as necessary, for example for the election of the members of the International Tribunal for the Law of the Sea. At present, States Parties to UNCLOS meet annually at the seat of the United Nations in New York. Non-governmental organisations may participate as observers. The UN Division for Ocean Affairs and the Law of the Sea operates as Secretariat to the meetings of States Parties.

(d) Convention on Biological Diversity

Biodiversity Convention

The *Convention on Biological Diversity* (CBD) of 1992 is designed to ensure the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of its utilisation.[10] It expressly mandates the establishment of protected areas and recognises that the conservation of biological diversity is a common concern of humankind. Whilst the provisions of the CBD do not directly apply to biological diversity in ABNJ, they do apply to processes and activities carried out under a state's jurisdiction or control in ABNJ. The CBD also underlines the need for parties to cooperate for the conservation and sustainable use of biodiversity in ABNJ.

Conference of Parties

The Conference of the Parties (COP) to the CBD is held every two years, with the possibility of summoning extraordinary meetings. The COP's mandate is to review the implementation of the CBD and undertake any additional action that may be required for the achievement of its objectives. The COP can review new scientific data, consider and adopt further legal instruments, establish subsidiary bodies, and cooperate with the executive bodies of other international treaties dealing with matters covered by the CBD. The next COP is due to be held in October 2012 in Hyderabad, India.

[9] See: http://www.un.org/depts/los/meeting_states_parties/meeting_states_parties.htm
[10] See: http://www.cbd.int

EBSA

In 2008, the CBD adopted scientific criteria that allow parties to identify 'Ecologically or Biologically Significant Areas' (EBSAs) in open ocean and deep seabed areas. The CBD Secretariat is currently convening a series of regional workshops to facilitate the identification of EBSAs. The results of these workshops are submitted to the scientific body of the CBD for consideration, with a view to being subsequently endorsed by the COP. The first such workshop was convened by the North-East Atlantic Fisheries Commission (NEAFC), the OSPAR Commission and the CBD Secretariat in Hyères, France, in September 2011. As a result, a number of potential EBSAs have been identified in ABNJ in the northeast Atlantic. Workshops in other regions are scheduled for 2012.

MPA targets

Parties to the CBD have also committed to implementing the target for a global network of MPAs by 2012 adopted at the World Summit of Sustainable Development in Johannesburg in 2002. One of their strategic goals, agreed in 2010, is to improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity. For that purpose they aim to ensure that, by 2020, at least 17 per cent of terrestrial and inland water areas, and ten per cent of coastal and marine areas, are conserved through effectively and equitably managed, ecologically-representative and well-connected systems of protected areas and other effective area-based conservation measures (the 'Aichi MPA Target').

Working Group link

The CBD supports the work of the Working Group, and noted that the Group should be the primary forum for actions enabling the development of MPAs in ABNJ. In 2010, at their tenth meeting, parties to the CBD noted the slow progress in establishing MPAs in ABNJ and the absence of a global process for the designation of such areas. They requested the UNGA to convene the Working Group in order to expedite work on MPAs in ABNJ, and urged parties to take action to advance its work.

VMEs and EBSAs

The following table provides a comparative overview of the content and scope of the criteria for Ecologically and Biologically Significant Areas (EBSAs) adopted in 2008 by the CBD, and the criteria for Vulnerable Marine Ecosystems (VMEs) in the FAO Guidelines based on recommendations formulated by the UNGA in 2006.

	VME	EBSA
Regime	UNGA/FAO	CBD
Coverage	Deep sea habitats and ecosystems including: seamounts, hydrothermal vents and cold-water corals.	Deep sea habitats and ecosystems including: seamounts, hydrothermal vents, cold-water corals and open ocean waters.
Mandate	To protect against destructive bottom fishing practices.	A scientific and technical tool to assist the implementation of ecosystem approaches.
Criteria	• Uniqueness and rarity • Functional significance • Fragility • Life history traits of component species • Structural complexity	• Uniqueness or rarity • Importance of threatened, endangered or declining species and/or habitats • Vulnerability • Fragility, sensitivity or slow recovery • Life history stages of species • Biological productivity • Biological diversity • Naturalness
Measures	Calls on states and RFMOs to: • Identify VMEs; • Close VMEs to bottom fishing; and • Not to permit such activities to occur unless conservation and management measures have been put in place to prevent significant adverse impacts	Urges states and relevant organisations: • To apply the scientific criteria and identify EBSAs; • To assist relevant processes within the UNGA; and • To implement conservation and management measures.
Key points	• Not high seas – only deep seabed. • Covers only bottom fishing practices. • States and RFMOs are ‘called’ to act. • Identification of VMEs triggers a management response.	• Deep seabed and high seas. • Covers all activities, fishing or otherwise. • States and relevant organisations are ‘urged’ to act. • Identification of EBSAs is a scientific process and does not in itself trigger a management response.
Main sources	UNGA Resolutions 61/105 (paras.80, 83-87), 64/72 (paras.117, 119-127), 66/L.22, and FAO Deep Sea Guidelines, 2008.	CBD COP Decision/IX/20 (Annex1), CBD COP Decision/X.29 (paras.21-51).

(e) United Nations Conference on Sustainable Development

Rio+20

In June 2012, the United Nations Conference on Sustainable Development (UNCSD) will be held in Rio de Janeiro.[11] 'Rio+20' will be the fourth global summit of its kind. It will assess the existing gaps in the implementation of previous commitments on sustainable development and progress to date. It will address new and emerging challenges and try to secure renewed political commitment for sustainable development. Its main themes are: a 'green' economy in the context of sustainable development and poverty eradication, and the institutional framework for sustainable development.

Working Group & Rio+20

The UNCSD preparations have stressed the significant economic, social and environmental benefits of the world's oceans and marine resources. They have also highlighted the importance of the deliberations of the Working Group for ABNJ and MPAs, and to ensure progress towards sustainable development in general. As a result, the zero draft of an outcome document ('The future we want') does not only refer to the Working Group but explicitly endorses future negotiations of an implementing agreement to UNCLOS. It remains to be seen whether language to this effect will actually be included in a final document adopted by the summit, however.

(f) International Maritime Organization

IMO

International rules and regulations concerning maritime safety, the efficiency of navigation, and the prevention and control of marine pollution from ships have been developed under the auspices of the International Maritime Organization (IMO).[12] The IMO is also considered the competent international body to establish special protective measures in defined areas where shipping presents a risk – both within and beyond areas of national jurisdiction.

Special Areas

The IMO has produced the *International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978* ('MARPOL 73/78'). MARPOL 73/78 regulates vessel design, equipment, and operational discharges from all ships within and beyond national jurisdiction. It also provides for the designation of special areas (the 'Special Areas') where more stringent discharge rules apply in respect of oil, noxious liquid substances, and marine debris. Special Areas are defined as areas where, for technical reasons relating to their oceanographical and ecological condition and to their sea traffic, the adoption of special mandatory methods for the prevention of sea pollution is required. Examples of Special Areas that include ABNJ are the Mediterranean Sea and the Antarctic.

[11] See: http://www.uncsd2012.org/rio20/index.html
[12] See: http://www.imo.org

Particularly Sensitive Sea Areas

The IMO instruments on the designation of Special Areas have been supplemented by the soft law concept of 'Particularly Sensitive Sea Areas' (PSSAs). Under the revised *Guidelines for the Identification and Designation of PSSAs*, a PSSA is defined as an area that requires special protection because of its recognised ecological, socioeconomic or scientific attributes, where such attributes may be vulnerable to damage by international shipping activities. The Guidelines provide guidance to the IMO and its member states in the formulation and submission of applications for the designation of PSSAs. They apply within and beyond the limits of the territorial sea. To date, however, the IMO has not designated any PSSAs in ABNJ.

(g) International Seabed Authority

ISA

The ISA was established under UNCLOS to control the exploitation of seabed resources beyond natural jurisdiction.[13] Its principal organs are the Assembly, the 36 States Council, and the Secretariat. As the executive organ, the Council is largely responsible for the implementation of the Authority's mandate and the formulation of policies. The Assembly – in which all parties to UNCLOS have one representative – is the forum that formally adopts most major decisions. It meets annually at the seat of the organisation in Jamaica. The Secretariat has responsibility for the ISA's administration and its relations with other organisations.

Current work

The most recent meeting of the Assembly and the Council took place in July 2011. It was *inter alia* agreed to develop a mining code to govern the exploitation of deep sea minerals in the Area and to continue work on the draft regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area. The ISA also considered a proposal for an environmental management plan to facilitate the exploitation of seabed resources in the Clarion-Clipperton Fracture Zone in an environmentally-friendly manner. The plan entailed the creation of a network of nine Areas of Particular Environmental Interest (APEIs). The Council requested the preparation of a revised version of the management plan for adoption by the Authority at its eighteenth session.

(h) UN Fish Stocks Agreement

Fish Stocks Agreement

The 1995 UN *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* (the 'Fish Stocks Agreement') is an implementing agreement of UNCLOS.[14] It requires fisheries management measures to be based on the precautionary approach. Measures referred to include: selective fishing gear and techniques; closed areas and seasons; and management measures for species belonging to the same ecosystem.

[13] See: http://www.isa.org.jm
[14] See: http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm

Informal consultations

To consider the regional and global implementation of the Fish Stocks Agreement, and make recommendations to the General Assembly on the scope and content of the annual report of the Secretary-General, the parties to the agreement have held informal consultation meetings at UN headquarters in New York since 2002. The most recent meeting took place in May 2010. Efforts to promote networks of MPAs did not succeed, largely because of concerns that MPA issues were already being dealt with by other initiatives – i.e., the Working Group. However, the meeting called for long-term conservation and management measures for deep sea fisheries in accordance with the FAO's Deep Sea Guidelines, and encouraged RFMOs to remove geographical gaps between their convention areas. The parties further agreed to keep the agreement under review through a resumption of the formal Review Conference at a date not earlier than 2015.

(i) International Whaling Commission

International Whaling Commission

The International Whaling Commission (IWC) was established by the 1946 *International Convention for the Regulation of Whaling* to ensure the proper and effective conservation of whale stocks.[15] Whilst specific to whales, the Convention is global in outlook and can fix the limits of open and closed waters; designate sanctuary areas; prescribe seasons, catch and size limits for each species of whale; and prohibit types and methods of fishing. As a result of the fundamental differences between pro- and anti-whaling nations, the IWC has failed to reach agreement on many issues.

Meetings

The Annual Meeting of the Commission is held either in the UK, where the organisation's Secretariat is based, or in another member country. The main duty of the IWC is to review and revise the measures laid down in the schedule to the Convention governing the conduct of whaling throughout the world. To date, the IWC has designated two sanctuaries for whales, both covering large areas of ABNJ. The first was designated in 1979 in the Indian Ocean and is due to be reviewed in 2012. The second is in the Southern Ocean, to be reviewed in 2014. At their most recent meeting in July 2011, the IWC failed to reach consensus on a new sanctuary for whales in the South Atlantic Ocean.

(j) Convention on Migratory Species

CMS

The *Convention on the Conservation of Migratory Species of Wild Animals* (CMS, or the 'Bonn Convention') aims to protect terrestrial, marine and avian migratory species throughout their range. It permits the establishment of MPAs as a conservation measure.[16] The COP can make recommendations to the parties on improving the conservation status of migratory species, the effectiveness of the Convention in general, and any additional measures that need to be taken to implement its objectives. A Standing Committee provides policy and administrative guidance between the regular meetings of the COP. A Secretariat, under the auspices of the United Nations Environment Programme (UNEP), provides administrative support.

[15] See: http://www.iwcoffice.org
[16] See: http://www.cms.int

Work under CMS

The Conference of the Parties meets at intervals of not more than three years. The last Conference of the Parties took place in Bergen, Norway in November 2011. Several subsidiary agreements and memoranda of understanding have been negotiated under the auspices of the CMS to promote cooperation in protecting individual maritime species of cetaceans, migratory water birds, albatrosses, petrels, and marine turtles. These conservation regimes have their own formal organisational structures, with meetings of parties that are also open to observers from NGOs.

(k) Regional initiatives

There are a multitude of other bi- and multilateral treaties dealing with environmental protection in different parts of the world. Because a review of all existing regional agreements with potential relevance to marine environment protection is impractical, the following section focuses on those regional agreements which are particularly significant in relation to the designation of MPAs in ABNJ.

OSPAR

OSPAR

The 1992 *Convention for the Protection of the Marine Environment of the North-East Atlantic* (the 'OSPAR Convention'), replacing both the earlier Oslo and Paris conventions, requires parties to take all possible steps to protect the maritime area of the northeast Atlantic from pollution.[17] It includes a significant area of the high seas and the Area. Annex V to the OSPAR Convention calls on its parties to take the necessary measures to protect the maritime area against the adverse effects of human activities and to restore marine areas that have been adversely affected. Under OSPAR, a network of MPAs is being developed in the northeast Atlantic – both within and beyond areas of national jurisdiction. In 2010, six MPAs were designated to protect deep sea habitats in ABNJ (see box below). The next meeting of the OSPAR Commission will be held in Bonn (Germany) in June 2012. OSPAR also operates a number of 'Intersessional Correspondence Groups', one of which works on MPAs.

[17] See: http://www.ospar.org

AN EFFORT TOWARDS INTEGRATED REGIONAL MANAGEMENT OF MPAS IN ABNJ

In 2003, the OSPAR Commission agreed to establish, by 2010, an ecologically-coherent network of well-managed MPAs in the northeast Atlantic (the 'OSPAR Network'). In 2010, OSPAR reviewed progress and revised this target. It decided that the network should be ecologically coherent by 2012 and well managed by 2016. Currently, 11 of the 12 parties to OSPAR bordering the northeast Atlantic have selected and nominated sites covering a total area of 433,000km^2 within and outside national waters. Each MPA is expected to have a management plan and appropriate protection measures in place, which are implemented either through domestic authorities or international organisations.

As part of this process, OSPAR ministers established six MPAs in ABNJ covering a total area of 285,000km^2 in September 2010. Four of these areas (Altair Seamount, Antialtair Seamount, Josephine Seamount and the Mid Atlantic Ridge north of the Azores) are in areas north and east of the Azores, which are subject to a submission by Portugal in respect of their extended continental shelf. In these instances, OSPAR has designated the high seas above the deep seabed as MPAs and Portugal has established MPAs covering the deep seabed.

In September 2008, OSPAR and NEAFC, the RFMO which controls fisheries activities in the area, entered into a memorandum of understanding promoting mutual cooperation towards the conservation and sustainable use of marine biological diversity, including the protection of marine ecosystems in the northeast Atlantic. They agreed to cooperate regarding marine spatial planning and area-based management strategies.

In April 2009, NEAFC responded to scientific advice received from the International Council for the Exploration of the Sea (ICES) and closed five areas of the high seas to bottom fisheries on the basis that they were VMEs and needed to be protected from the impacts of bottom fishing. These areas comprise some 330,000 km^2. Importantly, they substantially overlap with the MPAs that were subsequently designated as part of the OSPAR Network. The NEAFC will be reviewing the effectiveness of these closures in 2012.

To establish an integrated approach to the management of MPAs in ABNJ, in March 2010 OSPAR initiated a process of informal dialogue between authorities that have sectoral competencies in the northeast Atlantic . The relevant bodies include IMO, ISA, NEAFC, IWC, the International Commission for the Conservation of Atlantic Tunas (ICCAT), the North Atlantic Salmon Conservation Organisation (NASCO) and the North Atlantic Marine Mammal Commission (NAMMCO).

In September 2011, OSPAR, NEAFC and CBD held a scientific workshop to identify EBSAs in the northeast Atlantic . A total of ten EBSAs were identified. They are currently under review and the report of the regional workshop will be submitted to the CBD. IMO and OSPAR are also in the process of considering a proposal that the high seas MPAs previously designated by OSPAR should be further evaluated in terms of their suitability for consideration as Special Areas or Particularly Sensitive Sea Areas by the IMO.

Barcelona Convention

Barcelona Convention

The 1976 *Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean* as amended in 1995 (the 'Barcelona Convention') applies throughout the Mediterranean Sea.[18] Parties to the Convention have agreed to take all appropriate measures to prevent, abate, combat and eliminate pollution of the Mediterranean Sea and to protect and enhance the marine environment in this area.

SPAMI

In 1995, the parties to the Barcelona Convention adopted the *Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean* (in force since December 1999).[19] The Protocol provides for the establishment of a list of Specially Protected Areas of Mediterranean Interest (the 'SPAMI list'). This includes sites of importance for biodiversity conservation, or containing specific ecosystems or habitats, and may include areas located partly or wholly on the high seas. The parties to the Barcelona Convention meet every two years. The 17th meeting took place in Paris from 8 to 10 February 2012. It concluded with a declaration that calls for a 'blue' economy to safeguard and promote a clean, healthy and productive Mediterranean environment.

High seas MPAs

Under the Protocol, proposals for the inclusion of marine or coastal areas in the list of SPAMIs can be submitted by the party that has sovereignty or jurisdiction over the area concerned. If the site is situated, partly or wholly, on the high seas the (two or more) neighbouring parties have to apply jointly. The parties to the Barcelona Convention have to approve the proposal and related management measures by consensus. Once listed, all member states must comply with the measures and must not authorise or undertake any activity that may be contrary to the MPA's objective.

Pelagos Sanctuary

The Pelagos Sanctuary for Mediterranean Marine Mammals is a SPAMI covering over 87,500km^2 in the northwestern Mediterranean Sea, comprising the Ligurian Sea and parts of the Corsican and Tyrrhenian seas. It contains the internal maritime and territorial waters of France, Monaco and Italy, as well as the adjacent high seas. The sanctuary contains habitat suitable for the breeding and feeding needs of different whale and dolphin species. Initially proposed in 1991, the agreement between Monaco, France and Italy that created the Pelagos Sanctuary entered into force in February 2002. The parties to the Barcelona Convention placed the Pelagos Sanctuary on its list of the SPAMIs in 2001.

[18] The Barcelona Convention and other regional seas agreements are available at: http://www.unep.ch/regionalseas/legal/conlist.htm

[19] Legal instruments related to the Mediterranean are available at: http://www.unep.org/regionalseas/programmes/unpro/mediterranean/instruments/default.asp

Antarctic Treaty

Antarctic Treaty

The 1959 *Antarctic Treaty* was initially agreed by the twelve states active in Antarctica, seven of which had made territorial claims, while two reserved the right to do so.[20] The Treaty applies to the area south of 60° South latitude, and accordingly includes a significant area of the high seas. It provides that the continent of Antarctica should be used exclusively for peaceful purposes. It also prohibits nuclear explosions and the disposal of radioactive waste; promotes international scientific cooperation and the protection of living resources; and effectively freezes all territorial claims. Today the Treaty has 48 signatories.

Antarctic Special Areas

The 1991 *Protocol on Environmental Protection to the Antarctic Treaty* has five annexes. Annex V provides for the designation of (a) Antarctic Specially Protected Areas, to protect outstanding environmental, scientific, historic, aesthetic or wilderness values, and (b) Antarctic Specially Managed Areas, to assist in the planning and coordination of activities, improve cooperation between parties, and minimise environmental impacts. Marine areas can be included in either category but their establishment requires the prior approval of the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR - see below). The parties to the *Antarctic Treaty* hold informal Annual Treaty Consultation Meetings (ATCMs). Their Committee for Environmental Protection meets at the same time to consider environmental protection and management issues and provide advice to the ATCM. The next (50th anniversary) meeting will be held in Australia in June 2012.

Regional fisheries management organisations

RFMOs

Traditionally, regional fisheries management agreements have been drawn up by states engaged in fishing for the same species so that they can coordinate their activities in a specific geographical area.[21] These agreements may deal with the management of one or several species, or cover all living marine resources within a region. Many of them cover areas of the high seas. A commission or other institution decides on joint management measures – such as the allocation of quotas or national reporting of catches. RFMOs may adopt conservation measures, including closed areas and seasons as well as restrictions on gear and fishing techniques. Few RFMOs, however, provide for the protection and conservation of marine living resources through the application of the ecosystem approach. An exception is the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR).

[20] The legal instruments governing Antarctica are available at: http://www.unep.org/regionalseas/programmes/independent/antarctic/instruments/default.asp

[21] An overview of existing RFMOs is available at: http://ec.europa.eu/fisheries/cfp/international/rfmo/index_en.htm

Commission on the Conservation of Antarctic Marine Living Resources

CCAMLR

CCAMLR was established under the 1980 *Convention for the Conservation of Antarctic Marine Living Resources*.[22] The Convention aims to protect the marine living resources in the Southern Ocean surrounding the continent of Antarctica. CCAMLR has the mandate to identify and implement relevant conservation measures, e.g., the designation of protected species; fishing methods; allowed catch; size, age or sex of species; or the closing and opening of seasons and areas for environmental protection and scientific study. Measures can be related to components of the marine ecosystem other than the harvested populations.

Antarctic MPAs

The South Orkney Marine Protected Area is an example of a MPA that has been created under this system. Established in May 2010, it comprises 94,000 km^2 entirely on the high seas. In November 2011, CCAMLR also adopted a *General Framework for the Establishment of CCAMLR Marine Protected Areas*. The framework allows parties to propose MPAs in the sub-regions of the Southern Ocean. The Commission can establish MPAs following advice from the Scientific Committee by adopting specific conservation measures (e.g., the definition of spatial boundaries, restricted and permissible activities, and management priorities). MPA proposals by New Zealand and the United States in the Ross Sea region are currently subject to further consultations. A representative system of MPAs for the east Antarctic region has been suggested jointly by Australia and France. Appropriate conservation measures are likely to be considered by CCAMLR in 2012.

[22] See: http://www.ccamlr.org

6 THE MAIN GAPS

Although there are many international legal instruments that envisage the establishment of MPAs, there are major gaps in the processes regulating and governing their identification, designation and management, as well as other area-based management measures in ABNJ. These areas could be considered global commons belonging to all of humanity. In practice, however, they are exposed to haphazard and unfettered exploitation. This section considers the main problem issues in developing a coherent approach to the protection of the oceans in ABNJ.

(a) Data collection in ABNJ

Data

Historically, the collection of scientific data in the world's oceans, and particularly in ABNJ, has been limited, but recent initiatives – such as the Census of Marine Life and the work of the International Programme on the State of the Ocean (IPSO) – have led to some progress in this area.[23] In 2005, the UNGA also established the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socio-economic Aspects (the 'Regular Process'). The aim of the Regular Process is to enhance the scientific basis for marine policymaking. Subsequently, in 2008, the General Assembly established an Ad Hoc Working Group of the Whole to recommend a course of action for the Regular Process.

Regular Process

During the start-up phase of the Regular Process, a critical evaluation of the existing scientific assessments was carried out. The first full cycle of the Regular Process is scheduled to conclude in 2014. The last meeting of the Ad Hoc Working Group of the Whole took place from 27-28 June 2011. The meeting recommended that a series of workshops should be held to improve the capacity of states to carry out scientific assessments. The first workshop was held in Santiago, Chile, in September 2011. The next meeting of the Ad Hoc Working Group is scheduled for April 2012.

Data challenges

The collation of data is an important step towards a better assessment of the state of the marine environment and in strengthening the role of science in policy decision making. However, the scale of information required is immense and information needs to be collected from areas that are difficult to access. The compilation of adequate and reliable data is often hampered by the inaccurate or inadequate reporting of catches and other environmental impacts from, for example, shipping or energy extraction. There is also a lack of integration, coordination and knowledge sharing between the various global, sectoral and regional scientific bodies.

(b) Lack of agreed process for MPAs in ABNJ

Lack of process

There are currently no generally-accepted scientific criteria for identifying MPAs in ABNJ that would result in the requirement to adopt appropriate and effective management measures. The existing, globally-applicable criteria for, for example, EBSAs are a useful scientific tool but do not automatically lead to the adoption of management measures. Through its work on PSSAs and Special Areas, the IMO has the potential to assist with the identification of vulnerable ecosystems in ABNJ. But whilst it has identified 'Special Areas' in ABNJ that are binding on the parties to MARPOL 73/78, to date the IMO has not identified any PSSAs in ABNJ. However,

[23] See: http://www.coml.org and http://www.stateoftheocean.org

PSSAs are sectorally limited to prevent harm from shipping (rather than in situ extractive activities such as fishing and mining) and are not legally binding. OSPAR, the Barcelona Convention and the CCAMLR are limited in geographical coverage and many ABNJ lack a regional seas organisation (RSO).

(c) Lack of coordination

Coordination

Despite the commitment to the creation of a global, ecologically-coherent and representative network of MPAs (the Johannesburg Plan of Action and Aichi MPA targets), there is insufficient international coordination of efforts to achieve this goal. For example, no specific scientific body is responsible for identifying or reviewing proposals for MPAs in ABNJ based on the various scientific criteria meant to assist in this process. There is also no global governance forum facilitating a coordinated and integrated approach between states and organisations that could impose management measures in ABNJ on all maritime uses and users.

Time we don't have

Even where integration and coordination strategies have been developed, for example by OSPAR, the process of coordinating different states, organisations and other actors can be frustrating and time consuming. There are inherent delays if the different decision-making bodies of different institutions need to formally consider proposals for management measures. Further delays tend to occur between the identification of a vulnerable area and its designation as an MPA. As a result, vulnerable areas remain at risk whilst a lengthy decision-making process is carried out.

(d) Geographical coverage

Space

To date, the geographical coverage provided by regional initiatives to manage and protect the oceans is incomplete. Not only are the rules of many RFMOs inadequate to regulate ABNJ, but certain ABNJ fall outside the remit of any RFMO – notably the central Pacific, northern Indian Ocean, the majority of the Arctic Ocean, and the central and southwest Atlantic. With the exception of tuna and tuna-like stocks, there is a lack of regional-based fisheries management in these areas. The geographical coverage of RSOs is largely incomplete. Only the RSOs established under the OSPAR Convention, the Barcelona Convention and the *Antarctic Treaty* offer opportunities for integrated approaches to oceans management in ABNJ. The spatial remit of the vast majority of RSOs does not extend beyond the EEZs of their member states.

(e) Financial resources for the protection of ABNJ

Money

Some countries and conservation NGOs have invested significant amounts of money in the establishment and maintenance of (predominately coastal) MPAs. But there is a large gap in the availability of financial resources for the entire process, from the original gathering of scientific data to the designation process and the enforcement of management measures. To date, the Global Environmental Facility (GEF) has been relatively reluctant to fund such initiatives, despite 'international waters' being one of its 'funding windows'. This is despite the relative success of the projects that it has so far financed – for example: the IUCN-led Seamounts Project in the southern Indian Ocean.[24]

[24] See: http://www.iucn.org/about/work/programmes/marine/marine_our_work/marine_governance/samounts

(f) Regulatory gaps

Regulations

There are different law and policy instruments promoting principles that are relevant to area-based management measures in ABNJ. For example, UNCLOS contains a duty to protect and preserve the marine environment and the resulting obligation to take measures to protect and preserve rare or fragile ecosystems and habitats of marine life. These conservation principles were further strengthened through the Fish Stocks Agreement, which requires a precautionary and ecosystem-based approach. The CBD also reflects the ecosystem approach and the need for cooperation through competent organisations for the conservation and sustainable use of biological diversity in ABNJ.

Legal limitations

There are still large gaps in the coverage of the international legal instruments that apply to ABNJ, however. The United States, for example, has not ratified UNCLOS, and other agreements such as the Ballast Water Convention have not yet entered into force. In terms of legal substance, UNCLOS does not prescribe an ecosystem approach to the management of marine resources. Whilst such an approach has been adopted in the Fish Stocks Agreement, its principles only relate to highly migratory and straddling fish stocks. They do not expressly apply to discrete high seas' fish stocks or other marine resources.

Outdated law

As a result, living marine resources in ABNJ continue to be treated as a common property resource. This encourages their rapid exploitation and does not incentivise the adoption of new regulations on conservation and sustainable use. There is no legal requirement that modern conservation principles should be consistently applied, and no scientific standards to ensure that, for example, an ecosystem and precautionary approach are adopted in respect of activities such as marine scientific research or bio-prospecting. The regulation of the fishing, shipping, mining and energy industries often fails to keep up with technical advances, while new activities – such as floating nuclear power plants or open ocean aquaculture – remain essentially unregulated.

Environmental assessments

There is also no global process for EIAs or the monitoring of high seas' activities such as the laying of pipelines and cables, seabed installations, or bio-prospecting. EIAs and strategic environmental assessments (SEAs) are an essential part of developing an effective management regime governing MPAs in ABNJ and the oceans that surround them. Inadequate regulation of ocean uses surrounding MPAs can easily undermine the effectiveness of MPA management measures.

(g) Governance framework

Governance

The primary gap in the governance framework for ABNJ is the lack of an institution capable of ensuring the consistent application of overarching conservation principles and coordinating cooperation between the large number of global institutions, regional initiatives, states and other stakeholders involved in the management of ABNJ. The current dispersed structure lacks global oversight and a competent forum – not only for the exchange of legal and governance expertise, but also for the sharing of scientific information and ideas. No global organisation has an explicit legally binding mandate for the designation of MPAs or for forging the cooperation necessary to establish ecologically-coherent and representative networks of MPAs in ABNJ.

Limited mandates

A number of institutions in the existing framework also have mandates that lack a balanced approach between conservation and sustainable use. RFMOs, for example, often only have the competence to set fishing quotas or gather marine data. Very few have the express responsibility to establish area-based protective measures. They are also sectorally limited – non-fishing activities, such as shipping or the laying of cables

and pipelines that affect area-based management measures, do not fall within their mandate.

Other organisations also lack a comprehensive conservation mandate in ABNJ. The IMO is solely tasked with considering measures for the improvement of the safety and security of international ships and to prevent marine pollution from ships. The ISA's mandate includes an obligation for the conservation of the Area, with the focus on organising and controlling activities in the Area and administering its mineral resources. The IWC does not pursue a wider conservation approach but is only responsible for the management of whale species at a global level.

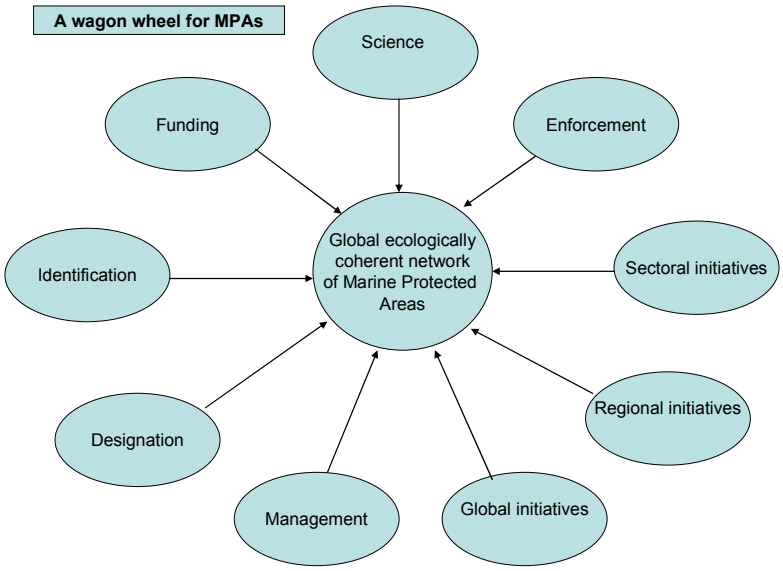
(h) Compliance and enforcement

Compliance

A key issue in relation to the management of MPAs is to ensure compliance and enforcement with the various measures formulated as part of the management plan. The remoteness of MPAs in ABNJ increases the logistical difficulties and resulting costs of compliance and enforcement. To date, available technology is still underutilised, with only a limited use of vessel monitoring systems and closed-circuit TV. There is also often a lack of clearly-defined responsibilities as to which states should enforce the rules of an MPA in ABNJ.

Jurisdiction

Even where MPAs are designated in ABNJ, member states to the relevant management agreement and body cannot automatically enforce obligations against non-parties. Therefore such MPAs remain vulnerable to the high seas' fishing fleets flying, in particular, 'flags of convenience' or 'flags of non-compliance', chosen by the vessel owners because of their inability or unwillingness to enforce rules and regulations on vessels registered in their territory. There also remains an inefficient reliance on enforcement by flag states rather than port or coastal states. At times, RFMO members have also shown themselves largely unwilling to enforce the terms of existing rules, as, for example, contained in the Fish Stocks Agreement.



7 LAW AND POLICY OPTIONS

There are a number of law and policy options that are open to the Working Group in order to address the gaps in regulation and governance of marine biodiversity in ABNJ, and area-based management strategies in particular. This section considers the strengths (+) and weaknesses (-) of some of these options.

(a) Implementing existing instruments at a global level

(+) The legal commitment of states under different international law and policy instruments to cooperate in the protection of the oceans could be utilised to improve synergies between the different regimes. For example, while the CBD and the UNGA could continue to promote the use of EBSA and VME criteria, states may increase their efforts to identify and protect those areas. Within the existing legal framework, efforts to coordinate global, regional and sectoral initiatives could produce a 'layering' of protective measures and support a more integrated approach to the management of ABNJ. The UNGA may have a central role in such an approach, with further resolutions on filling the gaps in the current global regime and encouraging the development of a fully integrated regime.

(-) In practice, the existing system of global and sectoral instruments has not proven effective. States and international organisations do not always meet the requirements of the current legal regime. Coordination and cooperation are not occurring on a scale sufficient to achieve an effective area-based management strategy for ABNJ within the timescales required. Even if all existing instruments were effectively implemented, specific scientific, regulatory and geographic gaps in the existing regime would remain. These could only be closed through a new initiative introducing a more principled approach in dealing with marine biodiversity in ABNJ.

(b) Implementing existing instruments at a regional level

(+) Ecosystems and habitats in different regions are often distinct, as are the interests of stakeholders and the relative stresses on the marine environment. A global 'one size fits all' approach to MPAs is therefore unlikely to be practical. Recent experiences (e.g., the establishment of the South Orkney MPA by the CCAMLR, or the Pelagos Sanctuary for Mediterranean Marine Mammals under the Barcelona Convention, see above) indicate that the development of regional approaches may be a successful option to enable the designations of MPAs in ABNJ. The work of the OSPAR Convention and its attempts to develop an integrated management system for MPAs also demonstrate a potentially effective example of coordinating area-based management measures in ABNJ. Its model for cooperation and coordination could be replicated in other regions and encourage the 'OSPARisation' of ABNJ.

(-) At present, the geographical coverage of RSOs with the ability to adopt effective integrated management strategies in ABNJ is limited (see above). The political will to create new RSOs or strengthen the competences of existing ones also appears limited. Integrated management also depends on the availability of competent regional authorities and institutions that could impose the management measures required in relation to MPAs. But they are often either completely absent, or do not have a mandate to adopt conservation measures (or are unwilling to do so). Regional approaches are also only legally binding on parties to the relevant treaty.

(c) Voluntary pilot projects

(+) Voluntary pilot projects are usually the result of public-private partnerships involving states and other stakeholders, such as intergovernmental organisations or conservation NGOs. The partners work together developing a set of management measures ensuring the protection of ocean spaces under threat and in need of protection. An example of such an initiative is the Sargasso Sea Alliance, which aims to introduce protective measures within the Sargasso Sea ecosystem, the majority of which lies in ABNJ.

Pilot projects like the Sargasso Sea initiative are a major stepping stone in the development and application of scientific criteria (e.g., as formulated with regard to EBSAs and VMEs). They also provide an opportunity for involved government authorities and other stakeholders to become engaged in the designation and management process for MPAs. Their informal framework encourages cooperation, the exchange of information and experiences, and quick problem-orientated solutions where other options – such as the negotiation of new regional or global agreements – would be time consuming and politically charged.

Sargasso Sea Alliance

The Sargasso Sea has been described as 'the golden rainforest of the ocean'. Its currents form a vast sub-tropical gyre in the North Atlantic. It covers an area of approximately 5,180,000km^2 and is dominated by a pelagic drift algae ('sargassum') that produces large drifting mats and sustains the unique ecosystems that surround them. The Sargasso Sea lies partly within the EEZ of Bermuda, although the significant majority (some 4,500,000km^2) is located in ABNJ covering an area roughly seven times the size of France.

The Sargasso Sea Alliance was established in 2010. It is led by the government of Bermuda in collaboration with scientists and international marine conservation groups. It is financially supported by private donors. Its aim is to develop a management plan for the Sargasso Sea and work with existing regional, sectoral and international organisations to establish a set of protective measures dealing with the key threats to the ecosystem, such as fishing, navigation and seabed mining.

(-) The voluntary nature of such pilot projects, however, also remains a substantial weakness. Where there is sufficient political will they may work well; they lack any form of compulsion if and when the idea loses momentum and the political will disappears, however. Accordingly, voluntary initiatives have an important 'trailblazer' role to play but are not a standalone solution for issues surrounding the identification, designation and management of MPAs in ABNJ. Without a wider, legally binding framework such initiatives are hampered in pursuing a truly integrated 'package approach' in ABNJ. Moreover, it could be difficult to develop a series of isolated pilot projects into an ecological and representative network of MPAs.

(d) Declaration by the UNGA

(+) A non-binding declaration (formally contained in a resolution) by the UNGA on policies for the designation, creation and management of MPAs in ABNJ could have a significant impact on the timely creation of effective governance arrangements. Similar to a new multilateral agreement, a UNGA resolution could set out a series of guiding

principles that apply to ABNJ and call for better coordination towards an integrated management process. It could specifically mandate the identification and designation of MPAs in ABNJ, and recommend management measures. Adoption in the UNGA would carry significant political weight and legitimise leadership by states that are willing and able to translate principles into practice.

A declaration would also avoid the extensive negotiations associated with a legally binding agreement, and would not have to go through a process of domestic ratification before its provisions could gradually spur states into action. It could constitute an interim measure whilst legally binding options are developed further, and provide important guidance to existing international, regional and sectoral regimes. It would add impetus to the current debates and contribute to a growing body of customary international law relating to environmental protection efforts in ABNJ.

(-) The promotion of a declaration or other soft law instrument in the UNGA, however, also carries certain risks. It is uncertain whether it could secure the level of approval necessary to give it significant political weight and include meaningful persuasive statements and calls for action. Previously, an attempt to declare a ban on deep seabed mining in the UNGA failed. The objectives and content of a resolution may also be sidelined by what some states may subsequently consider more pressing political initiatives. The inadequate implementation of the resolutions of the General Assembly in respect of VMEs is evidence of this.

(e) A protocol under the CBD

(+) The CBD requires parties to cooperate with each other directly, or through competent organisations, for the conservation and sustainable use of biodiversity in ABNJ. Parties are also required to adopt a precautionary and ecosystem approach. In addition, the CBD has expressly mandated the creation of MPAs. The work of the CBD in relation to EBSAs is central to the development of representative MPA networks in the world's oceans. The Convention has almost global coverage and has been ratified by even more countries than UNCLOS. In principle, the CBD would be well placed to adopt a protocol ensuring the conservation and sustainable use of marine biodiversity in ABNJ.

(-) There are, however, doubts as to whether the CBD has the mandate to create such a protocol. This is because the provisions of the CBD do not directly apply to biological diversity in ABNJ. They only apply to processes and activities carried out under a state's jurisdiction or control in ABNJ. The CBD tends to perceive its own role as adding scientific expertise in biodiversity to the process of establishing MPAs in ABNJ, but considers the Working Group to be the primary forum for action. In 2010, the COP of the CBD, noting the slow progress in establishing MPAs, requested the UNGA to convene the Working Group in order to expedite work on issues related to MPAs in ABNJ, and urged parties to take action to advance the work of the Group.

(f) Multilateral agreement specifically on MPAs in ABNJ

(+) A new global treaty specifically governing the identification, designation and management of MPAs in ABNJ could provide overarching principles and regulations applicable to area-based management techniques in ABNJ. It would include basic criteria (similar to those for EBSAs and VMEs) for the designation of MPAs; the basis for different legally binding management measures; and possibly also compliance and enforcement mechanisms to ensure their effective implementation. Such a treaty would advance the development of current global, regional and sectoral initiatives. As a result of its focus on MPAs and its otherwise limited remit – i.e., not covering all elements of

the ‘package approach’ – it is likely to be of a more protective nature and avoid certain contentious issues. For example, several states regard marine genetic resources as the common heritage of humankind, whereas others consider them to be a common property resource.

(-) A global treaty based solely on area-based management measures and MPAs is subject to significant limitations. For example, it appears to be difficult to implement a strategy for MPAs in ABNJ effectively without addressing broader concerns regarding the regulation and governance of ABNJ, or the requirements for EIAs and SEAs. To facilitate a meaningful contribution by developing countries in a regime governing marine biodiversity in ABNJ, the issues of capacity building, access and benefit sharing, and the transfer of marine technology, would also need to be dealt with. It is also uncertain that the negotiations of a treaty specifically relating to area-based management measures in ABNJ would be a swifter process than a more comprehensive agreement.

(g) Multilateral agreement under UNCLOS

(+) UNCLOS is often referred to as the ‘constitution of the oceans’. It largely codifies current customary international law and even states that have not ratified the Convention have acknowledged its authoritative status. It already contains a number of provisions relating to the conservation and sustainable use of marine biodiversity in ABNJ, and provides a comprehensive framework to further develop the ‘package approach’ (including area-based management measures, marine genetic resources, EIAs, capacity building, and the transfer of marine technology). It would allow for the creation of a set of guiding principles relating to ABNJ as well as specific provisions on the elements of the ‘package approach’, and would stimulate cooperation and coordination between states. The *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (the ‘Part XI Agreement’), and the Fish Stocks Agreement have previously been successfully adopted under UNCLOS.

(-) It is not certain that a multilateral agreement under UNCLOS can be achieved. A number of states currently do not support this option. The scope and complexity of issues covered by the ‘package approach’ might complicate the negotiations. The discussions in the Working Group on the terminology employed in this connection (‘implementing’ or ‘implementation’ agreement, for example) already indicate how politically charged such a process may be. The Part XI Agreement took four years to progress from the commencement of informal discussions to adoption, and an additional two years to enter into force. The Fish Stocks Agreement took three years to adopt and an additional six years to enter into force. Both agreements are limited in scope compared to the range of issues that could be addressed as part of a new multilateral agreement under UNCLOS.

8 NEW MULTILATERAL AGREEMENT UNDER UNCLOS

The last of the abovementioned options is the development of a multilateral agreement under UNCLOS. The purpose of the multilateral agreement would be to enable the progressive development of UNCLOS in accordance with the principles of sustainable development. This section provides a broad outline of the provisions that such an agreement might contain, with particular reference to the identification, designation and management of MPAs in ABNJ. This includes considerations related to the organisational framework required to implement a new agreement and to put its provisions into operation.

(a) New global governance mechanism

New governance mechanism

One of the central elements of a new multilateral agreement under UNCLOS could be the creation of an institutional structure or framework to deal with issues relating to ABNJ. This could result in the creation of a new global governance body modelled on, for example, the ISA. But to avoid further fragmentation of the international environmental governance regime, it may also take the form of a more informal forum to coordinate and enable the marine protection efforts of existing organisations (e.g., to develop representative networks of MPAs or accomplish the Aichi and Johannesburg targets). This would help to improve synergies between the different international processes and encourage a 'cross fertilisation' of ideas on how to achieve new standards or best practice. The functions of such a mechanism could include the identification and management of MPAs, fundraising, scientific assessments, monitoring, compliance and enforcement.

(b) Legally binding obligations of states

State obligations

As part of a new multilateral agreement under UNCLOS, the use of VME or EBSA criteria in identifying and designating MPAs in ABNJ could be agreed in a legally binding format. Specific national commitments supporting the Johannesburg and Aichi MPA targets could be recorded and agreed. The agreement could further include an obligation to undertake EIAs and SEAs in all areas of ABNJ (both within and outside MPAs) before any new activities commence, and use modern area-based management tools – such as marine spatial planning – with a view to enabling the conservation and sustainable use of marine resources. The obligation to coordinate protective measures among states and with the new global mechanism could be strengthened and clarified – for example, when the high seas zone extends above a state's extended continental shelf and is adjacent to its EEZ. Further provisions would need to address other elements of the 'package approach' as well as domestic implementation measures.

(c) MPA designation and management process

Establishing MPAs

Under the new agreement, the international community would allocate jurisdiction over ABNJ. Hence the agreement should outline the basic cornerstones for the creation and management of MPAs. This could be through a centralised process or – more likely – include regional and sectoral organisations. For example, nominations for MPAs could be made to the new global mechanism by existing institutions, such as RSOs and RFMOs. In geographical regions where there are no competent organisations, the

mechanism should also have a mandate to identify and nominate MPAs. (Where relevant organisations do not have the competence to identify and nominate MPAs, the global mechanism could help to develop their mandate and capacity.)

Managing MPAs

Once nominations are received, the new global mechanism would have the mandate to designate MPAs. It could also recognise larger numbers of existing MPAs in bulk. The primary responsibility for managing MPAs would remain with the organisations that nominated the MPAs. The global mechanism would provide advice and assistance to the extent necessary and would have the ability to 'step in' and impose interim management measures until certain organisations are able to assume responsibility for coordinating the integrated management of their MPAs. All parties to the new agreement would be bound by the measures imposed in the MPAs.

Financing

The establishment and effective management of MPAs, possibly including a whole network, will require significant financial resources. A certain amount could be raised through the annual budget contributions of parties. But it is unlikely that all states would be willing to commit large sums of money to pursue environmental protection efforts outside their respective jurisdictions and immediate spheres of interest. Therefore a new global mechanism would need to coordinate further income-generating activities and be designed to manage and distribute such funds. Possible sources of funding for the establishment and management of MPAs in ABNJ include the following:

- Increased use of the GEF funding window relating to 'international waters'.
- Procuring a mandatory contribution from governments.
- Imposing shipping levies on routes crossing the high seas.
- Levies on the extraction of marine resources including fishing, mining, energy abstraction, rare earth minerals and genetic marine resources.
- Utilising market approaches including, for example, certification schemes for environmental services.
- Payments made as part of an access and benefits-sharing regime.

(d) Science gateway

Science gateway

It is generally recognised that science has to be at the centre of management decisions relating to ABNJ. A scientific body could therefore be established or recognised under a new agreement as the 'scientific gateway' to, inter alia, the identification and designation of MPAs in ABNJ. This body could provide assistance to existing regional, sectoral and global processes and institutions, develop action plans for the identification of EBSAs and VMEs, and coordinate the gathering of information on the oceans in general. It could be modelled after the International Panel on Climate Change or build on existing structures such as the scientific bodies under the CBD. Its mandate would need to reflect that in order to create a scientifically sound network of MPAs a holistic approach, covering waters under national jurisdiction and in ABNJ, has to be taken.

(e) Enforcement, compliance and assistance

Teeth of the agreement

The adoption of comprehensive monitoring, control and surveillance measures and ensuring effective compliance and enforcement are important components of governance in ABNJ. In this connection, the new agreement may provide an opportunity to further strengthen the jurisdiction of coastal, market and port states. It should create a global system to monitor and review compliance with the agreement, and in particular the measures related to MPAs. While the control and enforcement of management measures would ultimately be carried out by state authorities, it may also be useful to create a compliance or assistance branch within the new international governance mechanism. Existing regional arrangements such as the Compliance Committee under the Barcelona Convention could be integrated into the structure. To address the non-compliance of parties, financial and capacity-building support should be available, and – as a means of last resort – a penalty system.

(f) General principles in ABNJ

General principles

Various principles of international environmental law apply to activities and decisions affecting the marine environment. A new multinational agreement represents the opportunity to clarify their status and application, and create a flexible framework that provides guidance on how to resolve conflicting interests – now and in the future. An overarching framework of principles would aim to guide the parties' behaviour and the development and implementation of a regulatory regime for ABNJ. It could influence regional arrangements and strengthen emerging concepts in order to fill existing regulatory gaps. These principles are relevant to all elements of the 'package approach' under consideration by the Working Group and are considered in more detail in the following section.

9 PRINCIPLES

In general, legal principles in multilateral environmental agreements have a normative quality but – unlike rules – are usually not legally binding and are less focused on outcomes. They provide overall guidance to the parties on how to implement a treaty, pursue its objectives, and balance conflicting interests. To create a flexible, sustainable and robust governance regime for the marine environment in ABNJ, there are several concepts and principles that should be integrated in a multilateral agreement under UNCLOS and that could also be reflected in other possible law and policy instruments.

This includes inter alia the following:

(a) International cooperation

International cooperation

The principle of cooperation between states is part of customary international law and is central to the operation of UNCLOS. It is particularly important in ABNJ, where the lack of sovereign jurisdiction (beyond flag state control) creates a governance vacuum. Its application has been described in more detail in the CBD and the Fish Stocks Agreement, which emphasises in particular the need for cooperation between coastal states and RFMOs. In practice, however, international cooperation is not always happening to the extent, and within the timescales, required. Thus express reference to specific collaborative activities by states, international organisations and other stakeholders will help in the development of an integrated approach with a view to creating the comprehensive web of protective measures necessary for the successful implementation of area-based management strategies and MPAs.

(b) Precautionary principle

Precaution

There remain significant gaps in scientific knowledge relating to our oceans. Where such data and information are currently unavailable or uncertain, it is essential that a precautionary approach be adopted. Otherwise certain species could be lost before they have even been discovered. The principle has been incorporated into the Fish Stocks Agreement and its relevance for the application of UNCLOS has been recognised by the International Tribunal for the Law of the Sea (ITLOS). As the legal status of the precautionary principle (as a rule of customary international law) remains contentious, its express inclusion in a new multilateral agreement would strengthen area-based management strategies and science-based approaches in ABNJ.

(c) Sustainable and equitable use

Equity

UNCLOS has designated the mineral resources of the Area as the common heritage of mankind and created a benefit-sharing system. But with regard to the living resources in ABNJ, state practice still reflects the perception that these may be considered an ‘open-access common pool’ resource. However, the high seas’ freedom to fish has been qualified in many respects under UNCLOS, e.g., by establishing an obligation on states to: ‘protect and preserve the marine environment and rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species and other forms of marine life’. In addition, the traditional approach to harvesting living marine resources may conflict with the principles of inter-generational and intra-generational equity. Provisions in a new multilateral agreement on the sustainable and equitable use of all marine resources in ABNJ could help to clarify the law and allow for its progressive development in the light of today’s circumstances and requirements.

(d) Common but differentiated responsibilities

CBDR

Provisions reflecting the common but differentiated responsibilities (CBDR) of states in relation to ABNJ would be important in order to facilitate the fair access of developing states to ABNJ and recognise the importance of capacity building in such countries. This could result in the differentiation of parties to a new agreement depending on their specific needs (e.g., landlocked countries) or vulnerabilities (e.g., dependence on certain economic activities). The operation of the CBDR principle would not necessarily result in lower environmental protection commitments and standards for developing countries, but rather would aim to safeguard their active participation in the process of identification and management of MPAs and other area-based management measures in ABNJ.

(e) Science-based approach

Science-based approach

Sound science is important to the conservation and sustainable use of marine resources. The gathering and analysis of scientific data and information are at the heart of all successful approaches to the sustainable management of resources in ABNJ. UNCLOS and the Fish Stocks Agreement already require states to base their fisheries and management measures on 'the best scientific evidence available'. The importance of adopting scientific criteria in relation to the management of pollution has also been recognised. A clear principle in a new agreement referring to a science-based approach would help to embed science as a crucial criterion in all decision-making processes (e.g., establishing criteria and formulating management plans for MPAs and their surrounding areas) and strengthen the role of possible independent scientific advisory bodies (see above).

(f) Ecosystem approach

Ecosystem approach

Modern science indicates that ecosystem-based management (rather than the separate protection of specific species) is at the core of any solution to the current threats to the oceans. It is only through the adoption and implementation of a regionalised ecosystem approach that coherent networks of MPAs can be established. Due to their lack of political boundaries, affected private property rights and limited economic interests, ABNJ also offer distinct opportunities to adopt and implement an ecosystems approach. The ecosystem approach has already gained a degree of legal recognition under the Fish Stocks Agreement, the CBD, and in UNGA resolutions.

(g) Stewardship for the marine environment in ABNJ

Stewardship

The obligation to protect and preserve the marine environment is already stipulated in a number of international treaties and is considered part of customary international law. Thus state obligations in respect of the marine environment cannot be viewed solely in an economic context (e.g., harvesting fish stocks at a sustainable level) but must also consider the welfare of the ecosystem as a whole. Provisions in a new multilateral agreement confirming that states are bound by the principle in ABNJ could be extended to incorporate a wider concept of international stewardship or public trust. Such a concept is closely intertwined with the principle of cooperation between states and is based on a shared interest in the good governance of ABNJ. One option, in this connection, would be to stress that all humanity has an interest in ensuring the effective governance of ABNJ and to therefore develop a regime on the basis of the 'common concern of humankind'. Another approach would be to expand the 'common heritage' concept to cover not only the Area but also the high seas above.

(h) Principle of prevention and 'polluter pays'

Prevention

Under international law, states have an obligation to ensure that activities within their jurisdiction or control do not cause damage to the marine environment of other states and in ABNJ. The legal consequences of this rule, however, are contentious and could be specified in the law of the sea context in a new multilateral agreement. In order to implement environmental protection commitments domestically, states often employ the 'polluter pays' principle. The principle aims to internalise the costs of pollution at source and a new agreement could include provisions that make its application for various activities (e.g., industrial production, mining or navigation) mandatory.

(i) Transparency and accountability

Transparency

Transparency and openness in decision-making processes at state and intergovernmental level are increasingly considered important elements of good governance and effective treaty regimes. Participatory rights (e.g., on access to information or consultations) tend to safeguard the involvement of all stakeholders, create better decisions, and facilitate their subsequent implementation. The parties to the 'Aarhus Convention' adopted a set of guidelines on promoting the principles of access to information, public participation in decision making, and access to justice in international fora dealing with matters relating to the environment (known as the 'Almaty Guidelines').[25] The inclusion of provisions in a new agreement that reflect the need for transparency and accountability, and which apply to all those who are responsible for activities in ABNJ, is an important component of effective area-based management measures.

[25] For further information on the Almaty Guidelines see: http://www.unece.org/env/pp/ppif.html

10 CONCLUDING OBSERVATIONS

There are a number of options available to the international community regarding how to advance the negotiations in the Working Group. The adoption of a new legally binding multilateral agreement, such as an implementing agreement, appears to be the most appropriate solution to addressing existing gaps and creating a comprehensive regulatory and governance regime for the management and conservation of marine biodiversity in ABNJ.

The Fish Stocks Agreement was adopted in 1995 to develop and implement the provisions in UNCLOS that require states to agree measures necessary to coordinate and ensure the conservation and use of highly migratory and straddling fish stocks. Formally, it stands alone as an independent legal instrument – although its provisions clarify that it should be applied and interpreted in accordance with the terms of UNCLOS. Consequently, non-parties to UNCLOS can nevertheless ratify the Fish Stocks Agreement.

Similarly, a new international agreement on the protection and management of ABNJ could be adopted to implement parts VII (high seas) and XI (Area) of UNCLOS. If the terms 'implementation' or 'implementing' in respect of the agreement risked alienating some non-parties to UNCLOS, some might prefer to depict it as a 'multilateral agreement'. Launching a new process of international negotiations and achieving a meaningful outcome will be challenging, but the recent developments have created a new window of opportunity and new political momentum.

The Working Group is to provide its recommendations as to the best ways forward to the UN General Assembly in September 2012. Given the increasing pressures on the world's oceans and the likelihood that key tipping points have been – or will soon be – reached, the Working Group could also suggest interim measures to be taken while a multilateral agreement is negotiated. For example, a declaration by the General Assembly outlining environmental principles relevant to ABNJ could be a useful tool to raise further awareness, demonstrate political will, and encourage immediate state actions.

Additional initiatives for the establishment and management of pilot projects would help to develop a better understanding of the practical needs for coordination and knowledge sharing between states and organisations. Utilising the experience of the OSPAR Commission, changes to the mandates of RFMOs and additional interim protective measures should also be encouraged. In addition, compliance and enforcement strategies, as well as funding strategies, capacity building, and efforts to develop the transfer of marine technology, could be strengthened.

But while the international community debates ways forward, and negotiations around a new international agreement may begin, meaningful marine protection efforts need to be undertaken by all stakeholders within the existing legal framework as a matter of urgency. With a view to the rapid creation of a system that will ensure the effective use of area-based management strategies and MPAs in ABNJ, and thus contribute to the conservation and sustainable use of the world's oceans as a whole, action needs to be taken now – before it is too late.