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Policy Brief #1 on ABNJ

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State sovereignty and protection of biodiversity in areas beyond national jurisdiction

I. Introduction

The international law of the sea contains numerous provisions concerning the protection of the marine environment, including its biodiversity. A basic obligation, quite general in its essence, is illustrated in Art.192 UNCLOS, according to which "States have the obligation to protect and preserve the marine environment," an obligation including both "the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment".[1] In implementing Article 192 UNCLOS, States may adopt measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life".[2] This provision constitutes the starting point in the discussion of regulating biodiversity protection in areas beyond national jurisdiction.

Indeed, while many global and regional treaties do regulate specific activities which take place in ABNJ, such as fishing, ocean dumping and navigation, they are only binding on States parties (Freestone, 2018), thereby lacking an integrated set of rules in ABNJ. This patchwork of existing treaties leaves biodiversity in areas beyond national jurisdiction vulnerable to growing threats. Consequently, it has become clear that the continued well-being and even the existence of such areas and the correlative access to their resources cannot be achieved without significant changes in their normative framework. The debate is further aggravated by the ever-increasing use of technology, which allows flag States and coastal States alike to exercise an unprecedented overview over activities in the high seas and the Area – with immediate and drastic repercussions on the very concept of the freedom of the high seas, which for long centuries has been the cornerstone of the allocation of State jurisdiction at sea.

II. A brief history of the negotiations regarding ABNJ

The areas beyond national jurisdiction (ABNJ) are those areas of the oceans that do not fall within the jurisdiction of any State. These areas comprise nearly 64 percent of the surface of the oceans. The governance of maritime areas beyond national jurisdiction and thus beyond the direct sovereignty of the State has long been one of the cornerstones of the Law of the Sea, with the traditional position considering the high seas as *res communis omnium.*

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[1]The M/V 'Louisa' Case (Saint Vincent and the Grenadines v Kingdom of Spain)(Merits), Judgment of 28 May 2013, para.76; see also The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Award of 12 July 2016, para.941. On the States' obligations deriving from the UNCLOS regarding protection of the marine environment, see Papanicolopulu, I. (2023). Marine Biodiversity Beyond National Jurisdiction. In: Garcia, M.d.G., Cortês, A. (eds) Blue Planet Law. Sustainable Development Goals Series. Springer, pp. 109-119.

[2] UNCLOS, Article 194(5).

During the past thirty years, the human activities in the oceans have expanded significantly. Climate change, pollution, overfishing, habitat destruction and ocean acidification, have affected maritime areas both inside and outside national jurisdiction, posing governance issues far beyond the remit of the 1982 UNCLOS. In order to address the full range of issues particularly related to the conservation of biodiversity in areas beyond national jurisdiction, the UN General Assembly agreed in 2004 to a recommendation by the UN Informal Consultative Process on the Oceans and the Law of the Sea (UNICPOLOS) to establish an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity in ABNJ. In 2006, the BBNJ Working Group commenced the discussions for a new agreement implementing the UNCLOS, for what is bound to be the third implementing agreement of UNCLOS[3] relating to the protection of biodiversity in areas beyond national jurisdiction, namely in the High Seas and in the Area (International Seabed).[4] The negotiations have indeed lasted a long time. In 2011 it was decided that all issues related to the new agreement would constitute a "package deal", [5] meaning that either the Agreement would be adopted as a whole, or not at all. The main issues addressed in the proposed UNCLOS implementation agreement are a) marine genetic resources, including questions on benefit-sharing b) Area Based Management Tools (ABMTs), including MPAs, c) environmental impact assessments (EIAs) and d) capacity building and transfer of marine technology (CT & TT).[6]

The BBNJ Working Group held its last meeting in January 2015, resulting in the adoption by the UNGA of Resolution 69/292 on 6 July 2015. By virtue of Resolution 69/292, the UNGA convened a Preparatory Committee (PrepCom) aimed at the development of recommendations on the elements of a draft text of a legally binding instrument on BBNJ. These recommendations were the first steps towards the adoption of Resolution 72/249 that convened an Intergovernmental Conference, under the auspices of the United Nations, "to consider the recommendations of the Preparatory Committee on the elements and to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of Sea on the conservation and sustainable use of marine biological diversity of areas beyond

[3] The other two are the 1994 Agreement relating to the implementation of Part XI of the UNCLOS of 10 December 1982 (NewYork, 28 July 1994, in force 28 July 1996), 1836 UNTS 42, and the 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 (New York, 4 August 1995, in force 11 December 2001) 2167 UNTS 88.

[4] Article 86 of the UNCLOS defines the high seas as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State" and UNCLOS Article 1 defines the Area as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

[5] Oceans and the Law of the Sea', UNGA Res 66/231 (24 December 2011) UN Doc A/RES/ 66/231, Annex – 'Recommendations of the 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', para (a).

[6] *Id.*

national jurisdiction, with a view to developing the instrument as soon as possible."[7] Resolution 72/249 also provided that if every effort to reach agreement by consensus has been exhausted, then "decisions of the conference on substantive matters shall be taken by a two-thirds majority of the representatives present and voting".[8]

Indeed, in 2018 a Diplomatic Conference was convened in New York by the United Nations, with the objective to adopt an implementing agreement that would allow, within the existing UNCLOS framework, the development of future regulations for the protection and sustainable use of biodiversity in sea Areas Beyond National Jurisdiction. It was also decided that an Intergovernmental Conference should be convened, with 4 Summits that would culminate to the adoption of a final text. Until today, only three out of the four Summits have taken place. The Fourth Summit was initially scheduled to take place in April 2020, but following the outbreak of the COVID-19 pandemic, it was postponed several times and is still pending. Meanwhile, many issues remain unresolved.

III. The new Implementation Agreement on Areas Beyond National Jurisdiction: Main issues and challenges

The new agreement is called upon to regulate issues in areas beyond national jurisdiction. Therefore, so the question that arises is how state sovereignty is involved. During the negotiations, States have presented arguments versed to protect their sovereignty:

A) The scope of application of the new Agreement

Will it be only applicable to the Area and the High Seas? What happens, for example, in the case of countries that do not have declared an EEZ (such as Greece), where competing rights and obligations shall arise? Draft Article 3 par. 2 provides that the Agreement "does not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service", while there have been suggestions for the exemption of state ships as well.[9] This leads to the conclusion that states do not want to give a wide scope to the new Agreement.

B) Adjacency

During the 2nd Summit, the principle of adjacency was suggested as one of the principles to guide the Agreement. The question was whether states adjacent to a marine genetic resources research area or a

[7] UN A/RES/72/ 249. For an overview of the negotiations up to the start of the IGC, see C Payne, 'Biodiversity in High Seas Areas: An Integrated Legal Approach' 21(9) ASIL Insights (1 September 2017), <https://www.asil.org/insights/volume/21/issue/9/biodiversity-high-seasareas-integrated-legal-approach>

[8] *Id.*

[9] As is the case of SOLAS.

marine protected area or an environmental impact assessment area would have an increased role in the relevant consultations and decision-making processes. The principle of adjacency does not exist *per se* in international law. It appeared in the Convention on Fishing and Conservation of the Living Resources of the High Seas,[10] regarding the "special interest" of adjacent states in the maintenance of the productivity of the living resources, but was not repeated thenceforth in any other international text.[11] After the 3rd Summit, it was replaced by the principle of "due regard". The principle of "due regard" may be found scattered across UNCLOS and the Draft Article 15, according to which any decisions "*shall not undermine the effectiveness of measures adopted by coastal states in adjacent areas within national jurisdiction and shall have due regard for the rights, duties and legitimate interests of all States, as reflected in relevant provisions of the Convention. Consultations shall be undertaken to this end*". In the case of *Enrica Lexie* in 2020, the Arbitral Tribunal declared it a principle both of substance and procedure, adding that states should respect the principle of due regard, otherwise they violate international law.[12]

C) Implementation of the new Agreement

States, Greece included, have always been in favour of the flag-state jurisdiction and flag-state control. Draft Articles 53 and 20 maintain that States will take measures (signifies an obligation of conduct) to comply with the Agreement. However, these obligations are rather weak and States are reluctant to adopt stricter rules. While the 2nd Implementation Agreement provides for boarding in high seas or for port-state jurisdiction, in the new Agreement, the implementation lies with the flag State, thereby raising concerns as to its effectiveness. It so it seems that sovereignty strikes back, in the sense that states are resisting new developments.

D) Permanent sovereignty of states over natural resources

States are still attached to the principle of permanent sovereignty over natural resources and are reluctant to lose any of their power therein. On the other hand, sovereingty can be restrictive as a concept because States are restricted to act only within their territory. By the same token, sovereignty is a limiting factor when dealing with global concerns. In relation to ABNJ, the question posed is whether the natural resources are common heritage of mankind and of freedom of seas, therefore whether a benefit-sharing or a non-monetary benefit-sharing approach should be adopted. Other issues concern the

[10] Article 6 of Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 UNTS, at 285.
[11] the UNCLOS does not include the concept of adjacency either.
[12] *Enrica Lexie,* pars 973 *et seq*. In particular, the Tribunal rejected India's counterclaim that Italy failed to give "due regard" to India's rights of the coastal state in the EEZ under UNCLOS Article 58(3), adding that the Enrica Lexie's response to a perceived threat of piracy was not an unreasonable interference.

management of marine protected areas, and the question in this case is whether management should be at a central level or regional, or what should be the threshold for an environment impact assessment to take place in the high seas.

IV. Concluding Remarks

It is true that negotiations have taken a considerable amount of time, and the current state of affairs does not offer much insight as to the final outcome. There are reasonable grounds to believe that many issues will remain resolved, or at best, an honest compromise will be achieved though lacking an effective enforcement mechanism with more robust commitments, thereby reinforcing the argument that this long journey has been necessary in order for the new to gain universal participation and approval.

V. Reading List

Boyle A, Redgwell C (2021) Birnie, Boyle, and Redgwell' s international law and the environment. Oxford University Press, Oxford.

Freestone D (2014) Governing the blue: governance of areas beyond national jurisidction in the twenty-first century. In: Schofield C, Lee S, Kwon M-S (eds) The limits of maritime jurisdiction. Martinus Nijhoff, Leiden, pp 729–751.

Freestone D (2019) (ed), Conserving Biodiversity in Areas beyond National Jurisdiction. Brill.

Geiss R, Tams CJ (2015) Non-flag states as guardians of the maritime order: creeping jurisdiction of a different kind? In: Ringbom H (ed) Jurisdiction over ships post-UNCLOS developments in the law of the sea. Brill, pp 19–49.

HN Scheiber, N Oral and M-S Kwon (2018) (eds). Ocean Law Debates: The 50-Year Legacy and Emerging Issues for the Years Ahead. Brill.

Pascale R (2019). Sovereignty and challenges of the future international legally binding instrument on marine biodiversity beyond national jurisdiction: how to reconcile the individual interest of States at sea and the 'common interest of mankind'?. Sovereignty: A concept in flux?.

O'Leary BC *et al.* "The first network of Marine Protected Areas (MPAs) in the high seas: the process, the challenges and where next", pp. 598-605, Marine Policy, vol. 36, 2012, p. 602.

Ribeiro MC (2010). "The 'Rainbow': the first national marine protected area proposed under the high seas", pp. 183-207, The international journal of marine and coastal law, Martinus Nijhoff Publishers, vol. 25, n. 2.

Ribeiro, M., Loureiro Bastos, F., Henriksen, T. (eds) Global Challenges and the Law of the Sea. Springer, 2020

Johnson DE (2016). Conserving the Charlie-Gibbs Fracture Zone: one of the world's first High Seas Marine Protected Areas, pp. 271-285. In: Mackelworth P (ed.) Marine Trans-boundary Conservation and Protected Areas, Earthscan Oceans.

Papanicolopulu I (2023). Marine Biodiversity Beyond National Jurisdiction. In: Garcia, M.d.G., Cortês, A. (eds) Blue Planet Law. Sustainable Development Gomals Series. Springer.

Ma D, Zhou J (2021). The binding force of the BBNJ agreement on third parties. Ocean Coast Manag 212:105818.

Nordquist MH, Long R (2021). Marine biodiversity of areas beyond national jurisdiction. Brill.

Papastavridis E (2020). The negotiations for a new implementing agreement under the un convention on the law of the sea concerning marine biodiversity. Int Comp Law Q 69:585–610.

Hossain K., Morris K. (2017). Protecting Arctic Ocean Marine Biodiversity in the Area Beyond National Jurisdiction. In: Andreone, G. (eds) The Future of the Law of the Sea. Springer.

Scovazzi T (2016). The negotiations for a binding instrument on the conservation and sustainable use of marine biological diversity beyond national jurisdiction. Marine Policy 70:188-191.

Tladi D (2019). An institutional framework for addressing marine genetic resources under the proposed treaty for marine biodiversity in areas beyond national jurisdiction. Int Environ Agreements 19:485–495.

International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, UN A/RES/72/ 249 of 24 December 2017.

'Our Ocean, Our Future: Call for Action', UN A/RES/71/132 of 6 July 2017.

Oceans and the Law of the Sea', Annex – 'Recommendations of the 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, UN Doc A/RES/66/231 of 24 December 2011.

'Development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction', UN A/RES/69/292 of 6 July 2015.

"Enrica Lexie" Incident, Italy v. India, Award, PCA Case No 2015-28, ICGJ 549 (PCA 2020), 21st May 2020.