



## Fragmentation in high seas fisheries: Preliminary reflections on a global oceans governance approach



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### A B S T R A C T

Notwithstanding the wide range of actions taken to strengthen the legal regime of international fisheries, overexploitation and the risk of depletion of stocks have been strong concerns for decades. Indeed, the regime of international fisheries law is currently not rooted in sustainability, and it does not adequately take into consideration the impact of fishing activities on the wider marine environment. One of the main causes lies in fragmentation of international fisheries law: a lack of coordination between instruments and institutions, and gaps in effective coherent structures for fisheries management. Areas beyond national jurisdiction (ABNJ), including the high seas, are particularly prone to this lack of coordination and integration.

One alternative to reach a durable management of high seas fisheries might be found in a 'global oceans governance approach'. This paper explores how this approach could impact the fragmented regime of fisheries. It suggests that governance-based perspectives underline concepts rooted in adaptability and interactions, concepts that suggest to approach international fisheries law not as a static set of rules but as an evolutive process. Reflecting on an overarching goal of coordination and possible management challenges in ABNJ provides an interesting starting point to develop a comprehensive understanding of the impacts of oceans governance on the fragmented legal regime of high seas fisheries. We now need to see how to give effect to governance, a task that remains, at this point, a work in progress.

Unsustainable fishing. Underestimation of global marine fisheries catches. Illegal, unreported and unregulated (IUU) fishing. Fishing activities as the main threat to marine biodiversity and the marine environment [1]. These concerns have been expressed in international documents and scholarly writings over more than 50 years [2]. For example, the Food and Agriculture Organization (FAO) recognized overfishing as early as 1945, the year of its creation, and the problem has been recurrently mentioned by the organization in its biennial *Report on the State of World Fisheries and Aquaculture* at least since 1994 [3]. We are, undoubtedly, facing perennial problems.

Yet, the progress achieved in the regulation of fishing activities and the protection of the marine environment needs to be acknowledged. The 1982 United Nations Convention for the Law of the Sea (UNCLOS) itself provides for the conservation and management of marine living resources, and its regime has been complemented by the 1995 Fish Stocks Agreement (FSA). Multiple United Nations General Assembly (UNGA) Resolutions also show recurring concern for various fishing-related issues, e.g., sustainable fisheries, deep sea fish stocks, fisheries by-catch and discards, and large-scale pelagic drift-net fishing [4].

Further, very concrete measures have been set in place to reduce overfishing, by introducing gear restrictions, catch limits, and closure of fishing areas, and the fight against IUU fishing has become a priority [5].

Notwithstanding the wide range of actions taken by the international community to strengthen the legal regime of international fisheries, overexploitation and the risk of depletion of stocks remain strong concerns. This sheds light on our oceans usage, and more specifically, our approach to fisheries management [6], an approach that is currently not rooted in sustainable fishing practices. Indeed, the current regime of international fisheries law does not adequately take into consideration the impact of fishing activities on the wider marine environment [7]. One of the main causes lies in fragmentation of international fisheries law, and of the law of the sea more generally. Fragmentation is two-faceted: a lack of coordination between instruments and institutions within the regime, and gaps in effective coherent structures for fisheries management.

Areas beyond national jurisdiction (ABNJ), including the high seas, are particularly prone to this lack of "coordinated, cohesive, [and]

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integrated interventions which actually ensure the implementation of [...] legal frameworks” [8], and the tragedy of the commons remains the reality in these areas. When addressing the specific regulation of the conservation and management of living resources in ABNJ, the problem of effective enforcement and compliance strikes out as a serious issue. This is due, among other things, to the priority given to the principle of exclusive flag-State jurisdiction on the high seas [9]. However, weak regulation of fishing activities on the high seas is a main threat to the preservation of marine biodiversity and ecosystems in ABNJ [10]. This illustrates the interrelatedness between fisheries and the wider marine environment. Attention should therefore be paid to clearly linking the two fields, as, due to a sectoral approach, conservation tasks are often undertaken by bodies that do not normally have fisheries regulation mandates [11].

One alternative to reach a durable management of high seas fisheries might be found in a ‘global oceans governance approach’, i.e. “those formal and informal rules, arrangements, institutions and concepts which structure the ways in which sea space is used, how ocean problems are monitored and assessed, what activities are permitted or prohibited, and how sanctions and other responses are applied” [12]. I argue that this approach, due to its malleable nature, could possibly help improve coordination and integration within the regulatory regime of high seas fisheries.

This paper contributes to a wider debate that considers the evolution and adaptability of the law of the sea and international fisheries law. It intends to explore how an oceans governance approach could impact the fragmented regime of fisheries by looking into the following question: Could relying on an oceans governance perspective make us address the fragmentation affecting high seas fisheries differently, by approaching the fisheries regime not as a static set of rules but as a flexible process, that would render it more adaptable to ongoing changes and challenges?

As a necessary point of departure, and to illustrate the fragmentation in the current regime of high seas fisheries, this paper first draws a portrait of the regime and the current state of discussions on conservation of biodiversity in ABNJ (Section 1). To understand better the governance framework in which the suggested alternative is rooted, the paper then moves to a theoretical analysis of global governance and its applicability to the oceans (Section 2). Finally, the paper engages in an exploration of some fisheries management challenges in ABNJ and makes preliminary reflections on the possible impact of a global oceans governance approach on high seas fisheries (Section 3).

## 1. The fragmented regime of international fisheries law and the broader discussions on conservation of biodiversity in ABNJ: An overview

High seas fisheries law is prone to fragmentation. It suffers from dysfunctionality arising not only from regulatory lacunae, but also from a lack of coordination and coherence across instruments and institutions shaping the regime. For example, fishing activities are most often species-oriented and managed at a regional level, their coverage differing greatly from one region to another. These variations are due not only to the varying mandates of the numerous regional fishery management organisations (RFMOs), but also to material and financial resources implications, as well as the influence of legal developments on these institutions, the recent RFMOs being more in line with the conservation objectives put forward by the FSA.

Also, the legal framework addressing fisheries is composed of a large number of instruments. For example, besides the FSA, which implements the general provisions of the UNCLOS on the conservation and management of straddling and highly migratory fish stocks, the FAO has also adopted binding and non-binding fishery-related instruments [13]. These instruments are subsequently implemented by individual State actions, as well as collectively through the work of RFMOs [14]. Furthermore, instruments directly targeting matters of

preservation of the environment also provide a framework for co-operation measures in the conservation of the marine environment [15]. It must be reminded, however, that not only do these environmental law and biodiversity related instruments provide their own understanding of cooperation and conservation, but also that the regime of environmental law faces its own fragmentation challenges [16].

Furthermore, fisheries on the high seas are currently impacted by the broader debate on the conservation of biodiversity beyond national jurisdiction (BBNJ) [17]. Early on in the BBNJ process, although uncertain of the place to give to fisheries-related issues within the discussions, it was agreed amongst the participants that fisheries on the high seas was one of the main threats to the marine environment. The uncertainty regarding the inclusion of fisheries within an eventual legally binding instrument persisted throughout the work of the Ad Hoc Open-ended Informal Working Group on BBNJ, as well as during the first two meetings of the Preparatory Committee for the development of an instrument on the conservation and sustainable use of BBNJ (PrepCom) (March-April, August-September 2016) [18]. It is now clear, following the third PrepCom meeting (March-April 2017), that fisheries as such will not directly be included in an eventual instrument [19].

This does not mean, however, that the BBNJ process will now evolve in a way that is irrelevant for high seas fisheries. On the contrary, area-based management tools and environmental impact assessments, two main elements of the discussion package, will undoubtedly impact fishing activities in ABNJ. Still, UNGA Resolution 69/292, which established the PrepCom, clearly mentions that the new agreement should not undermine existing instruments, frameworks and bodies, and delegations have been vocal on the fact that the instrument should not overlap with the existing mandate of the RFMOs. Following the third PrepCom meeting, uncertainty nevertheless remains as to the exact scope of the necessity not to undermine existing structures. For example, some Latin American States, such as Mexico and Guatemala, as well as the African Group, understand “not undermining” as “not weakening”. Others adhere to a stricter meaning, like Iceland, who states that it would not accept any provision that would change, modify or adapt the mandate and functioning of current structures. It has also been suggested that “not undermine” would mean “not reduce the effectiveness” of existing structures [20].

The first three PrepCom meetings have set the table as to what needs to be discussed. It is to be hoped that the upcoming fourth and last meeting will bring more details as to *how*, specifically, challenges will be addressed.

## 2. Global oceans governance: a possible approach towards flexibility

The preamble of UNGA Resolution 69/292 stresses “the need for the *comprehensive global regime* to better address the conservation and sustainable use of marine biological diversity of [ABNJ]” (emphasis added). This comprehensive global approach suggests the integration of all relevant elements impacting biodiversity in ABNJ, with the aim of developing a regime that will cover these areas completely and broadly. This looks like a concrete path towards strengthening the regulation of these areas. However, the ambiguities which stem from the necessity not to undermine existing structures emphasizes the ability of the BBNJ process to only offer partial solutions to the problems ensuing from fragmentation in high seas fisheries.

The necessity for a holistic view on ABNJ could be addressed more generally through a governance approach, which implies not only a global geographical coverage, but also consideration of various fields and sectors, as well as the many stakeholders having interests in these areas [21]. But governance remains difficult to tackle. To better understand its role and assess the impacts of its development on the framework of ABNJ and high seas fisheries, an overview of governance-related concepts is necessary, to which this second part of the paper is dedicated.

Two preliminary comments must however be made. Firstly, it is important to mention that governance-related indicators may refer to either processes (i.e. the way decisions are made and actors interact) or results (i.e. the actual outcomes of an action or measure). The focus of the current paper will be on the former; indeed, the goal is to further explore if and how the law, to face the weaknesses and gaps stemming from the fragmentation of the regime, could become of a more evolutive nature, a task achieved through the analysis of the processes that lead to the development and implementation of new approaches. Additionally, since the discussions on these possible developments based on governance are still at a preliminary stage, the results of using such approach are yet to come to fruition and their assessment would be premature. Secondly, while using governance-related approaches in legal studies, it must be kept in mind that the concept was imported from other disciplines such as political and social sciences; it still has to be transposed to the international legal field and cannot simply be “copy-pasted” to legal research [22]. Nevertheless, the governance approach might shed a new light on the fragmentation of international fisheries law and help find new solutions to it.

These preliminary points underline the methodological weaknesses to the proposal of using an approach rooted in governance, and show that it remains, for now, somewhat speculative. Nonetheless, the flexibility and holistic nature of governance-related indicators makes their analysis as a possible alternative focus for oceans management novel. This is why, in Section 2.1, the governance approach is first explained in the light of the oceans. Then, in Section 2.2, oceans management and governance principles are addressed, which serve as important parameters for understanding how governance is transposed to concrete processes and measures to ensure flexibility.

### 2.1. The global oceans governance approach

The governance analysis is multifold. It requires us to understand first the concept of governance and, further, its global application. It is generally agreed that governance builds on partnerships and the interactions between multiple fields and actors. It is often seen as a multifaceted *process*, characterized by flexibility and dynamism, driving away from the static structures normally associated with legal rules [23].

Governance, furthermore, is also about taking into consideration the values underlying the different instruments, institutions and activities. For example, in the framework of the marine environment, aiming for sustainability and the protection of ecosystems become values of the different users and shape their expectations [24]. These values and expectations, however, are likely to evolve; this is why an approach that gives more leeway for adaptation must be considered.

Brought to the sphere of globality, governance moves beyond the borders of States [25], and is seen as an answer to the perceived limitations of the current system that is now ill-equipped to face transboundary realities [26]. These concerns are particularly relevant in environmentally-related settings, including marine-related settings, where “[t]he divergence between ‘ecologically defined space’ and ‘politically defined space’ gives rise to a host of management problems” [27]. The application of the “less-politicized forms of coordination” [28] brought by a governance approach envisions a holistic way of addressing the challenges that are fluctuating across boundaries, sectors and actors.

The global governance analysis then moves on to examining the manner in which it applies to the oceans. Although “there is no single ‘truth’ in the conceptual apparatus of international ocean governance” [29], it can be understood as an approach towards the way we use oceans through the application of an array of rules, norms, and concepts, and the formal and informal interactions between fields, institutions and actors [30]. The FAO also provides a specific definition of *fisheries governance*, characterized “as the ensemble of institutions, instruments and processes ranging from short-term operational

management to long-term policy development and planning” [31]. Once again, all of this links governance to the notion of flexibility rather than to that of strict/static rule application.

### 2.2. Governance principles

When addressing oceans governance, its interaction with oceans management also arises. It is unclear whether there exists a causal link between the concepts. Is oceans management an approach to oceans governance, or rather the other way around, does effective oceans governance lead to good management?

The two concepts are however correlated [32]. Tanaka builds on this correlation by suggesting a dual oceans governance, illustrated through the interaction and complementarity of two management approaches: the zonal and the integrated. While the former refers to the regulation of activities according to the legal status of the maritime zone in which they take place [33], the latter considers a holistic management “of activities that impact upon [...] the oceans across sectors, space and time” [34]. Both are currently used for oceans management, but the latter is still emerging and “remains obscure in international law” [35]. Integrated management can nonetheless be characterized as “multi-sectoral”, “spatially focused”, “forward planning” and requiring “a relatively high level of political, legal, and institutional coordination” [36], and it relies on integration at the ecological, normative and implementation levels [37]. This management approach undoubtedly fits within the idea that governance puts forward the notion of a more flexible process.

It is within that discussion on the interconnectedness between oceans governance and management that the governance principles come into play. For instance, governance principles entail, *inter alia*, regional and international cooperation, the precautionary, ecosystem and science-based approaches, and sustainable and equitable uses [38]. It appears that governance might be best applied in practice to the particular situation of marine biodiversity in ABNJ through governance principles. These principles are a practical way of addressing management concerns and challenges, since they embed governance in processes leading to concrete conservation actions. While elaborating on the application and composition of these principles goes beyond the scope of this paper, suffice it to say that “[t]hey express certain underlying legal norms in a declaratory form and constitute the basis for all the obligations and rights” [39] that exist/are to be established for actors in ABNJ. Indeed, these principles act as standards to be taken into consideration when discussing *how* management decisions are made and *how* management actions are taken. This undoubtedly brings some leeway within a yet consistent framework, and moves away from a fixed set of rules that would be advocated under a purely legal positivist approach.

Although governance principles in and of themselves are not new and can already be found in a broad variety of instruments and international court decisions [40], studying their applicability to the specific situation of ABNJ forms the starting point for a clearer understanding of the use of the governance approach in these areas. However, it remains to be seen how the analysis can be developed further and be concretely applied not only to ABNJ in general, but also to one of its main activities, high seas fisheries, so that a legal framework, rooted in flexibility and adaptability, and vouching for sustainability over national interests, can be envisaged.

## 3. Global oceans governance to address fragmentation

Can coordination and integration be catalyzed through global oceans governance? Can governance promote coordination whilst making us address international fisheries law in an evolutive way, one that remains adaptable to processes that change over time? Can this approach act as an alternative to the current regime characterized by fragmentation? Very little has been said about the specific impacts of

oceans governance on ABNJ and fisheries, and the current scholarship is limited to identifying main issues and tentative reflections [41]. Therefore, we are, for now, limited to conducting an exploratory discussion on the potential role of a global oceans governance approach on high seas fisheries.

This section introduces some reflections on this role by first briefly looking into fragmentation and the suggested solutions of coordination and integration (3.1). It then deals with some management challenges that will mostly arise in ABNJ and what could be taken from the governance approach facing these challenges (3.2).

### 3.1. Fragmentation, coordination and integration

The legal framework in ABNJ, including fisheries law on the high seas, suffers from regulatory, implementation and enforcement gaps, weaknesses that stem from a lack of coordination and integration [42]. However, the premise that fragmentation is undesirable for regimes within the realm of international law is criticized. For example, without necessarily targeting coordination and/or integration as goals to reach, Koskenniemi, argues that “[t]he fact that the global public realm is uninstitutionalised and ‘weak’ should not be seen as overly problematic” [43]. The deformalisation (i.e. having no clear rules but more open-ended standards) and fragmentation (i.e. “general law breaking into particular principles and institutions with conflicting procedures and preferences”) faced by international law is not a sign of its weakening, but just a new way of developing. Indeed, international law making has moved from a formal codification to a more responsive concept of development, articulated around two trends: the proliferation of soft-law instruments, and the development of transnational informal networks [44].

The impact of global oceans governance on high seas fisheries is not necessarily incompatible with the critiques raised above, at least from the perspective of the rationale underlying governance. Indeed, governance applied to ABNJ, and high seas fisheries more particularly, aims at facilitating coordination and cooperation among the plurality of actors, instruments and bodies. The discussions on ABNJ intend to rely on global processes to create greater efficiency in the preservation of biodiversity in ABNJ, while not undermining existing instruments and frameworks in the process. This approach to global governance – seeking the creation of adaptive responses to the reality of ABNJ – therefore appears to be compatible with the flexible evolution of international law described by Koskenniemi “as moves to give up the law's generality by increasing its contextual responsiveness” [45].

### 3.2. Management challenges in ABNJ

The governance approach appears to allow for coordination and integration in ABNJ whilst remaining sufficiently flexible to respond to the different interests involved. It remains to be seen, however, if governance, as an approach to bring order to fragmentation, could still be maintained at the “instrumental” level, as it is yet unclear what specific mechanisms could be employed to facilitate coordination, integration and coherence. Barnes identified two options: integrate fisheries with other activities through collaborative institutional mechanisms, or use governance principles to shape the behavior of stakeholders in ABNJ and achieve substantive integration [46].

Indeed, the development, and later on the implementation, of a governance-based regime for ABNJ is put to the test when faced with the practical implications of management. At least three challenges can be distinguished. Firstly, ABNJ remain politically and jurisdictionally defined spaces that, as discussed above, do not necessarily follow ecosystems, and do not represent the “essential geophysical unity” of the oceans [47]. It seems that the solution resides in a change of focus – and, perhaps even, a change of values – within the law of the sea itself. We would have to imagine a regime that goes beyond maritime zones and that becomes rooted in functional approaches, e.g. “security

function, environmental and protection function [...] seabed exploitation regulation function” [48]. Until this is possible, this first management challenge forms the grounds for strengthening international cooperation, in order for trans-boundary measures to be undertaken. The governance principle of cooperation (both regional and international) can already be found in various instruments [49]. The difficulty lies in crystallising the parameters of this concept in relation to ABNJ and provide specifications as to its applicability in these areas [50].

Secondly, cooperation is needed to reconcile interests at sea. A wide range of activities take place in ABNJ (notably fisheries, shipping, marine scientific research, exploration and exploitation of the deep seabed, etc), and the challenge of identifying and accommodating the interests of all relevant stakeholders arises [51]. Management measures will therefore have to balance the individual interests of particular States/stakeholders in using the high seas and those interests that are common to all, taking into consideration the notion of due regard [52]. Partnerships between organizations, which “can be very effective in improving the sustainability of fisheries [...] and enhancing global and regional coordination on ABNJ issues” [53], illustrate a practical example of coordination and balancing of interests coming into play.

Lastly, the most delicate management challenge, for now, consists in advancing the BBNJ process without undermining existing structures. Indeed, respecting the existing instruments, processes, tools and practices, including the ones that have developed since the adoption of the FSA in 1995 and the creation of the Working Group in 2004, forms the core of the governance principle aiming for the respect of the law of the sea and related instruments [54]. In fact, even if global structures can be established as part of the process towards reinforcing the legal provisions for the conservation of biodiversity in ABNJ, they cannot ignore the specific measures addressing particular regional necessities [55]. This can be illustrated with reference to RFMOs, main actors in the field of fisheries. It would be wrong to say that a new regime would set them aside; on the contrary, “[t]he international community has increasingly recognized that strengthening governance of shared fisheries is best achieved by enhancing the role of RFMOs” [56]. However, considering the role of existing bodies within a new governance-oriented regime might necessitate adaptation.

The issue of not undermining existing structures comes forward when thinking of what machinery may be necessary in order to assist in the governance of high seas fisheries. As part of his integration option outlined above, Barnes suggests various institutional arrangements for ABNJ, ranging from a centralized and strongly integrated single ABNJ management authority, which would also include the work now conducted by the International Seabed Authority, to decentralized and weakly integrated coordinated sectoral management organisations, where existing bodies, such as RFMOs, would extend their mandate to fill existing gaps in ABNJ [57].

However, determining if these possible institutional arrangements are acceptable or not is limited by another concern: the exact meaning and scope of “not undermining” is still undecided. This uncertainty triggers two additional considerations. First, would an eventual *adaptation* of existing mechanisms be considered as “undermining”? Second, one could ask whether a new regime would exist at the same “level” as current instruments or would hold a more overarching framework role. Both these issues have been discussed during PrepCom 3, and they are worth keeping in mind when assessing the development of the BBNJ process and the potential impact of a governance approach.

## 4. Conclusion

The BBNJ process provides valuable insights on legal and policy perspectives regarding the international fisheries regime. These international meetings shed light on the way existing structures can impact fisheries management on the high seas. Integration has been at the center stage of the BBNJ discussions [58], and it is hoped that the BBNJ

process will propose possible solutions to the difficulties stemming from the fragmentation of the regime, although the concrete role to be played by the eventual agreement is still to be determined.

Further, a brief exploration of governance-based perspectives underlines concepts rooted in adaptability and interactions between multiple fields and actors, concepts that suggest to approach international fisheries law not as a static set of rules but as an evolutive process. Yet, reflecting on an overarching goal of coordination, as well as possible management challenges for governance in ABNJ provides an interesting and necessary starting point to develop a clear and comprehensive understanding of the impacts of oceans governance on the fragmented legal regime of high seas fisheries. We now need to work on how to give effect to the various governance principles. This task remains, at this point, at an exploratory stage and is still a work in progress.

It is in light of this reality that a focus on the development of oceans governance is desirable, in order to find alternatives to contribute to defining the best possible framework to reach sustainable high seas fisheries. We are at a critical juncture when talking about the state of fish stocks, and people are in need of input on how to face the challenges that are impacting fisheries. For that purpose, as suggested by the FAO, “[g]overnance of fisheries [...] should be greatly influenced by the 2030 Agenda for Sustainable Development [and] the Sustainable Development Goals (SDGs)” [59]. The enduring future of the marine environment and its adaptability to climate change, as well as food security will not only be influenced by sustainability, but will most likely depend on it.

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