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## Editorial

## Introduction: Advancing governance of areas beyond national jurisdiction

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## 1. Introduction

Marine areas beyond national jurisdiction (ABNJ) represent 64% of the total surface area of the oceans and around half of the planet's total surface area. Through their remoteness and vast expanse, ABNJ were largely protected from the brunt of human interference in the past. Technological advances have removed this de facto protection, however, exposing highly specialized ecosystems and unique forms of life to destructive and unsustainable human activities. Fortunately, knowledge of the exceptional biological diversity found in ABNJ has also increased hand-in-hand with the awareness that its conservation and sustainable use are urgent and essential.

ABNJ encompass two specific maritime zones under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) [1]: the high seas (the water column found beyond the territorial sea and Exclusive Economic Zones (EEZs) of coastal states [2]) and the Area (the sea bed, ocean floor and its sub-soils beyond the limits of national jurisdiction [3]). Between the freedoms of the high seas codified in Article 87 UNCLOS, one of the most enduring principles of customary international law, and the principle of the common heritage of mankind created through Article 136 UNCLOS, which placed the mineral resources of the area under a novel regime for the benefit of mankind, governance approaches to ABNJ span the gamut of the law of the sea.

Since the middle of the 20th century, states have continually sought to push back frontiers at sea in order to exploit all available resources. Maritime activities, long confined to coastal waters, have steadily expanded in step with the globalization of trade. At the same time, the overexploitation of fish stocks has pushed fishing into more remote areas, while the increasing demand for mineral resources has driven exploration activities further into the deep ocean. The creation of the EEZ regime under UNCLOS has formalized this unrelenting expansion of human activities in the ocean, reserving exclusive rights for coastal states regarding the

exploitation of fish stocks, the construction of installations and marine scientific research. Likewise, the number of state claims to an extended continental shelf continues to grow, demonstrating that states' appetites for ocean resources are growing unabated.

In the past, ABNJ issues were not traditionally at the forefront of ocean governance. This situation has now clearly changed. States, both individually and through their activities in international and regional institutions, are gradually mobilizing around the issues of conservation and sustainable use of marine biodiversity in ABNJ. These efforts have been encouraged and reinforced by the activities of non-governmental organizations and research institutions, which seek to fill gaps in scientific knowledge and advocacy on the part of the marine environment. Acknowledging this momentum, the United Nations General Assembly established an informal process in 2004 to study issues relating to the conservation and sustainable use of marine biological diversity in ABNJ [4]. This process, known as the "BBNJ Working Group"<sup>1</sup>, has met regularly since 2006 to identify key issues facing ABNJ and indicate options for promoting international cooperation and coordination toward their protection.

Discussions in the BBNJ Working Group have increasingly revolved around the need for a new legal instrument under UNCLOS to address regulatory gaps and the need to improve the implementation of existing instruments to achieve the effective conservation and sustainable use of marine biodiversity in ABNJ. Given the potential restrictions on the freedoms of the high seas, states' positions on the best way forward have been highly polarized. Although its outcomes were considered disappointing by many, the 2012 United Nations Conference on Sustainable Development (Rio+20) spoke out strongly regarding the urgency of improvements in the conservation and sustainable use of

<sup>1</sup> Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.

marine biodiversity in ABNJ. Through the Rio+20 outcome document “The Future We Want”, the General Assembly has committed itself further to taking a decision on the development of a new legal instrument under UNCLOS to address ABNJ issues by the end of the 69th General Assembly session in August 2015 [5].

Against this background, this Special Issue highlights on-going scientific, legal and institutional efforts to advance the governance of ABNJ. Recognizing that activity at all governance levels and using a variety of legal instruments is necessary to achieve effective conservation and sustainable use of marine biological diversity in ABNJ, this Special Issue hopes to contribute to the understanding of this timely and important issue.

## 2. Structure of the Special Issue

The Special Issue begins with two commentaries, each setting out potential global strategies for improving the conservation and sustainable use of marine biodiversity in ABNJ. The first commentary, “Charting pragmatic courses in ocean governance” by Topfer et al. [6] draws attention to two important outcomes of the Rio+20 process: the General Assembly’s commitment to take a decision on the development of an international instrument under UNCLOS on the conservation and sustainable use of marine biodiversity in ABNJ before the end of the 69th session in 2015, and the development of Sustainable Development Goals (SDGs) in the post-2015 development agenda. The authors highlight the danger in pursuing a multilateral treaty alone to address ABNJ issues, as states may fail to agree to begin negotiations. Instead, they caution that a variety of complementary governance approaches will be necessary for achieving conservation and sustainable use in ABNJ over the long term.

The second commentary “A Sustainable Development Goal for the Ocean and Coasts: Global ocean challenges benefit from regional initiatives supporting globally coordinated solutions” by Visbeck et al. [7] explores the outcomes of Rio+20 and the post-2015 development agenda. Here the authors outline potential elements of an SDG Ocean and Coasts, which would integrate the economic, social and environmental dimensions of sustainable development for the oceans. By providing specific targets and recommendations the global level for regional implementation, the authors argue that a comprehensive SDG would facilitate greater international cooperation towards more coherent governance in ABNJ.

The next four articles were inspired by in-depth discussions during the 2013 workshop “Advancing Governance of the High Seas” [8], jointly organized by the Institute for Advanced Sustainability Studies, Potsdam, Germany (IASS) and the Institute for Sustainable Development and International Relations (IDDRI). This transdisciplinary workshop brought together 40 leading experts from a variety of academic disciplines, policy-makers and representatives of civil society to develop proposals for advancing the conservation and sustainable use of marine biodiversity in ABNJ.

The first article from Druel and Gjerde [9] provides an analysis of the potential content of a new legal instrument under UNCLOS for the conservation and sustainable use of marine biodiversity in ABNJ, referred to as the “Implementing Agreement”. The authors provide a detailed account of the UN process out of which this proposal has emerged and explore the four priority elements of the new instrument agreed at the 2011 BBNJ Working Group in more detail. These include access and benefit-sharing in regard to marine genetic resources, area-based management tools (including marine protected areas – MPAs), environmental impact assessments, capacity-building and technology transfer. At the same time, the authors reflect on various structural issues in designing the new instrument such as the need for governing principles and

an institutional architecture for its implementation. The article also provides specific suggestions targeted to international policy-makers involved in the negotiation process as to how a legal instrument for the conservation and sustainable use of ABNJ can be achieved.

The following article by Ardron et al. [10] examines the current state of ABNJ governance, outlining both the critical realities and potentials of the various global and regional agreements applicable in ABNJ, and the associated institutions involved in their implementation. Here the authors argue that multi-sector, integrated and coordinated management mechanisms spanning diverse institutions are necessary to achieve the conservation and sustainable use of marine biodiversity in ABNJ. These require various forms of inter- and intra-sectoral cooperation in the dominant sectoral activities of fishing, shipping and in the emerging field of deep sea mining as well as enhanced coordination between multiple governance levels. Despite the obvious challenges in this endeavor, the authors nonetheless conclude that considerable potential exists to improve the implementation of both sectoral and conservation agreements in ABNJ.

Rochette et al. [11] then analyze clear patterns of regionalization emerging in regard to marine and coastal issues, particularly reflected in the UNEP-sponsored Regional Seas Programmes and the activities of Regional Fisheries Management Organizations in ABNJ. The authors present examples of how various regional initiatives and organizations, specifically in the Mediterranean Sea, the North-East Atlantic, the Southern Ocean, the South Pacific and the Sargasso Sea, have gradually extended their activities into ABNJ, in particular by establishing MPAs. They then discuss options for strengthening these activities including inter-institutional and cross-sectoral coordination, capacity-building and cooperation between regions. Finally, the paper reflects on the interconnections between regional activities for the conservation of marine biodiversity in ABNJ and global efforts to bring about an Implementing Agreement to UNCLOS, arguing that efforts undertaken at the regional level are integral to success at the international level.

The final contribution in this section from Houghton [12] illustrates the role of legal principles in an emerging regime for the conservation and sustainable use of marine biodiversity in ABNJ. Here the author argues that principles serve an essential function in regime-building, bridging legal and governance processes and preparing a common space for the emergence of new legal rules. Given the polarized discussions surrounding “regulatory gaps” and “implementation gaps” in the BBNJ Working Group, the paper argues that efforts should be made to identify points of convergence between these two perspectives, potentially found in principles. The paper concludes that a statement of principles – whether formulated as a declaration of the General Assembly or as a preamble and operative section for a new legal instrument under UNCLOS – would be a constructive next step in the on-going process to advance the conservation and sustainable use of marine biological diversity in ABNJ.

The next section of articles brings in important work being conducted by various research initiatives as well as critical inputs from practitioners and civil society in the conservation and sustainable use of marine biodiversity in ABNJ.

Bringing an ecological perspective to the volume, Ban et al. [13] identify key factors that differentiate the open ocean, defined as areas beyond national jurisdiction and deep areas within Exclusive Economic Zones, from other marine and coastal ecosystems. These include the wide distribution of species, the sizes and boundaries of biogeographical domains, varying stabilities of habitat types and vertical and horizontal linkages, all of which are highly relevant for ocean management. The authors highlight the need to manage the open ocean in an integrated manner and recommend bringing together three approaches to planning and management: marine

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