

UN General Assembly Resolution to Develop a New Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction

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Matter Commented On: General Assembly Resolution - 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](#)

A recent review article in *Science* predicts a major extinction event in the oceans if human impacts on the marine environment go unchecked because of the ‘profoundly deleterious impacts’ that our activities are having on marine life ([Douglas J McCauley and others, ‘Marine defaunation: animal loss in the global ocean’ \(2015\) 347 *Science* 247](#)). Pressures on marine ecosystems, including ecosystems beyond national jurisdiction, arise from pollution, overfishing, expanded shipping, marine mining, energy development, intensified aquaculture, as well as ocean warming and acidification. The authors of the article still hold out some hope: there remains a chance that we can reverse this trend if we engage in more effective management of the oceans and if we can slow climate change.

Marine areas that lie beyond the jurisdiction of any State comprise approximately two-thirds of ocean space. However, the legal and institutional frameworks that govern marine biodiversity in areas beyond national jurisdiction (ABNJ) are widely perceived as inadequate for ensuring the long-term health and equitable use of the living resources of this vast area. Some relevant legal principles and rules are prescribed in the [1982 United Nations Convention on the Law of the Sea](#) (LOS) and the [1992 Convention on Biological Diversity](#) (CBD) and other instruments of general application. But there are significant gaps in this patchwork of agreements and institutional structures; thus, measures to address these gaps could go a long way to prevent significant losses of marine species, habitats and ecosystems, and the benefits they provide.

This backdrop provides the context for the recent [resolution](#) adopted by the UN General Assembly to begin a process to develop an internationally legally binding instrument under the LOS on the conservation and sustainable use of marine biological diversity of ABNJ. This post provides a short summary of the process leading to this decision, and the decision itself. It also outlines next steps and some of the challenges and opportunities in reaching a new legally binding instrument under the umbrella of the LOS. In commenting on certain aspects of the law-making process, I draw upon James Harrison’s astute analysis in his book on the *Making the Law of the Sea*, and specifically the chapter on ‘Implementing Agreements’ ([Cambridge University Press 2013](#)).

A Short Summary of the Process to Date

The decision by the UN General Assembly to initiate a process to develop a new legally binding agreement on the conservation and sustainable use of marine biodiversity in ABNJ is the result of a long and protracted process that has spanned over a decade. The issue was first raised at the [fourth meeting](#) of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) in 2003 (at paras 13–23, 80, 98–104). Concerns about the lack of effective legal and institutional mechanisms for governing ABNJ were echoed in other international fora as well. In response, in [resolution 59/24](#) of 2004, the General Assembly established the 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) to clarify and examine these issues (at para 73).

By 2011, discussions under the auspices of the BBNJ Working Group began to focus on what specific changes, if any, would be required to the law of the sea. The Working Group recommended to the General Assembly that

... a process be initiated ... with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in ABNJ effectively address those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under [the LOSC]' ([A/66/119](#) Annex, at para I 1(a)).

This process would address ‘together and as a whole’ four key topics:

- marine genetic resources, including questions on the sharing of benefits
- measures such as area-based management tools, including marine protected areas
- environmental impact assessments
- capacity-building and the transfer of marine technology (at para I 1(b)).

Political support for a new agreement under the LOSC gained momentum at the 2012 UN Conference on Sustainable Development (Rio+20), where States committed themselves to urgently address the issue of the conservation and sustainable use of marine biodiversity of ABNJ, specifically by agreeing to decide by the end of the sixty-ninth session of the General Assembly whether to develop an international instrument to address this matter under the umbrella of the LOSC ([A/RES/66/288](#), at para 162).

In 2013, the BBNJ Working Group was charged with making recommendations on the scope, parameters and feasibility of an international instrument under the LOSC to the sixty-ninth session of the General Assembly ([A/RES/68/70](#), at paras 198-200; see also [A/RES/69/245](#), at para 214). In January 2015, at its final meeting on this matter, the BBNJ Working Group made the important recommendation to the General Assembly by consensus that it *inter alia* ‘[d]ecide 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 ...’ ([A/69/780](#), at para I 1(e)).

On 19 June 2015, the General Assembly adopted all of the recommendations of the BBNJ Working Group under resolution [A/RES/69/292](#), thereby taking the historic step of launching a new set of negotiations under the law of the sea.

Next Steps in the Process

In accordance with the BBNJ Working Group's recommendations, the General Assembly has decided to establish, prior to convening an intergovernmental conference, a preparatory committee to make substantive recommendations on the elements of a draft text of a legally binding instrument under the LOSC. This work is to commence in March 2016 and carry on into 2017 (at para 1(b)). Before the end of its seventy-second session in 2018, the General Assembly will render a decision on whether and, if so when, to convene an intergovernmental conference, under the auspices of the United Nations, to consider the preparatory committee's recommendations and elaborate the text of an international legally binding instrument under the LOSC (at para 1(k)).

Transparency and participation are increasingly regarded as constitutive ingredients in the deliberative phase of international law-making and essential to promoting sustainable development. Moreover, achieving the aim of conserving the global ocean commons is likely to require an 'all hands on deck' approach through enhanced cooperation and coordination between different international institutions and other sectors of society. In keeping with these objectives, the resolution mandates that the preparatory committee should be opened-up not only to Member States of the UN, but also to 'members of specialised agencies ... and other invited observers in accordance with past practice of the UN' (at para 1(a)). If this process is managed correctly, the exchange of views and information between a wider range of participants representing civil society, international organisations, and industry associations may lend greater legitimacy and accountability to the process and outcome.

Significance of the Resolution and Challenges Ahead

The adoption of the General Assembly resolution evinces a growing recognition within the international community that the regime governing the marine biodiversity in ABNJ is no longer fit for purpose, and that further action to develop a legal and institutional framework is necessary. However, despite reaching a consensus on the feasibility of a new instrument, the discussions under the auspices of the BBNJ Working Group indicate that there remain a few States who continue to express reservations about whether a new instrument is really necessary, arguing that strengthening the implementation of existing instruments would be sufficient ([A/69/780](#), at para 13). These countries included Canada, the United States, and the Russian Federation (see [Elisa Morgera, 'Do We Need a New Treaty to Protect Biodiversity in the Deep Seas?' IISD Policy Update No. 8, 20 January 2015](#)). It will be interesting to observe what impact such misgivings will have on the preparatory committee's task to develop draft provisions. In this respect, the General Assembly resolution provides that the preparatory committee must take all efforts to reach a consensus on substantive matters (at para 1(h)). However, if the process becomes bogged down and consensus cannot be achieved, these more controversial elements of the draft text may also be included in a section of the recommendations of the preparatory committee to the General Assembly (at para 1(i)).

Regardless, the General Assembly's decision to begin to elaborate a new instrument presents an historic opportunity to interpret and develop the core principles and rules of the law of the sea since the adoption of the 1982 LOSC. In a period in which there is diminishing appetite to negotiate new treaties, this demonstration of political will to launch negotiations under the law of the sea is to be lauded as a remarkable achievement in and of itself. It goes without saying, however, that tentative agreement on the need to rectify certain issues and gaps in the LOSC does not amount to agreement on how they should be solved. The following sections comment on the possible normative status and effects of a new instrument, as well as certain issues related

to scope and content.

Relationship of a New Instrument to the LOSC and its Normative Effects

The reports of the BBNJ Working Group and the academic literature refer to the idea that a new instrument could have the status of a so-called ‘implementing agreement’ under the law of the sea. Two treaties have been designated by the international community as implementing agreements to date: the [1994 Agreement Relating to the Implementation of Part XI of the 1982 Convention on the Law of the Sea of 10 December 1982 \(Part XI Agreement\)](#), and the [1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and management of Straddling Fish Stocks and Highly Migratory Fish Stocks \(Fish Stocks Agreement\)](#). Harrison points out that what distinguishes implementing agreements from other agreements in terms of their normative status and effects is, first, the level of political support for effectively implementing the regime in a universally applicable way, similar to that of LOSC itself, and, second, their close relationship to the LOSC.

To achieve the aim of a ‘comprehensive global regime’ on the conservation and sustainable use of marine biodiversity of ABNJ, it is vital that any new instrument secure widespread acceptance. Sufficient participation from all regions is not only required to overcome externality or free-rider problems that would otherwise hamper the protection of the global ocean commons, it is also necessary to preserve the integrity and coherence of the law of the sea, particularly given that significant modifications are being proposed to clarify and develop the existing legal framework under the LOSC. The need for extensive participation in concluding a new agreement is recognised in the body of the resolution, which notes

... the desirability that any legally binding instrument relating to marine biological diversity of areas beyond national jurisdiction under the Convention would secure the widest possible acceptance ... (at para (g)).

It is also significant that the United Nations will serve as the forum for concluding the new instrument, and that the process will use consensus decision-making techniques (at para (h)). All of this is important in order to achieve the political support necessary for an implementing agreement.

In considering the formal relationship between a possible new instrument on the conservation and sustainable use of marine biodiversity of ABNJ and the LOSC, it should be borne in mind that the Part XI Agreement and the Fish Stocks Agreement differ in the way in which they implement the Convention (see further Harrison, ch 4, *supra*). For instance, the Part XI Agreement significantly altered the regime on seabed mining in the LOSC. By contrast, although the Fish Stocks Agreement introduces important elaborations to the provisions governing fisheries in the LOSC, it does not go so far as to ‘modify or disapply’ the provisions of the LOSC. Harrison suggests that this is due to the fact that, in contrast to the Part XI Agreement, the Fish Stocks Agreement aimed at elaborating parts of the LOSC that were already accepted as law. Similar conditions exist with respect to ABNJ, where established general principles in the LOSC, such as the freedom of the high seas and responsibility to protect and preserve the marine environment, simply require further clarification and development to suit present needs and circumstances. This is also recognised in the language of the General Assembly resolution, which hints at the superior constitutional status of the LOSC in considering a new legally binding instrument ‘under the [LOSC]’. The resolution also generally emphasises that any new

instrument must not ‘undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies’ (at para 3). This suggests that, similar to 1995 Fish Stocks Agreement, the present aim is not to significantly alter the existing provisions and institutional structures governing the conservation and sustainable use of marine biodiversity in ABNJ in the LOSC (or any other agreements for that matter), but rather to elaborate on general obligations and fill in the gaps of the existing legal and institutional framework. Beyond this, the objectives and manner in which any new instrument would implement the principles of the LOSC presumably begins with work of the preparatory committee. It should be borne in mind, however, that as with the Fish Stocks Agreement, significant additions might be necessary to bring the existing rules in the LOSC in line with modern conservation concepts, such as the precautionary and ecosystem approaches.

Another issue concerns what impact a new agreement on the conservation and sustainable use of marine biodiversity in ABNJ might have in terms of developing the law of the sea. The General Assembly resolution clarifies that neither participation in the negotiations nor their outcome should prejudice the legal status of non-parties to the LOSC or any other related agreements with regard to those instruments, or the legal status of parties to the LOSC or any other related agreement with regard to those instruments (at para 4). The guarantee should not preclude that any new instrument could nevertheless influence the development of customary international law in the future. Factors that would support the crystallization of new customary rules include the extent to which the provisions address States in general terms (as opposed to just ‘States Parties’) and are supported by consensus and subsequent state practice.

Scope and Content of a New Instrument

The discussions under the auspices of the BBNJ Working Group provide few specifics about the coverage and substance of a new agreement for the conservation and sustainable use of marine biodiversity in ABNJ. As a starting point, States have agreed that negotiations on a new instrument shall address the four elements of the ‘package deal’ previously agreed by the BBNJ Working Group 2011, and outlined above (at para 2). However, for each of these topics there remains considerable scope for disagreement on substance, signalling that challenges lie ahead in crafting the terms of an instrument that will be generally acceptable to all States. For instance, the issue of the legal status of marine genetic resources, in particular, access and benefit sharing, has been a complex and contentious issue throughout BBNJ deliberations. Ultimately, a balance will have to be struck between the interests of developing States in gaining a greater share of the benefits of research and products developed from marine genetic resources in ABNJ, and some developed States in not sharing the monetary benefits of research and safeguarding intellectual property rights.

In terms of content, the text of a new agreement should avoid duplication and not undermine existing instruments, but it should also take into account potential overlaps and synergies between the law of the sea and other areas of international law. For example, any new agreement on the conservation and sustainable use of marine biodiversity in ABNJ can easily draw upon the principles of the CBD and its relevant protocols and thus facilitate regime interaction.

There are also possibilities for interlinkages with the climate change regime. As recognised by the General Assembly in its [2014 resolution on the Oceans and the Law of the Sea](#) and other

international bodies, rising greenhouse gas emissions may be one of the greatest threats to marine biodiversity both in and outside of ABNJ in the coming years. The IPCC's most recent [Fifth Assessment Report](#) (AR5) devoted significantly more attention than previous reports to the impact of climate change on the ocean system, summarising a growing body of scientific evidence predicting major adverse effects to the marine environment from climate change and ocean acidification. The International Law Association (ILA) has recently provided guidance to States by expounding [Legal Principles relating to Climate Change](#). The ILA prescribes that 'States and competent international organisations shall apply, interpret, implement and enforce their rights and obligations under the Law of the Sea in such a manner so as to effectively address climate change and its adverse effects' (Draft Article 10(c)). A new treaty on the conservation and sustainable use of marine biodiversity in ABNJ can make an important contribution to realising this principle by incorporating mechanisms for increasing ecosystem resilience, for example, through the creation of marine protected areas and by requiring that environmental impact assessments be conducted for new and emerging ocean activities relating to climate change (e.g., development of marine renewable energy, marine climate engineering). Provisions may also be needed to ensure concerted information exchange, the promotion of marine scientific research, and a flexible and adaptive legal and institutional framework given that there remain large uncertainties about exactly how marine biodiversity in ABNJ will be affected by climate change.

Conclusion

The current legal and institutional framework represents a piecemeal approach to governing the conservation and sustainable use of marine biodiversity in ABNJ through different instruments, and a range of organisations and institutions at the global and regional levels. Elaboration of a new legally binding instrument presents an opportunity to improve upon existing sectoral and fragmented approaches by providing a more coherent and integrated regulatory and institutional architecture under the LOSC in line with contemporary concerns and understanding. The General Assembly resolution is very timely, and one can only hope that the ambition of the international community in the law-making process matches the magnitude of the current threat posed by human activities to marine biodiversity of ABNJ.

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