

Historic UN talks could save the high seas

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Introduction

Since the adoption of the United Nations (UN) Convention on the Law of the Sea (UNCLOS) in 1982, human activities in areas beyond national jurisdiction (ABNJ)¹ have developed exponentially. Existing activities such as shipping and fishing have intensified and expanded, while a range of new activities are under development.² Climate change and ocean acidification are predicted to compound the impacts of these activities and place further pressure on marine ecosystems.³

In 2004, the UN General Assembly (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 of national jurisdiction* (the Working Group).⁴ The focus of the Working Group was mainly been on weaknesses and gaps in the current international framework and whether these necessitate the adoption of a new instrument. In January 2015, the Working Group recommended to the UNGA that it “decide to develop an international legally-binding instrument under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction”.⁵

A Preparatory Committee (PrepCom) will meet at UN Headquarters for a total of 4 weeks in 2016 and 2017 in order to prepare substantive recommendations on elements of a draft text.⁶ The PrepCom is to report to the UNGA, which will then decide by September 2018 on the convening and starting date of an intergovernmental conference.

What is the potential impact for high seas management?

Depending on the contours of a final agreement, a new instrument may:

- provide for the creation of marine protected areas (MPAs) in ABNJ, potentially restricting or prohibiting certain activities in a given area;
- require environmental impact assessment (EIA) to be carried out for a range of activities in ABNJ that do not currently require such a process; and
- institute a new legal framework for the exploitation of marine genetic resources (MGRs) taken from ABNJ.

Background

UNCLOS provides the basic “Constitution for the Ocean” and some general environmental duties, while further targets and objectives are provided by other Conventions and commitments, eg the 2010 “Aichi Targets”⁷ and the 2015 Sustainable Development Goals (SDGs). A variety of international instruments applicable to the ocean pre-date UNCLOS, with many additional instruments adopted since its entry into force — as a result the ocean governance framework is often characterised as fragmented.⁸

A number of international organisations have a mandate in ABNJ: the UN Food and Agriculture Organisation (FAO) already takes a proactive role in global fisheries management, while Regional Fisheries Management Organisations (RFMOs) are the competent bodies for managing migratory and straddling fish stocks; exploration and exploitation of the mineral resources are regulated by the International Seabed Authority (ISA); shipping and dumping within the framework of the International Maritime Organisation (IMO).

At the same time, a number of initiatives have been established with the aim of advancing the conservation and sustainable use of marine biodiversity in ABNJ at the regional level, including the establishment of MPAs⁹ and fisheries closures.¹⁰

There are a number of issues with the current governance framework, notably:

- absence of a comprehensive set of overarching governance principles;
- a fragmented institutional framework;
- absence of a global framework to establish MPAs in ABNJ;
- legal uncertainty surrounding the status of marine genetic resources in ABNJ;
- lack of global rules for EIAs and strategic environmental assessments (SEAs) in ABNJ;
- limited capacity building and technology transfer;
- uneven and often ineffective governance of high seas fisheries; and
- flag state responsibility and the “genuine link” issue.¹¹

The Working Group

An ideological divide appeared during the first meeting of the Working Group in 2006 regarding the legal status of marine genetic resources (MGRs) found in “the Area” (ie, the seabed beyond national jurisdiction).¹² Extreme environments in ABNJ (such as seamounts and hydrothermal vents) have given rise to the development of organisms with unique characteristics. These organisms are potential sources of novel genes that could be of both scientific and commercial interest. The search for such genes for use in commercial products has increased in ABNJ in recent years,¹³ with the vast majority of patents being held by a handful of developed countries. In this context, the G77, joined by China, advocated the application of the “common heritage of mankind” principle to MGRs found in the Area, entailing that benefits arising from the exploitation of MGRs should be shared between all countries, while others have insisted that MGRs are governed by the traditional “freedom of the high seas” principle. This divide became a defining issue during subsequent meetings.

Other states focussed their attention on issues such as the application of the precautionary approach and the establishment of MPAs in ABNJ. Recognising that a regulatory gap existed in UNCLOS with respect to the protection of marine biodiversity in ABNJ, the European Union (EU) called for the adoption of an Implementing Agreement (IA) to UNCLOS.

In 2011, the EU and the G77+China, now joined by Mexico, found a common position. They agreed to work towards the establishment of an intergovernmental negotiating process that would “address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction” focussing on a so-called “Package Deal” of issues, namely: MGRs, including questions on the sharing of benefits; measures such as area-based management tools, including MPAs; EIAs; capacity building and the transfer of marine technology.¹⁴

The PrepCom

The first meeting of the PrepCom took place at UN Headquarters in New York from 30 April to 8 May. The full-to-overflowing meeting room was packed with delegates and civil society representatives, causing Chair Eden Charles of Trinidad and Tobago to remark that the importance and urgency of the meeting was clear.

Initial statements, which were general and carefully worded, were followed by informal working groups on the four issues agreed in the 2011 “Package Deal”. Discussions were frank, but constructive, and seemed to move swiftly, often in stark contrast to the much slower pace of the Working Group.¹⁵

States clashed over whether the MGRs found in ABNJ should be freely exploited on a “first come first

served” basis, or if they should be part of the common heritage of mankind, an issue that has been intractable throughout the history of the discussions. Some delegations, like the EU, repeated their calls for a pragmatic approach: developing a mechanism for benefit sharing while shelving the more ideological question of the legal status of MGRs.¹⁶

States spoke positively about marine conservation and the need for protected areas, though some were clearly keen to limit ambition. While the majority of states focussed on the creation of a mechanism for the establishment of a network of MPAs based on the best available science, a few strongly resisted the notion that MPAs could be an end in themselves, arguing instead that MPAs must counter specific threats and be time-limited.¹⁷

The vexed issue of what a new agreement might mean for fisheries was unsurprisingly a point of dispute, though the conversation appears to have shifted from *whether* to include fisheries to *how* it will be included.¹⁸ Most states agree that fish are part of high seas biodiversity and that fishing, especially destructive bottom trawling, is currently the biggest threat. A small number of fishing states nonetheless continue to argue that current regulations are sufficient.

Discussion of EIA was somewhat less charged — states agree on the need for an EIA process and a range of principles, options and ideas were put forward, though there is not yet a clear agreement on how EIA in ABNJ will work in practice.

There is a high level of agreement on the need to provide developing countries with the know-how and technology to conduct marine scientific research, though it remains unclear how a new agreement will kickstart a new era of assistance and cooperation. In particular there is likely to be a difference of opinion between developing states that seek some sort of institutional mechanism or multilateral approach, and developed states that favour lighter measures.

Advancing the negotiations

The challenges inherent in negotiating a new agreement should not be underestimated. The negotiations will have to navigate a range of complex and often charged issues, including:

- ***Marine genetic resources and access and benefit sharing***

Parties will need to develop a mechanism that can reconcile the views of those in favour of the application of the common heritage principle and those that have argued for the application of the freedom of the high seas principle. An ABS regime will need to cover three main issues:

- access to the resources;
- fair and equitable sharing of benefits; and
- compliance.

- **MPAs**

The negotiations will have to consider a number of issues in the creation of MPAs in ABNJ, including:

- criteria used to identify potential areas for protection;
- proposal and adoption of MPAs;
- implementation of management measures; and
- enforcement.

- **Other area-based management tools**

The negotiations are not limited to MPAs and may wish to consider the broadest possible range of options available for achieving conservation and sustainable use.¹⁹

- **EIAs**

Some elements of EIAs to be considered include the threshold for EIAs, the content of impact statements, and consultation processes, as well as provisions for review, monitoring and reporting. Similar issues will also need to be considered in relation to SEAs.

- **Capacity building and transfer of marine technology**

With UNCLOS provisions and international guidelines already in place, the key question is how a new agreement can catalyse capacity building and technology transfer efforts beyond those already being undertaken.

There are also a number of general issues that will be part of the negotiation:

- **Institutional arrangements**

The effective implementation of the provisions of a new international instrument for ABNJ will potentially necessitate the establishment of some institutional structure through which Parties can take decisions, undertake coordination and integration efforts, and perform reviews and assessments of implementation.

- **Not undermining the mandates of existing organisations**

A number of bodies at the global and regional levels already have a mandate covering ABNJ and all delegations to the Working Group agreed that any eventual agreement should not undermine existing agreements or institutions. The question of what this means in practice has proved elusive and could continue to be a point of contention.

- **Addressing fisheries**

Fisheries in ABNJ are partially covered by the UN Fish Stocks Agreement, which has not attained universal ratification, while the efficacy and completeness of regulation has been criticised.²⁰ Given that fishing, and especially destructive fishing practices, is currently the greatest threat to marine biodiversity in ABNJ, many delegations have argued that a new agreement should make improvements to the existing fisheries management framework.

- **Funding**

The issue of how funding for the implementation of a new agreement components could be raised and equitably allocated will be crucial to the success of any new agreement.

Conclusion

While there will be many challenges on the road to a new international legally binding instrument on marine biodiversity in areas beyond national jurisdiction, the commencement of formal discussions provides a hopeful moment for the global ocean and a further step in the development of the law of the sea.

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Footnotes

1. ABNJ includes the high seas, ie the water column, and “the Area”, ie the seabed, beyond the 200 nautical mile limit of States’ Exclusive Economic Zones.
2. See, eg E Ramirez-Llodra, et al, “Man and the Last Great Wilderness: Human Impact on the Deep Sea” (2011) 6(8) *PLoS ONE*; A Merrie, et al, “An Ocean of Surprises — Trends in Human Use, Unexpected Dynamics and Governance Challenges in Areas beyond National Jurisdiction” (2014) 27 *Global Environmental Change* 19–31, doi:10.1016/j.gloenvcha.2014.04.012; Lorna Inness et al, “The First Global Integrated Marine Assessment (World Ocean Assessment I),” (2016).
3. J-P Gattuso, et al, “Contrasting Futures for Ocean and Society from Different Anthropogenic CO₂ Emissions Scenarios” (2015) 349(6243) *Science*; Ella L Howes, et al, “The Oceans 2015 Initiative, Part I: An Updated Synthesis of the Observed and Projected Impacts of Climate Change on Physical and Biological Processes in the Oceans” (2015); L Weatherdon, et al, “The

- Oceans 2015 Initiative, Part II: An Updated Understanding of the Observed and Projected Impacts of Ocean Warming and Acidification on Marine and Coastal Socioeconomic Activities/sectors” (2015).
4. “Marine biological diversity” is not specifically defined. UN A/60/63/Add.1, which established the Working Group, uses the definition in art 2 of the Convention on Biological Diversity, ie “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems”.
 5. *Recommendations 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 to the sixty-ninth session of the General Assembly*, 23 January 2015, p 1 available at www.un.org/Depts/los/biodiversityworkinggroup/documents/AHWG_9_recommendations.pdf. The recommendations of the Working Group were formally approved by UNGA Resolution 69/292 in June 2015.
 6. UNGA, *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*, 19 June 2015, A/RES/69/292, available at www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/292.
 7. Adopted under the auspices of the Convention on Biological Diversity (1992), see www.cbd.int/sp/targets/.
 8. K Töpfer et al, “Charting Pragmatic Courses for Global Ocean Governance” (2014) 49 *Marine Policy* 85.
 9. J Rochette, et al, “Delivering the Aichi Target 11: Challenges and Opportunities for Marine Areas beyond National Jurisdiction” (2014) 24 *Aquatic Conservation: Marine and Freshwater Ecosystems* 31.
 10. G Wright, et al, “*Advancing Marine Biodiversity Protection through Regional Fisheries Management: A Review of Bottom Fisheries Closures in Areas beyond National Jurisdiction*” (2015) 61 *Marine Policy* 134.
 11. According to UNCLOS, “every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas” (art 90) on the condition that there is a “genuine link between the State and the ship” (art 91). UNCLOS does not precisely stipulate what such a “genuine link” entails. In the absence of detailed guidance on attributing nationality (ie a “flag”) to a ship, the practice of “open registries”, “flags of convenience”, or “flags of non-compliance” has flourished, ie states with little interest in effectively regulating vessels provide registration, generally for a fee.
 12. “The seabed and ocean floor, and subsoil thereof, beyond the limits of national jurisdiction” is known as “the Area” (UNCLOS, art 1).
 13. S Arnaud-Haond, et al “Marine Biodiversity and Gene Patents” (2011) 331 *Science* 1521; A Broggiato, et al, “Fair and Equitable Sharing of Benefits from the Utilization of Marine Genetic Resources in Areas beyond National Jurisdiction: Bridging the Gaps between Science and Policy” (2014) 49 *Marine Policy* 176.
 14. UNGA, *Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly*, 30 June 2011, Document A/66/119, §I.1(a) and (b), available at www.un.org/depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm.
 15. See IISD Earth Negotiations Bulletin, *1st Session of the Preparatory Committee Established by the UN 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”* 28 March-8 April 2016, www.iisd.ca/oceans/bbnj/prepcom1/.
 16. Above.
 17. Above n 15.
 18. Above n 15.
 19. Similar language, that of “other effective area-based conservation measures”, is used in the context of CBD Aichi Target 11. Early commentary suggests that such measures may entail: a) an express purpose of biodiversity conservation; b) the primacy of conservation objectives where they conflict with other objectives; c) long-term management; and d) the possibility that conservation objectives can be achieved as a co-benefit of other management efforts (Harry Jonas, et al, “New Steps of Change: Looking beyond Protected Areas to Consider Other Effective Area-Based Conservation Measures” (2014) 20 *Parks* 111).
 20. See, eg S Cullis-Suzuki and D Pauly, “Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations” (2010) 34 *Marine Policy* 1036.