

# Indonesia's Role in Establishing Comprehensive Global Governance of Areas Beyond National Jurisdiction

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## I. INTRODUCTION

The adoption of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982 has resulted in a clear set of regulations to divide our ocean into various maritime zones: internal waters, territorial waters, archipelagic waters, exclusive economic zone, and continental shelf, each with a different degree of jurisdiction. Such maritime zones can generate a State's jurisdiction entitlement until 200 nautical miles (nm) seaward.<sup>1</sup> However, such a zoning system still left 61% of the world's oceans outside of any State's national jurisdiction.<sup>2</sup> Such an Area is called an Areas Beyond National Jurisdiction (ABNJ).

As the high seas constitute the majority of the world's oceans, it also hosts migratory, high-trophic fish species and long-lived species,<sup>3</sup> as well as rich biodiversity still needs to be well discovered. It is important to note that the high seas provide critical ecosystem services to humankind. This ranges from providing the resources used for food, medicinal or non-medicinal contexts; capturing and storing carbon in a global carbon cycle, preventing them from

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<sup>1</sup>Even up until 350 nm is for extended continental shelf entitlement.

<sup>2</sup>Bethan C. O'Leary et al., "Options for Managing Human Threats to High Seas Biodiversity," *Ocean and Coastal Management* 187 (2020).

<sup>3</sup>Laurenne Schiller, Megan Bailey, Jennifer Jacquet, and Enric Sala, "High Seas Fisheries Play a Negligible Role in Addressing Global Food Security," *Science Advances* 4, no. 8 (2018).

entering the atmosphere; being home to the habitats essential for species health, and supporting the gene pool for organisms wanting to adapt to the changing ocean conditions.<sup>4</sup> Considering the importance of the high seas in the ocean ecosystem, it is needless to emphasise that protecting the high seas is integral.

Over the years, activities at the high seas conducted by countries and other stakeholders have only skyrocketed and inevitably impacted the high seas. The increasing trend of high-seas fishing has stood at the top rank of the human activities that affect ABNJ, followed by maritime shipping and climate change and its associated effects.<sup>5</sup> Countries fishing in the high seas have increased to 112 countries in 2006 from only 52 countries in 1950,<sup>6</sup> however, the top 10 high-seas fishing countries land 63% of the catch.<sup>7</sup>

Moreover, the growth of shipping also undeniably affected the high seas ecosystem. Since global trade started to take off in 1950, it is predicted that the exponential growth of global shipping will continue, which will also use more of the global ocean space, including the high seas.<sup>8</sup> Further, the effects of climate change, resulting in the warmer temperature of the ocean and ocean acidification, also impact marine life on the high seas.

Human activities at sea will also be predicted to increase due to the growing possibility of extracting and exploiting the mineral resources in “The Area”, which is the seabed, ocean floor, and its subsoil beyond the limits of national jurisdiction. Such activities may also cause impacts on the environment, such as the loss of species, decreased biodiversity, changing hydrothermal activity, reduced water quality, and changing seafloor surface structure, as identified in the Solwara I project.<sup>9</sup> In order to govern the activities in “The Area”, UNCLOS

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<sup>4</sup>A.D. Rogers et al., “The High Seas and Us: Understanding the Value of High-Sea Ecosystems”, Global Ocean Commission, March 2016, 10, accessed on 24 January 2023, <https://fisheries.sites.olt.ubc.ca/files/2023/01/high-seas-and-us.pdf>.

<sup>5</sup>Gabrielle Carmine et al., “Who is the High Seas Fishing Industry?” *One Earth* 3, no. 6 (2020).

<sup>6</sup>Andrew Merrie et al., “An Ocean of Surprises – Trends in Human Use, Unexpected Dynamics, and Governance Challenges in Areas Beyond National Jurisdiction,” *Global Environmental Change* (2014), 22.

<sup>7</sup>Rogers, “*The High Seas and Us*,” 13.

<sup>8</sup>Merrie et al., “An Ocean of Surprises”, 24.

<sup>9</sup>Solwara I project is located in the Bismarck Sea, near Papua New Guinea, with more than 20 hydrothermal fields and rich in seafloor massive sulfide (SMS) deposits. The PNG government has given the project’s mining license to Nautilus Minerals, but the environmental risks are too significant to continue the commercial exploitation activities. However, the permit has been given by the PNG Government. Walter Leal Filho et al., “Deep Seabed Mining: A Note on Some

1982 has mandated the International Seabed Authority (ISA) to establish a set of rules for such governance, and it is currently underway.

This paper will analyse the legal significance of the current international endeavour to regulate the conduct of actors in the ABNJ through the development of two instruments: the International Legally Binding Instrument under the 1982 United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity beyond National Jurisdiction (ILBI BBNJ) and the Draft Regulations for Exploitation of Mineral Resources in the Area under the International Seabed Authority (ISA). This paper will also demonstrate Indonesia's active role in negotiating such instruments and, subsequently, its contribution to implementing the rule of law for activities on the high seas.

## **II. AREAS BEYOND NATIONAL JURISDICTION IN UNCLOS 1982 AND THE URGENCY FOR GLOBAL HIGH SEAS GOVERNANCE**

### **II.1. Areas Beyond National Jurisdiction in UNCLOS 1982 and Relevant International Law**

UNCLOS, also regarded as the 'Constitution of the Ocean', has directly referred to ABNJ, comprising "the Area" and the "High Seas". "The Area" refers to the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, as stipulated in Article 1 para. (1). Further, UNCLOS has also acknowledged the water column beyond the limits of the exclusive economic zone and dedicated a distinct part to regulate the rights and obligations of States on all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a State, or the archipelagic waters of an archipelagic State,<sup>10</sup> and are open to all States,<sup>11</sup> which is called "High Seas".

UNCLOS granted a set of freedoms for States to exercise in the high seas, such as freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations permitted under international law, freedom of fishing, and

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Potentials and Risks to the Sustainable Mineral Extraction from the Oceans," *Journal of Marine Science and Engineering* 9, no. 5 (2021): 521.

<sup>10</sup>Article 86 UNCLOS.

<sup>11</sup>Article 87 UNCLOS.

freedom of scientific research.<sup>12</sup> However, the exercise of such freedoms is not limitless. Article 87 of UNCLOS also provided several *chapeaus* that should be taken into account by States in exercising the freedoms above:

1. Conditions laid down by the Convention and other rules of international law;
2. Due regard for the interests of other States in their exercise of the freedom of the high seas;
3. Due regard to the rights under the Convention concerning the activities in the Area,
4. Reserved for peaceful purposes and
5. No State may validly purport to subject any part of the high seas to its sovereignty.

Included within the conditions highlighted above is the obligation for States to protect and preserve the marine environment.<sup>13</sup> Such freedom of the high seas shall be read together with the provisions contained in Articles 116 to 120 of UNCLOS, which deals with the conservation and management of living resources of the high seas. In the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case, the International Court of Justice (ICJ) have regarded that the ‘due regard’ obligation shall be considered side-by-side with the conservation and equitable exploitation of the fishing resources.<sup>14</sup> Further, the Third Conference of the Law of the Sea (UNCLOS III) in 1973-1982 also recognised the importance of ensuring the conservation measures and protection of the marine environment during the increasing trend of high-seas fishing.<sup>15</sup>

Regarding The Area, UNCLOS 1982 has regulated that the prospecting, exploration, and exploitation will only begin after the Authority has gained reassurance that the Contractor will comply with the provisions under the

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<sup>12</sup>Article 87 UNCLOS.

<sup>13</sup>Article 192 UNCLOS.

<sup>14</sup>Para. 64 of the *Fisheries Jurisdiction Case*: “It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.” Para. 79 (4) (c): “the obligation to pay due regard to the interests of other States in the conservation and equitable exploitation of these resources.”

<sup>15</sup>UNCLOS Commentary, p. 40-41.

Convention and relevant rules developed by ISA, including protecting the marine environment. UNCLOS 1982 has also mandated ISA to “adopt and uniformly apply rules, regulations, and procedures” on “mining standards and practices, including those relating to operational safety, conservation of the resources and the protection of the marine environment.”<sup>16</sup> The extent of such mandate is aimed to achieve the objective of ensuring adequate protection of the marine environment from harmful effects resulting from activities in the Area, which covers “drilling, dredging, coring, and excavation and from disposal, dumping and discharge into the marine environment of sediment, wastes, or other effluents.”<sup>17</sup>

Before UNCLOS 1982, the First Conference of the Law of the Sea (UNCLOS I) 1958 laid the groundwork for incorporating environmental concerns in exploiting living resources. It regulates that States shall adopt necessary measures to ensure the conservation of natural resources on the high seas to secure a ‘maximum supply of food and other marine products.’<sup>18</sup> On the other hand, the 1958 High Seas Convention also referred to the obligation of states to prevent pollution, either from the discharge of oil from ships or pipelines, activities in the seabed and its subsoil, or radioactive waste or materials. This was even before the first international conference on the environment, the 1972 United Nations Conference on the Human Environment, was conducted and resulted in the creation of other environmental frameworks: the 1972 London and Oslo Dumping Convention and the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL).

## **II.2. Urgency of the Global High Seas Governance**

### **II.2.A. Difficulty in ensuring marine environmental protection in the exercise of freedoms of the high seas**

Aside from establishing the “Constitution of the Ocean”, which comprehensively encompasses various issues on maritime affairs, it is essential to note that the

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<sup>16</sup>Article 17 (1) (b)(xii) – Annex III “Basic Conditions of Prospecting, Exploration and Exploitation”.

<sup>17</sup>Article 17 (2) (f) – Annex III “Basic Conditions of Prospecting, Exploration, and Exploitation”.

<sup>18</sup>Article 2 and Article 5 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.

deliberation leading to UNCLOS 1982 was conducted at the right time when environmental matters were actively discussed at international fora. UNCLOS 1982 has provided an umbrella and created an agenda for global, regional, and national action on protecting the marine environment.<sup>19</sup>

Despite such a trend-setting role, protecting the marine environment on the high seas remains a significant gap within UNCLOS 1982, particularly the exercise of freedoms of the high seas. The ideal approach will be exercising such freedoms while protecting the marine environment. However, its implementation remains challenging due to the difficulty in ensuring compliance on the high seas. The exclusive jurisdiction of the flag State has led to the problem of flags of convenience, resulting in the incapability of flag States to enforce international regulations over marine environmental issues,<sup>20</sup> and the application of non-exclusive flag State jurisdiction on the high seas is limited.<sup>21</sup>

## **II.2.B. Limitations of existing conservation measures under UNCLOS 1982**

It is essential to see the limitations of traditional approaches to conservation measures within UNCLOS 1982 to achieve the overall objective of biodiversity protection. The term 'biological diversity' itself is not yet defined in UNCLOS 1982 or the 1958 Convention, as it is only defined after the adoption of the Convention on Biological Diversity (CBD)<sup>22</sup> during the 1992 United Nations Conference on Environment and Development (UNCED).

In UNCLOS 1982, dividing the ocean into specific zones leads to spatial allocation to the state's jurisdiction, irrespective of the interconnected relationship of maritime ecosystems beyond such zoning mechanism.<sup>23</sup>

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<sup>19</sup>G.J. Matthews, "International Law and Policy on Marine Environmental Protection and Management: Trends and Prospects," *Marine Pollution Bulletin* 25, no. 1 (1992): 73.

<sup>20</sup>Hamad Bakar Hamad, "Flag of Convenience Practice: A Threat to Maritime Safety and Security," *Journal of Social Science and Humanities Research* 1, no. 8 (2016): 211, 215.

<sup>21</sup>This includes areas of the high seas under the fisheries management organisation (RFMO) that allows inspectors (not from a flag State) to board vessels on the high seas that do not comply with the regulations.

<sup>22</sup>Biological Diversity in CBD is defined as "the variability among living organisms from all sources including, among other things, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems."

<sup>23</sup>Yoshifumi Tanaka, "The Changing Approaches to Conservation of Marine Living Resources in International Law," *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 71 (2011): 294.

Regarding the conservation of living resources on the high seas, UNCLOS 1982 only obliges States to cooperate without providing further guidelines on implementing such cooperation and ensuring compliance. Further, the species-specific approach in UNCLOS 1982 also needs more consideration towards the relationship of various species to the marine ecosystem, despite its importance to be included in biodiversity protection.<sup>24</sup>

The CBD, conversely, obliges the States Parties to take measures to ensure biodiversity conservation and sustainable use.<sup>25</sup> However, in the high seas, CBD only applies to processes and activities executed under a Party's jurisdiction or control, not to the components of biodiversity, unlike its implementation in areas within national jurisdiction.<sup>26</sup> This results in the growing necessity to mitigate the increasing threats to biodiversity in ABNJ and address the deficiency of areas-based management tools (ABMT), including the marine protected areas (MPAs) in ABNJ, which is urgently needed.<sup>27</sup> In this sense, despite providing a more rigorous and comprehensive obligation for the protection of biological diversity, the application of CBD on the high seas still needs to be improved.

Moreover, regarding the establishment of ABMTs in the high seas, there needs to be a more detailed instrument that creates a standard on the criteria for MPA identification, as well as other related requirements for environmental impact assessments (EIA), consideration of cumulative impacts, and the mechanism for monitoring and enforcement, among others.<sup>28</sup>

### **II.2.C. Sectoral Activity-focused Framework, Instead of Biodiversity-Focused**

Aside from CBD, other instruments, frameworks, or bodies have regulated specific, sectoral activities on the high seas, mainly on marine pollution resulting from ships and fisheries. Such instruments have significant variability in the mandate

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<sup>24</sup>*Ibid.*, 302.

<sup>25</sup>The Southampton Oceanography Centre and A. Charlotte de Fontaubert, *The Status of Natural Resources on the High-Seas* (Southampton: WWF-IUCN, 2001), 80.

<sup>26</sup>Secretariat of the Convention on Biological Diversity, "The International Legal Regime of the High Seas and the Seabed Beyond the Limits of National Jurisdiction and Options for Cooperation for the Establishment of Marine Protected Areas (MPAS) in Marine Areas Beyond the Limits of National Jurisdiction," CBD Technical Series No. 19 (November 2005), 10, accessed on 12 December 2022, <https://www.cbd.int/doc/publications/cbd-ts-19.pdf>.

<sup>27</sup>*Ibid.*, 27.

<sup>28</sup>Nilufer Oral, "Freedom of the High Seas or Protection of the Marine Environment? A False Dichotomy", in *Ocean Law Debates* ed. Harry N. Scheiber, Nilufer Oral and Moon-Sang Kwon (Leiden: Brill-Nijhoff, 2018), 333.

and their capacity, mainly aimed at managing the activities without having the capacity to take necessary measures to fulfil specific biodiversity conservation objectives on the high seas.<sup>29</sup> For example, regional fisheries bodies are mainly mandated to manage fisheries activities, while the International Maritime Organization (IMO) manages shipping activities. On the other hand, ISA was given a mandate by UNCLOS 1982 to manage the exploration and exploitation activities in the Area. On another note, the CBD has attempted to identify ecologically or biologically significant areas (EBSAs), which include those in the ABNJ. During the <sup>ninth</sup> meeting of the Conference of the Parties (COP) to the CBD in 2008, seven scientific criteria were adopted to determine EBSAs.

Although they all manage the activities for conservation purposes or the protection of the marine environment, no overarching framework provides guidelines or standards for carrying out conservation measures for marine biodiversity on the high seas. This sectoral-based approach to environmental protection measures is facilitated by the specific permanent forum of discussions established under existing instruments, whose agenda is fixated on discussing a specific issue and limits the inclusion of new issues. This eventually encouraged negotiations only on an instrument covering specific sectors or activities.<sup>30</sup> Besides, environmental protection measures also require contributions from non-state actors and institutions combined in multi-level decision-making.<sup>31</sup> This way, environmental protection measures are tailored to adjust the needs and objectives of each activity instead of the environment as a whole, causing a view that environmental protection measures are put on the sidelines.

This sectoral, activity-based environmental regime approach causes the disintegration of conservation measures.<sup>32</sup> Such disintegration or disconnection among existing instruments poses challenges when issues involving more than one sector, region, or activity arise, i.a., the cumulative impact assessments,

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<sup>29</sup>Sharelle Hart, "Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction," *IUCN Environmental Policy and Law Papers – Marine Series No. 4*, 2008 (IUCN), 3.

<sup>30</sup>Thomas Gehring, "International Environmental Regimes: Dynamic Sectoral Legal Systems," *Yearbook of International Environmental Law* 1, no. 1 (1990): 43.

<sup>31</sup>Sandra Cassotta, "The Development of Environmental Law within a Changing Environmental Governance Context: Towards a New Paradigm Shift in the Anthropocene Era," *Yearbook of International Environmental Law* 30, no. 1 (2019): 58-59.

<sup>32</sup>Jeff Ardron et al., "Advancing Governance of the High Seas", Institute for Advanced Sustainability Studies (IASS) Policy Brief (May 2013), 5, accessed on 12 December 2022, <https://www.un.org/depts/los/biodiversityworkinggroup/documents/iass-iddri2013.pdf>



the lack of a global database on human activities at the high seas, especially the urgent need for information-sharing mechanism between fisheries, shipping, and deep-seabed mining activities.<sup>33</sup> As previously mentioned, the designation of the EBSAs is not automatically followed by specific conservation and management measures.<sup>34</sup> Enacting management measures in such areas will require more targeted institutional arrangements and formal cooperation to enable information-sharing mechanisms.<sup>35</sup>

The ILBI BBNJ and Draft Exploitation Regulation under ISA are also sectoral, as the ILBI BBNJ aims to protect marine biodiversity on the high seas. At the same time, the Draft Exploitation Regulation regulates deep seabed mining. However, the negotiating States have acknowledged that its implementation is inseparable from other relevant instruments, and the attempts to systemise the interactions with relevant instruments are also included on the agenda. This indicates that there needs to be a set of standards to ensure the conservation and sustainable use of marine biodiversity to fill the gaps in transparency, accountability, compliance, and reporting mechanisms in existing instruments.

## **II.2.D. Loopholes in the Regional-Focused Approach in Oceans Governance**

Since the 1972 Stockholm Conference, the importance of regional cooperation in protecting the marine environment, especially in controlling marine pollution, has started to be echoed and even incorporated into the Stockholm Action Plan. Following establishing United Nations Environment Programs (UNEP) after the 1972 Conference, one of its priority programs includes establishing the UNEP Regional Seas Programme.<sup>36</sup>

Other than the UNEP Regional Seas Programme, other regional frameworks also started to form. Some of them even included ABNJ as part of its scope of application, such as the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Convention for the Protection of the Marine Environment

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<sup>33</sup>*Ibid.*

<sup>34</sup>Convention on Biological Diversity, "Ecologically or Biologically Significant Marine Areas: Special Places in the World's Oceans," accessed on 12 December 2022, <https://www.cbd.int/ebsa/about>.

<sup>35</sup>Jeff Ardron et al., "Advancing Governance of the High Seas", 6.

<sup>36</sup>Leila Mead, "The 'Crown Jewels' of Environmental Diplomacy: Assessing the UNEP Regional Seas Programme", IISD Earth Negotiation Bulletin (April 2021), 2, accessed on 12 December 2022, <https://www.iisd.org/system/files/2021-04/still-one-earth-regional-seas.pdf>.

of the North-East Atlantic (OSPAR Convention), the Barcelona Convention, the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention), and the Convention for the Protection of the Marine Environment and Coastal Area of the Southeast Pacific (Lima Convention).<sup>37</sup> This is mainly in creating areas-based management tools (ABMT) that also include fractions of ABNJ, although the requirements, standards, and management measures between those frameworks vary.

Even with the inclusion of ABNJ in its scope of application, the priority of these regional frameworks is still on the areas within the Contracting States' jurisdiction. Besides, those frameworks need more institutional and financial capacity to expand their mandate to cover ABNJ further, which remains a challenge.<sup>38</sup>

### **II.2.E. The Need to Incorporate Emerging Principles under International Environmental Law**

The development of international environmental law also brings forth the development of new principles integral to the policy-making process, such as the protected areas and polluter pays principle, the precautionary approach, and integral coastal and marine management, yet to be incorporated in UNCLOS 1982 and CBD.<sup>39</sup> Another important principle that emerged is the ecosystem approach, which directs its attention towards the interconnected relationship of marine ecosystems instead of using a zonal-based system.<sup>40</sup> This approach was incorporated in the 1995 United Nations Fish Stocks Agreement (UNFSA), stating “the need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimise the risk of long-term or irreversible effects of fishing operations.” Further, the obligation of Coastal States and States fishing on the high seas also includes the assessment of fishing, other human activities and environmental factors and their impacts towards the ecosystem, not only the target stocks and species.<sup>41</sup> Following the adoption of UNFSA, the ecosystem approach continues to be incorporated in other frameworks.<sup>42</sup>

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<sup>37</sup>*Ibid.*, 7.

<sup>38</sup>Jeff Ardron et al., “Advancing Governance of the High Seas”, 8.

<sup>39</sup>Oral, “Freedom of the High Seas”, 333.

<sup>40</sup>Tanaka, “The Changing Approaches”, 303.

<sup>41</sup>Article 5 (d) of the 1995 UN Fish Stock Agreement.

<sup>42</sup>Tanaka, “The Changing Approaches,” 305.

The importance of the ecosystem approach was captured in the 1<sup>st</sup> United Nations World Ocean Assessment in 2016, which states that the “ocean is a complex set of systems that are all interconnected” and a “coherent overall approach is needed”.<sup>43</sup> The emergence of the ecosystem approach demonstrates scientific development, which stands at the core of environmental management and protection, and international law must catch up to capture the concerns.

Despite the advancement of scientific knowledge on the protection of biodiversity, there is still legal homework to operationalise the ecosystem approach and provide more practical guidance for the implementation of such an approach at global, regional, and national levels,<sup>44</sup> which has become one of the main agendas in negotiating the ILBI BBNJ and Draft Exploitation Regulation under ISA. In this regard, the ecosystem approach underlines the need for States to consider protecting the marine environment more comprehensively. In this case, harmonising the implementation of the ecosystem approach across existing instruments can become vital to systemising environmental protection measures at the high seas.

### **III. ANALYSIS OF THE CURRENT DEVELOPMENT OF INTERNATIONAL EFFORTS IN PROTECTING AREAS BEYOND NATIONAL JURISDICTION**

#### **III.1. Overview of the International Legally Binding Instrument under the 1982 United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity beyond National Jurisdiction (ILBI BBNJ)**

The UN General Assembly adopted Resolution No. 59/24 in 2004, establishing the Ad Hoc Open-Ended Informal Working Group to study biodiversity beyond national jurisdiction (BBNJ), conservation, and sustainable use. The issues that were identified include institutional coordination, Marine Genetic Resources

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<sup>43</sup>United Nations General Assembly A/70/112, *Summary of the First Global Integrated Marine Assessment*, para. 40, 13, accessed on 12 December 2022, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/187/09/PDF/N1518709.pdf?OpenElement>.

<sup>44</sup>Sarah Ryan Enright and Ben Boteler, “The Ecosystem Approach in International Marine Environmental Law and Governance,” In *Ecosystem-Based Management, Ecosystem Services and Aquatic Biodiversity*, edited by Timothy G. O’Higgins, Manuel Lago, Theodore H. Dewitt, (Cham, Switzerland: Springer, 2020), 334.

(MGRs), marine scientific research on marine biodiversity, marine protected areas (MPAs), and Environmental Impact Assessments (EIA). The Ad-Hoc Open-Ended Informal Working Group had 3 (three) meetings from 2006 to 2010.<sup>45</sup>

On the fourth meeting of the Working Group, held in New York, 31 May – 3 June 2011, the Working Group identified 4 (four) package issues to be addressed in the instrument, which include MGRs, including the question of benefit sharing; EIAs; Areas-Based Management Tools (ABMT), including MPAs; and capacity building and transfer of marine technology (CB-TMT). The commitment to initiating the negotiation was then discussed during the 2012 UN Conference on Sustainable Development.<sup>46</sup>

The negotiation of ILBI BBNJ started following the United Nations General Assembly (UNGA) Resolution No. 69/292 of 19 June 2015, which established a preparatory committee (PrepCom) to develop ILBI BBNJ. Two sessions of PrepCom were carried out in 2016 and 2017. PrepCom was mandated to convene four sessions, but States failed to reach a consensus in the PrepCom meeting 2017. Against this backdrop, the General Assembly decided to convene a diplomatic conference to negotiate the instrument for four sessions by adopting Resolution No. 72/249 on 24 December 2017. Such sessions are referred to as “Intergovernmental Conference (IGC)”.<sup>47</sup>

The first IGC (IGC-1) was held in New York on 4-17 September 2018. The IGC has been conducted for five rounds, with the last IGC-5 conducted on 15-26 August 2022 in the United Nations Headquarters, New York.

### **III.2. Overview of the Draft Regulations for Exploitation of Mineral Resources in the Area under the International Seabed Authority (ISA)**

Under UNCLOS 1982 and its 1994 Agreement,<sup>48</sup> ISA was mandated to develop a set of rules and regulations to govern the exploration and exploitation of

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<sup>45</sup>*Earth Negotiations Bulletin: A Reporting Service for Environment and Development Negotiations*, IISD Reporting Service Vol. 25 No. 179 (September 2018), 2.

<sup>46</sup>*Ibid.*

<sup>47</sup>J. Ashley Roach, “BBNJ Treaty Negotiations 2019”, in “Marine Biodiversity of Areas Beyond National Jurisdiction,” edited by Myron H. Nordquist and John Norton Moore (Leiden, The Netherlands: Koninklijke Brill NV, 2021), 26.

<sup>48</sup>Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982

mineral resources in the Area. ISA has issued draft exploration regulations for prospecting and exploration for polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts in the Area since 2000.<sup>49</sup>

The Regulations on Prospecting and Exploration for Polymetallic Nodules was issued on 13 July 2000, while the Regulations on Prospecting and Exploration for Polymetallic Sulphides was adopted on 7 May 2010. ISA also adopted the Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts on 27 July 2012.<sup>50</sup>

ISA is currently undertaking work to regulate the exploitation of mineral resources in the Area, starting with the stakeholder survey soliciting relevant information to develop the draft regulation in March 2014. The ISA then developed the first working draft of the exploitation regulations in February 2016, opened for stakeholder submissions in 2017 and 2018, and stakeholders' consultations in 2020, respectively. The draft was prepared by the Legal and Technical Commission (LTC) under ISA and negotiated by the members of the ISA Council every year.<sup>51</sup>

### **III.3. Legal Significance**

#### **III.3.A. Paving a way to operationalise the Ecosystem Approach in International Law**

As aforementioned, the definition and/or elements defining the 'ecosystem approach' have no solid foundation in international treaties. Nevertheless, some attempts have been made by experts, scholars, scientists, and even international organisations to start building the foundation. The United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS), in its seventh session in 2006, has discussed the key components of the ecosystem approach, which consists of the following:<sup>52</sup>

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<sup>49</sup>"The Mining Code: Exploration Regulations," International Seabed Authority, accessed on 12 December 2022, <https://www.isa.org.jm/mining-code/exploration-regulations>.

<sup>50</sup>IISB, "Summary Report, 1-4 August 2022: 27<sup>th</sup> Session of the Assembly of the International Seabed Authority (ISA-27)." <https://enb.iisd.org/assembly-international-seabed-authority-isa-27-summary>.

<sup>51</sup>"Draft Exploitation Regulations", International Seabed Authority, accessed on 12 December 2022, <https://www.isa.org.jm/mining-code/ongoing-development-regulations-exploitation-mineral-resources-area>.

<sup>52</sup>IISD, "Seventh Session of the Open-Ended Informal Consultative Process on Oceans and the Law of the Sea," accessed on 12 December 2022, <https://enb.iisd.org/oceans/icp7/>.

- a. Emphasise conservation of ecosystem structures and their functioning and critical processes in order to maintain ecosystem goods and services;
- b. Be applied within geographically specific areas based on ecological criteria;
- c. Emphasise the interactions between human activities and the ecosystem and among the components of the ecosystem and ecosystems;
- d. Take into account factors originating outside the boundaries of the defined management area that may influence marine ecosystems in the management area;
- e. Be inclusive, with stakeholder and local communities participation in planning, implementation and management;
- f. Be based on the best available knowledge, including traditional, indigenous and scientific information and be adaptable to new knowledge and experience;
- g. Assess risks and apply the precautionary approach;
- h. Use integrated decision-making processes and management related to multiple activities and sectors.

CBD also adopts a set of guidelines or indicative elements for the ecosystem approach, which consist of the following elements<sup>53</sup>:

- a. Focus on relationships and processes within ecosystems;
- b. Enhance benefit-sharing;
- c. Use adaptive management practices;
- d. Carry out management actions at the scale appropriate for the issue being addressed with decentralisation to the lowest level, as appropriate;
- e. Ensure inter-sectoral cooperation, emphasising the need to integrate the ecosystem approach into different sectors that impact biodiversity, including agriculture, fisheries and forestry and calls for increased communication and cooperation at a range of levels to achieve this, e.g. through inter-ministerial bodies or information-sharing networks.<sup>54</sup>

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<sup>53</sup>Enright and Boteler, "The Ecosystem Approach," 342.

<sup>54</sup>*Ibid.*

The ecosystem approach has also been acknowledged in other instruments, i.e., the Arctic Council. The approach has been included in the vital conservation framework by the Arctic Council, especially the 2004 Arctic Marine Strategic Plan. The Plan defines the ecosystem approach as envisaging “environmental, socio-economic, political and sectoral realms.” The Arctic Council in 2007 also established an expert group on the Ecosystem Approach to Management (EA-EG) and adopted the Kiruna Principles in 2013. One of its important principles is that the ecosystem approach is ‘place-based’, meaning that relevant geographical areas that fall under specific governance or management units shall be identified based on ecological criteria, including transboundary perspectives. This emphasises the need to cooperate with other regional mechanisms and mechanisms outside of the Arctic Council.<sup>55</sup>

As previously noted, the ecosystem approach also incorporates other well-known environmental principles, i.e., the precautionary approach and best-available knowledge. Such elements have been incorporated in the development of ILBI BBNJ and the Draft Exploitation Regulation under ISA. In addition, the latest draft of the ILBI BBNJ after IGC-4 has also included the “Ecosystem Approach” in Article 5 (General Principles and Approaches), which received significant acceptance from the negotiating States.<sup>56</sup> Article 17bis also includes ‘ecosystem approach’ as a basis to identify areas that require protection through ABMT,<sup>57</sup> Article 21 is a guiding principle for the COP to decide on amendment, extension, or revocation of ABMT.<sup>58</sup>

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<sup>55</sup>Vito De Lucia, “The BBNJ Negotiations and Ecosystem Governance in the Arctic,” *Marine Policy* 142 (2022).

<sup>56</sup>UN General Assembly Document No. A/Conf.232/2022/5, *Further Revised Draft Text of an Agreement 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*, (1 June 2022), accessed on 12 December 2022, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/368/56/PDF/N2236856.pdf?OpenElement>.

<sup>57</sup>*Ibid.* Article 17bis para. 1 sub-para (a): “On the basis of the best available science and scientific information, as well as relevant traditional knowledge of indigenous people and local communities, taking into account the application of precaution and an ecosystem approach.”

<sup>58</sup>*Ibid.* Article 21 para. (4): “Following the review, the Conference of the Parties shall, as necessary, take decisions on the amendment, extension, or revocation of area-based management tools, including marine protected areas, and any related measures, [as well as on the extension of time-bound area-based management tools, including marine protected areas, that would otherwise automatically expire,] on the basis of the best available science and scientific information, as well as relevant traditional knowledge of indigenous peoples and local communities, taking into account the application of precaution and an ecosystem approach.”

Despite the excellent progress, more than incorporating such principles in each provision would be required to make them implementable. States involved in the negotiation shall first determine the defining elements of the ‘ecosystem approach’ to be included in the treaty or the guidelines or procedures each treaty’s legal and scientific wing will develop further. It may take longer to reach a consensus, but states need to prepare what kind of basis they can work on and formulate the defining elements of the ecosystem approach itself.

It is also important to note that based on the current text of the ILBI BBNJ, the ecosystem approach is used in the provisions to establish ABMT on the high seas. On the other hand, the emergence of an ecosystem approach is also necessary to guide the process of conducting environmental impact assessments (EIA), primarily since it is directly related to the precautionary approach and the due diligence obligation.

One of the principles of the ecosystem approach is the holistic consideration of the impacts of activities in various sectors on the marine environment at the high seas. For EIA, such consideration encompasses the cumulative impact that will be considered in the EIA process. This is because one of the 4 (four) interrelated elements of the ecosystem approach is ‘integration’, which means that all cumulative impacts must be integrated into any management or governance regime, crossing different spatial and/or temporal scales.<sup>59</sup>

Aside from the ILBI BBNJ, States have also promoted incorporating the ecosystem approach within the Draft Exploitation Regulation, especially Regulation 2 on Fundamental Policies and Principles.<sup>60</sup> However, in the latest Facilitator’s Text for the 2<sup>nd</sup> Council Session to ISA, Regulation 2 para. (iii) has two alternative wording on ecosystem approach: the First is “ensure the effective application of an Ecosystem Approach”, and the Second alternative is “The application of an ecosystem approach, as reflected, among other things, in the Convention on Biological Diversity, COP 5 Decision V/6.<sup>61</sup> In this case, the first alternative, containing a more general wording, may be preferred by States as it does not contain a too prescriptive obligation. On the other hand,

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<sup>59</sup>Lucia, “The BBNJ Negotiations.”

<sup>60</sup>Facilitators’ Text on the Informal Working Group on Institutional Matters, accessed on 12 December 2022, [https://isa.org.jm/files/files/documents/Institutional\\_Matters\\_IWG\\_Facilitators\\_Draft\\_Regs\\_1-5.pdf](https://isa.org.jm/files/files/documents/Institutional_Matters_IWG_Facilitators_Draft_Regs_1-5.pdf)

<sup>61</sup>*Ibid.*



if the second alternative is preferred, it will provide a more robust legal basis for the elements of an ecosystem approach to be included in implementing the obligation of States to protect the marine environment.

Although it is possible to include the elements of the ecosystem approach in the draft Exploitation Regulation, more is needed to make it implementable fully. The integration of the ecosystem approach in the general obligation of States to protect the marine environment needs step-by-step guidance. That said, applying the ecosystem approach must also be incorporated in other Regulations in the Draft Exploitation Regulation with a complementary set of guidelines by the Legal and Technical Commission (LTC) under ISA.

The issue that will need further deliberation is the operationalisation of the ecosystem approach in existing frameworks or regulations. Despite the guidelines and the current efforts to operationalise the ecosystem approach in ILBI BBNJ and ISA, States shall also explore ways and means to implement this approach in the existing frameworks or instruments, especially on whether States shall work on existing institutional arrangements or establish new ones. This will remain the homework for States.

### **III.3.B. Formalise procedures for States to systematically implement their *erga omnes* obligation to protect the marine environment at the high seas**

States have the *erga omnes* obligation to protect the marine environment in the high seas under the 'do no harm' obligation under international customary law, i.a., the principle of *sic utere tuo ut alienum non laedas* (duty not to use one's property in a manner to cause harm to that of another) as identified in the award of the 1941 *Trail Smelter* and the *Corfu Channel case*. Principle 21 of the 1972 Stockholm Declaration, the 1992 Rio Declaration, and Article 3 of the Convention on Biological Diversity incorporated the 'not harm' obligation.<sup>62</sup> Further, Article 192 UNCLOS 1982 gives the obligation to all States to protect the marine environment, including the high seas, indicating the *erga omnes* obligation that is given to all States, not only the contracting States.<sup>63</sup> The obligation to protect the marine environment is indicated in Article 218 of UNCLOS 1982, where

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<sup>62</sup>Oral, "Freedom of the High Seas", 347.

<sup>63</sup>*Ibid.*

port states can exercise enforcement over discharge offences in any part of the seas, including outside of national jurisdiction.<sup>64</sup>

The obligation *erga omnes* contains two essential characteristics: universality, where the obligation binds all States, and the principle of solidarity, where each state has a legal interest in their protection.<sup>65</sup> This also means that State Parties to a Treaty can bring action against another party under the conviction that the Party violates treaty obligations, even if no material damage was caused.<sup>66</sup> In this regard, enforcement procedures include institutional dispute settlement and the measures taken by each state or Group of States.<sup>67</sup>

The obligation to protect the marine environment can be found in the 2011 ITLOS Seabed Disputes Chamber Advisory Opinion. The Chamber referred to Article 137 para. (2) of UNCLOS 1982 stating that “all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act.” The Chamber also provided direct reference to Article 48 of the International Law Commission (ILC) Articles on State Responsibility, which envisages that “Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to the preservation of the environment of the high seas and in the Area”. This further solidifies *Erga Omnes*’ obligation to protect the marine environment on the high seas.

In the current draft text of the ILBI BBNJ, the legal interest of States in protecting the environment of the high seas is reflected in the proposal of some groups of States for the creation of the Implementation and Compliance Committee.<sup>68</sup> Once established, the Committee will be tasked to facilitate and review the implementation of and promote compliance with the provisions of ILBI BBNJ while giving due consideration to the national capabilities and circumstances of the Parties. Another proposal, which was to create a more general provision of implementation and compliance without establishing a

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<sup>64</sup>Eirini-Erasmia Fasía, “No Provision Left Behind – Law of the Sea Convention’s Dispute Settlement System and Obligations *Erga Omnes*,” *The Law and Practice of International Courts and Tribunals* 20, no. 3 (2021): 531.

<sup>65</sup>Gregory D. Pendleton, “State Responsibility and the High Seas Marine Environment: A Legal Theory for the Protection of Seamounts in the Global Commons,” *Washington International Law Journal* 14, no. 2 (2005): 511.

<sup>66</sup>*Ibid.*, 510

<sup>67</sup>Fasía, “No Provision Left Behind”, 520.

<sup>68</sup>Article 53ter of the Draft ILBI BBNJ, accessed on 13 December 2020, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/368/56/PDF/N2236856.pdf?OpenElement>.

new Committee, will give the monitoring obligation on the implementation of ILBI BBNJ to each State Party. However, the Conference of the Parties (COP) may consider and adopt cooperative procedures, reporting requirements, and/or institutional mechanisms to promote compliance.<sup>69</sup> Despite this provision, the draft ILBI BBNJ is silent on the compensation mechanism that can be enacted for violating obligations under ILBI BBNJ. Further consideration is needed to ensure the consistency of the compensation mechanism in the ILBI BBNJ with the *erga omnes* obligation emphasised in the 2011 ITLOS Seabed Disputes Chamber Advisory Opinion.

### **III.3.C. Emphasise the importance of the obligation to conduct the Strategic Environmental Assessment (SEA)**

The current draft of ILBI BBNJ includes the obligation of States to conduct the Strategic Environmental Assessment (SEA). The obligation to conduct SEA has been acknowledged quite recently in international environmental law, while some States have regulated this obligation under their national regulations. There is currently no legally binding international instrument that entails a specific guideline on the conduct of strategic environmental assessment (SEA), especially how it can integrate the assessment of risks across sectors. The inclusion of SEA provision and the elaboration of such obligation in the instrument will re-emphasise the importance of the obligation to conduct SEA at an international level, especially for programs, plans, or policies of individual States, regional, or sub-regional institutions or frameworks that cover an area in the high seas.

### **III.4. Indonesia's Interests and Role in the Development of the Global Treaties Governing ABNJ**

Indonesia has actively negotiated the ILBI BBNJ, from the Preparatory Committee meetings until the latest round of the 5<sup>th</sup> Intergovernmental Conference (IGC). Indonesia has submitted textual proposals and worked alongside the position with other groups of States, one of which is the Group of 77 (G-77) throughout

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<sup>69</sup>Option I, Article 53 of the Draft ILBI BBNJ, accessed on 13 December 2020, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/368/56/PDF/N2236856.pdf?OpenElement>.

the IGC Meetings.<sup>70</sup> Besides, as a member of the ISA Council since 1996, Indonesia has actively negotiated the Draft Exploitation Regulation under ISA through its Council meetings. Indonesia has always been consistent with its positions throughout the ILBI BBNJ and the ISA.

### **III.4.A. Indonesia's Adjacency to ABNJ and the Due-Regard Principle under UNCLOS 1982**

Indonesia's maritime Area is adjacent to high-seas in the South China Sea, Indian Ocean, and Pacific Ocean. Article 87 of UNCLOS 1982 recognises freedoms of the high seas,<sup>71</sup> but the same Article also recognises the principle of due regard, where States should also consider the interests of other States.<sup>72</sup> Under this framework, any State wishing to conduct any activity on the high seas adjacent to Indonesia must exercise due regard to Indonesia's rights as the coastal state. ILC defines this principle as "States are bound to refrain from acts which might adversely affect the use of the high seas by national of other States."<sup>73</sup> On the other hand, as high seas are adjacent to Indonesia's EEZ, Article 58 para. (3) of UNCLOS 1982 also recognises the duty of other States to have "due regard" to the rights and duties of the coastal state in exercising their rights in the EEZ. This principle of due regard reaffirms that freedoms of navigation, overflight and laying of submarine pipelines and cables, and other internationally lawful uses of these freedoms cannot be exercised absolutely.<sup>74</sup>

The term adjacent itself is not defined in UNCLOS 1982 aside from showing geographical proximity for maritime boundaries purposes. Referring to the UN

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<sup>70</sup>Indonesia always submitted textual proposals concerning the ILBI BBNJ. Textual proposals submitted in February 2020 are accessible at [https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual\\_proposals\\_compilation\\_article-by-article\\_-\\_15\\_april\\_2020.pdf](https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_article-by-article_-_15_april_2020.pdf); Textual proposals submitted by 25 July 2022 are accessible at <https://www.un.org/bbnj/sites/www.un.org.bbnj/files/20220803bbnjgc5compilationproposals.pdf>.

<sup>71</sup>Article 87 para. (1) of UNCLOS states that freedom of the high seas includes freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, construct artificial islands and other installations permitted under international law, and freedom of fishing and scientific research.

<sup>72</sup>Article 87 para. (2) of UNCLOS, which states that "These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention concerning activities in the Area."

<sup>73</sup>Alexander Proelss, ed., *United Nations Convention on the Law of the Sea: A Commentary* (Munich: Nomos Verlagsgesellschaft, 2017), 681.

<sup>74</sup>*Ibid.*, 455.

Fish Stock Agreement (UNFSA), the term adjacent indicates where straddling stocks move beyond the EEZ boundary into the high seas. Therefore, the term adjacent can indicate the resources found within national jurisdiction and in the ABNJ.<sup>75</sup> The PSIDS first proposed this term based on concerns about the potential transboundary impact that certain activities may cause in the jurisdiction of coastal States.<sup>76</sup> The term adjacent, combined with the principle of due regard, is used in the ILBI BBNJ negotiation process to reflect that the high-seas activities should not prioritise the coastal state's rights and interests.<sup>77</sup>

### III.4.B. Indonesia's Archipelagic State Status in ILBI BBNJ

Since the beginning of the negotiation of ILBI BBNJ, Indonesia has consistently championed the Archipelagic State interests to be incorporated in the text, especially in the provisions on capacity-building and transfer of marine technology (CB-TMT) and the ABMT. This is supported by several legal and scientific considerations, which will be elaborated in the following paragraphs.

UNCLOS 1982 establishes an archipelagic state regime in international law, a *sui generis*. Indonesia became one of the leading proponents during the negotiation, alongside Fiji, Mauritius, and the Philippines. The discussion of the archipelagic state could be traced back to the sessions of the *Institut de Droit International* in 1888, 1927, and 1928, as well as the International Law Association meetings in 1924 and 1926.<sup>78</sup> In UNCLOS III, particularly in 1971-1972, the discussion started to touch upon the unique characteristics of archipelagoes, with particular recognition given to the archipelagic States' political, economic, and national security.<sup>79</sup>

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<sup>75</sup>“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,” *International Union for Conservation of Nature (IUCN), World Commission on Environmental Law & Environmental Law Centre* (15 August 2019), 2, accessed on 13 December 2022, [https://www.iucn.org/sites/dev/files/content/documents/iucn\\_comments\\_on\\_bbnj\\_draft\\_text\\_-\\_august\\_2019.pdf](https://www.iucn.org/sites/dev/files/content/documents/iucn_comments_on_bbnj_draft_text_-_august_2019.pdf).

<sup>76</sup>Jinyuan Su, “The Adjacency Doctrine in the Negotiation of BBNJ: Creeping Jurisdiction or Legitimate Claim?” *Ocean Development & International Law* 52, no. 1 (2021): 56.

<sup>77</sup>Joanna Mossop and Clive Schofield, “Adjacency and Due Regard: The Role of Coastal States in the BBNJ Treaty,” *Marine Policy* 122 (2020): 4.

<sup>78</sup>Office for Ocean Affairs and the Law of the Sea, *Archipelagic States: Legislative History of Part IV of UNCLOS*, (New York: United Nations, 1990), 1.

<sup>79</sup>*Ibid.*

The Delegates of Fiji captured the *sui generis* characteristics of the archipelagic state by stating that the sea and the land were “interdependent and the sea was regarded as an essential link between the islands of the archipelago”.<sup>80</sup> In addition, the control of the seas is equally essential to the control over the land by continental States.<sup>81</sup>

Aside from legal considerations, a scientific consideration makes it necessary to include the Archipelagic State in the ILBI BBNJ, guided by the principle of ecological connectivity. Archipelagic States have a more significant amount of water than their land area, making it surrounded by vast ABNJ with rich marine biological diversity. In that context, ecological connectivity between marine ecosystems means that negative impacts — such as overfishing and pollution — within ABNJ can affect the archipelagic state’s populations of marine species and ultimately change the structure of the archipelagic state’s ecosystems. This poses archipelagic States with greater risk arising from activities in the ABNJ.

The rich biodiversity in archipelagic States has been proven to hold an integral role in the broader ecosystem of the ocean. In Indonesia, one research<sup>82</sup> has found that five species of tropical anguillid eels inhabit the freshwater habitats in the seas around Sulawesi Island, more than anywhere else in the world, along with the endemic tropical species *Anguilla Borneensis* from eastern Borneo. Indonesian seas also have several populations of the giant mottled eel, *Anguilla marmorata*, found in the Western Indian Ocean, southern Japan, and across the western South Pacific. Further, *Anguilla celebesensis* has a spawning area in Tomini Bay of northern Sulawesi Island.<sup>83</sup>

Another research<sup>84</sup> found the migratory connectivity of adult Green turtles moving between important nesting and feeding grounds in Indonesia, Malaysia, the Philippines and Australia. All six sea turtle species are in the Western Sumatra and the Sunda Shelf/Java Sea ecoregions. One of the species, Hawksbills, came from Thailand to forage and mate in Western Sumatra, while

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<sup>80</sup>*Ibid.*

<sup>81</sup>*Ibid.*

<sup>82</sup>Sam Wouthuyzen *et al.*, “Seasonality of Spawning by Tropical Anguillid Eels around Sulawesi Island, Indonesia,” *Naturwissenschaften* 96, no. 1 (2009): 153-154.

<sup>83</sup>*Ibid.*

<sup>84</sup>C.L. Huffard, M.V. Erdman, Tiene Gunawan, eds., *Geographic Priorities for Marine Biodiversity Conservation in Indonesia* (Jakarta: Ministry of Marine Affairs and Fisheries and Marine Protected Areas Governance Program, 2012), 22.

Leatherback nesting sites are located on the north coast of Papua, the largest in the Pacific Ocean. The research concludes that the long-term survival of sea turtles in Southeast Asia and beyond relies on successfully protecting Indonesia's nesting beaches from habitat destruction.<sup>85</sup>

From the explanation above, the existence of spawning, nesting, and foraging grounds of biological resources, especially those spread across the seas, shall be protected through robust and targeted conservation measures. Due to the ecological importance of these grounds as parts of dispersed habitats of various species in supporting the broader ocean ecosystem and their vulnerability to the effects posed by any changes to the marine environment, including by activities in ABNJ, these concerns and challenges shall be further acknowledged in the ILBI BBNJ.

### **III.4.C. The Activity-Based Approach in the Environmental Impact Assessment (EIA) Provisions**

During the negotiation of the ILBI BBNJ, States have differing opinions on whether the EIA provisions under ILBI BBNJ will apply to activities conducted in ABNJ ("activity-based" or location-based approach) or to all activities that can affect ABNJ ("effect-based approach"). Indonesia is one of the supporters of the activity-based approach instead of the effect-based approach.<sup>86</sup>, due to 3 (three) main reasons, as follows:

#### **III.4.C.i. The activity-based approach focuses on addressing the lack of regulations for human activities on the high seas without causing procedural and institutional hindrances**

The activity-based approach narrows the scope of applying the EIA procedures under ILBI BBNJ only to be obliged for activities carried out in ABNJ under state jurisdiction or control. The limitation of the ILBI BBNJ application is

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<sup>85</sup>*Ibid.*

<sup>86</sup>In the textual proposals submitted by Indonesia in 2020 and 2022 (<https://www.un.org/bbnj/sites/www.un.org/bbnj/files/20220803bbnjigc5compilationproposals.pdf>), Articles 23: Indonesia proposes to regulate the obligation of Environmental Impact Assessment (EIA) for activities conducted in ABNJ, instead of activities with impacts in the ABNJ. Also, a statement by the Alternate Head of the Delegation of Indonesia to the IGC-4 of ILBI BBNJ highlighted that EIA should only be applied to activities in areas beyond national jurisdiction. This can be accessed from [https://www.un.org/bbnj/sites/www.un.org/bbnj/files/indonesia\\_statement\\_closing\\_igc\\_4\\_bbnj\\_.pdf](https://www.un.org/bbnj/sites/www.un.org/bbnj/files/indonesia_statement_closing_igc_4_bbnj_.pdf)

necessary to ensure that it does not overlap with the EIA procedures for activities conducted within the national jurisdiction of States and regulated under the States' national mechanism. The limitation of ILBI BBNJ application only for activities conducted on the high seas will also direct the application towards the primary target: regulating human activities on high seas that have been less regulated over the years. Moreover, this approach addresses the root cause of the increasing threats arising from human activities on the high seas towards biodiversity.

With the effect-based approach, the EIA procedures under ILBI BBNJ will also apply to the activities within the national jurisdiction of States. This will create another institutional and procedural restraint as some States have higher standards of EIA procedures than ILBI BBNJ, and it will create redundancy and double standards to the EIA procedures that States must comply with.

In addition, national EIA procedures have also regulated the review mechanism of EIA reports of activities conducted within States' national jurisdictions. Imposing obligations for activities within national jurisdictions to follow the EIA procedures under ILBI BBNJ means that the EIA reports of those activities will fall under the monitoring and review mechanism under ILBI BBNJ. If the Scientific and Technical Body (STB) has to monitor and review activities within national jurisdictions, this will create an unnecessary burden for them.<sup>87</sup> Risking the STB being stretched out from its capacity to do additional work will lead it away from its primary responsibility, which is to ensure the successful implementation of marine environmental protection of ABNJ as part of the overall high seas governance.

### **III.4.C.ii. The activity-based approach provides procedural clarity to ensure the effective implementation of the ecosystem approach**

Using an activity-based approach for EIA under ILBI BBNJ will create procedural clarity that will address the lack of guidelines for implementing the ecosystem approach. Although a critical principle of the ecosystem approach recognises the interconnected nature of the marine ecosystem that expands beyond maritime

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<sup>87</sup>Article 35, *Further Revised Text of an agreement 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*. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/368/56/PDF/N2236856.pdf?OpenElement>



zones set by UNCLOS 1982, another important principle of the ecosystem approach is the inter-sectoral consideration. This means there needs to be a holistic identification of the impacts of sectoral activities towards marine ecosystems in the high seas.

As previously mentioned, there have been existing frameworks, whether at the international, regional, or sub-regional level, as well as institutional agreements, that also have EIA procedures in place. Instead of regulating activities conducted within the national jurisdiction, States shall shift their attention to ILBI BBNJ to establish an effective mechanism for such frameworks to coordinate and cooperate and complement the loopholes that each existing framework has. For EIA specifically, considering cumulative impacts in the current text becomes an integral element that requires further elaboration. Besides, the knowledge-sharing mechanism on marine ecosystems and the impact of certain activities towards the marine environment in ABNJ can also be initiated under the auspices of ILBI BBNJ. In this regard, using the activity-based approach will also respect the principle not to undermine existing international, regional, and sub-regional frameworks and bodies that States have agreed upon during the preparatory committee meetings.

As a guide for ILBI BBNJ, one of the successful examples of such cooperation between existing institutions is the International Maritime Organization (IMO) and Food and Agriculture Organization (FAO) in eradicating Illegal, Unregulated, and Unreported (IUU) Fishing, where the two institutions created the Joint IMO/FAO Ad Hoc Working Group on IUU Fishing. Further, there is cooperation and coordination between CBD, the Convention on International Trade in Endangered Species (CITES), and the Convention on the Conservation of Migratory Species of Wild Animals (CMS).<sup>88</sup> However, such cooperation is still conducted on an ad-hoc basis. Thus, ILBI BBNJ must fill the role of an overarching framework or institution that can provide a permanent mechanism for existing decentralised and fragmented institutions to consult and coordinate.

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<sup>88</sup>Enright and Boteler, "The Ecosystem Approach", 347.

### **III.4.C.iii. The activity-based approach focuses on assessing and identifying measures to address risks of activities conducted in ABNJ in accordance with the principle of due regard for the rights of adjacent Coastal States.**

Using the activity-based approach does not mean that the risks of adverse environmental impacts are not assessed. As mentioned before, it only narrows down the risk assessment for activities in ABNJ that are still less regulated. Once the risks of adverse impacts have been assessed, it is of the utmost importance that ILBI BBNJ enables more integrated management measures for environmental protection through the creation of guidance for an environmental management plan after the authorisation of activities in the ABNJ that takes into account the cumulative and transboundary impacts. In this case, ILBI BBNJ may mandate the Scientific and Technical Body (STB) to establish further guidance to measure the cumulative and transboundary impacts of activities in the ABNJ towards the marine environment, especially in adjacent coastal States.

An important element in the ecosystem approach is the emphasis on conservation measures, which considers the “distribution of competencies for the adoption of conservation measures in different maritime zones or jurisdictional areas” and “encompass the entirety of relevant ecological areas”.<sup>89</sup> Enabling the creation of conservation measures requires comprehensive baseline data of the ecosystem in the ABNJ. The comprehensive baseline data of the ecosystem in the ABNJ will require an effective data collection and monitoring mechanism, which can only be done if States focus on assessing the possible impacts of activities conducted in the ABNJ. The Arctic Council also addresses this issue that cooperation is needed on the data collection and ecosystem monitoring,<sup>90</sup> which will also enable a more effective conservation measure.

This approach also balances the ecosystem approach, the need to establish an overarching framework for protecting the marine environment, and States’ jurisdictions, especially States’ sovereign rights, over the maritime spaces. As previously mentioned, the due regard principle also entails the obligations for States to take into account the rights of other States in the exercise of freedom

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<sup>89</sup>Lucia, “The BBNJ Negotiations”.

<sup>90</sup>“Ecosystem-Based Management in the Arctic,” *Report submitted to Senior Arctic Official by the Expert Group on Ecosystem-Based Management* (Arctic Council, May 2013), 31, accessed on 13 December 2022, [https://oarchive.arctic-council.org/bitstream/handle/11374/122/MM08\\_EBM\\_report%20%281%29.pdf?sequence=1&isAllowed=y](https://oarchive.arctic-council.org/bitstream/handle/11374/122/MM08_EBM_report%20%281%29.pdf?sequence=1&isAllowed=y).

of the high seas. In this case, it is essential to note that the rights and interests of adjacent coastal States shall also be considered. Using the activity-based approach will still respect existing EIA procedures at the national level and its subsequent conservation measures for activities under national jurisdiction. On the other hand, the draft of the ILBI BBNJ has provided a mechanism where adjacent coastal states shall be consulted if activities in ABNJ have a risk of adverse impacts on the marine environment of the coastal states.

#### **III.4.C.iv. Consideration of the Procedures of Strategic Environmental Assessment (SEA)**

Aside from the procedural considerations and the sovereign rights of States, applying an activity-based approach for EIA is also preferred due to the consideration of the obligation to conduct the Strategic Environmental Assessment (SEA). It is understood that from existing regional and national regulations,<sup>91</sup> SEA is aimed at policies, plans and programs that encompass several activities that will be conducted, while EIA is aimed only at a specific activity. The obligation of SEA needs to be better defined in the ILBI BBNJ, and there is a potential overlap of its scope of assessment with the EIA. The conduct of SEA may also encourage further identification and analysis of the baseline environmental data and the triggering factors that may develop significant adverse impacts. This can further guide the assessment for each activity carried out through the EIA procedure.

The interrelated relationship between SEA and EIA shall be further considered. In this regard, the cross-spatial, cross-temporal, and cumulative impacts are better assessed through the SEA procedures, as it can involve existing sub-regional, regional or international bodies or institutions and other groups of States, thus covering more expansive Areas of the high seas. In this regard, adopting the activity-based approach instead of an impact-based approach will pave the way for SEA and EIA's more distinctive and complementary nature without causing further overlaps.

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<sup>91</sup>Canada: [https://www.canada.ca/content/dam/iaac-acei/documents/strategic-environmental-assessment/cabinet-directive-environmental-assessment-policy-plan-program-proposals/cabinet\\_directive\\_on\\_environmental\\_assessment\\_of\\_policy\\_plan\\_and\\_program\\_proposals.pdf](https://www.canada.ca/content/dam/iaac-acei/documents/strategic-environmental-assessment/cabinet-directive-environmental-assessment-policy-plan-program-proposals/cabinet_directive_on_environmental_assessment_of_policy_plan_and_program_proposals.pdf). European Union: [https://ec.europa.eu/environment/eia/pdf/EIA\\_rulings\\_web.pdf](https://ec.europa.eu/environment/eia/pdf/EIA_rulings_web.pdf)

### **III.4.D. Capacity-building, including transfer of marine technology, to address gaps of scientific knowledge on the high seas**

UNCLOS 1982 has regulated the obligation of states to promote the development of the marine scientific and technological capacity of states that may need and request technical assistance, particularly developing states, including land-locked and geographically disadvantaged states.<sup>92</sup> Such capacity-building programs, including transferring marine technology, aim to address gaps in scientific knowledge on the high seas.

Article 144 of UNCLOS 1982 mandates explicitly that ISA take measures to ‘promote and encourage the transfer of technology and scientific technology to developing States’. The capacity-development programs implemented under ISA’s purview include the Contractor<sup>93</sup> Training Programme (CTP), the Endowment Fund for Marine Scientific Research (EFMSR), and the Internship Program. Besides, ISA has also carried out capacity-development programs at the regional level, such as the Abyssal Initiative for Blue Growth project for the Pacific and Small Island Developing States (PSIDS) and the Africa Deep Seabed Resources (ADSR) project.<sup>94</sup>

Indonesia has been one of the beneficiaries of ISA’s capacity development programs,<sup>95</sup> and consistently supports its implementation and incorporation in the Draft Exploitation Regulation under ISA and ILBI BBNJ. From 2009 to 2020, participants from Indonesia took part in the Contractor Training Programs (CTP) and the Endowment Fund for Marine Scientific Research (EFMSR). Indonesia has also participated in the ISA National Workshop in January 2021.<sup>96</sup>

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<sup>92</sup>Article 266 para. 2 of the 1982 UNCLOS.

<sup>93</sup>Contractors are defined as institutions that have entered into exploration contracts with ISA. Under the 1982 UNCLOS (Article 144) and the 1994 Agreement (Section 5 Paras. 1 & 2), Contractors are obliged to promote technology transfer.

<sup>94</sup>“Capacity-Development, training, and technical assistance,” *International Seabed Authority (ISA)*. <https://www.isa.org.jm/training>.

<sup>95</sup>Indonesia’s Participation: Seven participants are in the Contractor Training Programs, and five are in the Endowment Fund for Marine Scientific Research (EFMSR). Indonesia has also participated in the ISA National Workshop in January 2021.

<sup>96</sup>“National Capacity Building Workshop Organized Jointly by ISA and Indonesia Concludes with Enhanced Understanding of the Legal Framework in the Area,” Ministry of Foreign Affairs Indonesia, accessed on 13 December 2022, <https://kemlu.go.id/portal/en/read/2115/berita/national-capacity-building-workshop-organized-jointly-by-isa-and-indonesia-concludes-with-enhanced-understanding-of-the-legal-framework-in-the-area>.

As one of the beneficiaries of such capacity development programs, Indonesia highlights the importance of regulating a clear set of procedures to carry out this capacity development and transfer of technology programs. In the ILBI BBNJ and ISA negotiations, Indonesia supports the instruments to clearly outline the responsibilities of Contractors, Sponsoring States, and the ISA to institutionalise the capacity building and transfer of technology programs to ensure their effective implementation.

Specifically on ILBI BBNJ, one of its pillars is capacity building and transfer of marine technology. Until IGC-5, the current text still deliberates on the modalities of the capacity-building and transfer of marine technology, which was categorised as one of the benefits in Article 11 of the current draft text. The current draft text puts the obligations on states to cooperate in capacity building and transferring marine technology. However, states have yet to agree upon the monitoring and review mechanism to oversee the process.

#### **IV. RECOMMENDATIONS AND CONCLUSION**

Indonesia has played an active role in developing an international legal framework to solidify the protection of the marine environment on the high seas. There are also several legal significances that ILBI BBNJ and ISA's Draft Exploitation Regulation can contribute to implementing states' obligations under international environmental law. It is integral for countries to safeguard the negotiation of the instruments to be consistent with general principles envisaged in UNCLOS 1982 and customary international law and make the instruments implementable to address the root cause – that triggers the creation of ILBI BBNJ and ISA Draft Exploitation Regulation – which is the lack of governance for States or other relevant stakeholders at the high seas, and the lack of integration between existing regulations that cover sectoral activities at the high seas.

Since the negotiation for ILBI BBNJ and ISA Draft Exploitation Regulation is still underway, several recommendations can complement the current draft texts, as follows:

1. A more interpretative and implementable set of guidelines on the ecosystem approach that is not only cited as a general principle but as an essential element integrated into the implementation of each obligation of States under the instruments;

2. The consideration of procedural and institutional arrangements in light of existing relevant international, regional, or sub-regional frameworks or institutions whose mandates overlap with the ILBI BBNJ and ISA Draft Exploitation Regulation;
3. The obligation to conduct EIA and SEA, as the implementation of the due diligence obligation to prevent significant harmful effects on the marine environment, shall be further analysed to be complementary instead of causing redundancy;
4. There needs to be a balance between respecting existing jurisdictional zones established by UNCLOS 1982 and States' sovereign rights over such zones, as well as the principle of ecological connectivity that emphasises the interrelated nature of ecosystems;
5. Lastly, the instruments must incorporate the possibility of development in international environmental law and scientific knowledge and technology development. The subsequent bodies or institutions established under ILBI BBNJ or ISA shall create updated guidelines considering these developments. In this regard, the main provisions of the instruments shall include all necessary elements under international environmental law without being too technical, as such guidelines will be further developed after the adoption of the ILBI BBNJ or Exploitation Regulations under ISA.

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