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Current Legal Developments: International Union for The Conservation of Nature

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Current Legal Developments

International Union for the Conservation of Nature

Workshop on High Seas Governance for the 21st Century

The Workshop on High Seas Governance for the 21st Century was held in New York City on 17–19 October 2007.¹ Over 50 leading experts in international marine policy, science, law and economics gathered to explore policy and regulatory options to improve oceans governance beyond areas of national jurisdiction (BANJ), particularly as they relate to the protection and preservation of the marine environment and marine biological diversity. Participants attended in their personal capacity and the Workshop was conducted under Chatham House Rules. Co-chairs of the Workshop were David Freestone, Kristina Gjerde, Rosemary Rayfuse and David VanderZwaag.²

The Workshop opened with four keynote presentations, followed by brief presentations based on written 'thought pieces', and plenary discussions. Participants next divided into three breakout groups to discuss the following: 1) implications of new and emerging oceans uses for oceans governance;

¹ The Workshop was organized with the cooperation and support of IUCN, the Faculty of Law of the University of New South Wales, Pace University Law School, The Natural Resources Defense Council (NRDC), the Bard Centre for Environmental Policy and Juice Energy, Inc. Major support was provided by Debevoise and Plimpton, LLP, the Australian Mission to the United Nations, the Australian Department of Environment and Water Resources, the JM Kaplan Fund and the Netherlands Ministry for Agriculture, Nature and Food Quality.

² The full Workshop report is available for download, along with keynote presentations and other contributions to the Workshop on the IUCN, Global Marine Programme website (<http://www.iucn.org/themes/marine/high-seas-workshop-oct07.html>). The Co-Chairs would like to thank Tanya Rosen for her assistance in organizing the workshop and in editing the Co-Chairs' Summary Report. We would also like to thank the workshop participants and sponsors for their intellectual rigor, moral support and timely assistance. And finally, we thank IUCN for permission to reproduce the Executive Summary of the Co-Chairs' Summary Report in this issue.

2) short-term approaches for improving oceans governance; and 3) medium-term approaches for improving oceans governance. Participants then returned to plenary to discuss their findings.

For ease of reference, the Workshop's key findings are grouped under the five themes to be considered at the April 28-May 2, 2008 meeting of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (the UN Working Group): 1) the environmental impacts of human activities on marine biological diversity BANJ; 2) coordination and cooperation among States as well as relevant inter-governmental organizations and bodies; 3) the role of area-based management tools; 4) genetic resources BANJ; and 5) whether there is a governance or regulatory gap, and if so, how it should be addressed.

Participants recognised that the 1982 United Nations Convention on the Law of the Sea (LOSC) forms the overarching framework for human activities in or affecting areas beyond national jurisdiction, but that a series of short-term and medium-term measures are necessary to achieve effective protection of the marine environment and conservation and sustainable use of its resources.

Highlights of the key findings include:

- 1) *Environmental impacts*: In the short term, all States could be called upon, directly or through a UN General Assembly (UNGA) resolution, to control the behavior of their nationals and vessels carrying out activities that may adversely affect the marine environment and biodiversity BANJ, including by requiring prior environmental impact assessments (EIAs) for such activities. In the medium term, a globally effective and transparent EIA regime could be developed, building on existing models. An Intergovernmental Panel for the Oceans could enhance understanding of cumulative human impacts and better inform policy-making in the same way as the Intergovernmental Panel on Climate Change performs this service.
- 2) *Coordination and cooperation*: In the short term, the mandate of an existing agency or process, such as the UN Informal Consultative Process on Oceans and Law of the Sea, might be expanded to serve as an intergovernmental steering mechanism. Existing regional arrangements for marine environmental protection, resource conservation and maritime surveillance and enforcement could be strengthened and extended into proximate high seas areas, building on experience in the Antarctic, the North East Atlantic and the Mediterranean. The Global Environment Facility (GEF) might be encouraged to provide financial assis-

tance to enhance management and conservation capacity in developing States. Regional fisheries organizations might improve coordination through additional joint meetings, as well as through flag State performance audits, port State and market State controls, and harmonized sanctions. In the medium term, regional organizations could develop into regional oceans management institutions, and a global mechanism could be established to review, coordinate and endorse programs and measures initiated at the regional level and by global sectoral bodies, as necessary.

- 3) *Role of area-based management tools*: In the short term, the scientific basis for area-based management can be advanced through identifying ecologically and biologically significant areas and establishing priority areas as pilot high seas marine protected areas (MPAs), building data bases, and promoting bioregional mapping and marine spatial planning pursuits such as those underway in the Antarctic and North East Atlantic. In the medium term, further effort would be required to roll out representative networks of MPAs by 2012, including the identification of mechanisms for management, monitoring and enforcement, while ensuring that all ocean activities BANJ are based on compatible principles of protection, conservation and sustainable use.
- 4) *Genetic resources beyond areas of national jurisdiction*: If States are unable to find a common position with respect to the status of marine genetic resources on the seabed BANJ, they might consider an alternative approach. This could include applying equitable principles embodied in the LOSC and elsewhere to all marine resources and ecosystem services BANJ. The principles of intergenerational and intragenerational equity—consideration of the interests of present and future generations—and the Convention on Biological Diversity (CBD) concept of biodiversity as the “common concern of humankind”, may serve as the basis. A useful approach may be the concept of a trust whose proceeds could be used to fund institutional management arrangements or be reinvested in conservation and management activities.
- 5) *Governance and regulatory gaps*: Identified governance and regulatory gaps include:
 - The absence of coordination mechanisms to ensure the consistent and coherent application of modern conservation norms and tools, such as the ecosystem approach, the precautionary approach, EIAs, marine spatial planning and other area-based measures, to the full range of ocean-based human activities;
 - The limited nature of mechanism(s) to ensure transparency, accountability, and stakeholder participation in ocean legal regimes;

- The lack of regulations addressing the increasing environmental impacts from traditional activities, such as shipping, marine scientific research, oil and gas exploration, and military activities (e.g., underwater noise), and from new activities which have emerged, such as climate change mitigation techniques and potential construction and operation of floating energy and mariculture facilities.

To address the gaps, participants identified a “toolbox” of solutions—ranging from the short to the medium term, the voluntary to the legally binding, and the sectoral to the regional and the global. These include (a longer list is provided in the main text):

- Developing informal agreements and codes of conduct for unregulated activities;
- Establishing criteria for conducting flag State performance assessment, audit and evaluation;
- Enhancing of monitoring, control, surveillance, compliance and enforcement mechanisms;
- Establishing default mechanisms for interim regulation of new and emerging activities pending establishment of formal regulatory measures;
- Adopting, by the UNGA, of a Declaration on Principles of Oceans Governance reasserting the principles which have been developed in international law since the adoption of the LOSC; and
- Convening of a high-level Oceans Summit to focus attention on the need for enhanced protection of the oceans within and beyond national jurisdiction.

While much progress could be made through implementing this toolbox, many participants observed that significant advantages could be gained in moving towards a binding global agreement as a framework to guide the integrated development and implementation of sectoral and regional efforts. Possible elements of a new global instrument were identified as including:

- Objective and scope (to cover areas beyond national jurisdiction (high seas and the Area));
- General principles reflecting modern governance and conservation norms;
- EIA and strategic environmental assessment requirements;
- Spatial and area-based management tools, including MPAs;
- Monitoring and assessment of the status of the marine environment

- and biodiversity BANJ;
- Minimum standards for competent international and regional organizations;
 - Monitoring, control, surveillance, compliance and enforcement mechanisms;
 - Institutional underpinning, including identification/establishment of at least an interim default authority to regulate activities not expressly covered by existing institutions, as well as review of mandates of existing regional bodies;
 - Consideration of developing States, including capacity building and cooperation to assist them in complying with their environmental responsibilities under the LOSC;
 - The potential need for further specific annexes to assist in the implementation of the marine environmental responsibilities set out in the LOSC; and
 - Clarification of the relationship between the global framework and regional agreements.

Finally, participants recognized that other issues—such as dispute settlement and non-compliance mechanisms or principles related to the concept of inter-generational and intragenerational equity with respect to marine resources and ecosystem services in areas beyond national jurisdiction—deserved a fuller discussion, which was not possible during the Workshop because of time constraints.

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