

RECENT DEBATES ON THE CONSERVATION AND SUSTAINABLE USE OF MARINE BIOLOGICAL DIVERSITY BEYOND AREAS OF NATIONAL JURISDICTION, INCLUDING MARINE GENETIC RESOURCES

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Abstract

This insight offers a brief up date of the recent debates on issues relating to the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (ABNJ) - in particular on marine genetic resources. The debates were held at the United Nations General Assembly and mainly within 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 (Working Group).¹ It also presents the steps set out by the General Assembly towards developing a possible international instrument under the United Nations Convention on the Law of the Sea for areas beyond national jurisdiction.

Recent Debates at the United Nations General Assembly

In 2011 the General Assembly, pursuant to resolution 66/231² initiated, within the Working Group, a process

“with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses 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 United Nations Convention on the Law of the Sea”.

This process is mandated to address the conservation and sustainable use of marine biodiversity in ABNJ, “in particular, together and as a whole, marine genetic resources,

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¹ 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 was established by the United Nations General Assembly in resolution 59/24 of 17 November 2004.

² UN Doc. A/RES/66/231, resolution adopted by the General Assembly on 24 December 2011.

including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology”.³ The process will take place in the existing Working Group and in the format of inter-sessional workshops aimed at improving understanding of the issues and clarifying key questions as an input to the Working Group.

A year later, in resolution 67/78⁴ the General Assembly recalled the United Nations Conference on Sustainable Development (Rio +20) and its outcome document “The future we want”, where

“States committed to address, on an urgent basis, building on the work of the Ad Hoc Open-ended Informal Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea”.

In accordance with the terms of reference annexed to resolution 67/78, two inter-sessional workshops were convened in May 2013. The workshop on marine genetic resources included eight panels which addressed, *inter alia*, the following issues: meaning and scope; extent and types of research, uses and applications; impacts and challenges to marine biodiversity beyond areas of national jurisdiction; access-related issues and types of benefits and benefit-sharing; intellectual property rights issues; and capacity-building and the transfer of marine technology.⁵ It was reported by the Co-Chairs of the Working Group that the workshops provided valuable scientific and technical expert information as an input to its work.⁶

The Working Group held its sixth meeting from 19 to 23 August 2013. Discussions focused on the conservation and sustainable use of marine biodiversity in ABNJ and in the identification of gaps and ways forward to ensure an effective legal framework, taking into

³ UN Doc. A/RES/66/231, paragraph 167. See Annex 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.

⁴ UN Doc. A/RES/67/78, resolution adopted by the General Assembly on 11 December 2012, at paragraph 181.

⁵ Detailed information on the methods and organization of work of the inter-sessional workshops can be found at UN Doc. A/AC.276/6. Reports and abstracts presented at the workshops are available at http://www.un.org/depts/los/biodiversityworkinggroup/intersessional_workshop_2013.htm (accessed 1st April 2014).

⁶ UN Doc. A/68/399, Letter dated 23 September 2013 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Annex.

account the discussions at the previous meeting, as well as the input provided by the inter-
sessional workshops.⁷

As regards marine genetic resources, the letter from the Co-Chairs notes in paragraph 27 the diverging views between delegations on whether or not marine genetic resources of the Area are to be considered part of the common heritage of mankind.⁸ In paragraph 28 the Co-Chairs report that the suggestion was made “that international regulations on the sharing of benefits arising from the utilization of marine genetic resources beyond areas of national jurisdiction should be discussed separately from marine scientific research”. The report also notes in paragraph 29 the view expressed that there are still major obstacles to benefit sharing, including the fact that it is difficult to identify the various uses and origin of the resources. As reflected in the Co-Chairs summary of discussions, there seems to be a growing consensus that access and benefit-sharing related to marine genetic resources is a key issue that should be addressed, including in any future normative instrument;⁹ and on the importance of intellectual property rights for understanding how the exploitation of genetic resources is carried out.

The plenary of the Working Group adopted a number of recommendations for consideration by the General Assembly at its 68th session by consensus.

On December 2013, at its 68th session, the General Assembly requested the Working Group make recommendations to the Assembly on the scope, parameters and feasibility of an international instrument under the Convention in order to prepare for the decision to be taken at its 69th session. To this end, it requested the Secretary-General to convene three

⁷ For a summary of the discussions on identification of gaps and ways forward with a view to ensuring an effective legal framework for the conservation and sustainable use of marine biodiversity in ABNJ see UN Doc. A/68/399, Annex paragraphs 39 to 51.

⁸ A comprehensive review of the many differing views on the relevance of the common heritage of mankind to the debate surrounding marine genetic resources in ABNJ can be found in Leary, D. K., ‘Moving the Marine Genetic Resources Debate Forward: Some Reflections’ (2012) 27(2) *The International Journal of Marine and Coastal Law* 435, 448. The author puts forward a draft provision, based on article IV of the Antarctic Treaty, which “might be one possible way to help to bridge the ideological divide on the common heritage issue”.

⁹ For an assessment of the options within existing legal frameworks for accommodating an access and benefit-sharing system from marine genetic resources originating from ABNJ and suggestions to move the international debate forward, see Drankier, P., Elferink, A. G. O., Visser, B., and Takács, T., ‘Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit-Sharing’ (2012) 27(2) *The International Journal of Marine and Coastal Law* 375, 433. See also Broggiato, A., Arnaud-Haond, S., Chiarolla, C., Greiber, T., ‘Fair and equitable sharing of benefits from the utilization of marine genetic resources in areas beyond national jurisdiction: Bridging the gaps between science and policy’ (2014) *Marine Policy* (in press, corrected proof).

meetings of the Working Group,¹⁰ and the Working Group to invite “Member States to submit their views on the scope, parameters and feasibility of an international instrument under the Convention”.¹¹ This information will be compiled into an informal working document that will be updated and circulated prior to subsequent meetings with the aim of informing the deliberations of the Working Group.

The General Assembly also recognized the “abundance and diversity of marine genetic resources and their value in terms of the benefits, goods and services they can provide” and “the importance of research on marine genetic resources for the purpose of enhancing the scientific understanding, potential use and application, and enhanced management of marine ecosystems”.¹²

Steps Towards a Negotiation of a Possible International Instrument

The General Assembly has marked the start of possible negotiations on a new international agreement for ABNJ by asking States to submit their views on its scope, parameters and feasibility. The resulting informal working document has the potential to evolve into a common ground for negotiations, if on September 2015 the General Assembly decides on the need to develop an international instrument under the United Nations Convention on the Law of the Sea. A range of different mechanisms and options has been put forward for better governance of marine biodiversity in ABNJ,¹³ and there are many legal issues at stake that have to be discussed taking account of the scientific and technical information available. The next meetings of the Working Group, as recently stated by a UN legal counsel, “present a clear opportunity to try and overcome remaining differences and to crystallise the areas of convergence into concrete action”.¹⁴

¹⁰ The meetings will take place from 1 to 4 April and 16 to 19 June 2014 and from 20 to 23 January 2015.

¹¹ UN Doc. A/RES/68/70, resolution adopted by the General Assembly on 9 December 2013, at paragraph 201.

¹² *Idem*, at paragraphs 202 and 203.

¹³ A detailed three policy recommendations on how to advance the governance of marine biodiversity in areas beyond national jurisdiction can be found in Ardron, J., Druel, E., Gjerde, K. M., Houghton, K., Rochette, J., and Unger, S., ‘Advancing Governance of the High Seas’ (2013) 6 IDDRI Policy Brief. See also Gjerde, K. M., Currie, D., Wowk, K., and Sack, K., ‘Ocean in peril: reforming the management of global ocean living resources in areas beyond national jurisdiction’ (2013) 74(2) Marine Pollution Bulletin 540, 551.

¹⁴ UN News Centre, *At UN, countries to consider need for global instrument to protect marine biodiversity*, <http://www.un.org/apps/news/story.asp?NewsID=47492&Cr=ocean&Cr1=#.Uz1yXs40opk>, 2 April 2014.

In light of the threats facing our oceans, the time has come to address the fragmented and inadequate management of marine biodiversity in ABNJ. There is still time for the required political discussions that have to lead to an agreement on the scope, parameters and feasibility of a future international instrument under the Convention on the Law of the Sea. Recent debates indicate, at least, that States are conscious of the need to tackle these pressing issues, and that they have started thinking of the many possible ways to address the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction. While these processes are ongoing more pragmatic action could be adopted. It may be possible to enhance the coordination and coherence among the numerous instruments and bodies that currently have a mandate over biodiversity in ABNJ.