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**IASS_IDDRI_Discussion paper - Regional approach in
ABNJ**

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Governance of areas beyond national jurisdiction - developing and strengthening regional approaches

15th Global Meeting of the Regional Seas Conventions and Action Plans

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Background

1. The UNEP Regional Seas Strategic Direction 2008-2012 recognized the need for regional seas conventions and action plans to focus on “addressing the protection of i) marine biodiversity beyond areas of national jurisdiction; and ii) deep-sea biodiversity. Indeed, recently some regional organizations and initiatives have progressively extended their attentions to areas beyond national jurisdictions (ABNJ). Although most Regional Seas Conventions do not include ABNJ in their current mandates, these emerging examples demonstrate that the protection of high seas areas can be addressed regionally within the framework of existing agreements.
2. At the same time much of the international attention is also directed towards a possible new international instrument for the conservation and sustainable use of marine biological diversity in ABNJ under UNCLOS. The possible role and interaction with existing sectoral and regional instruments remains to be discussed.
3. This paper highlights key questions and possible options for regional ocean governance in areas beyond national jurisdiction on the basis of the existing legal regime and within the framework of a possible new legal international instrument.

Discussion

4. The Global Meeting of the Regional Seas Conventions and Action Plans is kindly invited to take note of the attached discussion document and consider the following main questions:
 - a. For regions that have a mandate in ABNJ: How could the cooperation of competent sectoral and regional organizations in ABNJ possibly be realized or improved, based on the experience of existing best-practices in some regions?
 - b. For regions without a mandate in ABNJ: What are possible pathways to start addressing Environmental issues in ABNJ or areas adjacent to their geographic coverage?
 - c. How could Regional Seas Conventions interact with the current international debate at UN level on a possible new global instrument?

1. Introduction

The United Nations Law of the Sea Convention (UNCLOS) includes a general duty for States to protect and preserve the marine environment¹. It also stipulates that States shall cooperate, as appropriate, on a regional basis, directly or through competent international organizations, to protect and preserve the marine environment².

Recently, regional organizations and initiatives³ have progressively extended their attentions to areas beyond national jurisdictions (ABNJ). These emerging examples demonstrate that the protection of high seas areas can be addressed regionally within the framework of existing agreements. However, these regional actions in ABNJ come with some important caveats, *inter alia*: the inability to directly affect States or their flag vessels not party to the agreement (third parties); the patchy management of human activities, including uneven implementation of legal instruments, and cooperation with other competent organizations; and, often weak enforcement and compliance.

But there are also certain inherent advantages to a regional approach⁴. These include the ability to customize management and reflect the political, legal and ecological characteristics of a given region and to foster a multitude of approaches that may be learned from for application elsewhere. Moreover, the interplay of other conventions and competent authorities with regional initiatives and existing management frameworks will differ from region to region and may require tailor-made answers that resonate with the regional political and cultural context. Whilst a uniform governance approach could be advantageous in some respects, regionally driven, “bottom-up” approaches can facilitate the participation of coastal States as well as other stakeholders, and support the co-development and implementation of ecosystem-based management regimes⁵.

Currently much of the international attention is directed towards a possible new international instrument for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction ABNJ⁶ under UNCLOS, a so-called “UNCLOS Implementing Agreement”. In this regard, States decided during the 2012 United Nations Conference on Sustainable Development

¹ UNCLOS, Article 192 and 194(5).

² UNCLOS, Article 197.

³ This paper addresses all types of relevant regional organisations and activities; this includes Regional Seas Conventions and Action Plans, Regional Fisheries Management Organisations and other regional bodies and cooperation mechanisms for the conservation and sustainable use of the marine environment.

⁴ Rochette J, Chabason L. A regional approach to marine environmental protection: the regional seas experience. In Jacquet P, Pachauri R, Tubiana L. Oceans: the new frontier; A Planet for life 2011; TERI Press: 111-121.

⁵ Kvalvik, I. (2011): Managing institutional overlap in the protection of marine ecosystems on the high seas. The case of the North East Atlantic, Ocean and Coastal Management.

⁶ Duel, E.; Rochette, J.; Billé, R.; Chiarolla, C. (2013): A long and winding road. International discussions on the governance of marine biodiversity in areas beyond national jurisdiction, IDDRI Study No. 7/13.

(“Rio+20”) to take “a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea by the sixty-ninth session of the General Assembly” (i.e. August 2015). Such a global instrument would likely take several years to negotiate, and longer for it to enter into force and be implemented. In the meantime, the regional approach will continue to be central for the protection of biodiversity in ABNJ. Furthermore, it seems unlikely that a new global agreement would redistribute existing competences of international and regional organisations involved in the management of ABNJ. Regional bodies already exist, and depending on the content of the potential new agreement, the regional level bodies could play an even more important role in high seas governance, including e.g. in the adoption of marine protected areas (MPAs) management plans, assessment and monitoring, or Environmental Impact Assessments (EIA) and Strategic Environmental Assessments (SEA), etc.

Developing and strengthening regional initiatives and instruments for the conservation and sustainable use of ABNJ therefore seems an important avenue both from the perspective of improving the effectiveness of existing institutions and instruments and in the context of a possible future global agreement.

2. Options for action on the basis of the existing legal and political framework

2.1. Achieving conservation and sustainable use of ABNJ through existing regional mechanisms, instruments and tools: strength, weaknesses and possible next steps

The governance of ABNJ falls currently under the competence of several international organizations and regulatory mechanisms. These include global sectoral authorities, such as the International Maritime Organization (IMO) for shipping and the International Seabed Authority (ISA) for seabed mining. It also includes regional organizations, namely some Regional Seas Programmes and Regional Fisheries Management Organizations. The level of management of ABNJ therefore differs from region to region depending on whether a marine area is covered by a regional organization and, if so, by what type, the resources and funding available, and the level of political and societal support.

Initial promising steps in ABNJ have recently been made through the establishment of area-based management tools, such as MPAs and fisheries closed areas for biodiversity conservation. Examples include a network of MPAs established under the OSPAR Convention for the Protection of Marine Environment of the North-East Atlantic, complementary fishery closures by the North East Atlantic Fisheries Commission (NEAFC), the Pelagos Sanctuary for Mediterranean Marine Mammals established under the Barcelona Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean, and the South Orkney Islands Southern Shelf MPA established

Under the Convention for the Conservation of Antarctic Living Marine Resources (CCAMLR)⁷. Another interesting case is the Sargasso Sea where, in the absence of a dedicated regional organisation, conservation is sought through an alliance of committed States and stakeholders (“Sargasso Sea Alliance”) based on existing regional, sectoral and international organisations⁸.

However, these recent initiatives highlight at the same time the importance of the challenges that still have to be tackled. For example, because of the fragmentation of competences among various organizations, the management of the most impacting human activities falls outside the competence of Regional Seas Programmes - fisheries (through RFMOs), shipping (through IMO), deep sea bed Mining (through ISA). Also considerable efforts still have to be made in terms of representativity and coherence of the networks in ABNJ. **A major challenge is therefore to strengthen the regulation of human activities in ABNJ.**

- How could cooperation of competent organizations, within regions that have a mandate in ABNJ, possibly be realized or improved?⁹ Are there best-practices in some regions that could inform applications elsewhere? For regions without a mandate in ABNJ, what are possible pathways to start addressing environmental issues in ABNJ or the area adjacent to their geographic coverage?

Last, **very few initiatives have been launched by Regional Seas Programmes in ABNJ that go beyond the establishment of MPAs.** Other possible regional measures could include e.g. environmental and strategic impact assessments (EIA/SEA), frameworks for Marine Spatial Planning, regional regimes for marine genetic resources, regulation of scientific research, and facilitation of the transfer of marine technologies.

- What are therefore the other Regional Seas Programmes’ rooms for maneuver in terms of ABNJ conservation? What could be the priorities in the future?

2.2 Improved cooperation and coordination at the regional level

The governance of high seas areas takes place through multiple agreements, institutions and players. This can lead to conflicting management decisions and dilute important funding sources¹⁰. On the other hand, it can in some cases accelerate protection if regional “champions” can be identified, and

⁷Gjerde K. M. and Rulska-Domino A., (2012). “Marine Protected Areas Beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead”, 27 International Journal of Marine and Coastal Law, 351-273.

⁸ <http://www.sargassoalliance.org/about-the-alliance>

⁹ It should be noted that effective coordination at the national level between relevant ministries is essential to achieve a consistent approach at the international level of competent organisation.

¹⁰Druel E., Ricard P., Rochette J., Martinez C., (2012), Governance of marine biodiversity in areas beyond national jurisdiction at the regional level: filling the gaps and strengthening the framework for action. Case studies from the North-East Atlantic, Southern Ocean, Western Indian Ocean, South West Pacific and the Sargasso Sea, IDDRI Study No 4 / 2012, 100p.

regional pride harnessed¹¹. **In this context of highly-fragmented institutional and governance frameworks, new and innovative modes of institutional interaction are required.** As a first step, to enhance cooperation and coordination among competent authorities at the regional level and *vis-à-vis* the global level, is the development of cooperative frameworks such as Memoranda of Understanding (MoU) between the various bodies¹². Also, a common scientific or technical advisory body (such as ICES in the case of the North-East Atlantic, or the Convention on Biological Diversity (CBD)'s Ecologically or Biologically Significant Areas (EBSA) process) can also enhance cooperation (e.g. joint requests for advice) and could provide the same scientific basis for measures taken by the different competent authorities.

To establish an integrating platform for cooperation, the OSPAR Commission has developed a "Collective Arrangement between competent authorities on the management of selected areas in ABNJ in the North-East Atlantic" that is underpinned by a set of MoUs with relevant organisations. It stipulates a commitment to cooperate in the development and implementation of appropriate measures for the conservation and management of a list of so called "selected areas". The collective arrangement also includes a list of joint principles on the management of human activities in ABNJ, such as the precautionary principle or the ecosystem approach, to set out a common understanding between competent authorities on the management of human activities in selected areas in ABNJ in the North East Atlantic. However, so far only OSPAR has *endorsed* the Collective Arrangement. ICCAT, IMO, ISA and NEAFC are still in the process of considering this proposal in their respective meeting cycles and acceptance has been cautious and slow.

In the case of CCAMLR, the mandate to manage fisheries and to conserve marine ecosystems from the impacts of fishing is combined in one organisation¹³. The effectiveness of CCAMLR compared to most other regions of the world shows what can be achieved when an RFMO has also a conservation mandate that applies to all living marine resources. **A crucial challenge is therefore the identification of the right type and level of cooperation for a given region:**

- Could experiences such as the OSPAR Collective Arrangement or the Sargasso Sea Alliance (see §2.1) be replicated in other regions of the world? Where they do exist, what tools or mechanism beyond soft law (MoUs) and informal *ad hoc* mechanisms, e.g. informal meetings or bilateral

¹¹ O'Leary, BC, Brown, RL, Johnson, DL, von Nordheim, H, Ardron, J, Packeiser, T, Roberts, CM. 2012. The first network of marine protected areas (MPAs) in the high seas: The process, the challenges and where next. *Marine Policy*; 36: 598-605

¹² E.g. the memorandum of understanding between the OSPAR Commission and the International Seabed Authority. (<http://www.isa.org.jm/files/documents/EN/Regs/MOU-OSPAR.pdf>)

¹³ It should be noted that CCAMLR has a special status as it neither qualify as Regional Seas Conventions nor as Regional Fisheries Management Organisation exclusively but combines both functions.

contacts between Secretariats and stakeholders, could reinforce the cooperative development of joint measures?

- In regions where there is no Regional Seas Convention or Action Plan, would it be desirable and feasible to broaden the mandates of RFMOs to include the protection of marine ecosystems and biodiversity from activities beyond fishing? What are other options could be pursued?

But also **interregional cooperation between relevant organisations, e.g. facilitated through the UNEP coordinated Regional Seas Programme, could be an option to support the development and implementation of programmes for the conservation and sustainable use of ABNJ.** Therefore:

- Would it be possible to strengthen and to harmonise regional approaches to high seas governance through a process of interregional (and cross-sectoral) cooperation? What could be tangible elements for such a process and how could they be developed and adopted?

2.3 Expanding the scope and mandates of regional frameworks and initiatives

Even if promising steps have been made at the regional level towards the conservation and sustainable use of ABNJ (see 2.1), most Regional Seas Organisations currently have no mandate to address issues beyond national jurisdiction. Indeed, even though the UNEP Regional Seas Strategic Direction 2008-2012 recognised the need for regional seas conventions and action plans to focus on “addressing the protection of i) marine biodiversity beyond areas of national jurisdiction; and ii) deep-sea biodiversity¹⁴”, **most of these regional seas bodies still focus largely on coastal areas within national jurisdiction only. Similarly, high seas fisheries in some regions are currently not (yet) regulated by RFMOs**, e.g. in the North Pacific¹⁵, the Central Atlantic (for bottom fisheries) or the Arctic¹⁶ and some fish stocks are not managed even in areas where there are RFMOs. Therefore:

- How desirable and feasible is the expansion of regional organisations’ and initiatives to ABNJ? Should we plead for a complete coverage of ABNJ by regional organisations and, if so, how could this be achieved (e.g. expansion of existing regional frameworks, creation of new frameworks in ABNJ)?

While pleading for a better conservation and sustainable use of ABNJ through the regional approach, it seems important to keep in mind that **many Regional Seas Programmes and RFMOs already face important difficulties to manage the marine environment and its resources under their charge.** Lack of human capacities within Secretariats, enforcement mechanisms, political will and necessary

¹⁴ UNEP, Regional Seas Strategic Directions 2008-2012, 14th Global Meeting of the Regional Seas Conventions and Action Plans, Nairobi, Kenya, 1st - 3rd October 2012, UNEP (DEPI)/RS.14 /WP.10.RS, §7a.

¹⁵ The treaty establishing a Regional Fisheries Management Organisation for High Seas areas of the North Pacific Ocean is not yet in force.

¹⁶ See <http://www.fao.org/fishery/topic/4440/en>

funding often hold up the implementation of the legal agreements adopted: this is true both for regional seas frameworks¹⁷ and RFMOs¹⁸. Expanding the mandate of already “overstretched” regional organisations to more comprehensive ABNJ conservation without providing them the necessary means to reach this objective could result in increasing difficulties for the regional cooperation frameworks. In other words:

- How could such regional organisations be supported most efficiently to exercise their existing and any new or expanded mandates and which accompanying measures (institutional, financial, human, etc) would be necessary? Do options come from innovative financial mechanisms, seconded staff from government agencies, cooperation between “developed and developing” regional organisations, etc.? Could a global mechanism be set up to support regional protection of ABNJ?

As an intermediate solution, regional organisations might consider a stepwise approach to expanding their attention and activities to ABNJ:

- What processes and steps could facilitate identifying and addressing priority issues and areas of concern in waters adjacent to the convention areas? Could concepts such as EBSAs and Vulnerable Marine Ecosystems (VMEs) and tools such as EIAs and SEAs play a role in this context? Once the issues dealing with regional organisations’ mandates, suitability and feasibility of regional initiatives in ABNJ are clarified, **another crucial question concerns the geographical priority of actions**. All marine regions are impacted by human activities but some specific areas in ABNJ may indeed be more threatened. Besides, some undisturbed areas might be particularly suited to provide refuges to species under changing environmental conditions. In this context:
- What are the scientific data (EBSAs, VMEs, etc.) available to identify the most suitable high seas areas? How comprehensive is the knowledge of existing and potential human impacts in ABNJ (seabed mining, deep sea fishing, bioprospection, etc.)? Could cross-checking these data help in identifying regions which particularly suffer from an absence of regional initiatives in ABNJ? Are there political champions in these regions which could help to launch a cooperative process?

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