
IASS WORKING PAPER

Institute for Advanced Sustainability Studies (IASS)

Potsdam, April 2015

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



Executive Summary

The conservation and sustainable use of marine areas beyond national jurisdiction (ABNJ) is one of the key issues currently being discussed in global ocean and sustainability policy. These areas are often simply referred to as the ‘high seas’ and cover around half of the planet’s surface. World leaders at the Rio+20 Earth Summit committed themselves to better conservation and sustainable use of marine biological diversity in ABNJ “including by taking a decision on the development of an international instrument under the UN Convention on the Law of the Sea” before the end of the 69th Session of the United Nations General Assembly (UNGA).

At the January 2015 meeting of the UNGA working group (‘BBNJ Working Group’), which addressed the scope, parameters and feasibility of a possible new legal instrument for ABNJ (an ‘Implementing Agreement’) under the United Nations Convention on the Law of the Sea (UNCLOS), states reached a historic compromise. Following intensive discussions, states decided to recommend that the UNGA should open negotiations in 2016 for a legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ.

These negotiations will cover (i) marine genetic resources; (ii) area-based management tools, including marine protected areas; (iii) environmental impact assessments; (iv) capacity building and the transfer of marine technology. The opening of the negotiations for an international instrument, however, 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.

Contents

- 1. Introduction** 3
- 2. States agree to open negotiations**
- 3. The road to consensus** 3
- 4. The process established** 3
- 5. The substance to be negotiated** 3
- 6. Anything but a formality** 3
- 7. Continued development at sectoral and regional level** 3
- 8. Conclusion** 3

1. Introduction

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 on 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 as a matter of urgency 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, which were specifically convened to discuss "the scope, parameters and feasibility of an international instrument under UNCLOS".

At the third meeting from 20 to 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.

2. States agree to open negotiations

The previous meeting of the BBNJ Working Group from 16 to 19 June 2014 saw the formation of a strong coalition calling for the opening of negotiations, with long-standing 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 Island 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 a 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

¹Wright 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.

²Recommendations 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.

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, which will allow the commitments made at Rio+20 to be met.

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 2:45 am closure of the meeting.

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

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.

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

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 on the basis 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 organisations (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

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 by national delegations themselves.*

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 probably have to address fishing activities and coordination with existing regional fisheries management organizations (RFMOs) in order to be effective. Ultimately, the consensus reached was that any new instrument would not “undermine” existing relevant legal instruments and relevant global, regional and sectoral bodies.

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 Nations 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.*

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”¹¹ of the need to elaborate a new instrument. 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 regard 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 closing of the PrepCom meetings, important issues may arise if some states feel that the work has not progressed sufficiently. The question is, would the UNGA convene an intergovernmental conference if the PrepCom outcome leaves too many questions unanswered and has not achieved full consensus? And if not, would the work of the PrepCom continue even with the absence of 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 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 Therefore developing measures in ABNJ through existing mechanisms could help to further expose the legal gaps in the current international framework and convince the remaining reluctant states that an ambitious international instrument is urgently needed.

8. Conclusion

The consensus reached at 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 on our

planet. 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, the pitfalls and challenges on the road ahead 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 Section*, 49, 109–117.





IASS Working Paper April 2015

Institute for Advanced Sustainability Studies Potsdam (IASS) e. V.

Contacts:

Sebastian Unger: sebastian.unger@iass-potsdam.de

Thomas Greiber: thomas.greiber@iass-potsdam.de

Address:

Berliner Strasse 130

14467 Potsdam

Germany

Phone 0049 331-28822-340

www.iass-potsdam.de

e-mail:

media@iass-potsdam.de

Management Board:

Prof. Dr. Dr. h. c. mult. Klaus Töpfer

Prof. Dr. Dr. h. c. mult. Carlo Rubbia

Prof. Dr. Mark Lawrence

Acting Secretary General:

Alexander Müller

DOI: 10.2312/iass.2015.012

