

## SYMPOSIUM ON GOVERNING HIGH SEAS BIODIVERSITY

### BIODIVERSITY BEYOND NATIONAL JURISDICTION: REGIMES AND THEIR INTERACTION

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International efforts to better conserve the marine biological diversity of areas beyond national jurisdiction (BBNJ) through a new international legally binding instrument<sup>1</sup> are developing in a context of established norms and institutions. Existing regimes already address specific marine sectors (such as shipping), regions (such as fishing in the South East Atlantic), species (such as whales), and even underlying customary international law and territorial concepts (including the boundaries of the “high seas”<sup>2</sup>). States have agreed that they will not “undermine” these existing frameworks.<sup>3</sup> We seek to contextualize this commitment within the fragmentation of international law and the interaction between regimes.<sup>4</sup> We argue that international law-making should not be overly restricted by deference to existing competencies and mandates, which are fluid and asymmetrically supported. An inclusive and adaptive approach to existing and future institutions is vital in the ongoing quest for integrated and effective oceans governance.

#### *A New Implementing Agreement and Relevant Regimes*

Negotiations for the new instrument will address the marine biological diversity of areas beyond national jurisdiction with a focus on

marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology.<sup>5</sup>

These elements reflect a long-standing recognition of unsustainable ocean use and management in areas that are not subject to the sovereignty of coastal states. Negotiations will thus elaborate a text that aims to improve on the

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<sup>1</sup> See [G.A. Res. 72/249](#) (Dec. 24, 2017).

<sup>2</sup> See [UN Convention on the Law of the Sea](#) Part VII, Dec. 10, 1982, 1883 UNTS 397 [hereinafter UNCLOS].

<sup>3</sup> [G.A. Res. 72/249](#) para. 7 (Dec. 24, 2017); [G.A. Res 69/292](#) para. 3 (July 6, 2015).

<sup>4</sup> See, e.g., Margaret A. Young, *Introduction: The Productive Friction Between Regimes*, in *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* 1, 11 (Margaret A. Young ed., 2012).

<sup>5</sup> [G.A. Res. 72/249](#) para. 2 (Dec. 24, 2017).

status quo while giving due recognition to the role, mandates, and capabilities of existing global, regional, and sectoral organizations that already govern much of human activity in areas beyond national jurisdiction.<sup>6</sup>

Shipping, fishing, and seabed mining are, at present, the activities of greatest concern for the marine environment and its biodiversity in areas beyond national jurisdiction.<sup>7</sup> Each is subject to some measure of regulation by an existing constellation of agreements, instruments, and decisions relating to ocean governance. These include sectoral organizations, such as the International Maritime Organization (IMO) and the International Seabed Authority, as well as regional fishery management organizations (RFMOs), such as the International Commission for the Conservation of Atlantic Tunas (ICCAT), the South East Atlantic Fisheries Organisation (SEAFO), and the South Pacific Regional Fisheries Management Organisation (SPRFMO). Those organizations exist alongside bodies more focused on promoting and protecting the ecosystem within a region, such as the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). Other organizations address specific species, like the International Whaling Commission and the conference of parties to the Convention on International Trade in Endangered Species (CITES). If the trade of certain fish products is restricted in order to, for example, deter illegal fishing within or outside national jurisdiction, the World Trade Organization (WTO) is also relevant.<sup>8</sup>

Still other regional organizations, including the Regional Seas Organizations promulgated under UN Environment's "Regional Seas" programme, and oceanic conservation organizations such as the Convention for the Protection of the Marine Environment of the North-East Atlantic's OSPAR Commission or the Sargasso Sea Commission, may have broad mandates that cut across sectors, but with varying degrees of binding authority or responsibility for areas beyond national jurisdiction.<sup>9</sup> The Convention on Biological Diversity (CBD) calls for cooperation in areas beyond national jurisdiction, and the CBD's conferences of the parties have called for the expansion of marine protected areas. The CBD's new Nagoya Protocol provides a model for fair and equitable sharing of the benefits arising from both the use of genetic resources that originate within countries' sovereign limits and the use of traditional knowledge associated with genetic resources.

This fragmented set of regimes<sup>10</sup> presents challenges for the negotiation and implementation of the new instrument. Before describing these challenges, it is important to note that our list of bodies relevant to the new instrument is not exhaustive. Nor do we provide an encompassing definition of the functions of each body. One of the perils of the literature on regime interaction is the essentialization or even fossilization of regimes.<sup>11</sup> For example, while only some of the existing regimes currently promote principles and approaches that have been identified as important for a new agreement, such as the ecosystem approach and the precautionary approach, this may change,

<sup>6</sup> [Report of the Preparatory Committee Established by General Assembly Res. 69/292](#) para. 38(IV), UN Doc. A/AC.287/2017/PC.4/2 (July 31, 2017).

<sup>7</sup> Elizabeth Druel & Kristina Gjerde, *Sustaining Marine Life Beyond Boundaries: Options for an Implementing Agreement for Marine Biodiversity Beyond National Jurisdiction under the United Nations Convention on the Law of the Sea*, 49 MARINE POL'Y 90, 90–91 (2014); Jeff Ardron et al., *The Sustainable Use and Conservation of Biodiversity in ABNJ: What Can Be Achieved Using Existing International Agreements?*, 49 MARINE POL'Y 98, 99 (2014).

<sup>8</sup> Margaret A. Young, *International Trade Law Compatibility of Market-related Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing*, 69 MARINE POL'Y 209 (2016).

<sup>9</sup> Julien Rochette et al., *Regional Oceans Governance Mechanisms: A Review*, 60 MARINE POL'Y 9 (2015).

<sup>10</sup> "Regimes" here are taken as "sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases." See Young, *supra* note 4, at 11.

<sup>11</sup> On the politics of regime definition, see Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MODERN L. REV. 1, 27 (2007).

even amongst RFMOs.<sup>12</sup> Regimes are not fixed, and an approach to regime interaction dependent on ex ante determinations of organizational competence risks entrenching positions instead of opening them to contestation and evolution. Yet we also consider that the mapping of different regimes can aid in understanding complexity, especially when asking how a new regime will affect existing obligations.

### *Strengthening of Obligations*

The new agreement is likely to create additional obligations for states that are parties to existing agreements. For example, if the new instrument implements area-based management tools, the subsequent identification of a new marine protected area, sanctuary, or fishery closure could prevent a state from fishing in areas otherwise regulated by an RFMO to which it belongs, including accessing opportunities to reach its RFMO-mandated fishing quota. New environmental protections or protocols could discourage a state from sponsoring mining in seabed areas under the International Seabed Authority's jurisdiction. New rules for ships on speed, noise, routing, or other measures in specific marine protected areas could restrict vessels' activities in ways that may vary from the standards issued by the IMO.

This situation can be generalized as an anticipated strengthening of obligations rather than as an imposition of conflicting obligations. By analogy, when states began to list marine species under CITES to restrict harmful trade, they did not undermine the Food and Agriculture Organization's mandate to promote the conservation and management of marine resources, but instead recognized the need to support conservation and management through multiregime measures. This enhanced the cooperation and coordination between secretariats, even when some states were members of one regime but not the other.<sup>13</sup>

The following table depicts a nonexhaustive list of states that have been active in the BBNJ negotiations (specifically, those that made written submissions to the preparatory committee sessions), alongside a corresponding list of those states' membership in selected intergovernmental organizations. Organizations include multilateral organizations addressing the global impact of a single sector and regional organizations addressing the impacts of one or more activities in a geographic area. While patterns of membership across multilateral organizations overlap closely (as indicated in the first two columns), in regional and sectoral organizations they are less aligned (as indicated in the next four columns). This is to be expected, but it also shows the complexity of achieving coordination through existing organizations with disparate memberships.<sup>14</sup> The momentum for the new instrument is justified in part by its potential role in encouraging coordination among regimes without parallel memberships.

<sup>12</sup> Zoe Scanlon, *The Art of "Not Undermining": Possibilities Within Existing Architecture to Improve Environmental Protections in Areas Beyond National Jurisdiction*, 75 ICES J. MARINE SCI. 405, 409 (2017).

<sup>13</sup> MARGARET A. YOUNG, *TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW* 134–38 (2011). A similar flexibility can be observed in proposals for disciplines on fisheries subsidies. See Margaret A. Young, *The "Law of the Sea" Obligations Underpinning Fisheries Subsidies Disciplines*, (ICTSD Research Paper, Nov. 14, 2017).

<sup>14</sup> YOUNG, *supra* note 13, at 267–87.

		Multilateral/ Sectoral Organizations		Regional Organizations			
		ISA	IMO	ICCAT	SEAFO	SPRFMO	CCAMLR
		Countries With Written Submissions to the Prepcom <sup>15</sup>	Argentina	✓	✓		
	Australia	✓	✓			✓	✓
	Bangladesh	✓	✓				
	China	✓	✓	✓		✓	✓
	Costa Rica	✓	✓				
	Eritrea	✓	✓				
	<i>European Union</i>	✓	<sup>16</sup>	✓	✓	✓	✓
	Federated States of Micronesia	✓					
	Fiji	✓	✓				
	Iceland	✓	✓	✓			
	Jamaica	✓	✓				
	Japan	✓	✓	✓	✓		✓
	Mexico	✓	✓	✓			
	Monaco	✓	✓				
	Nauru <sup>17</sup>	✓	✓				
	New Zealand	✓	✓			✓	✓
	Norway	✓	✓	✓	✓		✓
	Qatar	✓	✓				
	Russian Federation	✓	✓	✓		✓	✓
	Senegal	✓	✓	✓			
	United States		✓	✓		✓	✓

The new agreement will also coexist with customary international law, which applies to states regardless of their particular treaty commitments. Relevant customary obligations include the general duty to protect and preserve the marine environment, which is also codified in UNCLOS,<sup>18</sup> as well as a corpus of “due diligence” obligations.<sup>19</sup> Indeed, there is already a robust set of environmental obligations in areas beyond national jurisdiction. What is lacking is implementation and compliance by states, and effective institutional support and oversight. The new agreement can enhance implementation by providing a venue for interregime learning and cooperation.

<sup>15</sup> This chart generally excludes submissions made on behalf of regional groups (e.g., the Caribbean Community and the African Group) that listed no coordinating state on the submission. With the exception of the European Union, which is listed, these regional groups do not participate directly in the relevant organizations.

<sup>16</sup> The 28 member states of the European Union are members of the IMO, but membership is not open to intergovernmental organizations such as the Union itself, which instead has observer status.

<sup>17</sup> [Pacific Small Islands Developing States Submission on Institutional Arrangements: BBNJ Preparatory Committee](#) (Dec. 5, 2016) [hereinafter PSIDS Submission].

<sup>18</sup> UNCLOS, *supra* note 2, art. 192; *see also* [South China Sea Arbitration](#) (Phil. v. China), P.C.A. Case No 2013-19, Award, para. 944 (July 12, 2016).

<sup>19</sup> [Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission \(SRFC\)](#), Case No. 21, Advisory Opinion of Apr. 2, 2015, para.129, ITLOS Rep. 2013, 212. Note also the duties of consultation now recognized to be part of a decision to establish a marine protected area. *See* [Chagos Marine Protected Area Arbitration](#) (Mauritius v. U.K.), P.C.A. Case No 2011-03, Award (Mar. 18, 2015).

*The Creation of a New Institution*

A new organization's substantive responsibilities could extend to deployment of management tools, including designation of marine protected areas and promulgation and review of environmental impact assessments. It could also administer frameworks for marine genetic resource access and benefit sharing, capacity building, and technology transfer. Alongside these responsibilities, the organization would play an important role in coordinating and cooperating with existing bodies.

The work of such an organization requires significant resources, which partly accounts for differences of views about the desirability of empowering a standing institution such as a conference of the parties (COP)<sup>20</sup> or focusing on ad hoc coordination within existing bodies and frameworks.<sup>21</sup> BBNJ preparatory committee delegations have coded their preferences regarding these institutional models through oblique references to their support for “regional,” “global,” or “hybrid” models of implementation, or by trying to draw distinctions between “light” or “heavy” regimes.<sup>22</sup>

Existing regimes illustrate such characteristics. The WTO might serve as an example of a “heavy” and “global” regime, as it oversees a detailed set of covered trade agreements that rest upon international standards from other regimes such as food safety. WTO committees engage in ongoing scrutiny of the standard-setting process, thus exercising a degree of oversight over exogenous standards. In trade disputes, panels and the Appellate Body make authoritative interpretations of these exogenous standards, even if they have not been supported by the entire WTO membership. The authority of exogenous norms is thus contingent, rather than absolute.<sup>23</sup> This example is relevant to the BBNJ context especially if compliance with the new agreement is linked to the provisions for compulsory dispute settlement in UNCLOS Part XV.

A rather weaker, yet still regularized, institutional form is the COP, which manages its relationships with existing bodies through decisions. The United Nations Framework Convention on Climate Change COP, for example, has issued “safeguards” to ensure that forest-related emissions reduction policies “complement or are consistent with the objectives of national forest programmes and relevant international conventions and agreements.”<sup>24</sup> Yet the incentive for states to provide information about their compliance with these safeguards comes from their desire to attract climate finance,<sup>25</sup> which is a different scenario from the one currently envisaged for BBNJ.

<sup>20</sup> Favored by, e.g., [Written Submission of the European Union and Its Member States: Cross Cutting Issues](#) (Dec. 5, 2016). *See also* [Costa Rica and Monaco Joint Submission on Marine Protected Areas](#) (Aug. 31, 2016); [PSIDS Submission](#), *supra* note 17.

<sup>21</sup> Favored by, e.g., [Submission on Behalf of the Member States of the Caribbean Community \(CARICOM\) for the Development of an International Legally-Binding Instrument Under the Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction](#) (Dec. 5, 2016); [Written Submission of the Russian Federation](#); [Preparatory Committee on Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction \(BBNJ\): Submission by Australia](#) Note No. 146/2016 (Dec. 2016).

<sup>22</sup> *See* [Summary of the Fourth Session of the Preparatory Committee on Marine Biodiversity Beyond Areas of National Jurisdiction: 10–21 July 2017](#), 25 EARTH NEGOTIATIONS BULLETIN 141 (2017).

<sup>23</sup> YOUNG, *supra* note 13, at 123–24.

<sup>24</sup> UN Framework Convention on Climate Change, [Report of the Conference of the Parties on Its Sixteenth Session – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Sixteenth Session](#), UN Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011), Decision 1/CP.16, para. 70.

<sup>25</sup> MAUREEN F. TEHAN ET AL., [THE IMPACT OF CLIMATE CHANGE MITIGATION ON INDIGENOUS AND FOREST COMMUNITIES: INTERNATIONAL, NATIONAL AND LOCAL LAW PERSPECTIVES ON REDD](#) 342–43 (2017).

Weaker still are ad hoc arrangements for coordination. For example, the United Nations Fish Stocks Agreement<sup>26</sup> encourages states to apply guiding principles and approaches within existing bodies without engaging in systematic or binding norm development.<sup>27</sup> Attempts to develop a coherent set of practices through processes such as the joint meetings of the five tuna RFMOs initiated in Kobe, Japan, in 2007, have not progressed.

Whichever model states settle on for BBNJ, institutional design in the context of regime complexity will require the ongoing inclusion of perspectives on shipping, fishing, seabed mining, and so on. As David Caron noted, situations of complexity require us to adapt and learn.<sup>28</sup> While states and international organizations provide important perspectives and expertise, the participation of a broader epistemic community and civil society enhances learning and information-sharing.<sup>29</sup> Although nongovernmental organizations (NGOs) do not have strictly representative functions, they provide networked ideas and knowledge that are essential to adaptive governance.

Part of the ongoing assessment of regime interaction in the BBNJ context will therefore incorporate the activities of NGOs in the development and ongoing implementation of the new agreement. This participation may give rise to concerns by states, who wish to retain control over law-making. Questions of legitimacy should not be ignored, and there are cases in which certain stakeholders are rightfully excluded from regime interaction.<sup>30</sup> But the credentials of NGOs in the BBNJ negotiations are supported by an open charter,<sup>31</sup> a scientific foundation, and a public interest orientation. Ongoing inclusion of NGOs will be important for the new institution's functions.

### *Conclusion*

States likely will establish a new international regime to conserve and sustain the marine biological diversity of areas beyond national jurisdiction. Preparatory work has reinforced a commitment not to undermine existing global, regional, and sectoral regimes.<sup>32</sup> Such a commitment reflects the considerable intellectual, political, and human investments in existing institutions and practices. Equally important, however, is the recognition that the needs of the international community change and that regimes are not fixed. The instinct to divvy up existing competences and mandates must be checked, at the very least, by the recognition that the membership of regimes is unlikely to fully overlap. More broadly (and more compellingly, from a pluralist perspective of international law), developments in scientific understanding and environmental concerns will require laws and institutions to evolve and change. The BBNJ negotiations are an important moment for the international community to promote a dynamic, inclusive, and adaptive approach to oceans governance.

<sup>26</sup> [United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks](#), Dec. 4, 1995, 34 I.L.M. 1542.

<sup>27</sup> The (twice-resumed) Review Conference for the Fish Stocks Agreement has been reconvened on an ad hoc basis and produced a series of reports offering nonbinding recommendations for states to further implement their obligations under this agreement. *See, e.g., Report of the resumed Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Prepared by the President of the Conference*, UN Doc. A/CONF.210/2016/5 (Aug. 1, 2016).

<sup>28</sup> David D. Caron, *Confronting Complexity, Valuing Elegance*, 106 ASIL PROC. 21, 25 (2012).

<sup>29</sup> YOUNG, *supra* note 13, at 289–92.

<sup>30</sup> *Id.* at 283–84.

<sup>31</sup> [High Seas Alliance Charter](#).

<sup>32</sup> [G.A. Res. 69/292](#) para. 3 (July 6, 2015); [G.A. Res. 72/249](#) para. 7 (Dec. 24, 2017).