



JOURNAL OF
GLOBAL STUDIES

ISSN 1518-1219

<http://www.meridiano47.info>

Leandra Regina Gonçalves

University of São Paulo, Oceanographic
Institute, São Paulo – SP, Brazil
(goncalvesleandra@gmail.com)

 ORCID ID:
<https://orcid.org/0000-0003-1182-418X>

Acknowledgments

Fundação de Amparo à Pesquisa
do Estado de São Paulo (Fapesp)
for financial support
(FAPESP LRG: 2018/00462-8).

Copyright:

- This is an open-access article distributed under the terms of a Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided that the original author and source are credited.
- Este é um artigo publicado em acesso aberto e distribuído sob os termos da Licença de Atribuição Creative Commons, que permite uso irrestrito, distribuição e reprodução em qualquer meio, desde que o autor e a fonte originais sejam creditados.



Responsive governance: an approach to the conservation and sustainable use of Biodiversity Beyond National Jurisdiction

Governança responsiva: uma abordagem para a conservação e uso sustentável da biodiversidade além da jurisdição nacional

DOI: <http://dx.doi.org/10.20889/M47e23003>

Submitted in 05/06/2021

Accepted in 20/11/2021

Abstract

Marine areas beyond national jurisdiction represent 64% of the total surface area of the oceans and around half of the planet's total surface area. Through their remoteness and vast expanse, they were largely protected from human interference in the past. However, technological advances have removed this protection, exposing this largely unknown ecosystem to unsustainable human activities. To address this emergent problem, the United Nations General Assembly agreed on the legally binding nature of a future agreement on the conservation and sustainable use of Biodiversity Beyond National Jurisdiction (BBNJ) under the United Nations Convention on the Law of the Sea (UNCLOS). However, consider a business-as-usual scenario, in which individuals and decision-makers respond to problems rather than working to prevent them, this paper applies the responsive governance lenses to evaluate ten years of Ad Hoc Open-ended Informal Working Group meetings aiming to prove that governance is a problem-driven and it may be tightly connected to the on human perceptions of specific signals and the actors' relative positions of power. Thus, the chances of having a flexible agreement that will only comply with a partial response to the environmental problem are significant and this will only reduce or mitigate part of the problem but not all. In cases like that, the governance will remain ineffective in some ways.

Resumo

As áreas marinhas além da jurisdição nacional representam 64% da superfície total dos oceanos e cerca de metade da superfície total do planeta. Devido à sua distância e vastidão, elas estavam em grande parte protegidas da interferência humana no passado. No entanto, os avanços tecnológicos removeram essa proteção, expondo esse ecossistema em grande parte desconhecido a atividades humanas insustentáveis. Para enfrentar esse problema emergente, a Assembleia Geral das Nações Unidas concordou com a natureza juridicamente vinculativa de um futuro acordo sobre a conservação e uso sustentável de Biodiversidade Além da Jurisdição Nacional, em tradução livre sob a Convenção das Nações Unidas sobre o Direito do Mar (UNCLOS). No entanto, considerando um cenário

de negócios como de costume, no qual indivíduos e tomadores de decisão respondem a problemas em vez de trabalhar para preveni-los, este artigo aplica as lentes de governança responsiva para avaliar dez anos de reuniões do Grupo de Trabalho Informal Ad Hoc com o objetivo de provar que a governança é um problema dirigido e pode estar fortemente conectado à percepções humanas de sinais específicos e às posições relativas de poder dos atores. Assim, as chances de ter um acordo flexível que cumprirá apenas uma resposta parcial ao problema ambiental são significativas e isso só reduzirá ou mitigará parte do problema, mas não tudo. Em casos como esse, a governança permanecerá ineficaz de certa forma.

Keywords: Biodiversity Beyond National Jurisdiction (BBNJ); United Nations Convention on the Law of the Sea (UNCLOS); Responsive governance.

Palavras-chave: Biodiversidade Além da Jurisdição Nacional; Convenção das Nações Unidas sobre o Direito do Mar (UNCLOS); Governança responsiva.

Introduction

Marine areas beyond national jurisdiction represent 64% of the total surface area of the oceans and around half of the planet's total surface area (Ardron et al. 2013). Through their remoteness and vast expanse, they were largely protected from human interference in the past. However, the Anthropocene era has brought increased threats to the biodiversity of the world's oceans coupled with technological advances that have removed the so-called remote protection, exposing this largely unknown ecosystem to unsustainable human activities (WOA, 2021; Ramirez-Llodra et al. 2011; Houghton & Rochette 2014).

The United Nations (UN) has declared 2021-2030 the Decade of Ocean Science, and together with the Agenda 2030 and the Sustainable Development goals, it is an open opportunity to foster international collaboration towards the ocean, to improve research, and create innovative mechanisms to its sustainable use. Towards that end, progress is needed to address multiple and potentially conflicting uses of ocean space within national jurisdictions and beyond it to the biodiversity beyond national jurisdiction to promote the development of a just and equitable blue economy (BBNJ) (Klinger et al. 2018; Bennet et al. 2021).

The BBNJ governance is often described as inadequate and incomplete, with gaps related to specific issues such as biodiversity conservation (Gjerde et al. 2008; Visbeck et al. 2014; Campbell et al. 2016). Multiple actors have been working toward discussing how to fill this governance gap for more than a decade, particularly advocating for a UN Convention on the Law of the Sea (UNCLOS) implementing agreement.

In 2004, the UN General Assembly established the *Ad Hoc Open-ended Informal Working Group* (Hereinafter Working Group) to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. After nine years of meetings, the Working Group reached a consensus on the legally binding nature of a future agreement under UNCLOS to better enable conservation in BBNJ.

Therefore, in June 2015, the UN General Assembly adopted a Resolution on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. Following that decision, a process has started to negotiate an international legally binding instrument (ILBI) and better address marine management and conservation challenges of the 21st century. It is still early to predict the success of this future endeavor; however, one can argue that this moves forward with relevant elements foreseen at the 2030 Agenda, especially at the Sustainable Development Goal 14.

Four Preparatory Committee (PrepCom) meetings were held between April 2016 and July 2017, aimed at providing substantive and procedural recommendations for an ILBI to the General Assembly, and the formal negotiations started in September 2018.

Since 2018, three Intergovernmental Conference (IGCs) have been convened, leading to a draft treaty that was to be adopted at IGC 4 in March 2020. Yet, due to the COVID-19 outbreak, IGC 4 had to be postponed (Vadrot et al. 2021). Therefore, by resolution 75/239, the General Assembly decided to convene the fourth session in August 2021, bringing relevant outcomes to this debate.

The discussions have since 2011 being around the four items package, which includes 1) marine genetic resources, including questions on benefit-sharing, 2) area-based management tools, including marine protected areas, 3) environmental impact assessments, and 4) capacity-building and the transfer of marine technology.

As BBNJ is an emergent topic, many articles and books have been published discussing different aspects of this ongoing negotiation process by the lenses of other disciplines (Marciniak 2017; Wright et al. 2018; Ardron et al. 2018; Tyler et al. 2019; Barros-Platiau and Oliveira 2020; Webster et al. 2020). Here, in this article, to understand the governance process to establish a new agreement or the developments that have been made to find a better governance system for use and conservation of the biodiversity in the areas beyond national jurisdiction, we will employ the action cycle/structural context framework (AC/SC), proposed by Webster (2015), that is based on the concept of responsive governance, in which individuals and decision-makers respond to problems rather than working to prevent them.

With that in mind, we used desktop analysis, reviewing documents connected to the official meetings, e.g., statements, official documents and as well as Earth Negotiations Bulletin reporting and other reports from international organizations (FAO, ICCAT, and others), Environmental non-governmental organizations (ENGOs), to evaluate ten years of Ad Hoc Open-ended Informal Working Group meetings, previously to the formal negotiating meetings. This article applies the framework to a descriptive case of regime formation instead of using it for cases at an advanced level of implementation, as *per* Webster (2015).

Thus, to present the case study, first BBNJ will be introduced detailed to enable the use of analytical lenses of AC/SC at the UN Ad Hoc Informal Open-ended Working Group to study issues related to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ Working Group) meetings. Then, the structural context will be added as an external dimension, including the actors and their role to evolve the legal and institutional framework for conservation and sustainable use of marine biodiversity in BBNJ.

BBNJ context

As most discussions on the management of the commons, the challenge is to balance all the variables presented in the system, to cite a few of them, the use and conservation of a resource, interests of all actors involved in and economic development, equity, and many others (Webster et al. 2020). In general, it is not that the countries do not recognize what is at stake or that they do not recognize the outcomes of their own decisions. Still, States have their preferences and vested interests that lead them to different solutions, mostly not very ambitious to the end of marine conservation (Webster et al. 2020).

The conflict between the interests passes through the progress, which according to Webster (2009) *“is an ambiguous phenomenon. It has driven humanity’s prosperity, yet it also comes with unintended effects, such as resource depletion, ecosystem disruptions, and climate change. Coping with these problems is a struggle in itself, one that depends on the coordinated actions of many individuals”*.

When we talk about managing the commons in BBNJ, progress has meant bigger, faster boats, more efficient capture techniques, and wider availability of fish for human consumption and profits, jobs, and other economic benefits. All this by itself would mean lots of pressure to deal with, as we can notice from the Regional Fisheries Management Organizations (OECD, 2009). However, for the BBNJ, there is much more at stake. Progress also means an increase in offshore drilling and mining, which one would arguably say are necessary to our development, to produce our mobiles and computers, and even more to produce the amount of energy and fuel we use for living.

Over the past decades, human activities have increased exponentially, impacting and threatening the marine biodiversity in these areas. For example, around 90% of world trade is now carried out by the shipping industry, with associated risks of oil, garbage, noise pollution, collisions with large marine animals, and the introduction of alien species through ballast waters. In addition, fishing activities have expanded to the high seas and even into the deep sea, with growing concerns regarding the overexploitation of fish stocks, illegal, unreported, and unregulated fishing (IUU fishing), and damage to deep-water habitats due to destructive fishing practices such as bottom trawling (Druel & Gjerde 2014).

The context is so complex that, at the same time, the rapid expansion of economic activities in those areas has caused significant concern regarding the long-term viability of living marine resources and on the resilience of a still unknown ecosystem. The BBNJ Working Group met nine times (Table 1) from 2006 to 2015. According to Blasiak et al. (2017), the working group could be separated into three relatively distinct phases: the scope and content, definition of key pieces of text, and the definition of the package and a timeframe.

This complex system that involves various stakeholders and interests may be examined under the lenses of responsive governance proposed by Webster (2015) through the Action Cycle/Structural Context framework (AC/SC). Yet, we cannot take out our eyes and miss some relevant elements from the ecological debate as institutions will potentially promote an environmental and a social change within this immense marine social-ecological system (Berkes et al. 2003, Ostrom 2009). Therefore,

the new agreement must match the needs of social and environmental dimensions and yet guarantee that the institution can evolve and adapt in the future (Gonçalves et al. 2020).

Table 1. Historical of meetings related to the debate of Areas beyond National Jurisdiction, based on extracts from Earth Negotiation Bulletins and from report meetings

Meeting	Date	Main Debates/Outcomes extracted from the letters to UNGA
FIRST MEETING OF THE WORKING GROUP (A/61/65)	13-17 February 2006, New York	<ul style="list-style-type: none"> – exchanged views on necessary institutional coordination, – marine genetic resources (MGRs) debate, – rules to avoid the adverse impacts of marine scientific research (MSR) on marine biodiversity, – MPAs on the high seas to facilitate the establishment of high seas marine protected areas.
SECOND MEETING OF THE WORKING GROUP (A/63/79)	28 April–2 May 2008, New York	<ul style="list-style-type: none"> – the environmental impacts (EI) of anthropogenic activities on marine biological diversity beyond areas of national jurisdiction; – coordination and cooperation among States as well as relevant intergovernmental organizations and bodies for the conservation and management of marine biological diversity beyond areas of national jurisdiction; – the role of area-based management tools; – MGRs beyond areas of national jurisdiction; – Whether there is a lack of governance or regulatory gap, and if so, how it should be addressed – more effective implementation and enforcement of existing agreements;
THIRD MEETING OF THE WORKING GROUP (A/65/68)	1-5 February 2010, New York	<p>Agreed, by consensus the recommendations to the General Assembly on:</p> <ul style="list-style-type: none"> – the strengthening of the information base; – capacity-building and technology transfer to developing countries; – cooperation and coordination in implementation and for integrated ocean management and ecosystem approaches; – environmental impact assessments (EIAs); – area-based management tools and its implementation

continua...

continuação

Meeting	Date	Main Debates/Outcomes extracted from the letters to UNGA
FOURTH MEETING OF THE WORKING GROUP A/66/119	31 May-3 June 2011 New York	Adopted, by consensus, a set of recommendations to initiate a process on the legal framework for the conservation and sustainable use of BBNJ, by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS. The recommendations also include a “package 2011” of issues to be addressed as a whole in this process, namely: 1. MGRs, including questions on benefit-sharing; 2. measures such as EIAs and area-based management tools, including MPAs; 3. capacity building and marine technology transfer.
FIFTH MEETING OF THE WORKING GROUP A/67/95	7-11 May 2012 New York	engaged in substantive debates on the gaps and ways forward in plenary and intense negotiations, mostly in a government-only informal setting, on whether to recommend the launch of formal negotiations on a new implementing agreement under UNCLOS
UN CONFERENCE ON SUSTAINABLE DEVELOPMENT (RIO+20)	20-22 June 2012 Rio de Janeiro, Brazil)	The “Future we want ¹ ” (para 162 on Oceans) – highlighted the importance of the work and the debate of the Working Group and States agreed to decide by the end of the 69th session of the UNGA (September 2015) whether or not to launch the negotiations for the conclusion of such a new global agreement.
SIXTH MEETING OF THE WORKING GROUP A/68/399	19-23 August 2013 New York	Consensus recommendation on establishing a preparatory process within the Working Group to fulfill the Rio+20 commitment by focusing on the scope, parameters and feasibility of an international instrument under UNCLOS, calling upon the Working Group to be convened twice in 2014 and at least once in 2015, with a view to preparing for a decision on BBNJ by the General Assembly before the end of its sixty-ninth session.
SEVENTH MEETING OF THE WORKING GROUP A/69/82	1-4 April 2014 New York	Engaged in an interactive substantive debate on the scope, parameters and feasibility of an international instrument under UNCLOS, focusing on: the overall objective and starting point; the legal framework for an international instrument; the relationship to other instruments; guiding approaches; guiding principles; each of the elements of the “package;” and enabling elements and means of implementation.

continua..

1 http://www.un.org/disabilities/documents/rio20_outcome_document_complete.pdf

continuação

Meeting	Date	Main Debates/Outcomes extracted from the letters to UNGA
EIGHTH MEETING OF THE WORKING GROUP A/69/177	16-19 June 2014 New York	Engaged in a more detailed substantive discussion on the scope, parameters and feasibility of an international instrument under UNCLOS, and called upon the Co-Chairs to prepare draft elements of a recommendation to the General Assembly, based on the “package,” also outlining the main elements of convergence that emerged in the Working Group, for consideration at the next meeting
NINTH MEETING OF THE WORKING GROUP A/69/780	20-23 January 2015 New York	Delegates reached consensus on recommendations for a decision to be taken at the 69th session of the UNGA to develop a new legally binding instrument on BBNJ under UNCLOS
69TH SESSION OF THE GENERAL ASSEMBLY RES 69/292	19 June 2015 New York	Decided to develop an international legally binding instrument under UNCLOS on the conservation and sustainable use of BBNJ. To that end, the Assembly established a Preparatory Committee, to make substantive recommendations to the General Assembly.
UN SUSTAINABLE DEVELOPMENT SUMMIT	25-27 September 2015 New York	Adopted the 2030 Agenda for Sustainable Development. Under Sustainable Development Goal (SDG) The Goal 14 is about to conserve and sustainably use the oceans, seas and marine resources for sustainable development. Through this goal, states committed to: <i>“sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans by 2020; and effectively regulate harvesting and end overfishing, IUU fishing and destructive fishing practices, as well as implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics by 2020. SDG 14 also includes commitment to: conserve at least 10% of coastal and marine areas, consistent with national and international law and based on the best available scientific information by 2020; increase scientific knowledge, develop research capacity and transfer marine technology; and enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in UNCLOS”</i>

continua...

continuação

Meeting	Date	Main Debates/Outcomes extracted from the letters to UNGA
CBD SBSTTA 19 ²	2-5 November 2015 Montreal, Canada	Adopted a recommendation encouraging governments, organizations, and funding agencies to promote and support further research on the significance of marine biodiversity for health, including for food security, and the consequences of multiple stressors on marine ecosystems (including pathogens, chemicals, climate change, and habitat degradation).
FIRST SESSION OF THE PREPARATORY COMMITTEE	28 March – 8 April 2016 New York	Unpacking the 2011 package, topic by topic and countries expressed their concerns or their consensus, and the mains debated topics were: <ul style="list-style-type: none"> – marine genetic resources, including questions on benefit-sharing; – measures such as area- based management tools, including marine protected areas; – environmental impact assessments; – capacity building and marine technology transfer; – cross-cutting issues, such as the scope of an ILBI, its relationship with other instruments, and its guiding principles.
SECOND SESSION OF THE PREPARATORY COMMITTEE	26 August – 9 September 2016 New York	After concluding these meetings, it was clear that a huge homework it is still left on the table to find a common agreement between countries. The UNGA 71 st session will determine the agenda for more Prep Comm meetings to match the deadline of having a proposal to be presented at the 72 nd UNGA session.

The AC/SC framework applied to BBNJ

The AC/SC framework proposed by Webster (2015) was already applied for fisheries (Webster 2009) and is based on the concept of responsive governance, *“in which individuals and decision-makers respond to problems rather than working to prevent them.”*

The case of fisheries of highly migratory fishes used by Webster (2015) and, in the case of BBNJ used here to illustrate and broaden the framework, is a classical dilemma of common-pool resource problem (CPRs). Natural resources do not have a specific owner; they are not naturally restricted to and for usage. But they can be used by many individuals or institutions. The usage of these resources can be done by different technologies, by the different intensity in place and time,

² The nineteenth meeting of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) to the Convention on Biological Diversity (CBD).

and can get overexploited. If this happens, the involved actors face a problem. Therefore, in many cases, they decide to understand what would be the institution to regulate the use or, in the absence of one, to establish an institution with rules for usage of the resource (Ostrom 2015).

For the emergent BBNJ debate, the '*problem*' was that over the past decades, human activities in areas beyond national jurisdiction have developed exponentially, also leading to an increase in the impacts on and threats to a still unknown marine biodiversity found in these areas (Druel & Gjerde 2014). It is a common pool resource problem. The issue of conservation and sustainable use of biodiversity, including marine biodiversity beyond national jurisdiction, has been attracting increasing attention as part of the growing concern about the future of our planet.

The lack of scientific knowledge about BBNJ is due to the research in areas beyond national jurisdiction being carried out in complex and little-known environments. In addition, with the development of new technologies and techniques, scientists have had to adjust their thinking about the processes and functions of ecosystems found in oceans. At the same time, knowledge about the biological diversity of the deep ocean is so limited that it is not possible to estimate the number of species in any region or to predict the geographic range they occupy.

Even with this so little knowledge, new economic interests, and the old, but now with technological intensification, have been showing up for the BBNJ. Biological resources beyond national jurisdiction are resources shared by all States. Markets treat shared resources as "free resources" available through an open-access regime. The commercial value or direct use value of ecosystem goods and services can be calculated to a certain extent by looking at the main commercial activities relating to biological resources currently being carried out in areas beyond national jurisdiction. For example, the commercial value of fisheries and bioprospecting can provide an idea of the direct use value of biodiversity, although the extent of bioprospecting activities currently being undertaken is unclear (A/60/63/Add.1).

According to Druel & Gjerde (2014) exploration of mineral resources in the ABNJ is now underway, with 19 contracts for exploration already approved by the International Seabed Authority³. Yet, it is estimated that by 2025, the global market for marine biotechnology is projected to reach \$6.4 billion, including the pharmaceutical industry, for drugs and beauty products, biofuel and varied chemical industries (Vierros et al. 2016; Blasiak et al. 2018). Marine drugs obtained from marine living organisms could be used as antioxidants, antifungals and antibiotics and to fight diseases such as HIV/AIDS, cancer, tuberculosis, malaria, osteoporosis, Alzheimer's and cystic fibrosis. In sum, the potential uses of marine organisms are numerous. The possibility that certain bacteria could be useful in dealing with marine pollution, especially oil spills, is currently being investigated. Furthermore, oceans have been characterized as an infinite reservoir of high-quality food, anti-biofouling and anti-corrosion substances, biosensors, biocatalysts, biopolymers, and other industrially important compounds. However, the amount of use or how many species are still left is unclear (Reports of Secretary-General – A/60/63/Add.1)

3 https://www.isa.org.jm/sites/default/files/files/documents/isba-19c-8_0.pdf

Even the knowledge about the economic activities is still obscure, is not possible to deny the economic potential of the area, and the great interest paid by some countries in those natural resources. Some countries are, since 2001, requesting the extension of the continental shelf to the Commission on the Limits of the Continental Shelf (CLCS)⁴ aiming to expand its sovereign rights on the natural resources of the seabed and marine subsoil, to acquire sovereign rights for the exploration and exploitation of natural resources on these new areas and to increase its geostrategic power, as it is stated by the Economic, Social and Environmental Council of France (Grignon 2013).

In a context where countries were increasing the claim of sovereignty over the extension of the continental shelf, when uncertainty about the status of natural resources became apparent for decision-makers and the competition to exploit them increased, and the regulatory risks seemed evident to the countries with great economic interests in the BBNJ, the ENGOs reports (Blasiak et al. 2017), the corporation interest (Blasiak et al 2018) and those claims from countries to expand the limits of continental shelf (Gjerde et al 2008) works as a proxy to *'signals'* to trigger individual responses aiming changing the existing regulatory framework to regulate the uses and conserve the resources on the ocean.

The United Nations Convention Law of the Sea (UNCLOS), which entered into force on 16 November 1994, sets forth the rights and obligations of states regarding the use of the oceans, their resources, and the protection of the marine and coastal environment. Although UNCLOS does not refer expressly to marine biodiversity, it is commonly regarded as establishing the legal framework for all activities in the oceans.

On the other hand, the Convention on Biological Diversity (CBD), which entered into force on 29 December 1993, defines biodiversity and aims to promote its conservation, the sustainable use of its components, and the fair and equitable sharing of the benefits arising from the use of genetic resources. However, not in areas beyond national jurisdiction, the Convention applies to processes and activities carried out under the jurisdiction or control of its parties.

Although the gap is clear and undeniable “some delegations suggested that this gap could be addressed through the adoption of an implementing agreement to the United Nations Convention on the Law of the Sea and other delegations were of the view that there was no need for new institutions and legal frameworks to be devised for specific problems and vulnerabilities (A/61/65, para 25). Under great economic interests, and a growing concern of the use and the conservation of marine living in the areas, a crisis in the oceans governance regulatory framework was emergent, and each country or group of countries presented their different views on the topic.

Thus, in this context, aware of the regulatory gaps (Table 2), as a *'response'* to the emergent scenario, UNGA established an *Ad-Hoc Open-ended Working Group* considering the uncertainty of the conditions of natural resources and the increasing of economic interests, aiming to solve the problem before it turns out unavoidable.

4 http://www.un.org/depts/los/clcs_new/commission_submissions.htm

Table 2. Regulatory gaps in the current governance system in ABNJ (Gjerde *et al.* 2008)

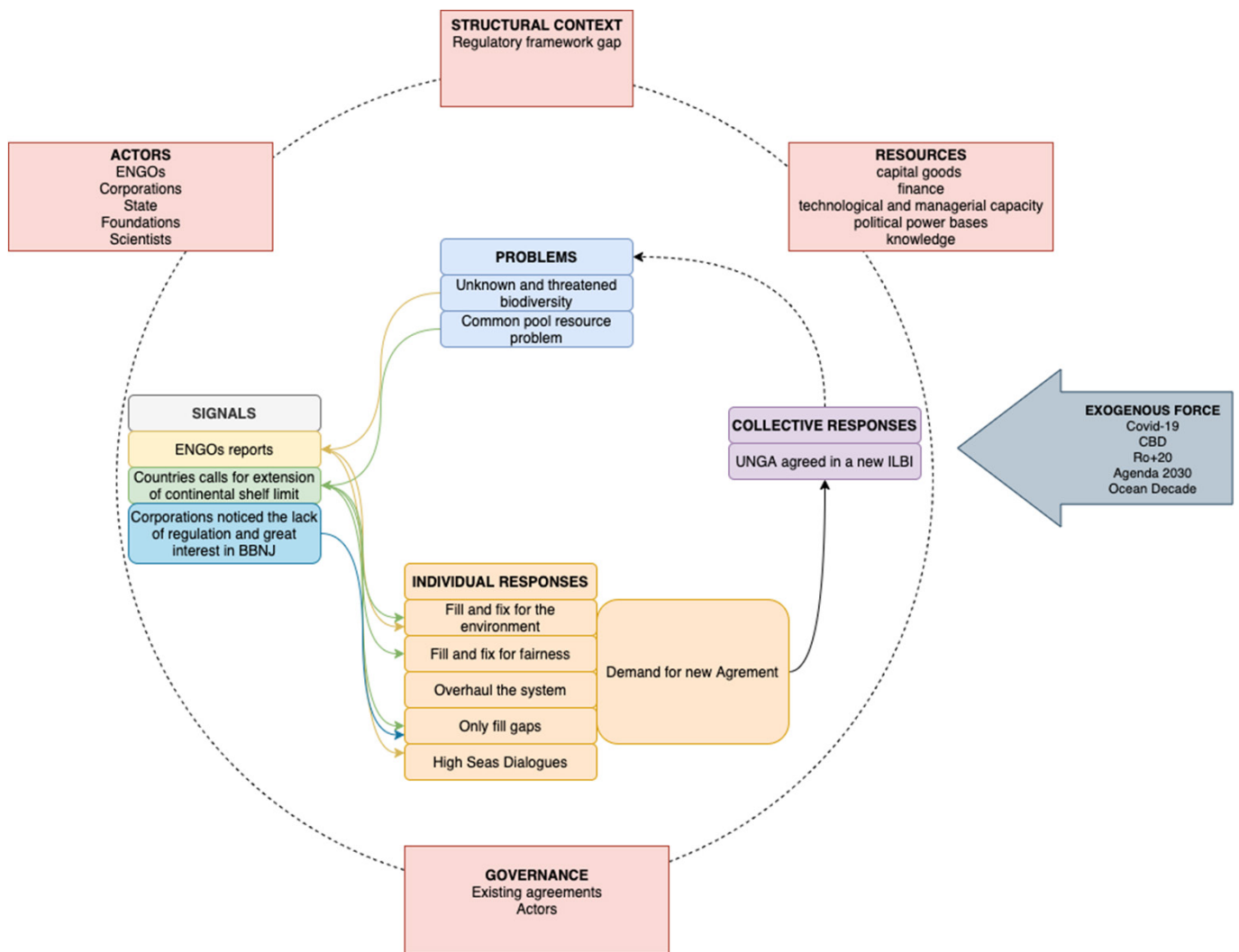
Regulatory gaps
Absence of global procedures and standards for applying modern conservation tools such as marine protected areas (MPAs), environmental impact assessments (EIAs) and strategic environmental assessments (SEAs)
Absence of a global instrument or mechanism to ensure that modern conservation principles such as ecosystem-based management and the precautionary principle are incorporated and applied by existing global and regional bodies
Lack of a sufficient legal mandate for ecosystem-based management, biodiversity conservation, cooperation and coordination in sectoral bodies in ABNJ
Lack of compliance and enforcement mechanisms to provide incentives for effective flag State performance
Lack of standards, procedures and guidance for capacity-building and marine technology transfer

Since the commencement of discussions in 2006, the focus has mainly been on gaps in the current international framework and whether these necessitate the adoption of a new instrument (Druel *et al.* 2013).

The Working group has met for over nine years, as it is shown on Table 1, and it is providing regular outcomes (letter) to the UNGA, where the decision should be taken, probably in 2020, if COVID-19 did not delay presential meetings. Currently, the UNGA has decided to convene the fourth session in August 2021. (Res 75/239). Table 1 shows the main outcomes from the letters sent to UNGA.

Exogenous factors can also affect the response delaying it or speeding up, particularly if they increase either the profit disconnect or the power disconnect (Webster, 2015; Webster *et al.* 2020). The ‘exogenous force’ for BBNJ was since 2012 reinforcing the process and keeping the pressure up to build the agreement as all actors were committed to achieve an ILBI. Thus, the Rio+20 “*The Future we want*” declaration, the Sustainable Development Goals and the debate about MGRs on CBD were the ones who had a role to maintain the commitment with the topic.

However, COVID-19 affect the development of negotiations, and since the last INC, no personal meetings were done. Despite the potential development in the national level, the negotiations have been delayed, as the expectation was to have an ILBI approved by 2020. Meanwhile, the High Seas Alliance carried out a series of virtual dialogues that could feedback on the process. Those webinars in 2020 provide an space to participants discuss matters related to the BBNJ Treaty, facilitating exchange among delegates and trying to keep the momentum alive (Vadrot *et al.* 2021; IUCN, 2020; Yadav and Gjerde, 2020).

Figure 1. The AC/SC framework applied to the BBNJ case.

The Structural Context

The Working group produced a document (A/69/780) addressed to the 69th General Assembly of what would be a possible agreement on the ABNJ, and based on that the UNGA decided to develop an international legally binding instrument under UNCLOS on the conservation and sustainable use of BBNJ. To that end, the Assembly established a Preparatory Committee (RES 69/292), to make substantive recommendations to the UNGA, in order to have a draft of an implementing agreement.

The Working group co-chairs presented a non-paper (first draft) dated 17 December 2014, which contained draft elements of recommendations to the sixty-ninth session of the General Assembly and had been prepared upon the request of delegations at the meeting of the Working Group held in June 2014. The non-paper was a compilation of the elements submitted by delegations, with a view to facilitating the development of draft recommendations. This document, even informal, and not representing the countries' consensual view, is the main 'feedback' from the Working Group to the governance of the BBNJ under the UNGA auspices (Figure 1).

The countries spent days discussing what was consensus, and what was not acceptable within the 2011 package. The ‘feedback’ from the Working group, even being an informal draft document, is impacting the structural context and governance itself, bringing the first components of a future binding agreement. Therefore, will alter ‘actors’ behaviors related to the draft, as governance factors in the structural context include formal laws, regulations, and agencies, as well as informal rules and norms governing actor behavior. Governance here, in a broad sense, would “*encompasses the activities of governments, but it also includes the many other channels through which “commands” flow in the form of goals framed, directives issued, and policies pursued*” (Rosenau, 1995).

Besides the strong recommendation made by UNGA on Res 59/24 (para 74) to encourage States to include relevant experts in their delegations attending the meetings, the participants list of, at least the Preparatory Meetings, were not constituted by experts. A preliminary analysis of the list of participants shows that delegations are mostly entirely formed and built by government representatives and also navy and mining ministry representatives.

In the First Working Group Meeting (2006) “*delegations considered that it was essential to build a stronger scientific basis on marine biological diversity beyond areas of national jurisdiction in order to facilitate the adoption and implementation of improved sustainable management and conservation measures of those marine resources (para 18)*”

However, even considering science as an important component, most representatives were UN Ambassadors or government representatives. Few countries prioritize researchers as part of delegations, like Japan, Chile, and the Republic of Korea.

According to Webster (2015) “*In formulating their responses, actors depend on available resources, which include natural resources, capital goods and finance, technological and managerial capacity, and political power bases. Where resources are limited, the responses of actors and the operation of the system as a whole are also limited, unless actors can find viable means of expanding the resource base.*”

As the case of ABNJ is not yet a regime on the implementation phase, instead it is a regime in formation, the resources here are many and also the ‘available knowledge’, which still is scarce and has a high degree of uncertainty.

Besides, in the 2006 Working group first meeting (A/61/65), some delegations “*noted that although more research would be welcome, enough information was already available for making immediate and necessary policy and management decisions, including on the basis of the precautionary approach*” (para 18).

Delegations agreed that marine scientific research played a fundamental role with regard to marine biological diversity, and they focused their statements on several aspects relating to cooperation and coordination in this field.

Notwithstanding past and present efforts and initiatives to increase knowledge of marine biodiversity beyond areas of national jurisdiction, significant knowledge and information gaps still exist. At the 2010 meeting of the Working Group, some delegations recalled that the need for further studies should not be used as a reason to delay the development of measures for the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction (para 262).

Actors

Actors are part of the structural context and may be individuals, groups, or states. For BBNJ, as the issue-area is still developing, we can identify a diversified group of actors and that can still change and expand as the agreement evolves.

States have been proactively engaged in the discussions as part of UNGA. Each State has a specific position, and they have stated it in blocks, mostly G-77 and China, African countries, Group of Latin America Countries, USA, Japan, European countries (REF). Those countries or group of countries have been declaring different position on the BBNJ matter (Webster et al. 2020).

Scientists are key in international negotiations and many UN resolutions relating to the marine environment acknowledge their role (UN 1992; UN 2012; ICCAT, 1966). In many cases, they do not only provide advice, but they also go beyond advocating for the science, and through trust and legitimacy (Gonçalves 2021), they constitute what is called epistemic community (Haas, 2015). For the BBNJ debate, as the ILBI is not yet approved or even ratified, and considering the complexities of the issue, the scientist may come from different communities and would include deep-sea scientists, marine biologists, ecologists, molecular biologists, geneticists, oceanographers, chemists, data managers, mining engineers and others (Harden-Davies, 2018).

The Environmental NGOs employ different campaign strategies to pursue influence at international politics, in a range of topics from human rights to environment, with varying levels of success (Blasiak et al. 2017). In the BBNJ case, it is reported that they have been involved since the beginning of the process, and generally positioning themselves through coalitions such as the High Seas Alliance, which includes more than 40 NGOs, including Greenpeace, the Natural Resources Defense Council, OceanCare, and Oceana (HSA, 2018). Most of the time, their position papers were pro-conservation (Mendenhall et al 2019), especially regarding the need of improve and expanding protection of the ocean with areas-based management tools (HSA, 2018). The International Union for the Conservation of Nature (IUCN, 2020) and the Pew international Group were also following up the negotiations reinforcing the need to increase ocean protection and adopt an ILBI (PEW, 2013). The expectations and the advocacy from the conservation organizations are towards a robust ILBI that could restore the biodiversity and the ocean resilience (Yadav and Gjerde, 2020). However, States have been lagging behind those expectations negotiating an agreement mostly to fill for fairness or fill gaps (Webster et al 2020).

The industry and corporation have an increased interest in BBNJ subject. Blasiak et al. (2018) reports a growing commercial interest in marine genetic, being the vast majority of patents were registered in the last 15 years, transmitting a strong 'signal' that a regulatory framework was needed. They also mapped that the patents were divided by different groups. Public and private universities accounted for 12%, while entities such as governmental bodies, individuals, hospitals, and nonprofit research institutes registered the remaining 4%. A single transnational corporation had registered 47% of all patent sequences: BASF, the world's largest chemical manufacturer. The power of corporations and industries needs to be taken into account when discussing the responsive governance. Corporations

as actors have access, power, and influence over the negotiations, and may shift the negotiation to a more pragmatic approach (Barros-Platiau and Gonçalves 2019).

Therefore, the actors are the ones responsible for triggering the signals and the individual responses. In order to elaborate their responses, the different type of actors need resources (natural resources, capital goods and finance, technological and managerial capacity, knowledge and political power bases). When those resources are not available or are limited, the outcomes are also limited (Webster, 2015). In some cases, the lack of resource can also be used as an excuse for inaction, when, in practical terms could be used to catalyze change (e.g.: technological innovation to support enforcement and compliance) and setting an example a global cooperation to safeguard our global commons (Gjerde, 2012; Yadav and Gjerde, 2020).

Conclusion

While the decision on the ILBI have been postponed due to the COVID outbreak, still reach consensus has remained deceptive as the States position differ on key matters. It is argued here that as governance is a problem driven, considering the complexity of BBNJ, the chances of having a flexible agreement that will only comply with partial response to the environmental problem are significant, and this will only reduce or mitigate part of the problem but not all. In cases like that, the governance will remain ineffective in some ways.

As the ILBI process is still underway, exogenous factors as the Agenda 2030 and the Ocean Decade can inform the process and trigger a more effective collective response. Dealing with potential tragedies of the commons is never easy and never finished. It is an endless endeavor, and the responsive governance cycle may help to understand and diagnose where the main obstacles are for improving the process providing knowledge and resources for actors enabling an effective implementing agreement for the use and conservation of BBNJ.

References

- Ardron, Jeff A., Henry A. Ruhl, and Daniel OB Jones. "Incorporating transparency into the governance of deep-seabed mining in the Area beyond national jurisdiction." *Marine policy* 89 (2018): 58-66.
- Ardron, Jeff, Elisabeth Druel, Kristina Gjerde, Katherine Houghton, Julien Rochette, and Sebastian Unger. "Advancing governance of the high seas." *IDDRI Policy Brief* 6, no. 13 (2013): 1-11.
- Barros-Platiau, Ana Flávia. And Leandra Regina Gonçalves. 2019. "Antarctica and ABNJ in the Anthropocene : Challenges to the Sustainable Management of Marine Genetic Resources ?" *Ambiente e Sociedade*. 22.
- Barros-Platiau, Ana Flávia, Carina Costa de Oliveira. *Conservation of living resources in areas beyond national jurisdiction: BBNJ and Antarctica = Conservação dos recursos vivos em áreas além da jurisdição nacional: BBNJ e Antártica* / organizadoras – Rio de Janeiro: Lumen Juris, 2020. 388 p. ; 23 cm.

- Bennett, Nathan James, Jessica Blythe, Carole Sandrine White, and Cecilia Campero. “Blue growth and blue justice: Ten risks and solutions for the ocean economy.” *Marine Policy* 125 (2021): 104387.
- Berkes, Fikret, Johan Colding, and Carl Folke, eds. *Navigating social-ecological systems: building resilience for complexity and change*. Cambridge University Press, 2008.
- Blasiak, Robert, Carole Durussel, Jeremy Pittman, Carole-Anne Sénit, Matilda Petersson, and Nobuyuki Yagi. “The role of NGOs in negotiating the use of biodiversity in marine areas beyond national jurisdiction.” *Marine Policy* 81 (2017): 1-8.
- Blasiak, Robert, Jean-Baptiste Jouffray, Colette CC Wabnitz, Emma Sundström, and Henrik Österblom. “Corporate control and global governance of marine genetic resources.” *Science advances* 4, no. 6 (2018): eaar5237.
- Blasiak, Robert, Jeremy Pittman, Nobuyuki Yagi, and Hiroaki Sugino. “Negotiating the use of biodiversity in marine areas beyond national jurisdiction.” *Frontiers in Marine Science* 3 (2016): 224.
- Campbell, Lisa M., Noella J. Gray, Luke Fairbanks, Jennifer J. Silver, Rebecca L. Gruby, Bradford A. Dubik, and Xavier Basurto. “Global oceans governance: new and emerging issues.” *Annual review of environment and resources* 41 (2016): 517-543.
- Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) Website: Convention Area. Available at <<https://www.ccamlr.org/en/organisation/convention-area>> (accessed 4 June 2021).
- De Santo, Elizabeth M., Áslaug Ásgeirsdóttir, Ana Barros-Platiau, Frank Biermann, John Dryzek, Leandra Regina Gonçalves, Rakhyun E. Kim et al. “Protecting biodiversity in areas beyond national jurisdiction: An earth system governance perspective.” *Earth System Governance* 2 (2019): 100029.
- De Santo, Elizabeth M., Elizabeth Mendenhall, Elizabeth Nyman, and Rachel Tiller. “Stuck in the middle with you (and not much time left): the third intergovernmental conference on biodiversity beyond national jurisdiction.” *Marine Policy* 117 (2020): 103957.
- Druel, Elisabeth, and Kristina M. Gjerde. “Sustaining marine life beyond boundaries: options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea.” *Marine Policy* 49 (2014): 90-97.
- Druel, Elisabeth, and Kristina M. Gjerde. “Sustaining marine life beyond boundaries: options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea.” *Marine Policy* 49 (2014): 90-97.
- Druel, Elisabeth, and Kristina M. Gjerde. “Sustaining marine life beyond boundaries: options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea.” *Marine Policy* 49 (2014): 90-97.
- Gjerde, Kristina M. “Challenges to protecting the marine environment beyond national jurisdiction.” *The International Journal of Marine and Coastal Law* 27, no. 4 (2012): 839-847.
- Gjerde, Kristina M., and Anna Rulska-Domino. “Marine protected areas beyond national jurisdiction: some practical perspectives for moving ahead.” *The International Journal of Marine and Coastal Law* 27, no. 2 (2012): 351-373.

- Gjerde, Kristina M., Harm Dotinga, Sharelle Hart, Erik Jaap Molenaar, Rosemary Rayfuse, and Robin Warner. "Regulatory and governance gaps in the international regime for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction." *IUCN, Gland, Switzerland* (2008).
- Gonçalves, Leandra R. "Regional Fisheries Management Organizations." Springer Series. 2021.
- Gonçalves, Leandra Regina; Michelle Portman, Mabel Augustowski, Ioaniss Giovo and Peter Mackelworth. Ocean Governance: Exploring how marine conservation is taken into account using Evolutionary Governance Theory. In: *Conservation of living resources in areas beyond national jurisdiction : BBNJ and Antarctica = Conservação dos recursos vivos em áreas além da jurisdição nacional : BBNJ e Antártica* / organizadoras Ana Flávia Barros – Platiau, Carina Costa de Oliveira. – Rio de Janeiro: Lumen Juris, 2020. 388 p. ; 23 cm.
- Haas, Peter M. *Epistemic communities, constructivism, and international environmental politics*. Routledge, 2015.
- Harden-Davies, Harriet. "The next wave of science diplomacy: marine biodiversity beyond national jurisdiction." *ICES Journal of Marine Science* 75, no. 1 (2018): 426-434.
- HAS (2018). High Seas Alliance. *High Seas Alliance recommendations for Marine Protected Areas under the new international legally binding instrument*. Available at: http://www.highseasalliance.org/wp-content/uploads/2013/04/HSA-MPA-recommendations_March-2018.pdf Accessed on: June, 2021.
- Houghton, Katherine, and Julien Rochette. "Introduction: Advancing governance of areas beyond national jurisdiction." *Marine Policy* 49 (2014): 81-84.
- ICCAT (International Commission for the Conservation of Atlantic Tunas – ICCAT. Convention text Madrid: ICCAT, 1966. Available at: <https://www.iccat.int/documents/commission/basictexts.pdf> Accessed June, 2021;.
- IUCN (2020). 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 IUCN Comments. Available at: https://www.iucn.org/sites/dev/files/content/documents/iucn_comments_on_revised_bbnj_draft_text_february_2020.pdf Accessed on: June, 2021.
- Klinger, Dane H., Anne Maria Eikeset, Brynhildur Davíðsdóttir, Anna-Marie Winter, and James R. Watson. "The mechanics of blue growth: management of oceanic natural resource use with multiple, interacting sectors." *Marine Policy* 87 (2018): 356-362.
- Marciniak, Konrad Jan. "New implementing agreement under UNCLOS: A threat or an opportunity for fisheries governance?." *Marine Policy* 84 (2017): 320-326.
- Mendenhall, Elizabeth, Elizabeth De Santo, Elizabeth Nyman, and Rachel Tiller. "A soft treaty, hard to reach: the second inter-governmental conference for biodiversity beyond national jurisdiction." *Marine Policy* 108 (2019): 103664.
- OECD. *Strengthening Regional Fisheries Management Organizations*. ISBN 978-92-64-07332-6 (2009)
- Ostrom, Elinor. "A general framework for analyzing sustainability of social-ecological systems." *Science* 325, no. 5939 (2009): 419-422.

- Ostrom, Elinor. *Governing the commons: The evolution of institutions for collective action*. Cambridge university press, 1990.
- PEW (2013). *Conserving Marine Biodiversity: Addressing Existing Commitments And Designing Next Steps For Action*. Policy recommendations.
- Ramirez-Llodra, Eva, Paul A. Tyler, Maria C. Baker, Odd Aksel Bergstad, Malcolm R. Clark, Elva Escobar, Lisa A. Levin et al. "Man and the last great wilderness: human impact on the deep sea." *PLoS One* 6, no. 8 (2011): e22588.
- Rosenau, James N. "Governance in the Twenty-first Century." In *Palgrave Advances in Global Governance*, pp. 7-40. Palgrave Macmillan, London, 2009.
- Tiller, Rachel, Elizabeth De Santo, Elizabeth Mendenhall, and Elizabeth Nyman. "The once and future treaty: towards a new regime for biodiversity in areas beyond national jurisdiction." *Marine Policy* 99 (2019): 239-242.
- UN. Rio Declaration. Agenda 21. Rio declaration on environment and development. (1992).
- UN. The Future we want. Rio Declaration. (2012). Available at: <http://rio20.net/en/iniciativas/the-future-we-want-final-document-of-the-rio20-conference/> Accessed on: June 2021.
- Vadrot, Alice, Arne Langlet, Ina Tessnow-von Wysocki, Petro Tolochko, Emmanuelle Brogat, and Silvia Ruiz-Rodríguez. "Marine Biodiversity Negotiations During COVID-19: A New Role for Digital Diplomacy?" *Global Environmental Politics*. Published electronically April 21, 2021. muse.jhu.edu/article/789823.
- Vierros, Marjo, Curtis A. Suttle, Harriet Harden-Davies, and Geoff Burton. "Who owns the ocean? Policy issues surrounding marine genetic resources." *Limnol. Oceanogr. Bull.* 25, no. 2 (2016): 29-35.
- Visbeck, Martin, Ulrike Kronfeld-Goharani, Barbara Neumann, Wilfried Rickels, Jörn Schmidt, Erik van Doorn, Nele Matz-Lück, and Alexander Proelss. "A sustainable development goal for the ocean and coasts: global ocean challenges benefit from regional initiatives supporting globally coordinated solutions." *Marine Policy* 49 (2014): 87-89.
- Webster, D. G. "The action cycle/structural context framework: A fisheries application." *Ecology and Society* 20, no. 1 (2015).
- Webster, D. G. *Adaptive governance: The dynamics of Atlantic fisheries management*. Mit Press, (2009).
- Webster, D.G., Leandra Regina Gonçalves, Rakhyun E. Kim and Jennifer Bailey. How power disconnects may affect the outcome of the ongoing BBNJ negotiations? In: *Conservation of living resources in areas beyond national jurisdiction : BBNJ and Antarctica = Conservação dos recursos vivos em áreas além da jurisdição nacional : BBNJ e Antártica / organizadoras Ana Flávia Barros – Platiau, Carina Costa de Oliveira. – Rio de Janeiro: Lumen Juris, 2020. 388 p. ; 23 cm.*
- WOA (2021). The Second World Ocean Assessment WORLD OCEAN ASSESSMENT II. Available at: <https://www.un.org/regularprocess/sites/www.un.org.regularprocess/files/2011859-e-woa-ii-vol-i.pdf> Accessed on: June, 2021.
- Wright, Glen, Julien Rochette, Kristina Gjerde, and Isabel Seeger. "The long and winding road: negotiating a treaty for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction." *Paris: IDDRI* (2018).

- Yadav, Siddharth Shekhar, and Kristina Maria Gjerde. “The ocean, climate change and resilience: Making Ocean areas beyond national jurisdiction more resilient to climate change and other anthropogenic activities.” *Marine Policy* 122 (2020): 104184.
- gestão sustentável dos recursos minerais marinhos/La fonction du droit dans la gestion durable des ressources Minerales Marines*. Rio de Janeiro: Editora Processo, 2021 (no prelo).
- SDG Indicators. *Metadata repositior*. Disponível em: <https://unstats.un.org/sdgs/metadata/?Text=&Goal=14&Target=14.c>. Acesso em 25 fev. 2021.
- SDG Indicators. *Sustainable Development Goals*. Disponível em: <https://unstats.un.org/sdgs/indicators/indicators-list/>. Acesso em: 5 jan. 2020.
- UNITED Nations. *A/CONF.210/2016/INF/1 – Delegations to the resumed Review Conference, New York, 24-27 May 2016*. Disponível em: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/187/31/PDF/N1618731.pdf?OpenElement>. Acesso em 25 jan. 2021.
- UNITED Nations. *A/CONF.210/2010/INF/2 – Delegations to the resumed Review Conference, New York, 24-28 May 2010*. Disponível em: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/403/55/PDF/N1040355.pdf?OpenElement>. Acesso em 25 jan. 2021.
- UNITED Nations Convention on The Law of The Sea. *Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the Implementation of Part XI of the Convention and of the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks as at 27 June 2019*. Disponível em: <https://www.informea.org/en/treaties/unclos/parties>. Acesso em 07 fev. 2021.. Acesso em 07 fev. 2021.
- VAN BELLEN, Hans Michael. *Indicadores de sustentabilidade: uma análise comparativa*. 2.^a ed., São Paulo: FGV, 2008.
- YOUNG, O. “Rights, Rules and Resources in World Affairs”. In: YOUNG, O. (Ed.). *Global Governance. Drawing Insights from the Environmental Experience*. MIT Press, 2004.
- YOUNG, O. *Governing complex systems: social capital for the Anthropocene*. Cambridge: The MIT Press, 2017.
- YOUNG, O.; STOKKE, O. “Why is it hard to solve environmental problems? The perils of institutional reductionism and institutional overload. *International Environmental Agreements*, v. 20, n. 1, p. 5-19.