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POLICY BRIEF

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Advancing Governance of the High Seas

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1. OUR GLOBAL OCEAN NEEDS BETTER GOVERNANCE

In marine areas beyond national jurisdiction (ABNJ)—the high seas and the deep seabed located beyond the limits of States' continental shelves covering almost two-thirds of the global ocean—biodiversity is at significant risk. Threats to biodiversity include the intensification and expansion of human activities into previously inaccessible locations as well as the growing impacts of climate change and ocean acidification. In light of this worrying situation, world leaders at the Rio+20 Earth Summit committed themselves to better conservation and sustainable use of marine biological diversity in ABNJ.

To discuss concrete proposals on how to advance the governance of marine biodiversity in ABNJ the Institute for Advanced Sustainability Studies (IASS) and the Institute for Sustainable Development and International Relations (IDDRI) brought together more than 40 leading experts in the workshop "Oceans in the Anthropocene: Advancing governance of the high seas" held on 20-21 March 2013 in Potsdam, Germany.[1] The following key messages emerged from these discussions and are further elaborated in this Policy Brief:

- Recommendation 1: Start negotiating an international instrument under the United Nations Convention on the Law of the Sea (UNCLOS) as soon as possible. This new international instrument is, however, not an "either/or" with the use and reinforcement of existing instruments.
- Recommendation 2: At the same time, strengthen existing regional and sectoral organisations by creating mechanisms for coordinated action.
- Recommendation 3: Establish overarching principles of ocean governance, either as a chapeau to the new legal instrument or as a declaration of the United Nations General Assembly (UNGA).

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1. The workshop was supported by the Federal Ministry of Education and Research of Germany and the State of Brandenburg.

2. A NEW LEGAL INSTRUMENT UNDER UNCLOS

2.1. A Priority for International Action

Marine biodiversity in ABNJ will be at the heart of international discussions for the next two years, as States have agreed to address the issue of its conservation and sustainable use before the end of the 69th session of the UNGA, *"including by taking a decision on the development of an international instrument under the Convention on the Law of the Sea"* [2] – referred to as the "Implementing Agreement". These discussions will take place within the framework of the UNGA *Ad Hoc* Open-ended Informal Working Group (also known as the "BBNJ Working Group") established to study issues relating to the conservation and sustainable use of marine biological diversity in areas beyond the limits of national jurisdiction. As agreed at the 2011 session of the BBNJ Working Group, this process should address, 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, and environmental impact assessments, capacity-building and the transfer of marine technology"* – often referred to as the "package deal".[3]

2.2. The Rationale for an UNCLOS Implementing Agreement

A new UNCLOS Implementing Agreement is 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. To ensure implementation of an integrated ecosystem approach to ABNJ, there is a need to put in place a framework with the proper authority to coordinate all instruments and organisations with respect to conservation and sustainable use of marine biodiversity in the water column and seabed beyond areas of national jurisdiction. The Implementing Agreement would provide an important opportunity to **enhance global cooperation and build capacity** in order to achieve the aspirations contained in the preamble of UNCLOS to *"promote 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"*.

2.3. Potential Content of an UNCLOS Implementing Agreement

In order to accomplish these crucial tasks**, the Implementing Agreement should address gaps and weaknesses of the current system**, including the lack of a global framework for the establishment of marine protected areas (MPAs), for the conduct of environmental impact assessments (where cumulative impacts could also be addressed) and strategic environmental assessments (EIAs/SEAs), or for the fair and equitable access to and sharing of the benefits from marine genetic resources obtained from ABNJ. Potential resources for enhancing the effectiveness of the Implementing Agreement and anchoring it in the larger body of international law include **the operationalisation of modern conservation, management and governance principles** agreed *inter alia* in the 1992 and 2012 Rio Declarations such as the ecosystem approach, the precautionary approach, sustainable development for the benefit of present and future generations, transparency and science-based decision-making. At the same time, **it will be essential to increase the efficient use of existing institutions and resources** and better articulate the relationships between institutions at the global, regional and sectoral levels. This will consequently provide an overview at the global level and support consistency and integration between the various instruments.

2.4. Preconditions for Initiating Negotiations on a Potential UNCLOS Implementing Agreement

In the coming weeks and months it will be necessary to build strong support among States in order to open negotiations on the Implementing Agreement by the end of 2014. Given the need for urgent action, negotiations should be launched as soon as possible – ideally by the end of 2013. To increase support, **discussions will need to occur at both the technical and the political levels** amongst those already in favour and to reach out to those seeking additional information. The next critical meetings are the two UNGA intersessional workshops on 2-3 and 6-7 May 2013 on marine genetic resources and conservation and management

2. Doc. A/RES/66/288, *The Future We Want*, §162.
3. Doc. A/66/119, Letter dated 30 June 2011 from the Co-chairs of the *Ad Hoc* Open-ended Informal Working Group to the President of the General Assembly, §1.1.(b).

GOVERNING PRINCIPLES

Marine Genetic Resources (MGRs)	Area-based management tools	Environmental Impact Assessments (EIAs)	Capacity-building and transfer of marine technologies
1. Access and benefit-sharing (ABS) principle included in a framework agreement	1. Marine Protected Area (MPA) objective included in a framework agreement	1.Guiding principles for EIAs/ Strategic Environmental Assessments (SEAs) included in a framework agreement	1. Recognition of capacity-building and transfer of marine technologies needs
2. Access regulated by States and mechanism for monetary benefit-sharing	2. MPA objective and mandate to States and international organisations to submit proposals	2. Provisions on EIAs/SEAs and mandatory framework for new activities	2. States to provide/facilitate access to MGRs technologies
3. Mechanisms for monetary and non-monetary benefit -sharing	3. Global scientific body to develop proposals and regional management	3. Development of minimum standards, including in respect of cumulative environmental assessments (CEA)	3. Fund and Clearing-House mechanism for capacity-building and transfer of marine technologies
4. A global body in charge of facilitating access to marine genetic resources	4. Framework for integrated ecosystem-based planning-management	4. Development of minimum standards for EIAs/SEAs/CEAs and review by a global body	

INSTITUTIONAL FRAMEWORK

Legend: Each column present several possible approaches related to a specific element of the "package deal" agreed in 2011. These approaches are not exclusive from each other, and can even be combined together. Vertical lines should not be read as "scenarios": for example, approach 1 on marine genetic resources can be combined with approach 3 on area-based management tools. Finally, the governing principles which might be included in the agreement and the institutional framework are considered as being transversal issues (the institutional framework would depend on the functions assigned under the agreement).

tools, the meeting of the BBNJ Working Group on 19-23 August 2013, and the consultations on the draft UNGA resolution on Oceans and the Law of the Sea in October and November 2013. As scientists and civil society have an important role to play by generating knowledge and engaging the public on these issues, it will also be essential to **ensure this process is transparent and accessible.**

In order to bring on board a majority of States[4], it will be necessary for States proponents of the Implementing Agreement to **present a brief and simple negotiating mandate to the UNGA based on the elements of the "package deal" agreed by the BBNJ Working Group in 2011** and, in the process, demonstrate that a large amount of the preparatory work for potential negotiations has already been carried out. Elements of the 2011 "package deal" described above would likely form the basis of any future agreement on marine biodiversity in ABNJ. Several approaches with respect to these elements were presented and discussed in Potsdam (see table 1), although it was generally recognised that **it would be extremely difficult to predict the outcome of future negotiations** and that this process should remain as open as possible.

3. IMPROVE AND BETTER UTILISE EXISTING GLOBAL INSTRUMENTS AND INSTITUTIONS

3.1. Challenges faced by Existing Instruments

A large number of institutions and agreements are currently mandated to regulate sectoral issues in ABNJ, including shipping (the International Maritime Organisation – IMO), fishing (the global network of regional fisheries management organisations – RFMOs) and mining (the International Seabed Authority). However, transparency, accountability, and compliance reporting

4. The decision to open the negotiations for the conclusion of an UNCLOS Implementing Agreement would be adopted through a UNGA resolution, either stemming from the recommendations of the BBNJ Working Group or presented by some co-sponsoring States. This resolution would have to be adopted at a simple majority vote. However, from a political point of view, it would be crucial to bring on board a vast majority of States – whereas, in the meantime, only around 70 States participate to the meetings of the BBNJ Working Group and are well-aware of the issues.

mechanisms are often weak in sectoral agreements. **Moreover, issues pertaining to the conservation and sustainable use of marine biodiversity are not systematically integrated in these arrangements.** The agreements concerning conservation of biodiversity, on the other hand, have little regulatory authority and generally rely upon voluntary measures (e.g. the Convention on Biological Diversity (CBD) or the Convention on Migratory Species (CMS)).

3.2. Towards Better Integration of Science into Policy-Making

Existing institutions and treaty bodies rarely pool their expertise and resources to tackle issues involving more than one sector, region or activity; for example, regarding cumulative impact assessments or multi-purpose MPAs. There are further gaps between the external researcher communities producing ecologically-oriented scientific knowledge and the sectoral bodies' internal information-collecting processes concerning human pressures on the marine environment. This disconnect makes it difficult to prioritise future scientific research that could inform emerging management needs. It also impedes a science-based approach to management, which systematically interferes with the realisation of a precautionary or ecosystem approach to the marine environment.

Scientific knowledge of ABNJ has increased significantly in recent years. Despite existing initiatives such as the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socio-economic Aspects, which also endeavours to establish associated databases, there is currently no global database for the monitoring of human activities in ABNJ, and there is an **urgent need for information-sharing mechanisms regarding the three largest industrial activities: fisheries, shipping, and deep-sea mining exploration and future exploitation**. Many fish stocks remain unassessed and detailed fishing data are rarely shared outside of fisheries bodies.

3.3. Progress in the identification of important marine areas

Some improvements have been made through the identification of vulnerable marine ecosystems (VMEs). Global concern regarding ecological harm to VMEs caused by bottom trawling has led to the adoption of UNGA resolutions,[5] outlining protective measures to be implemented through RFMOs, where they exist, and by flag States where none exist. Implementation has varied, in part because some RFMOs are relatively new. Nevertheless, more fisheries closures have occurred in ABNJ since these landmark UNGA resolutions than during all other years before. **Regular reporting, transparency and independent assessment obligations would help ensure progress towards VMEs protection through RFMOs**, and would demonstrate the value of the UNGA resolutions irrespective of their non-legally binding character.

The CBD plays the most active role in providing scientific and technical advice to States and competent authorities concerning ABNJ, but is removed from direct management action. Since being mandated by the 10th Conference of Parties (COP) in 2010[6], the CBD secretariat has organised regional workshops of State parties to describe **ecologically or biologically significant areas (EBSAs)**[7] in ABNJ in cooperation with regional bodies, extending the scope of these workshops to national waters when participating States agreed to do so. With hundreds of EBSAs in the process of description, this ambitious information-gathering exercise demonstrates how **scientific expertise can catalyse management decisions for ecologically important areas in the oceans.** Without formal cooperation or information-sharing mechanisms in place, however, it is unclear how institutions will make use of this scientific advice to enact management measures.

3.4. Overcoming the Institutional Divide

One of the greatest strengths of institutions mandated to work in ABNJ – their established internal working relationships – is also one of their greatest weaknesses. There are very few information-sharing mechanisms in place to exchange scientific information between institutions. **Cross-cutting issues, such as the protection of biodiversity or the emerging issue of climate engineering, require the integration**

5. Docs. A/RES/61/105 and A/RES/64/72.

6. CBD COP Decision X/29, §36.

7. Druel, E. (2012). "Ecologically or Biologically Significant Marine Areas (EBSAs): the identification process under the Convention on Biological Diversity (CBD) and possible ways forward", IDDRI, *Working Papers* N°17/2012.

of the work of distinct institutions.[8] In particular, although global conservation commitments, such as establishing MPAs, are well established, institutional responsibility for meeting these targets is often unclear. **State Parties and civil society must therefore continue to 'champion' and promote biodiversity commitments within appropriate institutions**. Regional seas agreements have coordinated efforts (as discussed below), though they rely on the existing institutions and treaty bodies to enact specific management measures. Recognising that the protection and preservation of marine biodiversity is increasingly required, existing agreements and institutions must cooperate better in fulfilling their mandated obligations.

4. STRENGTHENING OF REGIONAL ORGANISATIONS AND INITIATIVES TO IMPROVE CONSERVATION AND SUSTAINABLE USE OF ABNJ

4.1. Regional Approaches as a Trend in Oceans Governance

The regionalisation of international environmental law has emerged as an important trend in recent decades. In the field of the marine environment, it has taken place through Regional Seas Conventions and Action Plans, with now more than 143 participating countries around the world, as well as RFMOs aimed at ensuring the sustainable management of fish stocks. In addition, other regional initiatives, such as Large Marine Ecosystems (LMEs) projects, have been developed to engage neighbouring countries in protecting and sustainably managing their shared marine environment.

4.2. Advantages and Disadvantages of Regional Approaches to Oceans Governance

Regional governance in ABNJ faces significant challenges, most notably the limited coverage of ABNJ by regional seas frameworks, frequently weak compliance by members as well as third parties from outside the region, the multiplicity and fragmentation of initiatives, a lack of capacity and often inadequate management of human activities. **Nevertheless, there are also inherent advantages of a regional approach to ABNJ**, including the ability to customise management practices to reflect the unique political, legal, ecological and cultural characteristics of a given region and adapt and implement a variety of practices proven effective in other regions.

4.3. Extending the Scope of Regional Frameworks into ABNJ

Recently, some regional seas frameworks have progressively extended their activities into ABNJ[9], particularly through the use of area-based management tools, reflecting the interconnection between waters under national jurisdiction and ABNJ.[10] These emerging **examples have demonstrated that the protection of ABNJ can be achieved to some extent regionally within the framework of existing agreements**. Although there is no "one-size fits all" solution, these approaches could provide guidance and inspiration for other regions.

However, most regional seas bodies still focus on areas within national jurisdiction[11] and similarly, high seas fisheries in some regions are currently not regulated by RFMOs at all.[12] In this context, processes initiated by the CBD to describe EBSAs including in ABNJ and by individual RFMOs to identify VMEs based on criteria adopted by the Food and Agriculture Organisation[13] (FAO)

8. For example, the Conference of the Parties to the London Convention and Protocol (LC/LP) and the CBD reacted separately to the growing prospects of large-scale ocean fertilisation experiments by adopting resolutions in 2008 calling for a *de-facto* moratorium.

9. Druel, 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", IDDRI, *Working Papers* N°17/2012.

10. Promising 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 Specially Protected Areas and Biodiversity Protocol of Barcelona Convention for the Protection of the Marine Environment, and the South Orkney Islands Southern Shelf MPA established under the Convention for the Conservation of Antarctic Living Marine Resources (CCAMLR).

11. Regional Seas agreements in the Southern, West and Central African Region and Western Indian Ocean only regulate areas within national jurisdiction for example.

12. The treaty establishing a RFMO for high seas areas of the North Pacific Ocean is not yet in force, while the South China Sea, the Southwest Atlantic, the Central Atlantic (for bottom fisheries) and the Arctic are not currently regulated by RFMOs.

13. FAO International guidelines for the management of deep-sea fisheries in the high seas, 2009.

could provide the scientific basis and rationale to extend the geographic scope of regional organisations and initiatives to ABNJ. However, considering that many regional bodies already have insufficient institutional and financial capacities to manage the marine environment and resources within the national waters of their Contracting Parties, **expanding these bodies' mandates into ABNJ without simultaneously expanding their available resources would be unlikely to provide meaningful improvement for ABNJ**. In this context UNEP's Regional Seas Programme has an important role to play in developing pragmatic and incremental approaches in partnership with coastal States and relevant stakeholders.

4.4. Enhancing Regional Coordination and Cooperation

Effective coordination and cooperation amongst the different competent management organisations is another key factor for the success of regional initiatives in ABNJ. Cooperation may be improved through the development of informal mechanisms such as shared thematic meetings and regular exchange between the Secretariats, or through more formal measures such as the adoption of memoranda of understanding. However, current experience indicates that such mechanisms may take a long time to establish.

Initiatives by committed States ("**champions**") could also be crucial for effective governance of ABNJ at the regional level. This is true in existing regional seas frameworks and can similarly be effective in the absence of a dedicated regional organisation, as demonstrated in the Sargasso Sea where conservation efforts in ABNJ are being led by an alliance of committed States and stakeholders within existing regional, sectoral and international organisations.

4.5. Improving Compliance and Enforcement Mechanisms

Conservation and sustainable use of the oceans in general, and of ABNJ in particular, cannot be achieved without **improving regional tools aimed at ensuring compliance and enforcement**. It is widely recognised that the issue of compliance and enforcement is one that plagues all multilateral environmental agreements – irrespective of whether they are regional or global in character – and compliance with fisheries management obligations is perhaps the most egregious example. Regional arrangements may have advantages over global arrangements for compliance, however, given that the perceived legitimacy of shared obligations is potentially higher among neighbouring States. Equally pressing is the need for greater transparency and accountability.

4.6. The Role of Regional Structures under a Potential Implementing Agreement

Within the framework of an UNCLOS Implementing Agreement, regional organisations could possibly function as future implementation frameworks in the regions where they already exist. This would, however, require reviewing the regional organisations' mandates and strengthening their capacities in many regions of the world, both in terms of human and financial resources.

5. OVERARCHING LEGAL PRINCIPLES AS A RESOURCE FOR OCEAN GOVERNANCE

Concerning the conservation and sustainable use of marine biodiversity in ABNJ, a number of general principles have evolved out of customary international law and have informed the development of most international environmental treaties, both globally and regionally. Most of these principles have also been incorporated in the UNCLOS or non-binding "soft law" declarations, such as the 1972 Stockholm and 1992 Rio Declarations. **Efforts are now being made to identify groups of principles with particular applicability to the oceans**, and most specifically to ABNJ. Such principles include: (1) the conditional freedoms of the high seas, (2) the protection and preservation of the marine environment, (3) international cooperation, (4) science-based management, (5) the precautionary approach, (6) the ecosystem approach, (7) sustainable and equitable use of natural resources, (8) public access to information, (9) transparency in decision-making processes, and (10) the responsibility of States as stewards of the global marine environment.[14]

The recognition of overarching principles, for example in the activities of the COPs of existing treaties, will serve to guide the implementation of substantive rules of treaty law. Increasing the application of principles in the internal decision processes of treaty bodies is essential for

14. Freestone, D. (2009), Modern Principles of High Seas Governance: The Legal Underpinnings, *Environmental Policy and Law* 39(1), 44-49.

weighing different conservation and use priorities against an overarching ethical framework and resolving conflicts, particularly between treaties. At the same time, **principles provide an important integrative function between existing treaties** through their reiteration (albeit in varying formulations) in separate legal instruments. This function serves a critical need in multi-level governance, providing a "common denominator" between existing regional and global instruments, and can serve as an essential source of interlinkage between existing instruments and a potential Implementing Agreement, should it be pursued by the international community. In this event, an enumeration of principles **could provide a *chapeau* to the new legal instrument**. If the Implementing Agreement is not pursued, or while awaiting its conclusion, the principles could nonetheless be **adopted as a free-standing "soft-law" declaration of the UNGA, prompting further State practice and contributing to the progressive development of customary international law applicable to ABNJ via another pathway**.

6. THREE POLICY RECOMMENDATIONS

6.1. Recommendation 1: Start negotiating an international instrument under UNCLOS as soon as possible

Effective conservation and sustainable use of biodiversity in ABNJ requires the adoption of a legal instrument under UNCLOS referred to as an "Implementing Agreement". This instrument, complementing and enhancing existing sectoral and regional instruments, would likely address the following issues: marine genetic resources (including benefit sharing), area-based management tools (including marine protected areas), environmental impact assessments, capacity-building and the transfer of marine technology.

The remainder of 2013 will be critical for bringing together committed States and stakeholders into a broad coalition supporting the adoption of an Implementing Agreement. Bilateral and multilateral discussions between States should be encouraged in order to establish a solid foundation for future negotiations. The possibility of adopting a decision to open negotiations for an Implementing Agreement by the end of 2013, rather than 2014, could be pursued.

6.2. Recommendation 2: At the same time, existing regional and global bodies must be strengthened

The Implementing Agreement is not an "either/or" with the use of existing regional and sectoral organisations. They will, in either case, remain important as they offer pragmatic opportunities for addressing emerging and intensifying threats to ABNJ. However, mechanisms for coordinating action between existing bodies will need to be created and strengthened in order to be effective. A trans-disciplinary approach will require greater cross-sectoral cooperation and transparency. Effective cooperation could also clarify future roles for existing bodies under a potential new legal instrument and thereby support its implementation.

Subsequent steps in this process could include encouraging coordination and cooperation amongst competent regional, sectoral, and international institutions through the development of informal measures, such as shared thematic meetings (e.g. regarding area based management measures), and formal measures such as memoranda of understanding. In the medium-term, regional bodies could serve as implementation platforms for a new legal instrument, bringing together the sectoral management organisations, national interests and stakeholders. Capacity-building initiatives under UNEP's Regional Seas Programme and incremental expansion of the activities of the Regional Seas conventions and action plans into ABNJ may also make a significant contribution. Finally, considerable effort could be made to establish information and data-sharing mechanisms regarding activities in ABNJ, recognising in particular the need for public access to information on the three dominant activities in ABNJ: fisheries, shipping and deep sea mining.

6.3. Recommendation 3: Establish overarching principles of ocean governance

The international community has already agreed to a number of general principles applicable to ABNJ, such as the duty to protect and preserve the marine environment and to apply ecosystem-based and precautionary approaches to management, in large part constituting customary international law. Many of these principles are already incorporated into UNCLOS as well as the 1972 Stockholm and 1992 Rio Declarations and other legally binding and non-binding international agreements. At the Potsdam workshop **ten such principles were**

highlighted to support ABNJ governance, with particular emphasis on transparency, accountability, and the precautionary approach. These principles play a critical role in the implementation and interpretation of treaty obligations, integration of existing treaties and strengthening compliance and enforcement mechanisms. At the same time, **principles link the various levels of ocean governance** and can provide an anchor for a potential Implementing Agreement in the larger body of international law. If the Implementing Agreement is pursued, principles could provide a *chapeau* to the new legal instrument. Otherwise, the principles could nonetheless be adopted as a "soft-law" declaration of the UNGA, providing an immediate contribution to the governance of ABNJ *via* other legal and policy pathways that could stand on its own merits.

7. LOOKING FORWARD

Beyond developing new governance options for ABNJ, a trans-disciplinary dialogue involving States, key stakeholders, the academic community and civil society, is necessary for the conservation and sustainable use of the marine environment. IASS and IDDRI will continue to advance understanding of these issues, develop perspectives on the content of a potential Implementing Agreement, and pave the way for pragmatic action at the regional, sectoral and international levels.