IDDRI

ISSUE BRIEF

N°04/16 MARCH 2016 | OCEANS AND COASTAL ZONES

Sea change: Negotiating a new agreement on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction*

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Marine areas beyond national jurisdiction (ABNJ) represent nearly half of the Earth's surface and a significant portion of its biodiversity. The remoteness of ABNJ and a lack of knowledge previously placed them beyond the reach of human activities, but technological advancements, increased scientific knowledge, and growing demand for resources have increased interest in these areas, driving exploration and exploitation. Activities such as shipping and fishing have intensified and expanded, while a range of new activities are under development. Furthermore, climate change and ocean acidification are predicted to compound the impacts of these activities and place further pressure on marine ecosystems.

The international community has become increasingly aware of the growing threats to ecosystems in ABNJ and States have been discussing options to conserve and sustainably use their biodiversity. In 2015, after almost ten years of informal discussions, States took the historic decision to open negotiations for a new international legally binding instrument on the conservation and sustainable use of marine biological diversity of ABNJ, under the framework of the United Nations Convention on the law of the sea (UNCLOS). The next few years will therefore be of great importance for the future of international ocean governance as States begin to navigate the complex issues at stake and negotiate the provisions of a new agreement.

KEY MESSAGES

- Marine areas beyond national jurisdiction (ABNJ) represent nearly half of the Planet's surface and a significant amount of its biodiversity, but there are significant governance gaps that hinder effective conservation and sustainable use.
- In 2015, after almost ten years of informal discussions, States agreed to launch negotiations for the elaboration of an international legally binding instrument dedicated to the conservation and sustainable use of the marine biological diversity of ABNJ.
- The first meeting of a newly created Preparatory Committee will be held in March-April 2016, during which States will begin to navigate the complex issues at stake and discuss the elements of a new agreement, including the "Package Deal", namely: marine genetic resources; area-based management tools; environmental impacts assessments; capacity building and the transfer of marine technology. Institutional arrangements, including issues regarding the relationship with existing organisations and agreements, will also be discussed.

** This Issue Brief is the short version of IDDRI's Study N°01/16 "The long and winding road continues: Towards a new agreement on high seas governance".*

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1. EXISTING GOVERNANCE FRAMEWORK

UNCLOS provides the basic "Constitution for the Ocean" and some general environmental duties, while further targets and objectives are provided by other commitments, e.g. the 2010 "Aichi Targets" 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.

A number of international organisations have a mandate in ABNJ: fishing is covered by the UN Food and Agriculture Organisation (FAO) and by Regional Fisheries Management Organisations (RFMOs); 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 regional initiatives have been established with the aim of advancing the conservation and sustainable use of marine biodiversity in ABNJ, including the establishment of Marine Protected Areas (MPAs) (Table 1) and fisheries closures.

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 environmental impacts assessments (EIAs) and strategic environmental assessments (SEAs) in ABNJ; limited capacity building and technology transfer; uneven and often ineffective governance of high seas fisheries; Flag State responsibility and the "genuine link" issue.[1]

2. THE BBNJ WORKING GROUP

In 2004, the 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* ("BBNJ Working Group"). Since its first meeting 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.

An ideological divide appeared during the first meeting (2006) regarding the legal status of marine genetic resources (MGRs) found in the Area (i.e. the seabed beyond national jurisdiction). This divide became a defining issue during subsequent meetings. The G77, joined by China, advocated the application of the "common heritage of mankind" principle (CHM) to MGRs found in the Area, entailing that benefits arising from the exploitation of MGRs should be shared between all countries. 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 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.[2]

Spurred on by a deadline set at the Rio+20 conference (2012), in January 2015 States ultimately reached a consensus and took the historic step of recommending 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".[3]

A Preparatory Committee (PrepCom) will meet at UN Headquarters for a total of 4 weeks in 2016 and 2017 in order to prepare substantive

1. 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 (I.e. a "flag") to a ship, the practice of "open registries", "flags of convenience", or "flags of non-compliance" has flourished, i.e. States with little interest in effectively regulating vessels provide registration, generally for a fee.

2. 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, Document A/66/119, §I.1(a) and (b), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/397/64/PDF/N1139764.pdf.

3. 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), http://www.un.org/Depts/los/biodiversityworkinggroup/documents/AHWG_9_recommendations.pdf. The recommendations of the BBNJ Working Group were formally approved by UNGA Resolution 69/292 in June 2015.

recommendations on elements of a draft text.[4] The PrepCom is to report to the UNGA, which will then decide by September 2018 on the convening and starting date

3. STATE POSITIONS TO DATE

States have expressed a range of positions regarding the need for a new international agreement on the conservation and sustainable use of marine biodiversity in ABNJ. The summary of State positions here is necessarily only an overview of previously expressed positions. It is important to highlight that States made the decision to negotiate a new agreement by consensus, such that all States are now in agreement on the need to move forward on these issues.

3.1. European Union: compromising to establish MPAs in ABNJ

The European Union (EU) has been the leading proponent of an UNCLOS IA since the beginning of the discussions. The first EU proposal for an IA focussed on the establishment of MPAs in ABNJ, and initially suggested certain priority short-term measures for conservation. Following conclusion of the Package Deal, the EU increasingly discussed MGRs and capacity building. On MGRs, the EU has occupied a middle ground between the competing principles of freedom of the high seas and CHM, seeking pragmatic and practical compromises to advance the discussion of access and benefit sharing (ABS).

3.2. The G77, China and Mexico: compromising to establish an ABS mechanism for MGRs

Broadly,[5] the G77, China and Mexico agree that the *status quo* is not acceptable and that an UNCLOS IA is essential for the sustainable use of marine resources. The group's original position was that the CHM principle should apply to MGRs found in the Area. As the discussions have advanced, the G77 have at times appeared willing to be flexible on the legal status of MGRs, so long as a suitable ABS regime is adopted and strong advances are made on capacity building and technology transfer. The group's statements on conservation issues have been less detailed, though they have regularly reaffirmed that the importance of these issues as an integral part of the Package Deal.

Table 1. Summary of BBNJ Discussions

Date	Meeting	Summary
13-17 February 2006	First meeting of the BBNJ Working Group	Emergence of an ideological divide regarding the legal status of MGRs found in the Area EU called for adoption of an UNCLOS IA.
28 April-2 May 2008	Second meeting of the BBNJ Working Group	Continued discussions and development of State positions.
1-5 February 2010	Third meeting of the BBNJ Working Group	Working Group invited to make recommendations to the UNGA. Numerous proposals for advancing conservation and sustainable use.
31 May-3 June 2011	Fourth meeting of the BBNJ Working Group	Common position reached between EU, G77, China, Mexico; the "Package Deal". Intersessional workshops proposed.
7-11 May 2012	Fifth meeting of the BBNJ Working Group	Discussions focused on the preparation of the intersessional workshops.
20-22 June 2012	Rio+20	Commitment made to decide on whether to negotiate a new agreement; deadline set (September 2015).
2-3 May 2013	Intersessional workshop on MGRs	Scientific expertise provided to delegations.
6-7 May 2013	Intersessional workshop on conservation and management tools	
19-23 August 2013	Sixth meeting of the BBNJ Working Group	Recommended 3 meetings of Working Group on scope, parameters and feasibility.
1-4 April 2014	Seventh meeting of the BBNJ Working Group; first of three special sessions on scope, parameters and feasibility	Beginning of substantive debate; move towards identification of key issues.
16-19 June 2014	Eighth meeting of the BBNJ Working Group; second of three special sessions	Increasing convergence among States on a number of issues. Broader engagement of States in the process, especially CARICOM, the African Union, and the Pacific States.
20-23 January 2015	Ninth meeting of the BBNJ Working Group; third and final special session	Recommendation to the UNGA to decide to open negotiations.
19 June 2015	UNGA Resolution 69/292	Establishment of the negotiation process.

3.3. Africa, the Caribbean, and the Pacific: an increasingly vocal majority

The June 2014 and January 2015 meetings of the BBNJ Working Group saw a number of regional groups become engaged in the BBNJ Working Group discussions and speak out more strongly in favour of a new agreement. The African Union has noted that current gaps in the legal regime for ABNJ, particularly on ABS, mean that

4. UNGA Resolution of 19 June 2015 on 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, A/RES/69/292, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N15/187/55/PDF/N1518755.pdf §1(a)-(c).
5. Note that he G77 is a large and varied group: Members are permitted to speak separately and submit views on their own behalf, so the G77 does not necessarily maintain unified positions on all issues.

technologically advanced States can exploit marine resources without taking on a concomitant responsibility to protect the environment. The Caribbean Community (CARICOM) has argued that a binding agreement is the only feasible solution for ensuring that developing States benefit from conservation and sustainable use of resources. The Pacific States have called for urgent actions to conserve marine biodiversity in ABNJ.

3.4. Reluctant to negotiate a new agreement: active and influential voices

A small number of States (e.g. United States, Canada, Russia) have previously expressed reluctance to negotiate such an agreement for a variety of reasons.[6] These States have variously argued that a new agreement is not necessary, that MGRs fall firmly within the principle of freedom of the high seas, and that the UNCLOS provisions on marine scientific research are not applicable to bioprospecting for commercial purposes. These States have also engaged strongly in the debate regarding the need to not undermine the mandates of existing organisations and have argued that a new agreement would add little value to the existing governance landscape. Some have nonetheless acknowledged that implementation gaps exist and have often made proposals to advance through existing instruments, including at the regional level and through the development of non-legally binding tools.

4. 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:

- **MGRs & ABS**. Parties will need to develop a mechanism that can reconcile the views of those in favour of the application of the CHM 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: (i) access to the resources; (ii) fair and equitable sharing of benefits; and (iii) compliance.
- **MPAs.** The negotiations will have to consider a number of issues in the creation of MPAs in ABNJ, including: (i) criteria used to identify potential areas for protection; (ii) proposal and adoption of MPAs; (iii) implementation of management measures; and (iv) 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.
- **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 BBNJ 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 covered by an international agreement, however this has not attained universal ratification, while the efficacy and completeness of regulation has been criticised. Given that fishing 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.

6. Despite reluctance, these States have agreed, to develop a new legally binding instrument, but nonetheless may retain specific concerns that they wish to see addressed in the negotiations.