

Squaring the Oceanic Circle? On Regional Approaches to the Conservation of Marine Biodiversity in Areas beyond National Jurisdiction

By Vito De Lucia

Matter commented on: regional approaches to marine biodiversity conservation in ABNJ

Introduction

The ongoing COVID-19 pandemic has determined the cancellation or postponement of a great many international meetings, including the suspension of all physical activities at the UN Headquarters in New York City. On 23 March, the UN building should have hosted the fourth – and last scheduled – substantive session of the intergovernmental conference (IGC) aimed at adopting a new treaty on marine biodiversity in areas beyond national jurisdiction (BBNJ). This session was formally postponed to a date yet to be defined by UN General Assembly [Resolution 74/543](#) on 9 March 2020 (provisionally available as A/74/L.41). DOALOS however has kept busy behind the scenes and has recently released a very useful document (the [Compilation](#)) where it has compiled all the textual proposals countries (and observers) have been submitted following the [invitation](#) from the President of the IGC amb. Rena Lee that accompanied the release of the [revised draft text](#) in November 2019. A country-by-country compilation [already existed](#), but the added value of this new document prepared by DOALOS is that it compiles all textual submissions on an *article-by-article* basis, greatly facilitating review and analysis. This pause in the negotiations, while it risks reducing the momentum of the negotiations, creates also a particularly propitious opportunity for reflections and commentaries on some of the central questions at stake. This post wishes to address the question of “international cooperation”, a question currently addressed by draft article 6 of the revised draft text. The key point of this discussion is the distribution of roles and competences to adopt conservation measures between the future BBNJ treaty and relevant global, sectoral and regional instruments, frameworks and bodies.

Global v. Regional Approach to the BBNJ Treaty

Throughout the negotiations, there have been two main ways to think about this question. There is a global approach, which considers as the natural outcome of the BBNJ process a global framework and the creation of a global BBNJ body with a strong mandate and with direct competence to adopt conservation measures, especially with respect to one of the four topics under negotiations, area-based management tools (ABMTs), including importantly marine protected areas (MPAs). The groups of G77/China, of the Pacific Small Island Developing States (PSIDS), of the Alliance of Small Island States (AOSIS) and of the Core Latin American Group (CLAM), as well as most of the NGO participating as observers to the BBNJ negotiations have usually supported this global approach, in full or in part. By contrast, another group of countries such as Norway, Iceland, Russia, the Republic of Korea, Japan, China, the United States (countries with strong fisheries interests, strong institutions in their region, and an active Arctic interest) have [historically favored a regional approach](#). The regional approach wants to avoid that the BBNJ treaty undermines regional and sectoral instruments and bodies that already operate and are competent to adopt measures within their respective mandates. During the PREPCOM phase, a third, middle-of-the-road approach was proposed by New Zealand, known as the [hybrid approach](#). This approach gained immediately traction and still gathers much support, as there is certainly a need to approach the question of the distribution of competence in a diversified manner according to the topic of the Treaty, and even within the same topic. At the same time it is also evident to many delegations, as well as observers, that the effective governance of marine areas beyond national jurisdiction requires a strong participation of regional instruments and bodies, albeit within an overarching framework that should provide a “[common goal or purpose](#)”, as well as common principles that can be shared between the relevant bodies that will have direct competence to adopt conservation measures.

The New Proposal from Iceland

In this context, one particular textual proposal, submitted by Iceland as a comment on article 6 of the revised draft text, which addresses “international cooperation” ([Compilation](#), p. 52), stands out. The proposal articulates in detail an interesting and constructive vision of regional implementation, by bringing significantly further, in the view of the present writer, existing

“regional” submissions (such as [Norway’s](#), whose earlier proposal Iceland explicitly builds upon), and builds an important bridge towards a framework of conservation that would integrate global common rules and principles and regional implementation. Iceland has consistently preferred a regional approach, whereby the BBNJ global framework would only put in place the necessary rules to facilitate coordination and cooperation among sectoral and regional instruments and bodies, but with decision-making remaining with the latter. This proposal reiterates Iceland’s strong preference for a regional approach (a preference underpinned by an equally strong reluctance towards the BBNJ negotiations, the need for a new agreement and the vision of a global management of marine biodiversity). However, this proposal takes a significant leap forward. The core of the proposal hinges on the idea of a “consultation process” that “should include all relevant bodies and international organizations that have a mandate to adopt conservation and management areas in the relevant region”, including relevant intergovernmental organizations such as the International Maritime Organization and the International Seabed Authority. ([Compilation](#), p. 53, letter b). It also, interestingly, indicates that the consultation process shall be “formalized” in one of two ways: through the constitution of a formal international body, or more loosely through one of the participating bodies taking up the role of administrative coordinator ([Compilation](#), p. 53, letter c).

The proposal also refers to cases where “no regional body with a mandate to establish conservation and management measures to protect biodiversity” exists, and suggests, reproducing the earlier Norwegian proposal, that in such situations relevant States “shall cooperate to establish such a body” ([Compilation](#), p. 53, letter e). Here the expression “relevant States” includes both coastal States and States otherwise operating in the region. The central point, clearly, is to ensure a regional framework for implementation, whether regional bodies already exist or not in the particular region.

A Multiplication of Collective Arrangements?

The proposal by Iceland has arguably many merits. It appears to balance the need for an overall set of common rules and principles with the realities of regional and sectoral fragmentation. It also takes a pragmatic approach with respect to how to solve the question of the interaction (rectius: coordination and cooperation) between the BBNJ treaty and other relevant sectoral and regional instruments and bodies, a question so far mostly discussed in terms of ensuring that the BBNJ

treaty will not undermine relevant instruments and bodies, in ways however yet to be firmly agreed upon. The key leap, however, is the proposal that such consultation processes “shall be formalized”, in one of the two ways illustrated. It is important that not all relevant details are addressed explicitly in the proposal (for example the [issue of recognition](#)), and the devil is, as always, in the details (for example of the formalization process; of its institutional and normative outcome; of the relation between the BBNJ treaty and these new international organizations etc.). Nevertheless, the proposal deserves careful consideration.

Reading the proposal, however, it is difficult not to think immediately of the [Collective Arrangement](#) (CA) adopted in 2014 by the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) and the North-East Atlantic Fisheries Commission (NEAFC) for the governance of the North East Atlantic. I have discussed the potential role of the CA as a suitable model for the overall architecture of the future BBNJ treaty elsewhere (for example [here](#) and [here](#)), and the question before us now is whether Iceland envisions a multiplication of CAs to serve as a regionalized institutional framework that shall see to the implementation of the global rules and principles adopted under the BBNJ treaty, and perhaps also why it has not utilized the same language. Iceland is in fact a member of both OSPAR and NEAFC, so it will have had the CA in mind when considering a model suitable to articulate a regional approach to BBNJ governance that might function and that, importantly, might elicit broader consensus, in light of the obligation to formalize the process set out in the proposal. However, it must be noted that for the time being, the CA has failed to become fully operational as no organization other than NEAFC and OSPAR, which already cooperate through a [Memorandum of Understanding](#), has entered into the CA, reducing its practical relevance.

The goal of the CA is very similar to the aim of the proposed consultation process, as the CA aims to become a collective and multilateral forum composed of all competent instruments, frameworks and bodies addressing the management of human activities in the marine areas beyond national jurisdiction of the North-East Atlantic ([CA Agreement](#), Annex II). In other words, it is a framework aimed at integrating the regional, sectoral and global dimensions in a coherent arrangement for decision-making with the view to “help deliver” an ecosystem-based governance of the oceans, [as OSPAR underlines in relation to the CA](#). The relevant normative framework that the CA internalizes as the basis of the cooperation, importantly, already open for the operationalization of a future BBNJ treaty, through the non-exhaustive list of “relevant binding and non-binding

international instruments” contained in article 4(d) of the CA.

This envisioned structure and the vision of the CA is thus clearly similar to the consultation process proposed by Iceland. There are, however, also some difference. First, Iceland does not envision the consultation process to encompass fisheries bodies, as evident by the suggested article 6 bis, which would state, in the form suggested by Iceland, that the BBNJ treaty “does not apply to conservation and management of fish stocks” ([Compilation](#), p. 57). Secondly, the CA operates as a forum for cooperation and coordination. Within a BBNJ context however, there would be specific common goals and principles that such CAs would need to relate to in some manner. Additionally, there would be a multiplication of CAs (or consultation processes) resulting from a specific set of rules and obligations – those proposed by Iceland for example – which are addressed at State parties to the BBNJ treaty, but that articulate a global vision that would be the common foundation for all regional arrangements to implement.

One question that can be asked is whether a global BBNJ body should be participating to these regional consultation processes, perhaps not as a decision-maker, but with an oversight or safeguard function. This might be a functional benefit at least in relation to one of the problems that any regional approach raises. Not all regions have in fact sufficient institutional capacity or the resources to structure it, and that may impair significantly their ability to carry out effective regional cooperation and their ability to implement the BBNJ treaty – hybridity, and a diversity of approaches for different regions may thus be necessary, and envisioning a role for a BBNJ body as participating institution in regional arrangements, or as the operating body there where none exist, might offer a suitable, adaptive workaround.

Another question is how to ensure that all the relevant instruments and bodies participate to the regional arrangements, a relevant issue especially for the global bodies such as the IMO and the ISA, which, besides their [general resistance against the potential encroachment of the BBNJ treaty in their areas of competence](#), have also shown little interest, so far at least, with respect to the North East Atlantic CA.

A further point to raise is arguably that any regional implementation cannot be thought without thinking about an ecosystem-based model of ocean governance – and indeed this is the purpose of the CA. If one thinks in terms of ecosystems, or ecoregions, however, not only the inclusion of fisheries management becomes paramount, but the inclusion of coastal States in one such consultation process or arrangement becomes potentially central. It would be a missed opportunity

in fact if coastal States are not included as potentially relevant actors in a decision-making framework that, if seriously aiming at ecosystem-based governance, will have to inevitably encompass both areas beyond *and* within national jurisdiction. This interconnection, and the corresponding need for an active participation of coastal States in decision-making, has been already singled out under the rubric of [adjacency](#) during the BBNJ negotiations. In the context of a regional, ecosystem-based governance model, it would be simply a question of taking the next logical step, in order to adopt the perspective of ecosystems and [ocean connectivity](#), and move past the ill-suited jurisdictional zoning enshrined in UNCLOS. One possible way to articulate this expanded governance arrangement, is through what I have called [elsewhere](#) Regional Ecosystem Organizations (REOs). The idea is only been expressed in preliminary terms, but an REO should have a “[full mandate to implement an ecosystem-based conservation framework across all relevant jurisdictional zones](#)” (p. 9). Importantly, an REO, while formalized in terms of its legal basis, would need to “be conceived as a fluid governance arrangement [...] able to adapt its participatory base and its decision-making geometry to relevant oceanic and ecosystem circumstances,” (ibid.), which would mean also being able to accommodate the participation of coastal States as and when relevant for achieving effective ecosystem-based conservation. Further details would need to be considered and carefully articulated, including some “(con)federalist” aspects that will ensure willingness to participate by protecting minority views and localized implementation through mechanisms such as [concurrent majority](#).

Conclusions

The pause in the BBNJ negotiations imposed by the ongoing COVID-19 pandemics, creates a propitious opportunity for reflections and commentaries on some of the central questions at stake. This post addressed the question of “international cooperation”, and of the distribution of roles and competences to adopt conservation measures between the future BBNJ treaty and relevant global, sectoral and regional instruments, frameworks and bodies. Iceland has in this respect submitted a very interesting proposal for a balanced framework for the governance of marine biodiversity in areas beyond national jurisdiction that shall ensure that a) the new BBNJ treaty sets global standards, rules and principles; b) the BBNJ agreement will find effective implementation at a regional level, through a consultation process; c) the focus of the negotiators shift from the question of [not undermining](#) to mechanisms for coordination and cooperation. It seems evident that Iceland

had in mind the Collective Arrangement that is already in place in the North East Atlantic as a legal mechanism to foster cooperation among all relevant sectoral and regional instruments and bodies for the implementation of an ecosystem-based conservation. In that respect the Icelandic proposal seem to suggest a multiplication of Collective Arrangements, an idea that has been discussed in some recent publications by the present writer both as a [general model for the institutional architecture of the BBNJ treaty](#), and for the [Arctic region more specifically](#).

The Icelandic proposal has many merits, though it is unclear whether it will gather significant support on the part of all those delegations that have consistently supported a strong role for regional instruments and bodies, such as Norway, the Russian Federation, the United States, Japan, the Republic of Korea, in light of the suggested obligation to formalize the envisioned consultation process. By contrast, this same obligation is likely to elicit the support of those observer NGOs, such as WWF, that have long stressed the importance of an enhanced regional cooperation regime for the implementation of the BBNJ global standards, although with a strong oversight role for global BBNJ institutions. The next step perhaps would be to imagine Regional Ecosystem Organizations that, while formalized in terms of their legal basis, would be able to be adaptive in terms of governance geometry and participation to decision-making. This would be one way to [re-imagine international law in the Anthropocene](#) as a law that “[becomes-with](#)” the radically complex ecological circumstances within which it operates. The Icelandic proposal offers an excellent opportunity in this respect, in this pause of the negotiations, to shift significantly perspective and raise the bar of what can be accomplished.