Lessons Learned from Regional and Sectoral Organizations for Conservation in ABNJ

Overview

As negotiations progress for a new international legally binding instrument (‘Instrument’) on the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (ABNJ), the relationship of this new BBNJ Instrument to existing regional and sectoral organizations remains a point of intense debate. The new Instrument presents an opportunity to enhance the effectiveness of existing relevant legal instruments and organizations and bring forward a more coherent and comprehensive approach to the protection and conservation of marine biodiversity in the high seas.

This briefing offers examples from existing regional and sectoral organizations to illustrate systemic challenges to conserving biodiversity in ABNJ under the current fragmented ocean governance system. These challenges include: (i) implementation of the ecosystem and precautionary approach; (ii) cooperation and communication across sectors; (iii) adherence to scientific advice; (iv) achieving consensus on decisions needed to protect biodiversity; (v) considering climate change impacts in management decisions; and (vi) inadequate implementation of States’ obligations to conduct environmental impact assessments.

The biodiversity in ABNJ – which comprise nearly half the planet – is under siege from human activities as never before, including from overfishing and pirate fishing, plastics and noise pollution, the effects of climate change including ocean acidification and coral bleaching, and the prospect of new and emerging uses and deep seabed mining. Clearly, urgent action is needed. Understanding the dynamics of current regional and sectoral bodies with mandates relevant to ABNJ can highlight governance gaps that the future Instrument might address in order to improve the biodiversity and health of the ocean in ABNJ.
CASE STUDY 1

The International Seabed Authority and the ‘Lost City’

The International Seabed Authority (ISA), established by Part XI of the United Nations Convention on the Law of the Sea (UNCLOS), is the organization tasked with organizing and controlling activities concerning mineral resources in the seabed beyond national jurisdiction, known as ‘the Area.’ It is also required to adopt any measures necessary to ensure the effective protection of the marine environment from such activities.

Seabed mining in ABNJ is an emerging activity not yet underway at a commercial scale, and the ISA is in the midst of developing regulations for exploitation operations and regional environment management plans (REMPs) for mining regions that would permit commercial-scale mining. In the interim, currently 15-year mining exploration contracts have been awarded to private companies for data-gathering and sampling.

While the scope and scale of impacts of seabed mining are not yet fully understood, scientists warn that seabed mining will inevitably result in “significant biodiversity loss.” Even during the exploration phase, these impacts will likely include the damage or destruction of bottom habitat. Scaled-up testing of mining equipment and any future exploitation may create sediment plumes, stretching over many kilometers of the marine environment, which could increase water turbidity and smother marine life. A precautionary approach to mining that accounts for ecosystem impacts is clearly necessary in the face of this uncertainty. One method for addressing potential negative impacts is the ISA’s designation of Areas of Particular Environmental Interest (APEI) that prohibit deep seabed mining within a representative network of sites through regional environmental management plans. However, to date, APEIs have only been designated in one region, the Clarion-Clipperton Zone in the Pacific Ocean.

In 2017, the ISA awarded a 15-year exploration contract to the Government of Poland in an area of the Mid-Atlantic Ridge overlapping the ‘Lost City,’ which is a field of hydrothermal vents that scientists surmise could help us understand the origins of life on Earth. In this geologically unique vent field, warm alkaline waters react with seawater to create extraordinary carbonate spires rising up to 60 meters above the ocean floor. The Lost City along with other vents in the region have been identified as an Ecologically and Biologically Significant Area (EBSA) under the Convention on Biological Diversity (CBD) due to their uniqueness and rarity; importance for life history stages of specie; vulnerability; biological productivity; biological diversity; and naturalness. Moreover, a recent study concluded that if the World Heritage Convention were to be applied to the half of the world where it is absent – the high seas – the Lost City meets World Heritage criteria and would be worthy of World Heritage status.

The ISA’s Legal and Technical Commission (LTC) was responsible for evaluating Poland’s exploration application for any potential environmental impacts. There is no evidence that the LTC considered the ecological and biological importance of the Lost City or the values reflected by the area’s EBSA designation or potential World Heritage status, and an overall lack of transparency in the LTC’s decision-making process.
Governance gaps, lessons learned, and opportunities for the BBNJ Instrument

This case illustrates a lack of coordination across ocean governance frameworks, which limits the ISA’s ability to take decisions that are consistent with the precautionary and ecosystem-based approaches. The new Instrument presents an opportunity to promote: (i) consultation and sharing of information to ensure better cross-sectoral coordination with regard to the recognition of areas of ecological importance and establishment of marine protected areas (MPAs) in ABNJ; and (ii) transparency within sectoral body decision-making processes.

CASE STUDY 2

Southern Indian Ocean “Benthic Protected Areas”

In 2006, the Southern Indian Ocean Deepsea Fishers Association (SIODFA) was formed by four fishing operators. The Association identified 12 voluntary benthic protected areas (vBPAs), with an additional closure added later, in which the fishing vessel captains agreed not to engage in bottom trawling.9 This voluntary SIODFA network of closures still left 94.5% of seamounts and 93.3% of the fishable seafloor available to fishing.10

The Southern Indian Ocean Fisheries Agreement (SIOFA) came into force in 2012, with its primary objective being to ensure the long-term conservation and sustainable use of certain (mainly demersal) fishery resources in the Southern Indian Ocean; its decisions are made through consensus.11 Once SIOFA entered into force, Australia urged the agreement’s newly established Scientific Committee to assess the 12 vBPAs as candidates for protected areas. This would have closed these areas to all kinds of fishing regulated by SIOFA, including line, trap and bottom trawl fishing.12 The Committee subsequently recommended that five of the areas be designated as protected, but was unable to reach consensus on the other seven.13 Following this scientific advice, the measure was ultimately blocked by a single Party.14 As a result, all five areas proposed for protection were instead opened to line and trap fishing methods the following year.15

An observer noted that SIOFA missed an opportunity to show that its parties are able to act beyond narrow self-interest, observe the precautionary approach, and follow scientific advice.16 Instead, on the basis of a single objection, a weak decision-making mechanism with a requirement for consensus led to a failure to enact even modest protections.
Governance gaps, lessons learned, and opportunities for the BBNJ Instrument

This case study highlights a systemic failure to follow scientific advice. It should be noted that this problem is not unique to SIOFA – other Regional Fisheries Management Organizations (RFMOs) have been found to follow the advice of their scientific committees as little as 17% of the time. This challenge is amplified by consensus-based decision-making, which affords any single-party effective veto power over prescribed duties and obligations outlined in both UNCLOS and the United Nations Fish Stocks Agreement. The new Instrument could move beyond these limitations by incorporating flexibility into decision-making, including voting where necessary, and through a commitment to accountability for scientific advice.

CASE STUDY 3

North-East Atlantic Fisheries Commission (NEAFC)

VMEs remain open to bottom trawling

The North-East Atlantic Fisheries Commission (NEAFC) was created in 1959 with the main objective of ensuring the long-term conservation and optimum utilization of the fishery resources under its jurisdiction. Headquartered in London, NEAFC’s five contracting parties (including the EU) mainly cooperate in regulating demersal fisheries. Decisions at NEAFC are made by a qualified majority, subject to an opt-out procedure.

NEAFC has closed substantial areas of the high seas at fishable depths to bottom fishing, including areas where VMEs are known to occur, and receives advice on VMEs and fisheries from the International Council for the Exploration of the Seas (ICES). In 2012, NEAFC rejected a recommendation by ICES to extend an existing closure to Southern Hatton Bank. ICES responded by proposing a much smaller closure the following year, omitting areas where bottom trawling already occurred on the basis that prior intensive trawling made the presence of VME indicator species unlikely despite there being clear indications of corals, sponges, and other species throughout the area. These revised boundaries were adopted by NEAFC in 2014, leaving significant adverse impacts from the bottom trawl fishery on VMEs unassessed and unaddressed.

A similar scenario unfolded in the Southwest Rockall Bank in 2012, where ICES proposed two options for extending an existing closure due to the presence of reef-forming cold-water corals. NEAFC rejected both options on the basis that the closures should only encompass areas where corals and sponges were definitely ‘known’ to occur and not areas where they were ‘likely’ to occur. Smaller closures were proposed by ICES in 2013 and then adopted by NEAFC.
Lessons Learned: Conservation in ABNJ

Adding to the complexity of this case is that a Regional Seas Organization, OSPAR, tasked with protecting and conserving the North-East Atlantic and its resources, operates in the same geographic area as NEAFC; they have had some sort of formal cooperation mechanism in place since 2008. OSPAR can and has established MPAs in the North-East Atlantic, but because OSPAR has no authority over the fishing activities, nor over other human activities, impacting the areas, it is reliant upon sectoral organizations, including NEAFC, to adopt complementary measures to afford its MPAs protection from the biggest threats to the marine environment, namely fishing, shipping, and mining.

In the case of NEAFC and OSPAR, there are a number of enabling conditions that lend themselves to coordination and cooperation: (i) the organizations have the same area of high seas remit; (ii) they have nearly identical Member States; (iii) they are both relatively well funded; and (iv) they both receive scientific advice from the same organization (ICES). The two organizations have specifically coordinated with respect to the establishment of OSPAR’s MPA network. In spite of this coordinated effort, and a reduction in the ambition of MPA proposals, the OSPAR high seas MPA network only partially overlaps with NEAFC’s closed areas; ultimately, the areas that enjoy protection from bottom trawling are those areas identified by NEAFC, not the MPAs identified by OSPAR.

**Governance gaps, lessons learned, and opportunities for the BBNJ Instrument**

NEAFC’s failure to follow and implement scientific advice and to implement the precautionary principle illustrates that this issue is not limited to any single RFMO. It is and will remain a problem in any circumstance where scientific advice is considered in a narrow sectoral context, divorced from broader considerations of biodiversity and marine environmental conservation. Additionally, this example shows that even when all of the enabling factors for coordination and cooperation are present, the outcomes, vis-à-vis marine protection, do not always overlap. While NEAFC and OSPAR are often held up as examples of cross-organizational cooperation and coordination, it should also be noted that the conditions that enable and facilitate NEAFC and OSPAR’s cooperation do not exist in most other areas of the world; while lessons can be learned by their approach, its model could not be successfully replicated across the globe.

The new Instrument provides an opportunity to have more consistent and coherent coordination across various sectoral activities, as well as the opportunity to consider vulnerable ecosystems in the context of the ocean as a whole, with a consistent application of scientific advice and the precautionary approach.
CASE STUDY 4

CCAMLR and Climate Change

The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) was formed in 1982 by Antarctic Treaty Parties as a response to the collapse of several unregulated fisheries in the Southern Ocean. Antarctic krill (Euphausia superba) was being targeted as well, with potentially disastrous consequences given the large number of Antarctic species dependent on it. As a result, CCAMLR’s founding Convention took an unusual approach, explicitly focusing on conservation and on elaborating conservation principles that signatories must fulfill.

Despite this foundation, CCAMLR through its Scientific Committee has sometimes struggled to make timely decisions based on scientific information, often due to the requirement for consensus in both bodies. For example, in 2009 CCAMLR adopted a non-binding resolution that “urges increased consideration of climate change impacts in the Southern Ocean to better inform CCAMLR management decisions.”

To date, the two major proposals that would give effect to this resolution have failed to be adopted by the Commission: (i) a requirement to include statements on climate change implications in reports and relevant proposals; and (ii) a climate change response work program.

A requirement for mandatory climate change implications statements was first proposed in 2015 and again in 2018. Implications statements are envisioned as a clear way to communicate the integration of climate change science into the development of relevant proposals, such as a fishery management measure. The Commission has been unable to agree, however, with two Members insisting that implications statements would be based on “a limited number of observations” and would not be suitable for informing decisions. Notwithstanding, many CCAMLR Members have stated they will provide such statements in their proposals on a voluntary basis.

The climate change response work program was proposed for consideration by CCAMLR in 2017. It aims to bring CCAMLR’s climate change work into a “a cohesive and prioritised framework,” and facilitate consideration of climate change in Commission decisions. The proposal has been endorsed by CCAMLR’s Scientific Committee, despite some minor disagreements over process and formatting, but the Commission failed to enact it, despite most Members expressing support.

The 2017 CCAMLR Performance Review noted that “[h]arvest strategies for krill and toothfish currently use decision rules that imply no change to the ecosystem other than due to natural variability. Strategies need to be developed that will … be robust to ecosystem changes arising from the other causes, including from regional climate changes.” This demonstrates a disconnect between CCAMLR’s recognition that understanding climate change is relevant for management and its ability to make management decisions based on climate change research.
Lessons Learned: Conservation in ABNJ

Governance gaps, lessons learned, and opportunities for the BBNJ Instrument

Climate change will pose an ever-increasing threat to biodiversity in ABNJ. It is a bracing signal that CCAMLR, as the ocean-governance organization with perhaps the broadest mandate to conserve and protect biodiversity in ABNJ, has been unable to act in a timely response. The new Instrument provides an opportunity to avoid this inertia by incorporating an explicit mandate to consider and address climate change impacts as well as avoid situations where political and economic considerations block the implementation of scientific advice. Recommendations for doing this include: requiring minimum scientific credentials for participants of scientific advisory bodies; appointing independent scientists from a variety of institutions (i.e., not solely government scientists); and avoiding a requirement for consensus to advance scientific advice or act on such advice.

Recommendations

With negotiations for a new internationally legally binding instrument to protect biodiversity in ABNJ scheduled to conclude by 2020, it is imperative that the new high seas regime builds upon lessons learned from existing regional and sectoral organizations. These case studies highlight the following elements needed to improve high seas governance and management, which must be included in a new treaty to protect biodiversity in areas beyond national jurisdiction:

• Ensure better cross-sectoral coordination with regards to the recognition of areas of ecological importance and establishment of marine protected areas in ABNJ;

• Establish more detailed guidance for environmental assessments, including a standard for post-assessment decision-making that requires any activities assessed to have significant adverse effects be managed to avoid such effects or not allowed to proceed;

• Include flexibility in decision-making, including voting where necessary, under a new BBNJ Instrument;

• Require decision-makers to follow scientific advice;

• Provide detailed guidance with respect to how the precautionary and ecosystem approaches should be operationalized in a high seas biodiversity context, including with regards to decision-making;

• The need for effective dispute resolution procedures; and

• Provide an explicit mandate to consider and address cumulative impacts, including from climate change, with accompanying scientific advice and cooperation mechanisms to assist this.
Lessons Learned: Conservation in ABNJ


2. UNCLOS, Art. 145.


11. Leroy and Morin, Innovation in the decision-making process of the RFMOs; Marine Policy, 97, 2018, pp. 156-162.


16. SIOFA, ‘Report of the Fifth Meeting of the Parties to the Southern Indian Ocean Fisheries Agreement (SIOFA)’, Annex R.


19. Leroy and Morin, Innovation in the decision-making process of the RFMOs, pp. 156-162.

20. About 16.7% of the convention’s fishable area and 33.1% of fishable seamounts are closed to bottom trawling. Gianni et al., How much longer will it take, p. 11.

21. ICES, ‘Standing NEAFC request on vulnerable deep-water habitats in the NEAFC Regulatory Area: Special Request 1.5.4.1.’, 2012, pp. 5-7, http://www.ices.dk/sites/pub/Publication%20Reports/Advice/2012/Special%20Requests/NEAFC_Vulnerable_deep-water_habitats.pdf (accessed 6 January 2019).


23. ICES, ‘Standing NEAFC request on vulnerable deep-water habitats in the NEAFC Regulatory Area: Special Request 1.5.4.1.’, pp. 4-5.


25. ICES, ‘General advice – Vulnerable deep-water habitats in the NEAFC Regulatory Area; Special Request 1.5.5.’, pp. 3-5.

26. For example, a member of NEAFC served in OSPAR’s MPA working group, with the aim of facilitating a cohesive network of high seas MPAs. O’Leary et al., The first network of marine protected areas (MPAs) in the high seas: The process, the challenges and where next, Marine Policy, 36, 2012, p. 600.


