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## Addressing the Relationship between Area-based Management Tools (ABMTs) Including Marine Protected Areas (MPAs) and the Right of the Adjacent Coastal State to the High Seas: Recent Discussion and Suggestion

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### Abstract

*Marine biodiversity beyond areas national jurisdiction (BBNJ) are characterized by high diversity of life and ecosystem and played central role in maintaining and supporting life on earth. Nevertheless, in recent times a number of factors have increasingly brought about considerable damage, at an increasing pace, to the marine ecosystem and biodiversity. And currently there are no specific rules governing this marine environment on the BBNJ. Therefore, in 2004 The United Nation General Assembly (UNGA) created the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of BBNJ. With the process initiated by UNGA Resolution 69/292 of 19 June 2015, the General Assembly decided to develop an international legally binding instrument (ILBI) under the United Nations Convention on the Law of the Sea on conservation and sustainable use of BBNJ.*

*The paper contains the current discussion on the development of the new international legally binding instrument (ILBI) for conservation and sustainable use of BBNJ. It discusses on going mechanisms to address issues related to the package agreed in 2011, specifically on the measures such as area-based management tools (ABMTs), including marine protected areas (MPAs). More specifically, this paper discusses on the relationship between instrument and the rights of coastal States over all areas under their jurisdiction, including continental shelf within and beyond 200 nautical miles and the exclusive economic zone.*

*The paper concludes that there is a need for further cooperation and coordination in developing and implementing ABMTs including MPAs under new ILBI with the right of the coastal states over all areas under their jurisdiction. The paper also addressing the concept of due regard, adjacency, compatibility, and the right of the coastal state. This four concept can be used for the basic guideline in relationship between ABMTs including MPAs with costal States adjacent to the area beyond national jurisdiction (ABNJ).*

**Keyword:** BBNJ, International legally binding instrument (ILBI), Area based management tools (ABMTs) including marine protected area (MPAs), Adjacent coastal state

### Abstrak

Keanekaragaman hayati laut di luar wilayah Yurisdiksi Nasional (BBNJ) ditandai oleh keanekaragaman hayati dan ekosistem yang tinggi dan memainkan peran sentral dalam mempertahankan dan mendukung kehidupan di bumi. Namun demikian, dalam beberapa waktu terakhir sejumlah faktor telah semakin membawa kerusakan besar, pada kecepatan yang meningkat, pada ekosistem laut dan keanekaragaman hayati. Dan saat ini tidak ada aturan khusus

yang mengatur lingkungan laut ini di BBNJ. Oleh karena itu, pada tahun 2004 Majelis Umum Perserikatan Bangsa-Bangsa (UNGA) membentuk Kelompok Kerja Informal Terbuka Ad Hoc untuk mempelajari masalah-masalah yang berkaitan dengan konservasi dan pemanfaatan berkelanjutan BBNJ. Dengan proses yang diprakarsai oleh Resolusi UNGA 69/292 tanggal 19 Juni 2015, Majelis Umum memutuskan untuk mengembangkan instrumen yang mengikat secara hukum internasional (ILBI) di bawah Konvensi PBB tentang Hukum Laut tentang konservasi dan pemanfaatan berkelanjutan BBNJ.

Makalah ini berisi diskusi terkini tentang pengembangan instrumen pengikat hukum internasional (ILBI) baru untuk konservasi dan pemanfaatan berkelanjutan BBNJ. Ini membahas tentang mekanisme yang sedang berjalan untuk mengatasi masalah yang terkait dengan paket yang disepakati pada 2011, khususnya tentang langkah-langkah seperti alat manajemen berbasis daerah (ABMT), termasuk kawasan lindung laut (KKL). Lebih khusus, makalah ini membahas tentang hubungan antara instrumen dan hak-hak negara pantai atas semua wilayah di bawah yurisdiksi mereka, termasuk landas kontinen di dalam dan di luar 200 mil laut dan zona ekonomi eksklusif.

Makalah ini menyimpulkan bahwa ada kebutuhan untuk kerjasama lebih lanjut dan koordinasi dalam mengembangkan dan mengimplementasikan ABMT termasuk MPA di bawah ILBI baru dengan hak negara pantai atas semua area di bawah yurisdiksi mereka. Makalah ini juga membahas konsep penghargaan, kedekatan, kompatibilitas, dan hak negara pantai. Keempat konsep ini dapat digunakan untuk pedoman dasar dalam hubungan antara ABMT termasuk MPA dengan Negara kosta yang berdekatan dengan wilayah di luar yurisdiksi nasional (ABNJ).

**Kata kunci:** *BBNJ, instrumen pengikat hukum internasional (ILBI), alat manajemen berbasis wilayah (ABMT) termasuk kawasan perlindungan laut (KKL), negara pantai yang berdekatan*

## A. Introduction

Biological diversity (Biodiversity) defined in the 1992 Convention on Biological Diversity (CBD) as the variability among living organisms from all sources including terrestrial, marine and other aquatic inter alia ecosystems and the ecological complexes of which they part; this include diversity within species, between species and of ecosystems.<sup>1</sup> Biodiversity is important for the human well-being, since it provides a variety of services. Well marine biodiversity both within and beyond national jurisdiction are characterized by high diversity which also vitally important for the sustaining and supporting life of the earth also provide a source of livelihood for billions of people around the world.

However, based on the 2005 Millennium Ecosystems Assessment<sup>2</sup> by over 2,000 scientists under the United Nations (UN) system and a representative sample of other stakeholders from civil society stated that oceans and coasts are among the most

<sup>1</sup> Convention on Biological Diversity, 1992, Article 2, available at <https://www.cbd.int/convention/>

<sup>2</sup> The objective of the Millennium Ecosystems Assessment was to assess the consequence of ecosystem damage and how it might be repaired. It produced the most authoritative statement on the states of the world's ecosystems and biodiversity. Millennium Ecosystem Assessment (2005), *Ecosystems and Human Well-Being: Biodiversity Synthesis* (Island Press, Washington, DC)

threatened ecosystems in the world. Over two-thirds of the services performed by ecosystem were found to be in decline including fishery production. With the primary cause of biodiversity loss is habitat destruction from the expansion of human activities over the marine environment.<sup>3</sup>

These marine ecosystem and biodiversity should be maintained to meet human needs for the variety of services and to ensure the sustainable use of these services. The expansion and growing of the human activities in the area beyond national jurisdiction also brought about considerable damage, at an increasing pace, to the marine ecosystem and biodiversity in ABNJ. Definitely, the protection, preservation and sustainable use of the marine biodiversity in ABNJ is crucial important.

Therefore, in 2004 The UNGA created the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas national jurisdiction. With the process initiated by UNGA Resolution 69/292 of 19 June 2015, the General Assembly decided to develop an international legally binding instrument (ILBI) under the United Nations Convention on the Law of the Sea (UNCLOS) on conservation and sustainable use of BBNJ. This resolution provides that negotiations to develop the new ILBI should address the four elements of a package deal agreed by States in 2011. These four package comprise marine genetic resources (MGRs) including the sharing benefits, area-based management tools (ABMTs) including marine protected areas (MPAs), environmental impact assessment (EIA), building capacity to enable sustainable and equitable development and transfer of technology.

MPA is one of the important tools too protecting and preserving the marine biodiversity and ecosystem. The designation of MPAs is an essential tool in modern ocean management and a cornerstone of virtually all national and international conservation strategies. Nevertheless, only about 3.5 percent of the global ocean environment is subject to protected area status with majority located in are within national jurisdiction.<sup>4</sup> Therefore, the designation MPAs should also not only in the area within national

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<sup>3</sup> Lakshman Guruswamy, (1997) *International Environmental Law*, West Publishing Co, United States of America

<sup>4</sup> Karen N. Scott, (2016) *Evolving MPA Management in New Zealand: Between Principle and Pragmatism*, Ocean Development & International Law Vol. 47, 289-307

jurisdiction, but also in the area beyond national jurisdiction. Nevertheless, there a number of challenges in developing and implementing this MPAs in ABNJ.

This article discusses the ABMTs including MPAs. Specifically, this article addresses the questions of president's aid to discussion on the relationship measures between ABMTs including MPAs and the right of the coastal state adjacent to the area beyond national jurisdiction.

## **B. Area-based management tools (ABMTs), including marine protected areas (MPAs) in the High Seas**

ABMTs including MPAs is one of the four package which could be addressed in an implementing agreement under the UNCLOS. ABMTs including the establishment of MPAs has been recognized as an essential and effective tools for the conservation and sustainable use of marine biodiversity ABNJ. ABMTs encompasses the integrated, sustainable management of the full suite of human activities occurring in spatially defined areas ranging in size from discrete patches to larger ecosystems scale areas.<sup>5</sup>

ABMTs can be defined as spatial closures that offer a degree of protection greater than the surrounding area “due to more stringent regulation of one or more of all human activities, for one or more purpose”.<sup>6</sup> In addition to MPAs, these include Emission Control Areas/ Special Areas and Particularly Sensitive Sea Areas (PSSAs), sessional on year-round area fisheries closures, and Areas of Particular Environmental Interest (APEIs). Compared with MPAs, which offer a degree of long-term in situ conservation, ABMTs may be more adaptive/ tailored to particular sectors, but also potentially shorter-term measures.<sup>7</sup>

ABMTs can have a variety of management objectives, including the preservation of important ecological or geomorphologic processes, the conservation and management species, the protection of beautiful seascapes, cultural, archaeological, or historical sites, recreation and public enjoyment, environmental monitoring and assessment, and scientific research.

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<sup>5</sup> Lakshman Guruswamy, *Op. Cit.*

<sup>6</sup> D. Johnson, M.A. Ferreira, E. Kenchington, (2018) *Climate change is likely to severely limit the effectiveness of deep-sea ABMTs in the North Atlantic*, Marine Policy 87, 111–122

<sup>7</sup> Elizabeth M. De Santo, (2018) *Implementation challenges of area-based management tools (ABMTs) for biodiversity beyond national jurisdiction (BBNJ)*, Marine Policy

During the Preparatory Committee meeting, the topic of ABMTs has invited debate and a variety of perspective. The discussion between participating states on the ABMTs including MPAs in the Preparatory Committee meeting including; the objective of the ABMTs including MPAs, relationship to a measures under relevant instruments, frameworks and bodies, process in relation to area-based managements tools including marine protected areas, implementation, monitoring and review and issues from the cross-cutting elements.

On the 4<sup>th</sup> Preparatory Committee meeting, the discussion on the ABMTs have been focused on marine protected area (MPA) and marine spatial planning (MSP).<sup>8</sup>MPAs are widely regarded as an impotent tool in modern ocean management for biodiversity conservation, but are not infallible, particularly in remote areas that pose challenge for surveillance, or are inadequately planned and supported. MPA defined by International Union for Conservation of Nature (IUCN) as “a clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values”. Basically, there is no universally agreed definition of MPA, but this IUCN definition on MPA widely applied.<sup>9</sup>

The development of the need to adopt MPAs on the high seas raise legal question as to if and how MPAs may legally be established. UNCLOS as the umbrella ocean governance also does not directly provide a specific legal basis for the establishment of MPAs on the high seas. The States are under general obligation to protect the marine environment, which encourages the use of area-based management measures.

MSP is a much more recent idea and is seen as a way of improving decision making and delivering an ecosystem-based approach to the management of marine activities. In essence, it is a plan-led framework that enables integrated, forward-looking, consistent decision making on the use of the sea. MSP will also provide a more transparent process of

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<sup>8</sup> Robin Warner, (2018)*Oceans of Opportunity and Challenge: Towards a Stronger Governance Framework for Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction*, Asia-Pacific Journal of Ocean Law and Policy, p. 166.

<sup>9</sup> Karen N. Scott, (2016)*Evolving MPA Management in New Zealand: Between Principle and Pragmatism*, Ocean Development & International Law Vol. 47, 289-307

conflict resolution in a situation where there are many demands for the use of marine resources and sea space.<sup>10</sup>

### C. Addressing the relationship between measures of ABMTs, including MPAs

The relationship of the measures such as ABMTs, including MPAs still debating between participating States on the negotiation process of new ILBI on the conservation and sustainable use of marine biodiversity in ABNJ. The issue of the relationship between measures of ABMTs including MPAs still have a wide range views among State. Therefore, in the report of the BBNJ Preparatory Committee on 31 July 2017, the text of ILBI in BBNJ would set out the relationship between measures under the instrument and measure under existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, for the purpose of coherence and coordination of efforts.<sup>11</sup>

The new ILBI should pursue conservation and sustainable use of BBNJ in cooperation and coordination with relevant existing bodies and should not be given legal mandate which overrides that of the relevant existing bodies. Therefore, the text also would affirm the importance of enhanced cooperation and coordination between relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, with regard to area-based management tools, including marine protected areas, without prejudice to their perspective mandates. Furthermore, the text would also address the relationship between measures under the instrument and those established by adjacent States, including issues of compatibility, without prejudice to the right of coastal States.<sup>12</sup>

The first session of the Intergovernmental Conference (IGC) on an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biodiversity in ABNJ convened from 4-17 September 2018. Delegates considered a document prepared by the IGC President which address the topic identified in the package

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<sup>10</sup> Susan Gubbay, (2004)*Marine Protected Areas in the context of Marine Spatial Planning-discussing the links*, A report for WWF-UK, p. 3.

<sup>11</sup>United Nations General Assembly, (2017) *Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an 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*, Fourth Session

<sup>12</sup>*Ibid*

agreed in 2011 including the relationship to measures under relevant instruments, frameworks and bodies.<sup>13</sup>

The document prepared by president in these issues including some question on the manner in which the instrument would set out relationship between measures under the instrument and measure under existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies. The provisions that would be included to address issues of compatibility between measure under the instrument and those established by adjacent States, including issues of compatibility, without prejudice to the right of coastal States. Would provisions include, for example, provisions for the sharing of information and/ or for consultation? And then the manner in which the instrument would reflect respect for the right of coastal States over all areas under their national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone.<sup>14</sup>

#### **D. Current discussion and suggestion in the relationship between measures of ABMTs, including MPAs and adjacent coastal States**

One of the controversial issue in the developing new ILBI in the conservation and suitable use of marine biodiversity ABNJ is the relationship between measures of ABMTs including MPAs with the existing legal framework, bodies and adjacent coastal state. There are several questions should be addressed from the document of the President's aid for discussion relating to the issue of rights of coastal States, compatibility between measure under the instrument and those established by adjacent coastal States. Below are some discussion and suggestion to addressing the issue of the relationship between measures of ABMTs, including MPAs in ABNJ with coastal States.

##### **1. The Right of the coastal States adjacent to High Seas**

There are issues in relations to the conservation and sustainable use that are rather relevant to area beyond national jurisdiction and adjacent coastal State.

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<sup>13</sup> IISD Reporting Service, (2018) *Summary of the first session of the Intergovernmental Conference (IGC) on an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biodiversity in ABNJ*, Earth Negotiations Bulletin

<sup>14</sup> United Nations General Assembly, (2018) *Intergovernmental conference on an 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*, President's aid to discussions, p. 7.

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Activates in the ABNJ will have a direct impact on areas under the jurisdiction of the coastal State and vice versa. Pollution as well as conservation and management of living resources will be particular concern.<sup>15</sup>

Article 192 of UNCLOS provides that States have the obligation to protect and preserve the marine environment. Which means that all States under UNCLOS have duty to protect and preserve the marine environment not only in their sovereignty territories but also in their EEZs and also in ABNJ. These arguments also can see for example in the article 61-62 of UNCLOS on the conservation and utilization of the living resources.

ABMTs including MPAs are widely recognized as a key mechanism and tool for conserving and restoring biodiversity particularly in remote areas that pose challenges for surveillance, or are inadequately planned and supported. The new ILBI on BBNJ is considering a range of approaches to ABMTs including MPAs. Nevertheless, there are some challenges for the implementation of the ABMTs including MPAs in ABNJ.<sup>16</sup>

The designating and managing ABMTs including MPAs in the high seas which geographically located with adjacent coastal States proved to be the one of the controversial issues in the developing new ILBI on BBNJ. The new development ILBI in particular with the ABMTs including MPAs should respect to the right of the adjacent coastal States to the High Seas. Under the UNCLOS 1982 coastal States granted to claim Territorial Sea up to 12 nautical miles from the baseline and the right to claim Contiguous Zone up to 24 nautical miles from the baseline. Coastal States were further given sovereign rights in Exclusive Economic Zone<sup>17</sup> (EEZ) and also enjoy the inherent right to Continental Shelf.<sup>18</sup>

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<sup>15</sup> Statement by the Head of the delegation of the Republic of Indonesia at the first session of the Intergovernmental Conference on the negotiation of an international instruments on BBNJ, 5 September 2018

<sup>16</sup> Elizabeth M. De Santo, (2018) *Implementation challenges of area-based management tools (ABMTs) for biodiversity beyond national jurisdiction (BBNJ)*, Marine Policy

<sup>17</sup> The EEZ is an area beyond and adjacent to the territorial sea, subject to the specific legal regime under which rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the UNCLOS, UNCLOS, Article 55

<sup>18</sup> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the breadth of



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In the EEZ, coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of the energy from the water, current and winds.<sup>19</sup> Coastal State also has right with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment.<sup>20</sup>

In the continental shelf, coastal State has rights over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. These natural resources consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.<sup>21</sup>

Area beyond national jurisdiction are therefore the High Seas and the Area and no sovereignty claim could be accorded in the High Seas. The sovereign right of the coastal States in the EEZ and Continental Shelf are limited for its natural resources, while the right to freedom of navigation of other States applies. It could thus be concluded that *beyond national jurisdiction* means the area of which states has no sovereignty or sovereign rights over the waters and subsoil thereof. Therefore, generic scope of BBNJ only concern the governance which includes its utilization and conservation of living organisms that exist in areas that cannot be put under any country's sovereign rights.<sup>22</sup>

The scope and the issue of the right coastal state also have been discussed in the Preparatory Committee 4. The African Group, with the US, proposed including a reference to the EEZ to sovereign rights over the continental shelf. However, some

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the territorial sea is measured where the outer edge of continental margin does not extend up to that distance. UNCLOS, Article 76 (1)

<sup>19</sup>*Ibid*, Article 56 (1)

<sup>20</sup>*Ibid*

<sup>21</sup>*Ibid*, Article 77

<sup>22</sup>GulardiNurbintoro, (2016)*Biodiversity Beyond National Jurisdiction: Current Debate and Indonesia's Interest*, Indonesia Law Review 3: 283-306

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coastal States also have not claimed an EEZ and Continental Shelf. Therefore, the EU recommended reflecting the balance of rights over the all states, including those that have not claimed an EEZ and Continental shelf. The new ILBI should respect and not prejudice to State sovereign decision to claim an EEZ and Continental Shelf. Canada, supported by the Philippines, proposed reference to State sovereign rights and jurisdiction, including sovereign rights over their continental shelf and EEZ.<sup>23</sup>

Indonesia for instant, an archipelagic country who has huge marine areas adjacent to the ABNJ. Indonesia has made claims of a Continental Shelf beyond 200 nautical miles. Indonesia have submitted claims of the Continental Shelf in the northwest of Sumatra Island to the Commission on the Limits of the Continental Shelf (CLCS), and already received a recommendation from the CLCS. The outer limits delamination established by a coastal State and based on the recommendation is then regarded final and binding.<sup>24</sup>

Nevertheless, Indonesia has also indicated that the areas South of Nusa Tenggara and North of Papua as its outer limit of Continental Shelf beyond 200 nautical miles and also will make submission to the CLCS. In this regard, there will be overlap between Indonesia's designated Continental Shelves beyond 200 nautical miles with superjacent waters of High Seas. In these issues, there will be debate on who has the rights to exploit the biodiversity that exist in the High Seas above Indonesia's Continental Shelf beyond 200 nautical miles.<sup>25</sup>

## 2. Due Regard

The term "due regard" seems to be used mostly in the context of exercise of rights.<sup>26</sup> The term "due regard" is referred frequently in several parts of the UNCLOS. There are altogether nineteen appearances of "due regard" in the UNCLOS, for example, in the provisions on the territorial sea, straits used for international

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<sup>23</sup> IISD Report Services, *PrepCom 4 Highlight*, Earth Negotiations Bulletin, <http://enb.iisd.org/vol25/enb25136e.html> (accessed January 16, 2019)

<sup>24</sup> UNCLOS, Article. 76 Paragraph 8

<sup>25</sup> Statement by the Head of the delegation of the Republic of Indonesia at the first session of the Intergovernmental Conference on the negotiation of an international instruments on BBNJ, 5 September 2018

<sup>26</sup> Zhang Guobin, (2014) *A Discussion on "Due Regard" in the United Nations Convention on the Law of the Sea*, China Ocean Law Review Vol. No. 2, p. 72.

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navigation, territorial sea, exclusive economic zone, contiguous zone, continental shelf, international seabed area and high seas.

The concept of “due regard” pointed by China and supported by Uruguay in the first session of IGC for addressing adjacent coastal States to the high seas. “due regard” provided in the UNCLOS is the general standard to deal with the relations between the adjacent States as well as the State conducting activities in the area beyond national jurisdiction. The new international instrument should address the issue of compatibility between measures under the new ILBI and those established by adjacent coastal States in accordance with the rule of “due regard”.<sup>27</sup>

There are two main basis reasons to make the above suggestions: *first*, according the UNCLOS, State shall conduct activities on the high seas or in the Areas with “due regard” for the rights and freedom other States, including adjacent coastal States. *Second*, pursuant to the UNCLOS, each State enjoys equal rights in the areas beyond national jurisdiction. The adjacent coastal States do not have any special privileges.<sup>28</sup>

The rule of due regard can be emphasized from the UNCLOS provisions. The article 87 of the UNCLOS requires States to exercise of the freedoms “with due regard for the interests of other States in their exercise of the freedom of the high seas”. This article does not refer to due regard for the rights of the coastal States in its maritime zones. However, it is submitted that a “due regard” requirement also applies in this instance. Four arguments maybe advanced to support this position.<sup>29</sup>

- Article 58 of the UNCLOS provides that the high seas freedoms those States enjoy in the EEZ shall be exercised with “due regard to the right and duties of the coastal States”
- Part V of the UNCLOS on EEZ requires the coastal State to “have due regard to the rights and duties of other States”

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<sup>27</sup> Statement by Mr. Ma Xinmin, Head of Chinese delegation on the first session of the Intergovernmental Conference on the negotiation of an international instruments on BBNJ, 7 and 10 September 2018

<sup>28</sup> *Ibid*

<sup>29</sup> Alex G. Oude Elferink, (2018) *Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC*, The International Journal of Marine and Coastal Law 33

- The judgment of the ITLOS in Bangladesh/ Myanmar provides support for view that States carrying out activities in ABNJ have to have due regard for the rights and duties of coastal States in the EEZ
- Article 194 (4) of the UNCLOS, read in conjunction with Article 194 (5), indicates that States designating MPAs in any case have a “due regard” obligation to all other States, including coastal States.

The new international instrument should explicitly provide that, the ABMTS, including MPAs, shall not undermine the rights of coastal States over all area under their jurisdiction in accordance with the UNCLOS, including the rights over the exclusive economic zone, and the continental shelf within and beyond 200 nautical miles. nor shall they undermine the rights of each State in the areas beyond national jurisdiction in accordance with the UNCLOS.

### 3. Principle Adjacency

The term adjacency or adjacent has been discussed in the Preparatory Committee meetings and Intergovernmental Government Conference (IGC), and still debating between Participating States. The term adjacency with respect to maritime coastal boundaries, refers to a State’s spatial proximity with the open ocean and deep sea in ABNJ in the context of the rights and duties of coastal States to enforce conservation measures in the High Seas and Area.<sup>30</sup>

It can be argued that coastal States have a special interest in adjacent High Seas areas, but only in relation to the overarching obligation of UNCLOS to protect and preserve the marine environment, including marine resources. There are three arguments in relating to the right and obligation of the adjacent coastal States to the ABNJ.<sup>31</sup>

*First*, the argument can be drawn from the UNCLOS which provides that the protection and preservation of the marine environment is the duty of all States,<sup>32</sup> both inside their EEZs and also in ABNJ and also from the manner in which it has been

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<sup>30</sup> DC Dunn, *Adjacency: How legal precedent, ecological connectivity, and traditional knowledge inform our understanding of proximity*, Policy Brief UN PrepCom: Nereus Scientific & Technical Brief on ABNJ Series, p. 1.

<sup>31</sup> Ibid

<sup>32</sup> UNCLOS article 197, 61-63

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interpreted and applied by international tribunals and States practice.<sup>33</sup> Therefore, the new instrument legally binding on the conservation and sustainable use of marine biodiversity beyond area national jurisdiction has to support granting coastal states greater influence over the management of those ABNJ resources to which they lie adjacent. From this approach, those adjacent states would be recognize as having the primary responsibility to coordinate with existing sectoral and regional organizations to become the leading architects of new regional conservation agreement.

*Second*, the legal definition of adjacency addresses geographic proximity, the ecological implications of adjacency involve oceanographic and ecological connectivity. An area adjacent to a national jurisdiction maybe equally ecologically or biologically connected to areas on the others on the other side of an ocean basin through oceanographic or migratory connectivity. Similarly, anthropogenic impacts in ABNJ will not disperse evenly in all directions from the area of origin, but rather, may have highly directed flows due to ocean currents or long-distance animal movements that crisscross our oceans. In certain circumstances, oceanographic flows will directly support claims for prioritization of a Coastal State's interest. However, any attempt to address adjacency should provide for how such prioritization of a State's interest will improve the status of highly migratory species that may be effected.

Due to their wide-ranging swimming behaviors, migratory fish, marine mammal, seabird and sea turtle species experiences a variety, and an increasing amount, of anthropogenic pressure over the source of their lives. Some migratory species are of cultural importance to peoples for their industry and have been a pillar of fisheries sector for longtime.<sup>34</sup> Understanding how these species use areas beyond national jurisdiction is essential for their transboundary conservation and management, which will in turn, preserve some of these socioeconomic, cultural and ecological relationships with coastal States around the world.<sup>35</sup> The term migratory species not

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<sup>33</sup> DC Dunn, *Op. Cit.* p. 1

<sup>34</sup> Migratory sharks and turtle species of Pacific Island Nations, migratory humpback whales fuel the whale in Caribbean States, migratory fish such as Atlantic Bluefin tuna have been pillar of Mediterranean fisheries.

<sup>35</sup> Guillermo Ortuó Crespo, *Understanding how marine species use the high seas: The Migratory Connectivity in the Ocean (MiCO) system*. <http://archives.nereusprogram.org/understanding-how-marine-species-use-the-high-seas-the-migratory-connectivity-in-the-ocean-mico-system/> (accessed on January 15, 2019)

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only tie wide-ranging species to opposite ends of an ocean, but also ties Indigenous Peoples and local communities (IPLCs) across ocean basins and to the High Seas.

Understanding, preserving and managing the transboundary connectivity of many of these species does not only have ecological implications, but also economic and cultural ramifications for coastal communities or IPCLs worldwide. This cultural connectivity also should be taken into account when applying the concept of adjacency.<sup>36</sup>

#### 4. Compatibility

The issue compatibility also has been discussed during the negotiation process of new international legally binding on the conservation and sustainable use of marine biodiversity in ABNJ. The term “compatible” generally used to qualify rights or obligations attributed under a provision by requiring their exercise or observance to be compatible with another provision. This implies that the provisions, which has to be compatible, shall be applied in such a way that it does not result in a derogating of rights or obligations existing under the provision with which it has to be compatible.<sup>37</sup>

In the first session of intergovernmental conference on an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biodiversity in ABNJ, participating States argued that in the designation of ABMTs, including MPAs should inclusive and transparent consultation with adjacent coastal States, including IPLCs, and traditional knowledge holders, when determining boundaries, monitoring plans, and evaluating ABMTs. This argument stated by Alliance of Small Island States (AOSIS) and supported by New Zealand.<sup>38</sup>

The issues of compatibility also can be addressed with the article 7 of the 1995 Fish Stock Agreement (FSA). Article 7 of the 1995 Fish Stock Agreement provides that the measures of the conservation and management which states established in the high seas and those in national jurisdiction of adjacent coastal states should be compatible. In particular, it provides that measures implemented in the high seas not

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<sup>36</sup> DC Dunn, *Op Cit*

<sup>37</sup> *Ibid*

<sup>38</sup> IISD Reporting Service, *Summary of the first session of the Intergovernmental Conference (IGC) on an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biodiversity in ABNJ: 4-17 September 2018*, p. 8

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undermine the effectiveness of those implemented by coastal states within their national jurisdiction.<sup>39</sup> This argument also pointed by Chile and AOSIS and suggested a consultation and information sharing mechanism for establishing MPAs, ensuring consideration of resilience, biodiversity restoration, and climate change effects.<sup>40</sup>

ABMTs should also cooperate and coordinate with existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, for the purpose of coherence and coordination of efforts. This obligation to cooperate refer to the obligations in CBD article 5 that “*cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and other matters of mutual interest, for the conservation and sustainable use of biological diversity*”

Japan for instant gave statement on the relationship between the BBNJ new instrument in existing bodies in the Preparatory Committee. Japan state that in international community, sectoral bodies such as IMO, ISA and RFMOs are provided with mandates based on intergovernmental agreements to adopt various conservation and management measures, and are implementing these measures in various sea areas. Similarly, various Regional Sea Conventions, such as the Antarctic Treaty and its relevant instruments and the OSPAR Convention, undertake conservation and management measures in their perspective sea areas.<sup>41</sup>In the first IGC, Japan also suggested consultation and cooperation with the competent organization. P-SDIS furthermore called for mandatory consultation with adjacent coastal states, stressing that ABMTs in ABNJ should not be of a lower standard than those within national jurisdiction.

## E. Conclusion

ABMTs including the establishment of MPAs has been recognized as an essential and elective tools for the conservation and sustainable use of marine biodiversity ABNJ. In the 4<sup>th</sup>Preparatory meetings, MSP also considered as the ABMTs which also important in

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<sup>39</sup> Alex G. Oude Elferink, (1999)*The impact of article 7 (2) of the fish stocks agreement on the formulation of conservation and management measures for straddling and highly migratory fish stocks*, FAO Legal Papers Online, p. 3.

<sup>40</sup> IISD Reporting Service, *Op. Cit.*

<sup>41</sup>Statement by Japan on the Relationship between the BBNJ New Instrument and the Existing Bodies, 29 March 2017

the developing new ILBI for the conservation and sustainable use of marine biodiversity ABNJ. However, the implementation of ABMTs including MPAs and MSP in BBNJ faces a number of challenges, including technical and governance challenges. This issue has bringing debate and a variety of perspectives in the Preparatory Committee meeting.

The relationship to measure between costal States and High Seas or ABNJ also one of the crucial challenge on the development of new ILBI. in this regard author suggest that the development new ILBI should respect to the coastal States sovereign right over the continental shelf. New ILBI should also reflecting the balance of rights over the all States, including those that have not claimed an EEZ and Continental shelf. The new ILBI should also respect and not prejudice to State sovereign decision to claim an EEZ and Continental Shelf.

The role of coastal States and another States in the designation ABMTs including MPAs in the ABNJ can be address through four concept mentioned above. This concept including the right of the coastal States adjacent to the ABNJ, due regard, adjacency, and also compatibility. These concepts also have been advanced at the preparatory committee meeting in addressing these issues. However, the debate on the implementation of this concept also raised for the development the future international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biodiversity ABNJ.



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