

Ocean governance: strengthening the legal framework for conservation of marine biological diversity beyond areas of national jurisdiction

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ABSTRACT

Marine ecosystems are a rich source of biodiversity, and healthy oceans are integral to the well-being of the ecosystem. Marine biological diversity, which is unique, is, however, unprotected and is threatened by various stressors on the oceans. The paper outlines the existing ocean governance framework and analyses the gaps and limitations in addressing the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ). It discusses the ongoing mechanisms to address issues related to BBNJ, presents the deliberations and arguments and explores the nature of future agreement for protection of marine biological diversity in areas beyond national jurisdiction. The way ahead for strengthening of institutional arrangements to address existing ocean governance gaps is also discussed. The paper concludes that there is a need for further international cooperation and global support for ensuring conservation of BBNJ.

KEYWORDS

Biological diversity; marine genetic resources; ocean governance; high seas; areas beyond national jurisdiction

Introduction

Oceans occupy an area of 362 million km² which is approximately 71% of the Earth's surface. Oceans provide 99% of the Earth's living space¹ and they are therefore the largest ecosystem on this planet. This justifies the sobriquet for Earth as the “blue planet”. Oceans are a major source of related economic activity such as shipping, ship-building, ports, and offshore oil and gas production, and contribute significantly to the world's gross domestic product (GDP). Eight of the top 10 largest cities in the world are located along the coast and around 44% of the world's population lives within 150 km of the coastline.² Over three billion people depend on marine and coastal resources for their livelihoods, and more than 90% of the world's trade is transported via the sea route. The social dimension is equally important as oceans contribute extensively to food security, and fisheries are an important source of livelihood. Oceans also drive marine and coastal tourism, and recreational and cultural activities, and have a large intrinsic value. The environmental facet of the oceans is extremely relevant as they are

the primary regulator of the global climate and act as a natural heat buffer. Further, oceans are a large absorber of carbon dioxide, and phytoplankton in the seas contribute around 50% of the world's oxygen. Oceans are the largest source of biodiversity on this planet and an estimated 50–80% of all life on Earth is found under the surface of the ocean.³ Healthy oceans are therefore critical for the protection and continuation of biodiversity.

However, there are many stressors on the health of the oceans such as overfishing, over-exploitation, pollution and unintended impacts of anthropogenic activities which are leading to ocean degradation, and a large number of marine ecosystems are being used unsustainably. It is estimated that up to 13% of global fisheries have collapsed due to commercial overexploitation of the world's fish stocks.⁴ Coastal areas are also under threat and approximately 30–35% of critical marine habitats such as sea grass, mangroves and coral reefs are estimated to have been destroyed.⁵ Although Marine Protected Areas (MPA) have been established to conserve the biodiversity of the oceans, only approximately 1% of the world oceans are protected, as compared to 12% of the land area.⁶

The paper aims to provide an overview of the existing ocean governance framework, and intends to analyse the gaps and limitations in addressing conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ). The next section discusses the legal framework for governance of the oceans, and the following section specifically looks at marine biological diversity and the Convention of Biological Diversity (CBD). The existing legal framework and the gaps are thereafter highlighted. Various mechanisms to address marine BBNJ and the issues under deliberation are examined in the next two sections. The last section deals with the possible nature of future agreements related to BBNJ and concludes that there is a need for further international cooperation and global support for ensuring conservation of marine BBNJ.

UNCLOS and ocean governance

The United Nations Convention on the Law of the Sea III, 1982 (herein referred to as UNCLOS), provides a comprehensive legal regime and governs the use of the oceans and its resources.⁷ It is complemented by two implementing agreements, namely the Agreement relating to Part XI of UNCLOS,⁸ which addresses matters related to the Area, and the Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.⁹

Under UNCLOS, the seas and oceans are divided into various maritime zones such as “territorial waters”, “contiguous zones” and the Exclusive Economic Zone (EEZ), which are defined from the “baseline”, which is usually the mean low-water mark along the shore of the coastal state. The territorial waters extend from the baseline to 12 nautical miles out. According to the UNCLOS, countries have exclusive sovereignty over water, seabed and airspace in their territorial waters, and therefore have the right to set environmental protection laws, and regulate and enforce legislation, in their territorial waters. Beyond this lies the contiguous zone, which extends a further 12 nautical miles into the sea, where the state can enforce laws in pollution control. The EEZ extends to 200 miles from the coastline but does not belong to the coastal state. However, the coastal state has the “sovereign rights for the purpose of exploring and exploiting, conserving and managing the

natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil ...”¹⁰

Under article 61 of the UNCLOS, states have the jurisdiction to protect and preserve the marine environment, to determine the allowable catch of living resources, to ensure conservation and management and to maintain/restore population for maximising sustainable yield in the EEZ. Under article 62 which deals with utilisation of the living resources, countries have prescriptive and enforcement rights in the EEZ and need to promote optimal utilisation of living resources in the EEZ. Hence, coastal states can apply nationally defined conservation laws governing the exploration, exploitation, conservation and management of the living resources in the EEZ. While other states can exercise freedom of navigation, and laying of pipes and submarine cables, in the EEZ, they are subject to the environmental protection laws of the coastal state.

Beyond the 200-nautical-mile limit lies the “High Seas”,¹¹ which is considered a part of the global commons, and all states enjoy equal rights to it including freedom of fishing and undertaking scientific research. The areas beyond the limits of national jurisdiction include: the water column beyond the EEZ, or beyond the territorial sea where no EEZ has been declared, and the seabed beyond the limits of the continental shelf,¹² which is designated as the “Area”.¹³ Parts VII and XI of the Convention provide the legal framework for the high seas and the Area, respectively.

Under the current international law, fishing on the High Seas is open to all countries, and the minerals in the seabed are agreed as “the common heritage of mankind”.¹⁴ While no state has the jurisdiction to pass laws regarding marine conservation, or to limit fishing, regional fishery arrangements have emerged to restrict fishing for optimal utilisation and to determine sustainable yields. Seabed resources in the Area are regulated and controlled by the International Seabed Authority (ISA) and no state may claim or exercise sovereignty or sovereign rights over any part of the Area or its resources. It is the responsibility of the ISA to adopt the necessary measures to protect and conserve the natural resources of the Area, and to prevent damage to the flora and fauna. On the other hand, shipping activity in the High Seas is regulated by the International Maritime Organization (IMO). Under the current rules, the authority to punish environmentally irresponsible conduct by ships on the High Seas falls on the flag state of each vessel. This has led to the practice of “flag of convenience” for merchant shipping, and is one of the major weaknesses in the protection of the marine environment.

Those areas of the oceans for which the responsibility for management lies beyond the jurisdiction of nation states are known as Areas Beyond National Jurisdiction (ABNJ) and include the “High Seas” and the “Area”. Approximately 64% of the surface of the oceans and 95% of their volume fall under the ABNJ, and conservation and protection of biodiversity in these areas is extremely important for healthy oceanic ecosystems.

UNCLOS also gives great importance to the preservation of the marine environment, and devotes an entire section to the same.¹⁵ Part XII of the UNCLOS spells out the obligations and rights of different states for the protection and preservation of the marine environment. Article 192 defines the general obligation and emphasises that states have the obligation to protect and preserve the marine environment. Article 193 deals with the sovereign right of states to exploit their natural resources, and explicitly mentions that “states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the

marine environment”. Article 194(1) assigns duty on the states, and lists the measures to prevent, reduce and control pollution of the marine environment, explicitly stating that

States shall take, individually or jointly as appropriate, all measures consistent with this convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

Such measures must also 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.

Marine biological diversity and the convention on biological diversity (CBD)

Biodiversity can be defined as “the variability among living organisms from all sources including terrestrial, marine and other aquatic inter alia ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems”.¹⁶ Biodiversity is composed of three main categories: genetic diversity, species diversity and ecosystem diversity. Genetic diversity is the degree to which members of the same species differ, species diversity is the number of different species present within an ecosystem and ecological diversity is the number of different ecosystems within a larger area.¹⁷

The maritime domain provides a rich biodiversity of pelagic (in open waters away from the shore and bottom surface) and benthic (sediment surface and some subsurface) ecosystems. Marine and coastal habitats include mangrove forests, coral reefs, sea grass beds, estuaries in coastal areas, and soft sediments on the ocean floor which support rich marine ecosystems.¹⁸ The world’s oceans host 32 of the 34 known phyla on Earth and contain between 500,000 and 10 million marine species, and new oceanic species are continuously being discovered, particularly in the deep sea.¹⁹ Further, there are deep seabed ecosystems, which include hydrothermal vent, cold seep, seamount, cold water coral and sponge reef ecosystems which contain genetic resources.

The goods (products) provided by marine biodiversity include food (about 100 million tonnes annually) and natural substances and ingredients for biotechnology and pharmaceuticals which are mainly delivered by macroscopic organisms.²⁰ Genetic resources in the oceans have significant commercial value and are being used for bioprospecting and scientific research. Substances extracted from these genetic resources are used in various pharmaceutical products and in cosmetics.

The services (functions) include the production and mineralisation of organic material, the storage of carbon, the storage of pollutants and waste products from land, the buffering of the climate and of climate change, and coastal protection (mangroves, dune-beach systems, coral reefs) which are delivered by microscopic organisms. The range of goods and services that is provided is determined by interactions between organisms, and between organisms and their environment, and therefore is a function of the biodiversity in a region. Hence, conservation of marine biodiversity is extremely important.

The Convention on Biological Diversity, 1992 (CBD),²¹ a comprehensive, legally binding multilateral treaty, covers all ecosystems, species and genetic resources and is a

key document for protection of biodiversity, sustainable development and fair and equitable sharing of the benefits of resources. The CBD lays out principles, scope, mechanisms and functional arrangements in its 42 articles. This convention is primarily land centric, and its implementation is hinged on the legal responsibility and effectiveness of nation states to undertake various activities in areas under their national jurisdiction. The CBD also recognises the legal status of the maritime zones as specified in the UNCLOS, and acknowledges that countries have sovereign rights and consequently legal mandate to frame laws on the conservation and sustainable use of biodiversity in marine areas under their jurisdiction.²² However, the CBD does not specifically address the uniqueness of issues related to conservation of marine biodiversity, and does not contain any specific article on marine and coastal biodiversity.

To overcome these lacunae, the 1995 Conference of the Parties on CBD agreed on two decisions. The policy decision contained basic principles and thematic areas and is known as the Jakarta Mandate²³ on the Conservation and Sustainable Use of Marine and Coastal Biological Diversity. The second decision was related to certain provisions which were to be implemented through a multi-year programme of work.²⁴ While the programme of work on marine and coastal biodiversity involved aspects of integrated marine and coastal area management, marine and coastal living resources, marine and coastal protected areas, mariculture and invasive alien species, these did not address specific issues of conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.

Another important protocol related to BBNJ is the Nagoya Protocol on the Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization. This entered into force on October 12, 2014, and applies to all genetic resources which are within the scope of article 15 of the CBD.

Existing legal framework for protection of biodiversity in the marine environment

Though addressed inadequately, the conservation and sustainable use of marine BBNJ falls under the purview of the UNCLOS. Section 2, Part VII of the UNCLOS specifically deals with the “conservation and management of the living resources of the high seas”. Article 116: Right to fish on the high seas; article 117: Duty of states to adopt with respect to their nationals measures for the conservation of the living resources of the high seas; article 118: Cooperation of states in the conservation and management of living resources; and article 119: Conservation of the living resources of the high seas address some of the related issues. Under articles 63 and 64, states also must cooperate in the management of “straddling stocks” and “highly migratory species”, respectively. This article was strengthened with an additional treaty known as the “Agreement for the Implementation of the Provisions of the UNCLOS, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks” which came into force on December 11, 2001.

Apart from the above, measures adopted by the IMO and specific agreements on protection of fisheries implemented by the Food and Agriculture Organization (FAO) are also applicable in the ABNJ on a global level. At the regional level, there are various agreements

implemented by the regional fisheries management organisations and arrangements (RFMO/As) and by “The Regional Seas Conventions and Action Plans” under the Regional Seas programme.²⁵ Further, there are many non-binding instruments which provide policy guidance for addressing marine biodiversity in ABNJ. These include the Rio Declaration and Agenda 21 adopted at the 1992 United Nations Conference on Environment and Development; the Johannesburg Plan of Implementation (World Summit on Sustainable Development, 2002); and “The Future We Want” (outcome document of the United Nations Conference on Sustainable Development, 2012).²⁶ Some of the concerns on BBNJ were addressed in the eighth meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 8) held in Curitiba, Brazil, from March 20 to 31, 2006. Decision VIII/21 on “Marine and Coastal Biological Diversity: Conservation and Sustainable Use of Deep Seabed Genetic Resources Beyond the Limits of National Jurisdiction” was also adopted.²⁷

However, due to the presence of many “legal gaps” and “implementation gaps”, the existing framework of ocean governance does not address the conservation and sustainable use of marine BBNJ sufficiently, and these need to be addressed at the country, regional and global levels. A “legal gap” describes the absence of a rule or inadequate legal mechanisms to regulate an issue at a global, regional or subregional level. Hence, an issue remains inadequately addressed, either in a substantive or geographical sense or both. An implementation gap, on the other hand, denotes the failure of an existing institution to regulate an issue or matter properly.²⁸ The legal gaps arise due to limitations in international law and agreements to protect biodiversity, while the implementation gaps flow from insufficient and uncoordinated efforts or from overlapping scope of existing agreements.

As outlined earlier, the UNCLOS demarcates different zones and defines the responsibilities of actors according to the legal status of the zone. Hence, the rules for conservation of biological diversity and those related to pollution differ depending on the zone such as territorial seas, contiguous zone, EEZ, continental shelf or the high seas, and are also based on different uses of the sea such as fisheries, shipping and marine scientific research, amongst others.

Both the “High Seas” and the “Area” fall beyond areas of national jurisdiction and, hence, states cannot exercise any laws for monitoring or for declaring MPA in these regions. Hence, these are to be governed collectively and currently there is no internationally legally binding treaty for protection of marine habitats in the ABNJ.

Mechanisms to address marine BBNJ

In order to identify the legal gaps and inadequacies in governance of the ABNJ, an Ad Hoc Open-Ended Informal Working Group to study issues related to the conservation of marine BBNJ and its sustainable use was established by the United Nations (UN) General Assembly in 2004 by Resolution 59/24.²⁹ The first meeting of the working group was convened in New York from February 13 to 17, 2006, and nine other meetings have been held over the course of the last decade.

In the fourth working group meeting held in 2011, the group agreed to a “package” of issues which could be addressed in an “implementing agreement” under the UNCLOS. This included the following main issues.³⁰

1. Marine genetic resources,³¹ including the sharing of benefits;
2. Area-based management tools, including marine protected areas;³²
3. Environmental impact assessments (EIA),³³
4. Building capacity to enable sustainable and equitable development;
5. The transfer of marine technology.

In the Rio+20 conference held in 2012, September of 2015 was fixed as a deadline for taking a decision on the possibility of development of a new agreement. Over the course of various meetings, the UN Informal Working Group on the conservation and sustainable use of marine biological diversity in ABNJ deliberated the scope, parameters and feasibility of a new international instrument under the UNCLOS and submitted its recommendations in the final meeting held at New York from January 20 to 23, 2015.³⁴

The Ad Hoc Open-Ended Informal Working Group stressed the need for a comprehensive global regime to better address the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.³⁵ The group reached a consensus on the process of negotiations and recommended developing an International Legally Binding Instrument (ILBI) under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. It decided to establish a preparatory committee, which would make substantive recommendations to the UN General Assembly on the elements of a draft text of an ILBI under the Convention before the end of the seventy-second session of the General Assembly in 2017. The group also recommended that the UN General Assembly consider the recommendations of the preparatory committee, and recommended that it should thereafter decide whether to convene an intergovernmental conference to elaborate the text of an ILBI under the Convention.

The group recommended that the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction would be addressed, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments, capacity-building and the transfer of marine technology. The above would be in accordance with the existing relevant legal instruments and frameworks, and relevant global, regional and sectoral agreements.

This step is quite significant as it represents a shift from the current ocean governance regime focused on the exploitation of ocean resources, to their conservation. Further, the principled intergovernmental debate has now graduated to intergovernmental text-based negotiations on BBNJ.³⁶

Issues for deliberation³⁷

Marine genetic resources (MGR), which are a potential source for drugs and medicinal use, is one of the main issues of contention between the developing and the developed countries. MGR consist of the genetic material of, deep-sea marine sponges, krill, corals, seaweeds and bacteria, etc., and are attracting increasing scientific and commercial attention as they are likely to possess unique characteristics that may lead to groundbreaking innovations in the pharmaceutical and food industries, among others.

The existing UNCLOS regime is silent on the MGR and only refers to the mineral resources in the Area. The ISA regulates all activities for exploration and exploitation of the “resources” in the Area which are the common heritage of mankind (UNCLOS, art. 136). The definition of “resources” is limited to “all solid, liquid or gaseous mineral resources in situ, in the Area, at or beneath the seabed, including polymetallic nodules”, which when recovered are referred to as “minerals” (UNCLOS, art. 133 and 136). Part VII, Section 2 of the UNCLOS deals with fisheries and marine mammals in the high seas but does not refer to other living resources, such as MGR, in the water column above the Area. Some parties therefore interpret that UNCLOS does not specifically regulate living resources such as those seabed, or benthic, ecosystems living on or near seamounts, hydrothermal vents and cold-water coral reefs, or bioprospecting in the Area. As per the existing provisions of the UNCLOS, marine scientific research (MSR) in ABNJ does not require any permission from the coastal state and is a part of the freedom of the high seas. Bioprospecting is therefore open to all states in the ABNJ as it is the common heritage of mankind, except for the general obligations to protect the marine environment which is specifically mentioned in the UNCLOS.

Anticipating that there are financial benefits which can be derived from MGR, countries from the developing world called for BBNJ to be declared the common heritage of mankind and demanded that access to these resources and the mechanism of benefit sharing should be based on the principles of equity. Records show that only 10 countries accounted for 90% of the patents on MGR, due to lack of physical access to ABNJ, technology to extract MGRs and financial resources for its commercial development. Issues of limited or no access to samples and data, limited ability to use the resources, and lack of transfer of technology in scientific research, including molecular biology and oceanographic skills, was also highlighted.³⁸ Developing countries therefore argued that free access to MGR, such as that applicable to the living resources in the High Seas, goes against the principle of “just and equitable international economic order”³⁹. Hence, they demanded that all countries should benefit from the economic returns, including sharing of benefits. These countries therefore proposed an arrangement similar to the exploitation of mineral resources in the deep seabed which is controlled and administered by the ISA. This arrangement would allow sharing of revenues, and access to relevant technology and research results from the development of MGR. Developing countries would also benefit from enhanced capacity to undertake follow-up research and from transfer of technology.

These arguments are countered by developed nations which maintain that exploration and exploitation of MGR falls under the right to conduct MSR and is a part of the freedom of the high seas. Hence, under UNCLOS, MGR in the ABNJ are accessible to any state. States such as Japan, the US and Canada put forth the argument that research on MGR is a costly scientific exercise and is undertaken by private companies. Hence, they have the first and the sole right to earn from the profits which they make out of commercialising the technology. Further, as and when the research is successful, it would benefit humanity by a trickle-down effect. Other developed countries such as members of the EU and New Zealand are open to the possibility of some form of benefit-sharing such as sharing of data and research results, capacity-building and scientific collaboration which is a part of an integrated approach, and suggest that access to MGR can be subject to notification and authorisation to conduct research in the ABNJ. Intellectual property rights (IPR) on the

MGR are also one of the contentious issues which need resolution. Countries are also divided on the need for explicitly defining the use of marine BBNJ and framing laws for its conservation and sustainable use, as under article 240(d), UNCLOS already specifies that MSR has to be conducted in compliance with all relevant regulations including those for the protection and preservation of the environment.

On the issue of “area-based management tools”, including establishment of MPA, parties claim that several arrangements already exist, such as RFMO. However, some parties feel that these arrangements are insufficient as there is no overarching framework, or global criteria for the selection and establishment of MPA in ABNJ.⁴⁰ An implementing agreement under the UNCLOS could therefore provide a global framework for the identification, designation and establishment of MPA in the ABNJ and would help to establish a global network of such areas.⁴¹ It is also expected that ecologically or biologically significant marine areas (EBSA) which need protection and have been framed by the decision of COP 9 of the CBD (decision IX/20, Annex I) also need to be incorporated into sectoral and MPA planning.

On the issue of “conservation tools and management tools”, the working group concluded that there is a requirement for improved conservation of marine biodiversity in the ABNJ, and a coordinated management approach is needed. It also highlighted that many regions lack a specific organisation which has the mandate for the conservation and sustainable use of marine biodiversity in ABNJ. Some of these do not have the regulatory capacity and there is no mechanism to ensure that conservation principles such as ecosystem-based management and the precautionary principle are incorporated and applied in the ABNJ.

The deliberations concluded that there is a lack of co-operation and co-ordination, particularly on a cross-sectoral basis, among the existing global, regional and sectoral bodies which are necessary to address potential conflicting uses of ABNJ, such as bottom-fishing activities and seabed mining. There is therefore a need to address all activities impacting marine biodiversity in ABNJ, including issues of competing jurisdictions and uses. Coordination of the implementation measures at the sectoral and regional levels, managing user conflicts and developing cross-sectoral integrated management approaches have also been recommended.

Regarding the issue of conduct of EIA and strategic environmental assessments (SEA), it is felt that these need to be operationalised to fulfill the obligation under article 206 of UNCLOS as there is no overarching global framework or mechanism in the ABNJ.⁴² These need to address both the cumulative impacts and the aggregate impacts of human activities.⁴³

Other issues which need to be addressed are:⁴⁴

1. Criteria to identify the activities that might require EIA, and their thresholds;
2. Standards or guidelines for conduct of EIA drawing on guidance developed by international organisations, including the CBD and the ISA; and
3. Procedures for reporting, assessment and monitoring of EIA.

Other gaps include lack of a specific follow-up action on the recommendations of the EIA.⁴⁵ Further, there are no mechanisms to assess or regulate the implementation of potential and emerging activities such as climate engineering, marine tourism, offshore

mariculture, offshore energy production or underwater noise in the ABNJ.⁴⁶ Some activities which require cross-sectoral EIA include fishing, seabed mining and the laying of submarine cables in the ABNJ. The sharing of information and data and independent verification of EIA conducted in ABNJ also need to be addressed, and there is a need to enhance regional capacity for the conduct of the EIA.⁴⁷

On the issue of marine science, it was felt that there are gaps due to the lack of a centralised data repository which emerges from the research in ABNJ; there is a need to increase South–South cooperation, and a need for further scientific research in the ABNJ. Regarding technology transfer and capacity-building, it was felt that there are difficulties in achieving transfer of marine technology and there is a need for global mechanisms for technology transfer and data sharing, as well as to protect commercially confidential data. Lastly, capacity-building activities are needed and these should not be considered a single activity but a complex series of interrelated activities.

Nature of the future agreement⁴⁸

It is evident that there are several issues of contention in the governance regime of oceans due to legal and implementation gaps. A suitable legal instrument is therefore needed to implement and update the environmental protection and conservation provisions of UNCLOS in order to address new threats and intensifying uses which are undermining the health, productivity and resilience of the oceans in general, and marine biodiversity beyond national jurisdiction in particular.

Opinions on the mechanism and the legal instruments to address these issues have been divided. A few options which exist range from a new legally binding implementation mechanism to additional dispute-settlement mechanisms in the UN General Assembly. Development of voluntary guidelines for enhanced cooperation between the existing institutions, strengthening mechanisms for information sharing, coordination between the existing sectoral and regional regimes, and evolving common mechanisms for reporting and disclosure are also possible. The Fish Stocks Implementing Agreement could be used as a model arrangement for the new implementation agreement. The nature of the institution which would regulate the BBNJ is also open to discussion. Options such as formation of a completely new body, increasing the scope of the ISA and better coordination among the existing institutions are also under consideration.

While the Ad Hoc Working Group recommended developing an ILBI under the UNCLOS, the content and the contours of this instrument still remain to be evolved. The definition of biological diversity has to be agreed upon and could include living marine resources, including their genetic resources located seaward of the outer limits of the EEZ and continental shelf. Such a definition would have to exclude fish, marine mammals and sedentary species, as these are already covered under the Convention. The vexing question which would, however, remain is the status of BBNJ as the common heritage of mankind.

The recommendations of the Ad Hoc Working Group on the BBNJ were adopted by the UN General Assembly in September 2015. Pursuant to the United Nations General Assembly resolution 69/292,⁴⁹ the Preparatory Committee⁵⁰ (Prep Com) will make substantive recommendations and will submit a report to identify the elements of a draft text of an ILBI under UNCLOS to the General Assembly before September 2017.

The Prep Com has commenced its work and the first Prep Com meeting was held from March 28 to April 8, 2016, while the second meeting is scheduled from August 29 to September 12, 2016.⁵¹

The Prep Com will identify the elements for a text covering the five issues identified in the 2011 package. The rules of procedure, elements for the draft text, texts for each element and other issues will be discussed and evolved based on a consensual process. Based on the progress of discussions in the Prep Com, the UN General Assembly will have to decide whether or not to convene an intergovernmental conference to finalise the negotiating text in 2018.

Conclusion

Healthy oceans are essential for life on Earth. The UN Convention on the Law of the Seas III, 1982, provides the legal framework for governance of the oceans and the seas and lays great importance on the preservation of the marine environment. However, there are legal and implementation gaps in the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ) and the existing legal framework for addressing BBNJ is inadequate. Various concerns have been expressed on the limitations to address the issues related to BBNJ, in response to which an Ad Hoc Open-Ended Informal Working Group was established by the UN General Assembly which agreed on a “package” of issues. These related to marine genetic resources, including the sharing of benefits; area-based management tools, including marine protected areas; conduct of environmental impact assessments; building capacity to enable sustainable and equitable development; and transfer of marine technology.

Protracted discussions on these issues were undertaken and the Ad Hoc Working Group recommended developing an international legally binding instrument under the UNCLOS for addressing the above issues. It was also agreed that the process would be based on consensus and in accordance with the existing relevant legal instruments and frameworks, and relevant global, regional and sectoral agreements. The rules of procedure, elements for the draft text, texts for each element and other issues will be discussed and evolved based on a consensual process by a preparatory committee (Prep Com) which will work through 2016 and will submit a report to the UN General Assembly in due course.

Though far from complete, the process of addressing the legal and implementation gaps regarding the conservation and sustainable use of marine BBNJ has come a long way. The importance of BBNJ has been highlighted, the need for addressing the issues has been accepted, and the nature of possible future agreement has been deliberated. What now remains to be seen is how countries collaborate and resolve their differences in order to protect and conserve marine biodiversity in the ABNJ, which is perhaps the last untouched bastion of marine biodiversity.

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Notes on contributor

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