

**Conservation and Sustainable  
Use of Marine Biodiversity  
in Areas Beyond  
National Jurisdiction:**

Options for Underpinning a Strong  
Global BBNJ Agreement through  
Regional and Sectoral Governance

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## Summary and key messages

### **Preamble to United Nations Convention on the Law of the Sea (UNCLOS, 1982)**

*“Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole,*

*Recognising the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment”*

### **The Future We Want (2012) UNGA Resolution A/66/288, §158**

*“We commit to protect and restore, the health, productivity and resilience of oceans and marine ecosystems, to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an eco-system approach and the precautionary approach in the management, in accordance with international law, of activities having an impact on the marine environment, to deliver on all three dimensions of sustainable development.”*

This policy brief demonstrates that there is both a need and opportunity to increase the interplay between the regional and global levels of ocean governance through a new global agreement for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ). Particularly, this policy brief aims to highlight the role and contribution of regional and sectoral governance in developing and underpinning the implementation of a strong high seas agreement. Regional efforts offer lessons learned, platforms for scientific data and knowledge exchange, mechanisms for convening states and stakeholders and coordinating regional approaches and measures for management. This policy brief identifies opportunities for how the coordination, cooperation and action between these two levels can be increased in view of an effective international legally binding agreement under the UN Convention on the Law of the Sea (UNCLOS).

Part 1 of this brief introduces the value of and threats to the marine environment and biodiversity beyond national boundaries, and the relevance of this vast region to coastal states and the planet as a whole. Part 2 describes the current framework for ocean governance in ABNJ as well as its main challenges. Part 3 provides a basic background on the upcoming UN negotiations and key elements for discussion with respect to institutional arrangements, and Part 4 describes the importance of interplay (i.e. cooperation, coordination and action) between the global and regional levels to delivering the goals of a global BBNJ agreement and how future opportunities to advance the aims of a new agreement may hinge on its ability to create the conditions for effective interplay. Possible options for underpinning a strong global BBNJ agreement through regional and sectoral governance are introduced in Part 5. Part 6 provides a short summary.

### Key messages from this policy brief:

- Regional ocean institutions, processes and coordination mechanisms should play a significant role in advancing the conservation and sustainable use of marine biodiversity in ABNJ by contributing to improved global governance of the ocean. Achieving and using this potential at the global level will require a new enabling UNCLOS implementing agreement.
- Successful cross-sectoral cooperation in conserving biodiversity in ABNJ requires a common goal or purpose and overarching set of principles, shared between managing bodies as well as transparent, participatory, and inclusive decision-making and coordination, and appropriate distribution of competence between the global and regional/sectoral levels. Such elements should be included in an international agreement for marine biodiversity in ABNJ (“BBNJ agreement”).
- Lessons learnt, expertise and capacity from the regional and sectoral levels can guide the development of provisions in a new BBNJ agreement to ensure that the future implementation of a new BBNJ agreement will be effective and adapted to the reality of its implementation in the ocean governance landscape.
- The regional and sectoral levels can underpin global standards established in a new BBNJ agreement by developing, implementing and enforcing regionally or sectorally-based agreements. This allows them to consider the specificity of the region, its challenges and needs, as well as go beyond the standards established by a new BBNJ agreement.



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# 1) Why is marine biodiversity in areas beyond national jurisdiction important?

Marine areas beyond national jurisdiction (ABNJ), the high seas and the international seabed Area,<sup>i</sup> comprise nearly two-thirds of the global ocean. This vast global commons contains marine resources and biodiversity of immense ecological, socioeconomic, and cultural importance. The ocean nourishes life in the sea and on land and acts as a heat and carbon sink, and provides habitat that shelters not only commercial fisheries but also species of significant scientific, cultural and spiritual value. Yet, as with waters closer to shore, the health, productivity and resilience of the marine environment beyond national boundaries is under mounting pressure from human development and global environmental change.<sup>ii</sup> All states suffer from declines in marine environmental health in ABNJ.

The cumulative effect of these mounting pressures is now undermining essential ecosystem functions, processes and services upon which all nations depend.<sup>iii</sup> Decades of overfishing and destructive fishing practices, pollution including marine debris, nutrients, anthropogenic noise and chemicals stemming from land as well as sea now threaten marine species, habitats and ecosystems—the key components of biodiver-

sity. The rising pressures of ocean warming, acidification and deoxygenation combine with these more direct causes of ocean degradation in often unpredictable ways. If not regulated wisely, deep seabed mining – an activity now under serious consideration – is likely to emerge as a significant new pressure.<sup>iv</sup> The first UN Global Ocean Assessment cautioned that urgent, timely and integrated action is needed to address mounting pressures: “The greatest threat to the ocean comes from a failure to deal quickly with the manifold problems.”<sup>v</sup>

The international community via United Nations General Assembly (UNGA) Resolution 69/292 has determined that existing sectoral and regional processes are necessary but not sufficient to achieve the integrated perspective and comprehensive action required to address these mounting pressures.<sup>vi</sup> Upcoming negotiations for a new global agreement for the conservation and sustainable use of marine biodiversity in ABNJ, launched pursuant to UNGA Resolution 72/249,<sup>vii</sup> offer States the opportunity to join forces for a strong (comprehensive, coherent and resilient) regime to address these challenges.

## Ecological Connectivity of the Ocean

The adoption of UNCLOS in 1982 was established to manage human activities taking place in and on the ocean. It however does not reflect the ecological connectivity of the ocean.

The ocean is a dynamic environment within which nutrients, gases, energy and heat move both horizontally across marine realms and vertically within the water column through physical, chemical and biological processes that enable their distribution across latitudes, longitudes and water depth. Marine species, ranging from microscopic plants to large marine mammals, are moved by currents or migrate across states' boundaries and between EEZs and ABNJ.<sup>viii</sup> Threats to the marine environment, such as marine pollution, marine debris, or alien species, are also spread by currents and gyres horizontally and vertically in the ocean; beyond and across the legal divide that we have set for the ocean.

Ensuring the conservation and sustainable use of marine biodiversity in ABNJ will therefore require taking into account the ecological connectivity of the ocean beyond legal jurisdictions; the intricate ecological, biological and oceanographic links that make the ocean the dynamic and living environment that it is to ensure its benefits for future generations.

## 2) How are activities in ABNJ currently managed and governed regarding BBNJ?

The high seas and international seabed area are managed under the framework of the 1982 UN Convention on the Law of the Sea (UNCLOS)<sup>ix</sup> through a suite of activity-specific agreements and global and regional bodies, each with their own mandates and priorities.<sup>x</sup>

UNCLOS imposes a duty to “cooperate on a global basis and as appropriate, on a regional basis, in formulating international rules, standards and recommendations, practices and procedures for the protection and preservation of the marine environment, taking into account characteristic regional features.” UNCLOS Article 192 contains the explicit obligation to protect and preserve the marine environment, and UNCLOS Article 194.5 requires that measures taken shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. The freedoms of the high seas recognised by UNCLOS Article 87 are to be exercised under the conditions laid down by the Convention, including the duty to protect and preserve the marine environment, and other rules of international law, and with due regard for the interests of other States. However, the Convention provides neither a mechanism nor specific procedures to enable States to implement these responsibilities.<sup>xi</sup>

The 1992 Convention on Biological Diversity (CBD) includes concepts and tools for the conservation and sustainable use of marine biodiversity, making it more advanced than UNCLOS. It defines biodiversity<sup>xii</sup> and aims to promote its conservation, the sustainable use of its components, and the fair and equitable sharing of the benefits arising from the use of genetic resources.<sup>xiii</sup> The CBD supports the establishment of a system of protected areas and other measures to conserve biodiversity and ecosystems. One of the key tools of the CBD is national biodiversity strategies and action plans. They are to reflect the measures

set out on the CBD, including the need to “integrate, as far as possible and as appropriate, the conservation and sustainable use of biodiversity into relevant sectoral or cross sectoral plans, programmes and policies.” Although CBD provisions are primarily focused on national jurisdiction, the CBD is still relevant to ABNJ, as it applies to processes and activities carried out under the jurisdiction or control of its parties and seeks to promote cooperation both directly and through competent international organisations, consistent with UNCLOS (CBD Articles 4, 5 and 22.2).<sup>xiv</sup>

Several other key bodies and instruments govern activities that impact biodiversity in ABNJ, including the following:

**Fisheries:** Most fishing in ABNJ is managed at the regional level by regional fisheries management organisations (RFMOs) focussing either on tuna and tuna-like species (“tuna RFMOs”) or fish stocks in a region other than tuna (“non-tuna RFMOs”). The 1995 UN Fish Stocks Agreement (UNFSA) provides guiding principles and elaborates requirements for cooperation, transparency, precaution, ecosystem-based management and RFMO performance.<sup>xv</sup> The Fisheries and Agriculture Organization of the UN (FAO) supports fisheries management through: a Code of Conduct for Responsible Fisheries (1995); guidelines;<sup>xvi</sup> plans of action<sup>xvii</sup> and the Port State Measures Agreement (PSMA).<sup>xviii</sup> The 2009 International Guidelines for the Management of Deep-sea Fisheries in the High Seas set forth criteria and suggestions for management to protect “vulnerable marine ecosystems” (VMEs) from the impacts of deep sea bottom fisheries.<sup>xix</sup>

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**Mineral resources:** Exploration and exploitation of the mineral resources of the Area are regulated by the International Seabed Authority (ISA) pursuant to Part XI of UNCLOS and the 1994 Implementing Agreement.<sup>xx</sup> Under UNCLOS, the seabed area and its mineral resources are the “common heritage of mankind,” to be managed by the ISA on behalf of humankind as a whole.<sup>xxi</sup> The ISA is currently elaborating regulations to govern exploitation of seabed minerals in the Area, building on existing regulations for mineral prospecting and exploration.<sup>xxii</sup> The ISA has developed a regional environmental management plan for the Clarion Clipperton Zone in the Pacific that includes a network of no-mining areas and is in the early stages of designing such plans for other regions of mining interest.<sup>xxiii</sup>

**Shipping and dumping:** Shipping and dumping are regulated through international conventions adopted within the framework of the International Maritime Organisation (IMO).<sup>xxiv</sup> The IMO has developed a series of measures that have been or could potentially be applied on the high seas, including Special Areas for discharge restrictions, routing measures and reporting measures. The IMO Guidelines for Particularly Sensitive Sea Areas (PSSAs) are for areas vulnerable to specific risks of shipping activities.<sup>xxv</sup>

**Marine science:** The Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) promotes international cooperation and coordinates programmes in marine research, services, observation systems, hazard mitigation and capacity development to understand and manage ocean and coastal resources.<sup>xxvi</sup> The IOC has developed International Guidelines and Criteria for the Transfer of Marine Technology.<sup>xxvii</sup>

The CBD also plays a key role in the provision of scientific advice with respect to marine biodiversity and the application of ecosystem-based approaches in ABNJ.<sup>xxviii</sup> This includes a scientific process to describe “ecologically or biologically significant marine areas” (EBSAs). CBD COP Decision 10/29 requested States and competent international organisations to consider enhanc-

ing EBSA protection and management.<sup>xxix</sup> The CBD has also developed voluntary guidelines for the consideration of marine biodiversity in environmental impact assessments (EIA) and strategic environmental assessments (SEA) in ABNJ.<sup>xxx</sup>

**Species-oriented conservation instruments:** A number of species-oriented conservation instruments are in place, including the International Convention on the Regulation of Whaling (IWC), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on Migratory Species (CMS).<sup>xxxi</sup> The CMS encourages States to develop further agreements on species of concern, such as the Agreement on the Conservation of Albatrosses and Petrels (ACAP) and the Memorandum of Understanding on the Conservation of Sharks.<sup>xxxii</sup>

**Regional seas conventions and action plans:** The current sector-based approach in ABNJ means that an objective such as biodiversity conservation and sustainable management of ocean resources do not fit neatly into the priorities of sectors or fall directly within the institutional responsibilities identified in UNCLOS. It also means that there are few mechanisms to enhance cooperation to address issues that involve several activities and institutions at the same time.<sup>xxxiii</sup>

Four regional seas organisations already have an explicit geographic mandate which include ABNJ,<sup>xxxiv</sup> while several others are exploring options for extending their governance efforts to ABNJ, including the Permanent Commission for the South Pacific;<sup>xxxv</sup> the Abidjan Convention in the Southeast Atlantic,<sup>xxxvi</sup> and the Nairobi Convention in the Western Indian Ocean.<sup>xxxvii</sup>

In 2016, the United Nations Environment Assembly (UNEA) of UN Environment adopted a resolution that encouraged parties to regional seas conventions to consider the possibility of increasing the regional coverage of those instruments in accordance with international law.<sup>xxxviii</sup>

Gaps and challenges in the current legal regime for ABNJ hamper efforts to conserve and sustainably manage marine biodiversity in ABNJ both regionally and globally.<sup>xxix</sup>

- **Absence of a comprehensive suite of overarching governance principles** to guide decision-making, such as precaution, cooperation, accountability, transparency, inter-generational and intra-generational equity, the ecosystem approach, and stewardship;
- **Fragmented institutional framework** lacking mechanisms for global coordination, cooperation or coherence among existing regional and global competent organisations. As a result, not all human activities in ABNJ are adequately regulated; not all regions are covered; and some organisations exercise their mandate with limited reference to modern governance principles, such as the ecosystem approach, or transparent and inclusive decision-making processes;
- **Absence of a global framework for area-based management tools (ABMTs) including marine protected areas (MPAs).** MPAs and MPA networks are widely recognised as being important tools for preserving and restoring ecosystem health and diversity; increasing resilience and enhancing productivity.<sup>xi</sup> Global standards for sectoral and cross sectoral area-based management tools and decision-making for globally legally-binding MPAs are similarly lacking;<sup>xii</sup>
- **Legal uncertainty surrounding the status of Marine Genetic Resources in ABNJ** including questions of sharing of benefits;
- **Lack of global practicable criteria and standards for the implementation of general UNCLOS rules to conduct and report on Environmental Impact Assessments and Strategic Environmental Assessments,** under which human activities and their individual and cumulative pressures can be assessed in a comprehensive manner to inform decision-making;
- **Limited capacity building and technology transfer,** which means the provisions in UNCLOS on this element are not adequately addressed or monitored. It is widely recognised that improved implementation mechanisms are needed; and
- **Uneven governance of high seas fisheries** has frequently been highlighted as a specific challenge, due to the primary focus of high seas fisheries management on regional level implementation. This has resulted in mixed RFMO performance in implementing ecosystem-based management to sustain habitat, species and ecological integrity; gaps in spatial coverage as well as target species (sharks, squid); and illegal, unreported and unregulated fisheries stemming in part from often poor domestic control over nationally registered and flagged vessels.



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### 3) What has happened to date?

In late December 2017, after more than ten years of United Nations discussions on how to improve the conservation and sustainable use of marine biodiversity in ABNJ, the UNGA adopted a resolution to formally launch negotiations for a new international legal instrument under UNCLOS.<sup>xiii</sup> The first of four substantive meetings takes place from 4 to 17 September 2018.<sup>xliii</sup> Another two meetings will take place in 2019, and a fourth in early 2020.

A central organising theme for the UN negotiations is the need for the comprehensive global regime to better address BBNJ conservation and sustainable use, and an understanding that an international legally binding instrument will take the form of a new implementation agreement to UNCLOS, akin to the Part XI Agreement and the UN Fish Stocks Agreement.

It is thus recognised that an important role of the international legally binding instrument will be to promote greater coherence with and complement existing agreements and bodies at both the global and regional levels, and that the international legally binding instrument will be interpreted and applied in a manner that would not undermine these instruments, frameworks and bodies.

Many ideas and options are already on the table and some key elements have been agreed by nearly all States.<sup>xliiv</sup> Starting points where there is general convergence include:

- (i) that a new agreement will recognise the central role of UNCLOS as well as the role of other existing agreements and bodies,
- (ii) the need to enhance cooperation and coordination for BBNJ conservation and sustainable use, and
- (iii) the need for assistance so that developing countries, in particular, geographically disadvantaged states, Least Developed

Countries (LDCs), Land-Locked Developing Countries (LLDCs) and Small Island Developing States (SIDS) as well as coastal African states can participate effectively.<sup>xliv</sup>

The negotiations will focus on a package of four issues: 1) marine genetic resources, including questions on the sharing of benefits; 2) measures such as area-based management tools, including marine protected areas; 3) environmental impact assessments; and 4) capacity building and the transfer of marine technology.<sup>xlvi</sup> Cross-cutting issues such as guiding principles and institutional arrangements will also be considered. The sections below briefly describe some of the key issues and challenges with respect to institutional arrangements.

A key component for the negotiations will be the elaboration of the roles and responsibilities of the States Parties and institutional structures for cooperation. Key questions will be what types of bodies will be needed, should there be new bodies or reliance on pre-existing ones, what authority should they have and what will their relationships to each other be?

Institutional structures envisaged by many for the global level include: A Conference of the Parties (COP) to take decisions, undertake coordination and integration efforts, and perform reviews and assessments of implementation; an Executive Committee to oversee the implementation of the decisions, policies and procedures established by the COP; a scientific body to provide advice on scientific and technical matters; a compliance body to resolve disputes and facilitate compliance with the provisions of an agreement; and a Secretariat to provide support to the parties to an agreement.

The issue of “not undermining” existing arrangements plays a role here, as some states have argued that the establishment of a new institutional mechanism that may have some role with respect to biodiversity impacts of fisheries,

may undermine existing RFMOs. At the same time, one of the precipitating reasons for the negotiations was the concern that without a global structure for cooperation, coordination, review, monitoring and collective action, the actions by some may undermine both global and national biodiversity conservation efforts.<sup>xlvii</sup>

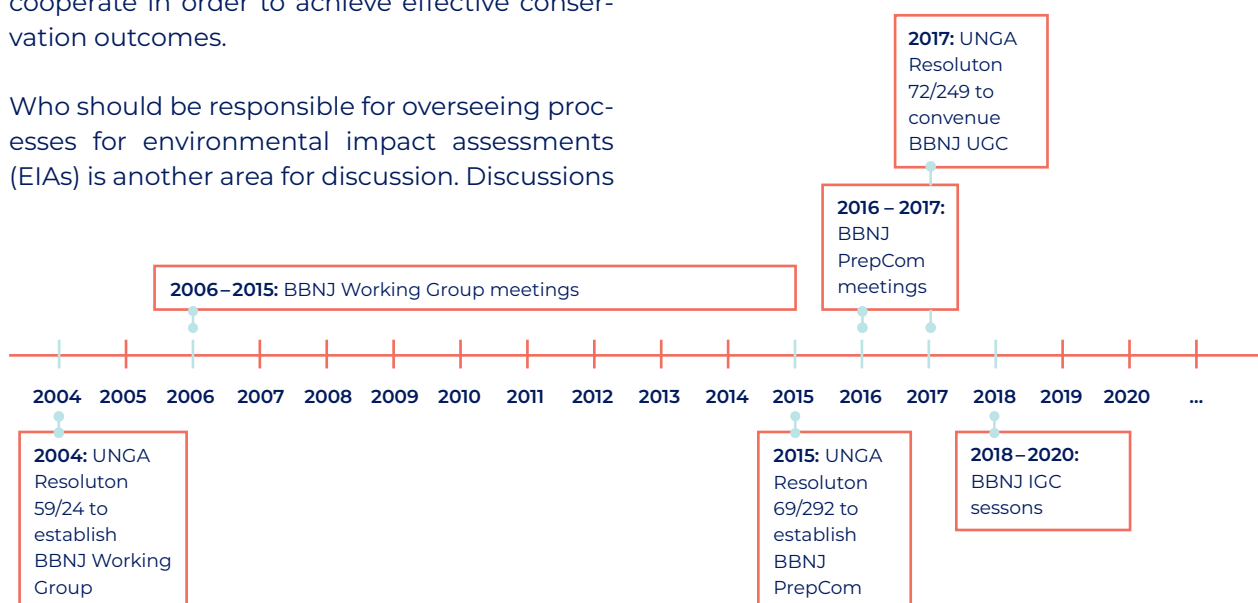
Institutional arrangements are of particular interest with respect to ABMTs including MPAs. Much of the PrepCom discussions explored one of these ABMTs, marine protected areas, through a range of proposals for their identification, selection and management. Key for MPA designation and management are whether these should take place at the global level through a new centralised body or conference of parties, at the regional level through existing sectoral and regional organisations, or through some combination of the two (“global approach,” “regional/sectoral approach,” and “hybrid approach”).

Though less discussed, questions of how to address sectoral impacts outside of MPAs are also relevant. During the PrepCom meetings, there were also proposals on how the new instrument could encourage the adoption of sector-specific ABMTs such as fisheries closures, vessel discharge restrictions, or no-mining areas within the mandate of RFMOs, IMO and the ISA, respectively. This discussion aims to find solutions that will more clearly give effect to the obligation to cooperate in order to achieve effective conservation outcomes.

Who should be responsible for overseeing processes for environmental impact assessments (EIAs) is another area for discussion. Discussions

during the PrepCom meetings indicate that there is broad recognition of the need to establish mechanisms for EIA implementation through, at minimum, common principles, standards, thresholds and public consultation and reporting procedures. However, it is still open as to who should be responsible for conducting, reviewing and approving the EIA and whether this should be the sole responsibility of the state where the proponent resides, a shared responsibility between the state and the States Parties to a new agreement, or subject to global level approval.

Strategic environmental assessments (SEAs) as envisaged in CBD Article 14(b) have been proposed by some as another important tool, as SEAs are used for assessing potential environmental and social impacts of proposed plans, policies or programmes, often at a regional scale. SEAs have also been applied to assess the potential range of impacts of new technologies or even new activities such as deep-sea mining, to enable the comprehensive assessment of potential impacts of new activities before they are approved. Questions to be addressed could be what would trigger a SEA process, and who or what might have the authority to foster cooperation and coordination to achieve effective results consistent with the objectives and principles of UNCLOS and a new BBNJ agreement.<sup>xlviii</sup>



**Figure 1: Timeline of the main BBNJ-related UN resolutions and meetings**

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## 4) The interplay of the global and regional levels in delivering the conservation and sustainable use of marine biodiversity in ABNJ via a global agreement

Regional and sectoral organisations could also play an important role in implementing an agreement. However, while opportunities exist, challenges also exist for sectoral and regional implementation of a new agreement and future opportunities to advance its aims may hinge on its ability to create the conditions and practical arrangements for effective cooperation, coordination and action (“interplay”).

Negotiators for a new agreement under UNCLOS for the conservation and sustainable use of marine biodiversity in ABNJ are to strive to enhance biodiversity conservation and management through enhanced cooperation and coordination whilst not undermining existing institutions and mandates. Achieving these aims will require a creative approach to establishing an integrated and cross-sectoral system of ocean governance at global, regional and national scales. As underscored by Mahon et al. (2015), successful interplay between different organisations requires that they operate in sync, based on a common purpose and a shared set of principles.<sup>xlix</sup>

A new global agreement could provide an opportunity to create conditions to enable a high degree of coherence and integration horizontally between and across regional institutions and vertically between regional and global institutions and a new BBNJ agreement. Ingredients that can assist in such integration identified in Mahon et al.<sup>l</sup> include: 1) a clearly identifiable overarching mechanism for integrated policy development and coordination as are found in some regions;<sup>li</sup> 2) effective science-policy advisory mechanisms to ensure that critical scientific knowledge is communicated effectively; 3) subscribing to the same set of environmental principles, in particular conservation in addition

to sustainable use, as well as the ecosystem and precautionary approaches; and 4) incorporating operational principles considered essential for “good governance”, such as transparency, accountability, participation, and efficiency to enable informed decision-making. For as noted in UNEP 2016, “strong efforts in just a few regions will still not prevent loss of marine biodiversity at the global level.”<sup>lii</sup>

Regional agreements are considered to be an important means of translating global agreements to specific geographical areas, which is essential for an ecosystem approach.<sup>liiii</sup> Thus, the regional level can complement and underpin the global level as a nexus for action. As noted by Durussel et al. (2017):<sup>liv</sup>

*“It can catalyse and progress this issue while an international agreement is being developed, negotiated, and agreed on. Notably, working at the regional level has been shown to drive better legal commitment and policy convergence between regional States, thus leading to large-scale changes being more efficiently tackled in the longer term. Cross-institutional cooperation can also be more efficiently increased at the regional level, contributing to a better coherence between biodiversity conservation and fisheries management.”*

A key issue for negotiators interested in pursuing regional level collaboration will be how a new instrument can encourage to enhancing the effectiveness, inclusiveness and capacity of regional and sectoral institutions on the one hand, and how regional activities and mechanisms can bolster the achievement of global objectives set forth in a new agreement.

Regional level institutions, including regional seas conventions and action plans, RFMOs and scientific bodies, have already made some significant advances to this end. Regional seas organisations have a long-standing history of convening regional member states to work together on transboundary marine issues, such as conducting scientific assessments, creating working groups, establishing protocols and making efforts to ensure compliance. Some regions, such as the Mediterranean, the North-East Atlantic (OSPAR Convention) and the Southern Ocean (CCAMLR) have already established a mechanism to establish MPAs through specific annexes, protocols or binding decisions.<sup>lv</sup>

Some regional level institutions and sectoral bodies have established a memoranda of understanding (MoU) to collaborate on regional issues and have developed experience and guidance documents on this subject. The MoU between the General Fisheries Commission for the Mediterranean and the Mediterranean Action Plan is a good example that stimulated joint studies on the impacts of climate change on the marine environment and ecosystem and their living marine resources, and integrated zoning approaches to mitigate cumulative risks due to increasing conflictive uses, among other joint initiatives.<sup>lvi</sup> These organisations have also established joint work programmes, joint meetings, participation at each other's meetings and scientific committees.

Many RFMOs possess advanced technologies for monitoring, surveillance and control for fisheries which could, at least in theory, be applied to other activities and the enforcement of MPAs. Regional scientific bodies such as the International Council for the Exploration of the Sea (ICES) and the North Pacific Marine Science Organization (PICES) are working on interdisciplinary assessments and developing ways to

collaborate through data and information exchange. The Pacific Islands Forum (PIF) and its Council of Regional Organizations of the Pacific (CROP), complimented recently by the Office of the Pacific Ocean Commissioner, is a prominent example of a high-level mechanism that has created the political conditions necessary for cross-sectoral cooperation and coordination of policies.<sup>lvii</sup>

Although there are positive signs of increasing willingness to cooperate across sectors, the majority of oceanic regions suffer from significant gaps in regulating human activities for the conservation and sustainable use of marine biodiversity in ABNJ or pursuing integrated policy development and coordination.<sup>lviii</sup> Challenges to cooperation between and amongst sectoral organisations and regional seas organisations may occur for lack of capacity, time, money or information, as well as sometimes differing priorities amongst bodies. Likewise, organisations can only act within the specific terms of their respective jurisdictions and mandates. That said, an injection of funds, human resources, and/or scientific capacity towards projects that contain a common commitment to shared goals and objectives has been shown to help stimulate cooperation.<sup>lix</sup>

At the same time there is increasing recognition of the need to strengthen collaboration at the national level amongst the various ministries so that a harmonised position is taken by the same government in the various regional and international organisations.<sup>lx</sup> To date this is not the case and is considered by some to be a key roadblock to preventing a coherent approach to management.<sup>lxi</sup> Such roadblocks underscore the need to also strengthen capacity at the national level and to ensure that national representatives are able to participate in a meaningful way in regional and global processes.

## 5) Possible options for underpinning a strong global BBNJ agreement through regional and sectoral governance

An agreement to enhance the conservation and sustainable use of BBNJ will need to rely on competence, capacity and action at multiple levels to be effective, while the preconditions for effective cooperation and coordination to this end require a new global instrument.

➤ A robust global body such as a Conference of Parties to decide on, review, monitor and promote implementation on a consistent basis across regions, ocean basins and sectors, to maintain momentum and adaptability to change.

Enabling mechanisms at the global level would include:

- Adopting international rules, standards and recommended practices and procedures for operationalising protection and preservation of the marine environment as envisaged in UNCLOS Article 197;
- Activating other core responsibilities of UNCLOS with respect to cooperation, capacity building and technology transfer;
- Incorporating modern approaches to biodiversity conservation, sustainable use and good governance as developed under the CBD, UNFSA and modern multilateral environmental agreements.

A global BBNJ agreement will therefore need to include sufficient legal obligations and institutional mechanisms to secure cooperation, coordination and action across and between sectors and regions as well as fill gaps in geographic coverage, scientific understanding and institutional capacities. To address global and regional biodiversity priorities, it will need to strengthen mechanisms for incorporating both regional biodiversity concerns at the global level and global biodiversity priorities at the regional and sectoral levels. At the same time, a new agreement will need to contain the right mix of flexible and supportive provisions that can be tailored to the needs of particular regions and sectors, while building the capacity of all actors and sectors to contribute to and benefit from improved conservation and sustainable use of marine biodiversity beyond national jurisdiction.

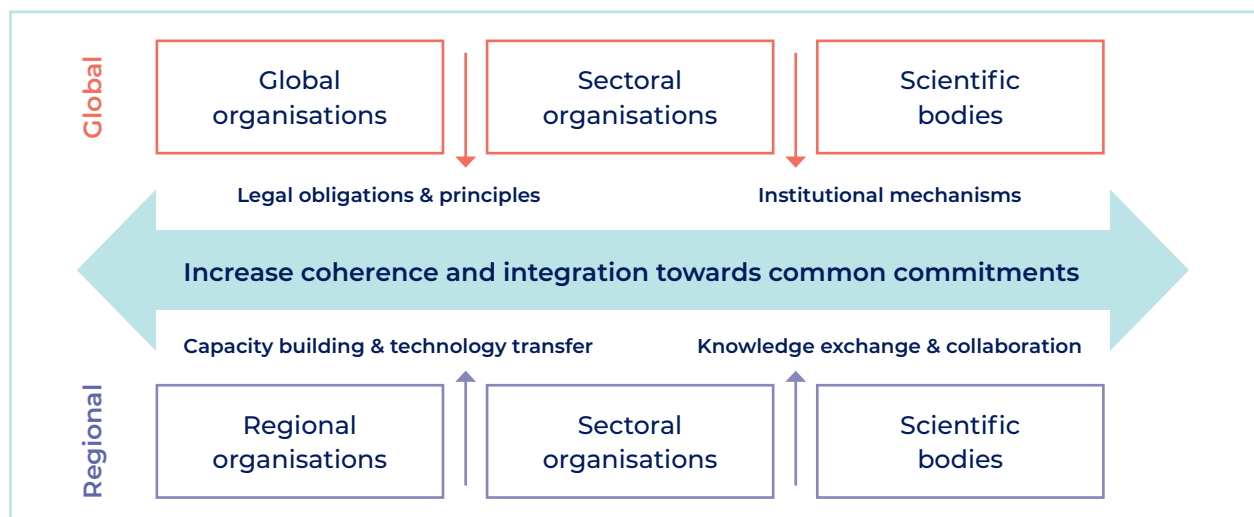


Figure 2: A new agreement will need to increase coherence and integration between and across regional and global institutions, both vertically and horizontally, to enhance the conservation and sustainable use of BBNJ.

Options for underpinning a new strong global BBNJ agreement through regional and sectoral governance could include:

### Reaffirming principles and reinforcing them through global rules and standards

- **Overarching governance and environmental principles** to guide decision-making at all levels that reflect and reaffirm modern principles, commitments and approaches could establish minimum standards for decision-making processes and activities in ABNJ. General principles could increase consistency between different regional initiatives and help guide the development of sectoral regimes. The regional level already uses sectorally and regionally agreed principles and has gained experience that can guide the development of such provisions in a BBNJ agreement. Developing and applying criteria based on the agreed principles for monitoring of “good governance” practices could also help to create a platform for cross-sectoral cooperation.
- **Global rules and standards for EIAs and SEAs** as well as recommended practices and procedures could ensure that human activities and their individual and cumulative pressures can be assessed in a transparent, comprehensive and accountable manner. The regional and sectoral levels can underpin these standards by developing, implementing and enforcing regionally or sectorally-based protocols that take into account the specificity of the region, its challenges and needs, and that can go beyond the minimum standards established by a new BBNJ agreement.
- **Global biodiversity conservation objectives, targets and obligations** can help to promote an integrated, coherent and consistent approach to the governance and management of BBNJ. Such provisions could draw upon the CBD and the UNFSA by requiring states to give effect to their duty their duty to cooperate by taking actions directly and through relevant organisations to main-

stream biodiversity considerations. Obligations could include minimising impacts, developing biodiversity strategies and actions plans and adopting proactive and precautionary protective measures through ABMTs including protected areas, EIAs and other measures. States who are contracting parties of regional and sectoral organisations could similarly be called upon to build on existing progress by collaborating in the conduct of scientific assessments, identifying joint measures for managing human activities, and developing cross-sectoral strategies and action plans for the conservation and sustainable management of activities in ABNJ.

- **Global performance standards, criteria and guidelines for good governance** could help promote the strengthening of existing sectoral and regional institutions and the establishment of new bodies, where necessary. This could be done by elaborating the duty to cooperate through provisions calling for states to, *inter alia*: update mandates of sectoral bodies where necessary; apply best available science; ensure access to data and information; ensure transparency; and institutionalise good governance principles. This could foster a stronger institutional framework for accountability without directly affecting the management authority or mandate of existing bodies.

### Increasing cooperation and coordination

- **Regional integration mechanisms** could be established or strengthened to undertake ecosystem-based management in offshore waters and ABNJ. Regional integration mechanisms have been shown to build political understanding and support for ocean governance in ABNJ provided they also build links with regional multipurpose organisations. Such cross-sectoral platforms can build trust and political will amongst regional actors by fostering stakeholder dialogues, joint programmes of work, and largescale spatial planning projects.<sup>lxii</sup>

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➤ **Expanded support for scientific cooperation programmes** could improve the ability of regional and sectoral organisations and states to implement ecosystem-based management approaches. The regional level can underpin this by establishing regional scientific knowledge hubs, similar to the ICES and PICES, to provide scientific and technical advice, knowledge, and data to different regional organisations and thereby boost cross-sectoral and multi-level cooperation and exchange.

➤ **Sustained support for capacity building and technology transfer** could enable all States Parties to effectively implement a new agreement regionally and domestically. Such provisions could build on the existing provisions in UNCLOS and other instruments to facilitate access to modern tools, technologies, and resources. The regional level can greatly contribute to implementing these provisions and ensuring that they adequately reflect the reality and needs of the regions. Regular regional and cross-regional capacity building workshops can ensure the continuous exchange of knowledge and data. At the same time, mechanisms are needed to strengthen regional and national institutions as well as individual capacity to ensure that national representatives are able to effectively participate in regional and global processes and to implement relevant obligations.

## Tools for managing human activities

➤ **Decision-making on ABMTs including MPAs at the global level under a new BBNJ agreement** could build on advances already made at the regional level for identifying and using scientific data for MPA establishment, notably in the CCAMLR and OSPAR regions. Regional experiences with MPAs can also help to inform discussions around procedures for adopting and implementing MPAs, such as weighted voting procedures. At the same time, a global process to establish MPAs which both endorses and supports regionally-designated MPAs can help to ensure that third parties outside of the specific region

recognise regional MPAs. This could be complemented by regional level commitments and protocols to foster MPAs in ABNJ to ensure that regional needs, challenges and interests in marine conservation and management are taken into account within a global process.

➤ **Global rules and standards, and recommended practices and procedures for other (ie. sectoral and cross-sectoral) ABMTs** could build on the provisions of the CBD to establish a specific duty to cooperate to adopt measures to conserve and protect marine biodiversity in ABNJ. Regional level coordination mechanisms could be used to bring together regional and sectoral bodies as well as national, regional and international stakeholders for strategic environmental assessments and marine spatial planning processes. As each region faces common as well specific challenges and needs, the regional level can help to catalyse, establish and implement mechanisms for coordination, cooperation and coherence among existing regional, sectoral and global competent organisations.

## Options for sharing benefits

➤ **A global mechanism for the sharing of benefits from marine genetic resources** has the potential to facilitate access to global and regional scientific expeditions, samples, information and technologies so that all can study, learn and benefit from marine genetic resources and biodiversity in ABNJ. An agreement could also support the establishment of regional and national marine research clusters and foster collaboration across all levels as envisaged in UNCLOS Part XIV. Scientists at the regional level can contribute as well as foster local expertise and skills to study, innovate and develop new applications for marine genetic resources, and apply conservation tools involving marine genomics and environmental DNA thereby accessing and contributing to global science and national management outcomes.

➤ **Capacity building, technology development and transfer initiatives need** to be designed to enable all regions and states to participate in and benefit from improved governance in ABNJ. Such scaling up and up-skilling will require new and sustained financial resources. Mechanisms both traditional and innovative

could build on lessons learned from existing mechanisms such as the Global Environment Facility (GEF), the UNESCO IOC Capacity Development Fund and regional development banks, recognising the need to make funding streams more ambitious, sustained and coherent.<sup>lxiii</sup>



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## 6) Summary

Mounting environmental pressures on the components of marine biodiversity beyond national jurisdiction – marine species, habitat and ecosystems – threaten to undermine global ecosystem services upon which all nations depend. The international community via UNGA Resolution 69/292 has determined that existing sectoral and regional processes are necessary but insufficient to achieve the i) integrated perspective and ii) collaborative action required to address these mounting pressures.

Upcoming negotiations for a new global agreement for the conservation and sustainable use of marine biodiversity in ABNJ launched pursuant to UNGA Resolution 72/249 offers States the opportunity to join forces for a strong (comprehensive, coherent and resilient) regime to address these challenges. The starting points for negotiations over the next two years include:

- (i) that a new agreement will recognise UNCLOS as the universal legal framework for ocean governance as well as the role of other relevant and competent agreements and bodies;
- (ii) the need to enhance cooperation and coordination for BBNJ conservation and sustainable use; and
- (iii) the need for assistance so that developing countries can participate effectively.

Enabling mechanisms at the global level could include:

- (i) adopting international rules, standards and recommended practices and procedures for the protection and preservation of the marine environment as envisaged in UNCLOS Article 197;
- (ii) activating other core obligations under UNCLOS with respect to cooperation, capacity building and technology transfer;

- (iii) incorporating modern approaches to biodiversity conservation, sustainable use and good governance embodied in the CBD, UNFSA and modern multilateral environmental agreements; and
- (iv) a robust global institution such as a Conference of Parties to review, monitor and promote implementation and to maintain momentum and adaptability to change.

At the same time, a new agreement will need to contain the right mix of flexible and supportive provisions that can be tailored to the needs of particular regions and sectors, while building the capacity of all actors to contribute to and benefit from improved conservation and sustainable use of marine biodiversity beyond national jurisdiction.

Options identified in this policy brief for improving biodiversity conservation through cross-sectoral cooperation at the regional level include:

- **Overarching governance and environmental principles** to guide decision-making in regional and sectoral bodies. These overarching standards of practice would reflect modern principles, inter-governmental commitments and scientific approaches and would establish minimum standards for decision-making processes and activities in ABNJ.
- **Global rules and standards for EIAs and SEAs** as well as recommended practices and procedures would ensure that human activities (and their individual and cumulative pressures) can be assessed effectively and transparently. These would be augmented by regional agreements to take into account regional characteristics.
- **Global biodiversity conservation objectives, targets and obligations** would help to promote an integrated, coherent and consistent approach to the governance and manage-

ment of BBNJ and to help drive cross-sectoral collaboration at the regional scale. Building on the UNFSA and CBD, such obligations might include minimising impacts, developing biodiversity strategies and actions plans and adopting proactive and precautionary protective measures through ABMTs including protected areas, EIAs and other measures.

- **Global performance standards, criteria and guidelines for good governance** would help promote the strengthening of existing sectoral and regional institutions and the establishment of new bodies if and when they are deemed necessary.
- **Regional integration mechanisms** could be established or strengthened to undertake ecosystem-based management in offshore

waters and ABNJ, accompanied by expanded and sustained support for science cooperation programs and capacity building and technology transfer to enable all States Parties to effectively implement, participate in and benefit from improved governance in ABNJ.

It is hoped that the options offered here for consideration as states embark on this historic journey can advance the goals envisaged in UNCLOS many years ago: *“the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,”* while securing the multi-level cooperation that will be required to achieve a healthy, productive and resilient ocean for present and future generations in the face of accelerating change.



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- <sup>x</sup> David Freestone, 2012. The Final Frontier: The Law of the Sea Convention and Areas beyond National Jurisdiction, in H. N. Scheiber and Director M. S. Kwon, eds., *LOSI Conference Papers, 2012 Securing the Ocean for the Next Generation*, Papers from the Law of the Sea Institute, UC Berkeley–Korea Institute of Ocean Science and Technology Conference, held in Seoul, Korea, May 2012.
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<sup>xxxv</sup> Carole Durussel, Eulogio Soto Oyarzún, Osvaldo Urrutia, 2017. Strengthening the Legal and Institutional Framework of the Southeast Pacific: Focus on the BBNJ Package Elements. *The International Journal of Marine and Coastal Law*. 32. 635–671. In the South Pacific, the Permanent Commission for the South Pacific (CPPS) has the competence to promote the conservation of marine living resources within the national jurisdiction of its member States and beyond (art. 4 of the 2013 CPPS Statute). CPPS' jurisdiction also extends to adjacent high seas areas affected by marine and coastal pollution under the 1981 Lima Convention. However, the extent of this mandate is not explicitly outlined. Furthermore, the CPPS Member States adopted the Galapagos Declaration in 2012 whereby signatories commit to promote coordinated action regarding their interests in living and non-living resources in ABNJ.

<sup>xxxvi</sup> Abidjan Convention COP Decision CP.11/10, 2014 requests the Secretariat to establish a working group to study all aspects of issues related to ABNJ.

<sup>xxxvii</sup> The Nairobi Convention COP 8 Decision, 2015 urges States to “cooperate in improving the governance of areas beyond national jurisdiction, building on existing regional institutions including the Nairobi Convention and developing area based management tools such as marine spatial planning”.

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<sup>xlvii</sup> Robin Warner, 2017. Strengthening Governance Frameworks for Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction: Southern Hemisphere Perspectives. *The International Journal of Marine and Coastal Law*. 32. 607–634; <https://doi.org/10.1163/15718085-13204064>.

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<sup>lviii</sup> Robin Warner, 2017. Strengthening Governance Frameworks for Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction: Southern Hemisphere Perspectives. *The International Journal of Marine and Coastal Law*. 32. 607–634; <https://doi.org/10.1163/15718085-13204064>.

<sup>lix</sup> The funding situation of regional programs varies significantly. Most regional seas conventions depend on the economic condition of the member states as well as the level of contributions from UNEP and other donors. On the other hand, the Global Environment Facility (GEF) has adopted a Large Marine Ecosystem concept as the marine component of their International Waters focal area and have GEF supported projects worth over US\$6 billion (David Vousden, 2015. Large marine ecosystems and associated new approaches to regional, transboundary and 'high seas' management. Ch. 18 in Rosemary Rayfuse, 2015. *Research handbook on international marine environmental law*).

<sup>lx</sup> UNEP, 2016. Regional Oceans Governance: Making Regional Seas Programmes, Regional Fishery Bodies and Large Marine Ecosystem Mechanisms Work Better Together. UNEP Regional Seas Reports and Studies No. 197.

<sup>lxi</sup> UNEP, 2016. Regional Oceans Governance: Making Regional Seas Programmes, Regional Fishery Bodies and Large Marine Ecosystem Mechanisms Work Better Together. UNEP Regional Seas Reports and Studies No. 197.

<sup>lxii</sup> Robin Mahon, Lucia Fanning, Kristina M. Gjerde, Oran Young, Michael Reid, Selicia Douglas, 2015. Transboundary Waters Assessment Programme (TWAP) Assessment of Governance Arrangements for the Ocean. Volume 2: Areas Beyond National Jurisdiction. UNESCO-IOC, Paris, France. IOC Technical Series. 119.

<sup>lxiii</sup> Harriet R. Harden Davies, 2017. Research for Regions: Strengthening Marine Technology Transfer for Pacific Island Countries and Biodiversity beyond National Jurisdiction. *The International Journal of Marine and Coastal Law*. 32. 797–822; <https://doi.org/10.1163/15718085-13204023>.

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## ViSdP

Prof. Dr Patrizia Nanz, Managing Scientific Director

**August 2018**



# About the STRONG High Seas project

The STRONG High Seas project is a five-year project that aims to strengthen regional ocean governance for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. Working with the Secretariat of the Comisión Permanente del Pacífico Sur (CPPS; Permanent Commission for the South Pacific) and the Secretariat of the West and Central Africa Regional Seas Programme (Abidjan Convention), the project will develop and propose targeted measures to support the coordinated development of integrated and ecosystem-based management approaches for ocean governance in areas beyond national jurisdiction. In this project, we carry out trans-disciplinary scientific assessments to provide decision-makers, both in the target regions and globally, with improved knowledge and under-

standing on high seas biodiversity. We engage with stakeholders from governments, private sector, scientists and civil society to support the design of integrated, cross-sectoral approaches for the conservation and sustainable use of biodiversity in the Southeast Atlantic and Southeast Pacific. We then facilitate the timely delivery of these proposed approaches for potential adoption into the relevant regional policy processes. To enable an interregional exchange, we further ensure dialogue with relevant stakeholders in other marine regions. To this end, we set up a regional stakeholder platform to facilitate joint learning and develop a community of practice. Finally, we explore links and opportunities for regional governance in a new international and legally-binding instrument on marine biodiversity in the high seas.

**Project duration:** June 2017 – May 2022

**Coordinator:** Institute for Advanced Sustainability Studies (IASS)

**Implementing partners:** BirdLife International, Institute for Sustainable Development and International Relations (IDDRI), International Ocean Institute (IOI), Universidad Católica del Norte, WWF Colombia, WWF Germany

**Regional partners:** Secretariat of the Comisión Permanente del Pacífico Sur (CPPS), Secretariat of the Abidjan Convention

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Partners of the STRONG High Seas project:



ABIDJAN CONVENTION  
CONVENTION D'ABIDJAN



IDDRI



International Ocean Institute  
African Region

