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Towards a new legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction

Posted on 21/10/2016 by gje011

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Meetings commented on: Meetings towards an internationally legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction in March/April and August/September, 2016.

In a JCLOS blog post of 17 August 2015, Anna-Maria Hubert provided an overview of the UN General Assembly resolution (A/RES/69/292) to begin a process towards an internationally legally binding instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (ABNJ). This post examines how the process has progressed since then.

First, let us briefly recap: Marine areas beyond national jurisdiction cover nearly half of the world's surface. Science tells us with still greater force that these large oceans are more affected by human influence than was previously understood. Pollution, overfishing, expanded shipping, marine mining, energy development, intensified aquaculture, ocean warming and acidification all pose serious threats to marine ecosystems – including those beyond national jurisdiction – and require more effective marine management. The extent to which the UN Convention on Biological Diversity (CBD) extends to BNJ has been disputed, but in practice the CBD's role is limited to providing technical and scientific advice. The Law of the Sea Convention (LOSC) only provides very broad duties of states to protect the marine environment and its living resources in ABNJ. Besides, a number of sectoral instruments are also applicable in ABNJ, such as those developed by the FAO on fisheries, the IMO on shipping and the International Seabed Authority (ISA) on seabed mining. The same applies to arrangements made by regional fisheries management organisations and other regional forums.

All in all, this leaves ABNJ with a patchy institutional and legal framework. Besides, there are gaps in this framework since not all activities in ABNJ are covered and since regional forums may differ in terms of measures to protect marine biodiversity. For these reasons, the UN General Assembly (UNGA) in 2015 decided to launch a process towards a new implementing agreement that would address "together and as a whole" the following key topics:

- 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 process does not disregard the other global instruments relevant for biodiversity in ABNJ and the regional arrangements mentioned above. Indeed, the mandate prescribes that these arrangements should be built upon and not "undermined".

The preparatory committee (prepcom) established by UNGA Resolution 69/292 has held two meetings, the latest being in August-September 2016. Veterans involved in the 10 year negotiating process to adopt the UNGA resolution find that good progress has been made, and that a new momentum has been created to protect biodiversity in ABNJ. However, the process is still at an early stage and much work remains to be done. The two meetings have mainly been used to line up and set the agenda for the inevitable tough give-and-take negotiations that are coming in the next stage. The main areas of convergence and divergence have been identified. Areas of divergence are considerable both in terms of the overall need for and scope of the instrument and on the individual four topics. The main four topics are addressed in the following sections.

Marine genetic resources, including questions on the sharing of benefits

Chemicals from marine sponges have led to the development of leukemia and HIV drugs; antifreeze proteins from cold-water fish are the basis for improving the quality of ice-cream and other frozen foods; and enzymes extracted from the Mid-Atlantic Ridge are used to develop biofuels. These are just a few examples of why marine genetic resources are of considerable scientific and commercial interest. According to a scientific article of 2011 'Marine Biodiversity and Gene Patents', 10 developed countries account for 90% of patents related to marine genetic resources indicating that developing countries have so far had limited benefits from marine bioprospecting. Therefore, these countries argue hard for a regime based on equity which will assure that not only the economically and technologically rich countries in the North, but all countries obtain monetary and non-monetary benefits from bioprospecting in ABNJ.

For genetic resources on land and in marine areas within national jurisdiction, the CBD and its Nagoya Protocol already provides a regime: States have sovereignty over genetic resources and access to these resources is subject to prior informed consent from the State and mutually agreed terms which may include benefit sharing arrangements. But what is or should be the legal status of marine genetic resources in ABNJ? The LOSC is silent and countries are clearly divided on this key question. LOSC draws a distinction between the characteristics of the two areas beyond national jurisdiction, the high seas (the water column) and the Area (the deep seabed). As for the high seas, it seems to be undisputed that in the absence of specific provisions in LOSC on marine genetic resources, the freedom of the high seas principle applies. As for the Area, developing countries argue that genetic resources should have a legal status similar to that of mineral resources. For exploring and exploiting mineral resources of the deep seabed, LOSC provides a common heritage of mankind regime implying that the resources cannot be accessed exclusively by any State, but only for the benefit of humankind under the centralized control and administration of the International Seabed Authority.

Developed countries generally oppose a common heritage status for marine genetic resources. While countries like the US and Russia oppose any deviation from high seas freedom arguing that it could impede research and development, the EU, New Zealand and Norway take a more pragmatic position and support a multilateral benefit sharing regime as part of an integrated approach to conservation and sustainable use of biodiversity in ABNJ. These countries recognize that a "first come, first served" approach to bioprospecting for marine genetic resources (based on the high seas freedom principle) could be harmful to conservation and sustainable use. So far, no details have been offered by the countries as to how such a *sui generis* regime could work.

Area-based management tools, including marine protected areas

Area-based management tools, and especially the designation and management of marine protected areas in ABNJ, is another contentious issue. Here the divide is less between North and South (although the EU is the

strongest proponent) and more between countries with strong commercial interest at sea – especially fisheries interests – and others. The minimalist view is that since other global and regional agreements already have authority to provide some kind of protection against the use of marine areas, there is no need for another regime in this field which may even undermine these other agreements. Countries like Iceland, Japan and Russia are especially reluctant to provide any authority to this new instrument over fisheries matters particularly if this could interfere with global and regional fisheries agreements,

On the other side, proponents of a strong regime argue that the various sectoral and regional agreements are insufficient. Restrictions in certain high seas areas imposed for example by regional fisheries management organisations (RFMOs) only address fisheries; and designations of Particularly Sensitive Sea Areas (PSSAs) by IMO only address shipping. The new instrument could fill the gaps and serve as a coordination mechanism in the creation of a representative, global network of multipurpose protected areas on the basis of an ecosystem rather than a sectoral approach. The situation can be compared to protected areas on land or in coastal areas under national jurisdiction where a range of human activities are typically regulated to protect biodiversity.

When it comes to purely regional designation of marine protected areas in ABNJ by regional seas organization (which has been practiced under e.g. OSPAR in the North Atlantic and under the Barcelona Convention in the Mediterranean), the limitation is that these have no greater rights over ABNJ than their members – typically the adjacent coastal states. These will typically be the only states legally bound by the rules applicable to the protected area; third countries may be unwilling to comply.

Other questions that need to be resolved include the scientific criteria for designation and decision-making competence for proposing, adopting, managing and enforcing the protected areas. Other area based management tools in addition to protected areas (e.g. marine spatial planning) also need to be discussed.

Environmental impact assessments

While less controversial than the two issues described above, the question of how Environmental Impact Assessment (EIA) should be addressed by the new instrument is also the subject of discussion. It is generally held that EIA is a customary law obligation in cases of activities with transboundary environmental impacts and perhaps also for activities affecting global commons such as ABNJ. LOSC contains a very broad EIA obligation for activities in ABNJ. Perhaps because of its general nature, this obligation has been sparsely implemented, and it is generally held that LOSC fails to take into account the cumulative impact of multiple stressors on the marine environment. Thus, there is a broad wish among all countries that the new instrument should fill in the gaps with criteria for invoking EIA and procedures for carrying out the assessment. There is also broad support for Strategic Environmental Assessment (SEA) in the new instrument. SEA is environmental assessment further “upstream” in the decision-making process of plans, programs and policies that may affect marine biodiversity.

A point for further discussion is whether the requirement for conducting EIA should be based on a list of potential harmful activities, thresholds for environmental impacts or a combination of the two. Other points are whether activities carried out within national jurisdiction, but with effects beyond, should be subject to EIA and who should be responsible for the EIA; national governments responsible for the activity (flag states), or a body under the instrument. Also on the EIA topic, a controversial underlying question is whether, and if so to what extent, the fisheries sector will be affected.

Capacity-building and the transfer of marine technology

There is broad agreement that capacity building and technology transfer are vitally important to enable developing countries to take their share in conservation and sustainable use of biodiversity beyond national jurisdiction, and that the new instrument should address this issue as do many other global environmental regimes. The application of these other regimes on this topic – not least the LOSC itself – is one of the issues for further discussion. Another is the nature of and modalities for a funding mechanism and whether funding will be provided on a mandatory or voluntary basis.

What is next?

The mandate of UNGA to the prepcom is *not* to elaborate treaty text but only to provide *elements* for a possible new instrument. This shall be done by the end of 2017 on the basis of four meetings. Only then will UNGA decide whether to convene an intergovernmental conference to consider the recommended elements and to elaborate the text of an international legally binding instrument under LOSC. Nonetheless, the two remaining prepcom meetings in 2017 face a significant task. Not only are there differences in relation to each of the four main themes, there are also different priorities as between the themes. Developing countries are likely to insist quite strongly on an effective benefit-sharing mechanism for the use of marine genetic resources and to make their support for more conservation oriented measures dependent on this – a negotiation situation that evokes memories of the negotiations for the Convention on Biological Diversity.

For the coming third meeting in 2017, the prepcom chair will prepare a "non-paper" as a basis for the negotiations. This will be based on countries' views presented at prepcom 2 and written submissions to be made by countries in the coming months.

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