



This article is based on research that has received financial support from the French government in the framework of the programme « Investissements d'avenir », managed by ANR (French national agency for research) under the reference ANR-10-LABX-14-01.

Institut du développement durable
et des relations internationales
27, rue Saint-Guillaume
75337 Paris cedex 07 France

ISSUE BRIEF

N°02/15 FEBRUARY 2015 | OCEANS AND COASTAL ZONES

A new chapter for the high seas?

Historic decision to negotiate an international legally binding instrument on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction

Julien Rochette, Glen Wright (IDDRI), Kristina M. Gjerde (IUCN), Thomas Greiber, Sebastian Unger (IASS), Aurélie Spadone (IUCN)

Marine areas beyond national jurisdiction (ABNJ) represent around half of the Planet's surface and a significant amount of its biodiversity. In recent years, the international community has become increasingly aware of the growing and expanding threats to marine biodiversity in ABNJ. To address this issue, the United Nations General Assembly (UNGA) created an Ad Hoc Open-ended Informal Working Group ("BBNJ Working Group") to discuss the conservation and sustainable use of marine biodiversity in ABNJ.

Since the commencement of discussions in 2006, the focus has mainly been on weaknesses and gaps in the current international framework and whether these necessitate the adoption of a new instrument. In particular, States have discussed the possible adoption of an Implementing Agreement to the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biodiversity in ABNJ (UNCLOS IA).

At the 2012 United Nations Conference on Sustainable Development ("Rio+20"), States committed to address on an urgent basis the conservation and sustainable use of marine biodiversity in ABNJ and agreed to decide by the end of the 69th session of the UNGA (September 2015) whether or not to launch negotiations for the conclusion of a new international instrument. This decision-making process spanned three meetings of the BBNJ Working Group, specifically convened to discuss "the scope, parameters and feasibility of an international instrument under UNCLOS".

At the third meeting, held on 20-23 January 2015, States took the historic step of agreeing to open negotiations for a new international legally binding instrument under UNCLOS. This paper presents the discussions leading up to the decisive third meeting, explains the agreement reached, and outlines the next steps.

KEY POINTS

- After almost 10 years of discussions, States finally agreed to launch negotiations for the elaboration of an international legally binding instrument dedicated to the conservation and sustainable use of marine biodiversity in ABNJ.
- The process will take a two-step approach: (1) a Preparatory Committee (PrepCom) will make recommendations to the UNGA on the elements of a draft text by the end of 2017; (2) the UNGA will then decide on the convening and date of an intergovernmental conference by the end of its 72nd session (i.e. September 2018).
- The historic nature of the decision taken by the States, and the enthusiasm demonstrated by many delegations and observers, does not mean the forthcoming negotiation process will be easy. The road ahead is paved with difficult choices and complex challenges.

2. STATES AGREE TO OPEN NEGOTIATIONS

The previous meeting of the BBNJ Working Group, held from 16-19 June 2014, saw the formation of a strong coalition calling for the opening of negotiations, with longstanding proponents such as the European Union (EU), the G77+China, Australia, Mexico and New Zealand being vocally supported by regional groups, including the African Union, Caribbean Community (CARICOM), and the group of Pacific Small Islands Developing States (Pacific SIDS). However, some key States, including the United States (US), Canada and Russia, remained reluctant to open negotiations for a new UNCLOS IA, arguing that the need for such an agreement had not been established, and that a new global instrument could interfere with existing regional and sectoral arrangements. Some States that had been strongly against a new agreement appeared to be more open during the June meeting, showing willingness to advance the negotiations if their concerns could be assuaged.¹

At the January 2015 meeting, the third and final meeting of the BBNJ Working Group on the scope, parameters and feasibility of a new instrument, States reached a compromise following intensive discussions and took the historic step of recommending to the UNGA that it open negotiations in 2016 for a legally binding instrument. Specifically, the BBNJ Working Group recommended that the UNGA:

“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 and to that end:

- *a) prior to holding an intergovernmental conference, decide to establish a preparatory committee, open to all Member States of the United Nations, members of specialized agencies, and Parties to the Convention, with others invited as observers in accordance with past practice of the United Nations, to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument under the Convention, taking into account the various reports of the Co-Chairs on the work of the Ad Hoc Open-ended Informal Working Group established pursuant to paragraph 73 of General Assembly resolution 59/24. The preparatory committee will start its work in 2016 and by the end of 2017 will report to the General Assembly on its progress;*

- *b) before the end of the seventy-second session of the General Assembly, and taking into account the aforementioned report of the preparatory committee, will decide on the convening and on the starting date of an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the preparatory committee on the elements and to elaborate the text of an international legally-binding instrument under the Convention”.*²

In terms of substance, it was recommended that the UNGA:

“Decide that negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity building and the transfer of marine technology;

Recognize that the process indicated in paragraph 5 should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies;

*Recognize also that neither the participation in the negotiations nor their outcome may affect the legal status of non-parties to the Convention or any other related agreements with regard to those instruments, or the legal status of parties to the Convention or any other related agreements with regard to those instruments.”*³

These recommendations must now be adopted by the UNGA by September 2015, in order to meet the commitments made at Rio+20.

3. THE ROAD TO CONSENSUS

The discussions under the auspices of the BBNJ Working Group have often been charged, with States fervently disagreeing on a number of issues.⁴ The final meeting was no different, and the uphill battle to consensus was evidenced by the 2:45am closure of the meeting.

States clashed over the question of whether the new process should lead to “an international

1. Wright G., Rochette J., Unger S., Gjerde K., Ardron J., (2014), The Scores at Half Time: An update on the international discussions on the governance of marine biodiversity in areas beyond national jurisdiction, IDDRI, Issue Briefs N°02/2014, 4p.

2. 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, §5.

3. *Ibid*, §§6-8.

4. Druel E, Rochette J, Billé R, Chiarolla C, (2013), A long and winding road. International discussions on the governance of marine biodiversity in areas beyond national jurisdiction, IDDRI, Study 7/13, 41p.

legally binding instrument” or more broadly “an international instrument”, which is the wording used in the Rio+20 outcome document.⁵ This latter position—which could have paved the way for a soft law document—was favoured by US, Russia and Japan. The EU, the G77+China and many individual States fought to include an explicit mention of a legally binding instrument.

States also disagreed on the mandate to be given to the PrepCom. Some States argued that the PrepCom should focus on preparing rules of procedure and a structure for the negotiations, which raised concern that the new process would, in practice, lead to the continuation of the same informal discussions that had taken place under the auspices of the BBNJ Working Group. Ultimately, it was agreed that the PrepCom will “make substantive recommendations to the General Assembly on elements of a draft text of an international legally binding instrument” under UNCLOS.

Whether or not the end of the work of the PrepCom should automatically lead to the convening of an intergovernmental conference or if the UNGA should take yet another decision on the opening of such a conference depending on the outcome of the PrepCom was also an important point of disagreement. As part of reaching consensus, no deadline was set for the convening of the intergovernmental conference, which will be decided by the UNGA taking account of the PrepCom report

Finally, States held different positions regarding the level of detail in which substantive issues should be mentioned in the recommendations. It was decided that the recommendations would mirror the language used in the so-called “Package Deal”, rather than adding further substantive issues and principles. It was also decided that the recommendations would avoid making reference to any specific legal instruments and organizations (whether global, regional or sectoral) that will have to be respected by a future instrument.

4. THE PROCESS ESTABLISHED

The process established will take a two-step approach:

- A PrepCom will first be established and will convene during 2016 and 2017 in order to prepare substantive recommendations on the elements of a draft text. The PrepCom will report to the UNGA by the end of 2017;
- Before the end of its 72nd session (i.e. September 2018), the UNGA will decide on the convening and on the starting date of an

intergovernmental conference to consider the recommendations of the PrepCom and elaborate the new instrument.

Importantly, the PrepCom will be open not only to Member States of the United Nations, but also to “members of specialised agencies (...) and others invited as observers” in accordance with past practice.⁶ The process therefore allows for the participation of civil society, ensuring the transparency of the meeting.⁷

5. THE SUBSTANCE TO BE NEGOTIATED

The negotiations will address the four topics identified in the so-called “Package Deal” of 2011,⁸ namely “marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity building and the transfer of marine technology”.⁹ One key result was that no topic, such as fisheries, was explicitly excluded. A number of fishing States had previously argued that there is no place for fisheries in a new instrument, as this is already covered by an existing implementing agreement to UNCLOS.¹⁰ Others, including the US, pointed out that as fisheries are the primary activity significantly affecting biodiversity in ABNJ, any instrument would likely have to address fishing activities and coordination with existing regional fisheries management organizations (RFMOs) in order to be effective. Ultimately

5. UNGA resolution A/66/288, The future we want, §162.

6. 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, §5a.

7. In 2011, 2012 and 2013, the final discussions of the BBNJ WG took place between national delegations only as part of the so-called “Friends of the Co-Chairs Group”. This “hidden” decision-making process was strongly criticised by non-governmental organisations (NGOs) and even national delegations themselves.

8. Document A/66/119, 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, and United National General Assembly, Resolution 66/231, Oceans and the law of the sea, 5 April 2012.

9. 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, §6.

10. The 1995 United Nations Fish Stocks Agreement on straddling and highly migratory fish stocks. For more on these discussions, see Wright G., Ardron J., Gjerde K., Rochette J., (2014), Advancing marine biodiversity protection through regional fisheries management: a review of high seas bottom fisheries closures, IDDRI, Working Paper N°14/2014, 28p.

the consensus reached was that any new instrument would not “undermine” existing relevant legal instruments relevant global, regional and sectoral bodies.

6. ANYTHING BUT A FORMALITY

The historic nature of the decision, and the enthusiasm demonstrated by many delegations and observers, should not lead us to underestimate the difficulties that may arise during the negotiation process.

Even though consensus was reached on the opening of negotiations, a few States, primarily the US, Canada, Japan and Russia, remain “unconvinced” of the need to elaborate a new instrument.¹¹ They therefore may continue to express their doubts and concerns during the PrepCom meetings, which could slow down the process by returning to the perennial debate on whether or not there are gaps in the current legal framework.

Moreover, the explicit reference to the elements of the Package Deal does not mean that delegations share a common vision on the content of the future instrument. Negotiations on marine genetic resources could be complex, particularly with regards to developing a mechanism that will not hamper access to these resources but ensure the fair and equitable sharing of benefits arising from their exploitation. In the same manner, although States agreed not to “undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”,¹² finding practical ways to integrate biodiversity conservation and enhance coordination with existing frameworks will be one of the key challenges.

At the close of the PrepCom meetings, an important issue may arise if some States feel the work has not progressed sufficiently. Would the UNGA convene an intergovernmental conference if the PrepCom outcome leaves too many questions unanswered and has not achieved full consensus? If not, would the work of the PrepCom continue absent a target date for completion? This absence of an agreed deadline for convening the intergovernmental conference highlights the need for a serious and considered approach to the PrepCom meetings, such that a substantial outcome on the draft text can be reported to the UNGA by the end of 2017.

11. IISD, Summary of the ninth meeting of the working group on marine biodiversity beyond areas of national jurisdiction, 20-23 January, 2015.

12. 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, §7.

7. CONTINUED DEVELOPMENT AT THE SECTORAL AND REGIONAL LEVEL

The opening of the negotiations for an international instrument does not diminish the need to advance sectoral and regional initiatives to conserve and sustainably use marine biodiversity in ABNJ. These must be strengthened hand in hand with the development of the new agreement. As the outcome of the negotiations and the entering into force of the new agreement remains unpredictable, developing measures through existing instruments, based on existing legal obligations and institutional mandates, should not be postponed. A legally binding instrument is essential to provide a global platform for ensuring coherence, cooperation and compliance but will depend on strong and well-coordinated action at multiple levels.¹³ Finally, developing measures in ABNJ through existing mechanisms could help to further expose the legal gaps in the current international framework and help to convince the remaining reluctant States that an ambitious international instrument is urgently needed.

8. CONCLUSION

The consensus reached within the last BBNJ Working Group meeting is undoubtedly a historical one. The recommendations pave the way for a global legally binding instrument specifically dedicated to ABNJ, which represent around half of the Planet’s surface and whose ecosystems, habitats and resources are increasingly threatened by human activities. In the context of global and climate change, a healthy and productive ocean is absolutely necessary to achieve food security and sustainable development. This instrument can fill the governance and regulatory gaps and significantly improve the conservation and sustainable use of marine biodiversity in ABNJ for the benefit of all humankind and future generations. However, pitfalls and challenges remain in the road ahead that will need to be carefully navigated. ■

13. Rochette J., Unger S., Herr D., Johnson D., Nakamura T., Packeiser T., Proelss A., Visbeck M., Wright A., Cebrian D., (2014), “The regional approach to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction”, Marine Policy, Special Segment, 49, pp.109-117.