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THE STATUS OF HIGH SEAS BIODIVERSITY IN INTERNATIONAL POLICY AND LAW

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While the biological bounties of the water column have been known for centuries, it is only in the past forty years that the deep sea – once thought of as a desert from a biological point of view – has been recognized as host to many new species. In fact, discovery of unique species and organisms has recently accelerated, outstripping even the advance of technologies that give access to the deep seas, some of the most remote areas of Earth. Such organisms have drawn the attention of interested groups – governments, science, industry, academia and lawyers. This is due to their diversity, uniqueness and direct value on the one hand (e.g., to food security, with fish; to science and industry, with genetic resources) and indirect value on the other – for example, as parts of properly functioning marine ecosystems that play a role in carbon assimilation. This article will focus on current issues in international law and policy-making concerning marine biodiversity in areas beyond national jurisdiction. In particular, it will address the challenges and accomplishments of the United Nations and other relevant organizations in this field.

Policy-makers and lawyers have invested considerable time and resources in marine biodiversity, especially beyond areas of national jurisdiction. The former have by and large focused on balancing political, economic, social, environmental and ethical interests. In international policy-making fora, many states have promoted the equitable and sustainable use of marine biodiversity and genetic resources, while at the same time seeking to protect surrounding ecosystems from extraction risks. This includes advancing marine scientific research and clear regulatory frameworks, while counterbalancing the significant financial investment and advanced technology needed for deep-sea activities, and clarifying resource exploitation rights and sharing of benefits.

*The views expressed herein are those of the authors and do not necessarily reflect the views of the United Nations.*
International lawyers seek to identify the relevant legal principles and rules governing the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction. A patchwork of international instruments applies—first and foremost, the United Nations Convention on the Law of the Sea (UNCLOS)—yet none of those instruments directly or specifically addresses this issue. One of the particular sticking points in the legal discussions concerns marine genetic resources and whether the common heritage of humankind or the freedoms of the high seas apply to them. This question also relates to matters of legal interpretation, in particular whether Part XI of UNCLOS applies only to the mineral resources in the Area1 or also to its biological resources. Another issue concerns the legal implications of conservation tools, such as marine protected areas, in the specific jurisdictional and institutional context governing areas beyond national jurisdiction.

In recent years, international fora have seen intense discussion of these and other questions—including appropriate management and conservation tools, enhancing the capacity of developing states, and the necessity of additional scientific information. In 2004, the UN General Assembly, which performs an annual review and evaluation of UNCLOS implementation and other developments relating to ocean affairs and the law of the sea, mandated an Ad Hoc Open-ended Informal Working Group (the “Working Group”) to study issues related to the conservation and sustainable use of marine biodiversity beyond national jurisdiction, including scientific, technical, economical, legal, environmental and social issues. The Working Group also surveys relevant activities of the United Nations and other relevant international organizations, identifies key issues and questions requiring more detailed background studies, and indicates possible approaches for international cooperation and coordination. This broad mandate demonstrates the widespread and growing interest of states in this field, including issues related to marine genetic resources. Other intergovernmental organizations and bodies also take part in this discourse through their areas of competence. For example, the Food and Agriculture Organization of the United Nations (FAO) and regional fisheries management organizations address the impacts of destructive fishing practices on vulnerable marine ecosystems and biodiversity beyond national jurisdiction. The International Seabed Authority (ISA)2 has adopted regulations targeting the environmental impacts of mining activities. The United Nations Educational, Scientific and Cultural Organization (UNESCO) and its Intergovernmental Oceanographic Commission have added valuable scientific input with the development of the Global Open Oceans and Deep Seabed Biogeographic Classification. The scientific and technical work undertaken by the Convention on Biological Diversity and by the United Nations Environment Programme (UNEP) has also catalyzed international debate. One should finally mention the contribution of non-governmental organizations, which are very active in bringing relevant issues and proposals to the attention of states.

In the General Assembly, states are negotiating a coordinated approach to the measures and proposals discussed in these institutions and aim to identify possible solutions. A number of states focus on practical measures to address existing implementation gaps, and to enhance the conservation and sustainable use of marine genetic resources. Such measures include the promotion of marine scientific research and development of codes of conduct, methodologies for carrying out environmental impact assessments, area-based management tools (including protected areas), and mechanisms for cooperation, sharing of information and knowledge, discussion of practical options for benefit-sharing and consideration of intellectual property aspects of genetic resources beyond areas of national jurisdiction.

While open to considering practical measures, other states stress the importance of discussions on the legal regime for genetic resources beyond areas of national jurisdiction (UN 2008). In February 2010, the Working Group recommended that the General Assembly call upon states to make progress

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1. The Area is the seabed and ocean floor and subsoil, thereof beyond the limits of national jurisdiction (see Article 1 (UNCLOS 1982)).

2. The International Seabed Authority is an international organization established under UNCLOS to organize and control activities in the Area, particularly with a view to administering the mineral resources of the Area.
in the discussion on the relevant legal regime for, and implementation gaps in, the conservation and sustainable use of marine genetic resources in accordance with international law, UNCLOS in particular, and taking into account states’ views on its Parts VII and XI (UN 2010). The recommendation reflects the differing views of states on the legal status of marine genetic resources beyond areas of national jurisdiction. In fact, while states recognize that UNCLOS provides the framework for all activities in the oceans and seas, their views diverge on the relevant legal provisions for these specific resources. Developing countries hold the view that the common heritage of humankind, as set out under Part XI of UNCLOS, not only applies to mineral resources but also to the biological resources of the Area. Developed countries, generally, hold the view that Part XI only encompasses mineral resources, while marine genetic resources fall under the high seas regime set out in Part VII of the Convention; the freedom of the high seas would therefore govern their collection and exploitation. By and large, those positions reflect the respective capacity of each group of states to access and exploit those resources, taking into account varying degrees of capacity within each group. The Working Group recommended that the General Assembly convene another meeting in 2011 to elaborate further recommendations (UN 2010).

Both in the short and longer term, a number of challenges exist for advancing the international debate, and for finding measures that would both satisfy the urgency of making progress on the ground and the varying interests of states. Given the broad range of issues and interests at stake, certain states advocate for their “pet” issues, such as furthering area-based management tools, including marine protected areas, and environmental impact assessments; others prefer continued discussion of the legal regime for marine genetic resources. Increasingly, negotiations have been treated as a “package,” polarizing rather than coordinating the interests of conservation and those related to utilization and access. This does not even account for states that engage in the discussions while apparently favouring the status quo – that is, continuing activities not already specifically regulated, without definite rules for conservation and sustainable use.

Many differing perspectives remain under discussion amongst states and will call for future reconciliation. These include following a global approach in policy development and guidance, versus adopting regional approaches; and focusing on implementation of existing legal and institutional frameworks, versus developing new ones to fill perceived governance and legal gaps. Adequate leadership and follow-up at the national level will be required to protect this large portion of the planet’s biodiversity, and to ensure its sustainable use for present and future generations.

WORKS CITED


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