

February 1, 2018

Towards Normative Coherence in the International Law of the Sea for the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction

By: Anna-Maria Hubert and Neil Craik

Document Commented On: 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/72/249, provisionally available as document [A/72/L.7](#)

This past November, based on the recommendations of the [Preparatory Committee](#) (PrepCom) established under [General Assembly Resolution 69/292](#), the UN General Assembly agreed in [Resolution 72/249](#) to convene an intergovernmental conference “to consider the recommendations of the preparatory committee on the elements and to elaborate the text 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, with a view to developing the instrument as soon as possible” (para 1).

One of the many unresolved issues to be faced in the upcoming negotiations concerns how a new legal instrument will be situated within an increasingly dense, and fragmented, legal and institutional landscape. The [Chair’s Overview of the Third PrepCom Session](#) highlights the relationship between agreements as an important cross-cutting issue, stating that “going forward, it would be useful to further consider how to articulate the relationship between a new instrument and the arrangements established there under with relevant legal instruments and frameworks and relevant global, regional and sectoral bodies” (page 5).

This blog post offers some thoughts on how a new legal instrument on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ) can be conceived of within the wider legal and institutional landscape of the law of the sea and public international law. Specifically, it explores the question of what relationship a new legal instrument should have to other relevant agreements, including the [1982 UN Convention on the Law of the Sea](#) (LOS). (LOSC).

The [General Assembly Resolution](#) sets out two separate requirements in this regard. First, the new legal instrument should be “fully consistent with the provisions of the *United Nations Convention on the Law of the Sea*” (para 6). Second, for all others, the new legal instrument should not “undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies” (para 7). These important legal questions are situated against the backdrop of a [global ocean which is in a rapid state of decline](#). The tension embodied in this legal analysis requires finding room for the law to dynamically evolve to meet growing

environmental challenges, while also maintaining normative cohesion across the existing body of agreements and institutions of the law of the sea.

The ways in which negotiating States define the legal relationship of a new instrument on marine biodiversity beyond national jurisdiction (BBNJ) to other relevant instruments is important for several reasons. First, this conception will partly influence the normative status and scope of the new instrument vis-à-vis other treaties. For example, States may argue that the new instrument should be drafted narrowly and maintain the primacy of the LOSC and other relevant instruments in the area. Second, this relationship will be important post-negotiation in addressing the interpretation of any new agreement, whose meaning would be influenced by how it is positioned in relation to existing relevant agreements. For instance, a new legal instrument on BBNJ might include significant benefit sharing elements that could be viewed by some as inconsistent with the basic rule of common access to high seas resources embodied in other marine agreements. The legal relationship to other relevant instruments would have a bearing on whether new rules on benefit sharing could be read narrowly. Finally, the issue is important for the dynamic evolution of the law of the sea and public international law more generally. A new agreement may have interpretive relevance as a subsequent agreement between the parties or subsequent practice in the application of the LOSC as anticipated in accordance with Article 31(2) of the [Vienna Convention on the Law of Treaties](#) (VCLT) to the extent that a new agreement is viewed as a specific interpretation and elaboration of existing commitments. For example, can new ‘constitutional’ norms – such as precaution – be more forcefully inserted into existing environmental regimes if they are incorporated in a new legal instrument on BBNJ (see [Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area](#))?

“Fully consistent with” the 1982 LOSC

The requirement that the new legal instrument be “fully consistent” with the LOSC reaffirms the LOSC’s *de facto* status as the “constitution of the oceans”. The preamble of the LOSC declares the desire of States Parties to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea.

This does not mean that law of the sea has remained stationary since the conclusion of the LOSC. Although significant legal and institutional gaps remain, the past decade has seen a proliferation of specific laws, regulations and procedures relevant to the protection of marine ABNJ. For example, in 2013, the Contracting Parties to the [London Protocol adopted an amendment on marine geoen지니어ing](#) — a new and emerging use of marine ABNJ. The International Seabed Authority has pursued efforts to lay down the next plank of its [Mining Code](#) by elaborating rules on the [exploitation of minerals in the Area](#).

The relationship of the LOSC to other conventions and international agreements is expressly addressed in Article 311 which allows States to modify or suspend provisions of the *Convention* “provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by

other States Parties of their rights or the performance of their obligations under this Convention.” However, the phrasing of [Resolution 72/249](#) tracks the more liberal language of Article 237, which is *lex specialis* for Part XII on the protection and preservation of the marine environment. According to Article 237, “specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner *consistent with* the general principles and objectives of this Convention” (emphasis added). New environmental agreements need only be ‘compatible or in agreement’ with the general principles and objectives of the LOSC ([Oxford Dictionary](#)).

Article 237 affords States considerably more leeway to negotiate special rules on the marine environment, an interpretation which is backed up by significant state practice (cf [UN Fish Stocks Agreement, art 4 et seq](#)). Indeed, in many cases, the structure of the obligations in Part XII provides for, and even depends upon, the dynamic evolution of the rules to achieve environmental objectives. This point was confirmed by the Annex VII Arbitral Tribunal in its [Award on South China Sea](#) in its interpretation of Article 192 which establishes an overarching obligation on States to protect and preserve the marine environment. The Tribunal stated that the “content of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention” (para 942). Moreover, many of the articles in Part XII are constructed as due diligence obligations. The ITLOS Seabed Disputes Chamber affirmed in its [Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area](#) that “due diligence is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge” (para 117; reaffirmed ITLOS [Fisheries Advisory Opinion](#), para 132).

The point to be stressed when considering the relationship of the LOSC to a new legal instrument on ABNJ is that the LOSC provides for the dynamic evolution of the law on the protection and preservation of the marine environment.

“Shall not undermine” Other Relevant Agreements

The General Assembly Resolution also lays out the requirements for a new legal instrument on ABNJ in relation to other relevant agreements, namely, that “the process and its result should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies” (para 7). Two points warrant emphasis here.

First, the question of whether a legal instrument or body is ‘relevant’ turns to some extent on the geographical and regulatory scope of the new instrument. As indicated in the [Chair’s Streamlined Non-Paper](#), these matters are still up for negotiation. However, even if a new legal instrument ultimately excludes some issues from its scope, existing legal instruments that address such issues may still be considered relevant. For instance, some States have proposed that fisheries management in ABNJ should not form part of the negotiations. However, even if negotiations do take this turn, and fisheries are excluded from the scope of the new legal instrument, it is relatively clear that global and regional fisheries agreements and bodies will still be relevant in light of environmental and other interdependencies. It is also important to note that

the wording does not restrict the list of relevant agreements to the law of the sea, and thus includes legal instruments in the area of international environmental law, such as the [UN Convention on Biological Diversity and its Protocols](#). Against this backdrop, the array of “existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies” captured by this process is potentially quite broad.

Second, the standard to be met regarding the compatibility of a new legal instrument with other relevant instruments is clearly lower than that applied in relation to the LOSC. [Resolution 72/249](#) stipulates that the new instrument cannot “undermine” existing relevant agreements and bodies. To “undermine” means to “to lessen the effectiveness, power, or ability of” ([Oxford Dictionary](#)). At a minimum then, a new legal instrument cannot operate at cross-purposes with existing relevant legal instruments and processes which will impede the effective implementation of agreements. Or, to put it another way, to the extent that the new instrument regulates an issue, the new instrument cannot make the existing agreement or body covering the same issue appreciably less effective.

Beyond minimising normative conflicts, however, it is possible to conceive of other kinds of relationships that a new legal instrument on BBNJ could have with other relevant instruments. Some of the options that are currently on the table in the [Chair’s Streamlined Non-Paper](#) aim at a gap-filling function. For example, some States have suggested that the BBNJ process should only regulate activities to the extent that they “are not adequately addressed by existing international conventions” (Option 7). Another option put forward is that the new legal instrument on BBNJ will cover “[a]ll activities that take place in areas beyond national jurisdiction and/or may have an impact on marine biological biodiversity and resources of areas beyond national jurisdiction. Where such activities are already managed or governed by an existing agreement, the instrument would apply relevant provisions of the existing agreement *mutatis mutandis*” (Option 5). In effect, the function of relevant existing instruments would be to provide a “ceiling” which dictates the regulatory scope of a new legal instrument on BBNJ.

There are also more progressive options in considering the potential role of a new instrument on BBNJ within the existing legal landscape. These options would not only backstop the laws that we have now, but use the upcoming UN negotiations as an opportunity to supply a broader, more ambitious vision for the protection of the global ocean commons. States could frame the regulatory scope of a new instrument broadly (see Options 1-4), and in a way that interprets and elaborates upon the provisions of the LOSC and other relevant instruments. As discussed above, this approach would be generally consistent with objectives and principles of the LOSC. It is also in keeping with the related “principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives” ([ILA New Delhi Declaration, principle 7](#)). The principle of integration “reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind” (ILA New Delhi Declaration). It supports the argument that the development of laws related to BBNJ should be undertaken in a mutually-supportive manner, and in a way that strengthens and provides co-benefits across different regimes (see further Koskenniemi, ILC Report on Fragmentation of International Law, [UN Doc](#)

[A/CN.4/L.682](#), 13 April 2006, in particular, the discussion on “Systemic Integration and Article 31(3)(c) of the VCLT”).

Further in-depth analysis of how new and existing legal instruments could operate synergistically to work towards and enhance shared conservation and equitable goals is needed. Achieving these kinds of mutual benefits will also require concerted cooperation and coordination across all relevant instruments and institutions, and calls for broad, inclusive stakeholder participation in the intergovernmental BBNJ process.

Conclusions

On the one hand, the preceding analysis suggests that the constraints on States in negotiating a new legal instrument are not necessarily legal, but instead are tethered to their level of ambition and political will to advance protections for the marine environment. On the other hand, it is important to emphasize that States’ political ambitions are framed by their shared understanding of their existing legal obligations. The negotiation of a new treaty on the conservation and sustainable use of marine biodiversity of ABNJ opens the door to practices of legality that could either enhance a commitment to marine protection or derogate from it ([drawing on Brunnée and Toope, 2010](#)).

This blog post is an output from a workshop organised at the University of Oxford in June 2017, entitled “Towards Regime Coherence in the International Law of the Sea and the Governance of the Global Oceans Commons”. Professor Hubert gratefully acknowledges the support of the [Oxford Martin School Visiting Fellows Programme](#) and [Institute for Science, Innovation and Society](#) at the University of Oxford for hosting this event.

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