

First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018

The first session of the Intergovernmental Conference (IGC) on an international legally binding instrument under the UN Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) begins on Tuesday, 4 September 2018, at UN Headquarters in New York and will continue until 17 September. Delegates will consider a concise document, prepared by the IGC President, which identifies areas for further discussion and does not contain treaty text.

Expectations for the Meeting

The IGC will begin substantive discussions based on the elements of a package agreed in 2011 on:

- marine genetic resources (MGRs), including questions on benefit-sharing;
- environmental impact assessments (EIAs);
- area-based management tools, including marine protected areas (MPAs); and
- capacity building and marine technology transfer.

The IGC is expected to draw on the recommendations from the BBNJ Preparatory Committee (PrepCom) that completed its work in 2017. The PrepCom's final outcome was adopted by consensus, but contains elements that "do not reflect consensus"—namely elements that generated "convergence among most delegations" and "main issues on which there is divergence of views." While the lack of consensus is largely seen as a reflection of the views of a minority of countries, delegations preferred avoiding the possible adoption of elements by voting, thereby signaling a commitment to negotiating a future international legally binding instrument (ILBI) with the goal of universal participation. As the divergence of views continued at the IGC organizational meeting in April 2018, delegates opted for requesting a document to guide discussions at IGC-1, rather than a zero draft of the ILBI. The IGC is expected to take consensus-based decisions on the preparation process of a zero draft.

Origins of the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction

The conservation and sustainable use of BBNJ is increasingly attracting international attention, as scientific information, albeit insufficient, reveals the richness and vulnerability of such

biodiversity, particularly around seamounts, hydrothermal vents, sponges, and cold-water corals, while concerns grow about the increasing anthropogenic pressures posed by existing and emerging activities, such as fishing, mining, marine pollution, and bioprospecting in the deep sea.

UNCLOS, which entered into force on 16 November 1994, sets forth the rights and obligations of states regarding the use of the oceans, their resources, and the protection of the marine and coastal environment. Although UNCLOS does not refer expressly to marine biodiversity, it is commonly regarded as establishing the legal framework for all activities in the oceans.

The Convention on Biological Diversity (CBD), which entered into force on 29 December 1993, defines biodiversity and aims to promote its conservation, the sustainable use of its components, and the fair and equitable sharing of the benefits arising from the use of genetic resources. In areas beyond national jurisdiction (ABNJ), the Convention applies to processes and activities carried out under the jurisdiction or control of its parties. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, which entered into force on 12 October 2014, applies to genetic resources within the scope of CBD Article 15 (Access to Genetic Resources) and to traditional knowledge associated with genetic resources within the scope of the Convention.

Following more than a decade of discussions convened under the United Nations General Assembly, the Assembly, in its resolution 72/249 of 24 December 2017, decided to convene an IGC to elaborate the text of an ILBI under UNCLOS on the conservation and sustainable use of BBNJ, with a view to developing the instrument as soon as possible. The IGC will meet initially for four sessions, with the second and third taking place in 2019, and the fourth in the first half of 2020.

Key Turning Points

Working Group: Established by General Assembly resolution 59/24 of 2004, the *Ad Hoc* Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of BBNJ served to exchange views on institutional coordination, the need for short-term measures to address illegal, unregulated, and unreported (IUU) fishing and destructive fishing practices, MGRs, marine scientific research (MSR) on marine biodiversity, MPAs, and EIAs. It met three times from 2006 to 2010.

The "Package": The fourth meeting of the Working Group (31 May-3 June 2011, New York) adopted, by consensus, a set of recommendations to initiate a process on the legal framework for the conservation and sustainable use of BBNJ, by identifying

gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS. The recommendations also include a “package” of issues to be addressed as a whole in this process, namely: MGRs, including questions on benefit-sharing; measures such as EIAs and area-based management tools, including MPAs; and capacity building and marine technology transfer.

UN Conference on Sustainable Development (Rio+20): The UN Conference on Sustainable Development (20-22 June 2012, Rio de Janeiro, Brazil) expressed the commitment of states to address, on an urgent basis, building on the work of the Working Group and before the end of the 69th session of the General Assembly, the issue of the conservation and sustainable use of BBNJ, including by taking a decision on the development of an international instrument under UNCLOS.

A Legally Binding Instrument: Between 2014 and 2015, the Working Group engaged in interactive substantive debates on the scope, parameters, and feasibility of an international instrument under UNCLOS. At its ninth meeting, the Working Group reached consensus on recommendations for a decision to be taken at the 69th session of the UN General Assembly to develop a new legally binding instrument on BBNJ under UNCLOS, and to start a negotiating process to that end.

The Preparatory Committee: Established by General Assembly resolution 69/292, the PrepCom was mandated to make substantive recommendations to the General Assembly on the elements of a draft text of an ILBI under UNCLOS, taking into account the various reports of the Co-Chairs on the Working Group’s work; and for the Assembly to decide at its 72nd session whether to convene an IGC to elaborate the text of the ILBI. The PrepCom considered the scope of an ILBI and its relationship with other instruments, guiding approaches and principles, as well as the elements of the package. In spite of diverging views with a wide majority of countries arguing that the PrepCom had exhausted all efforts to reach consensus, the PrepCom outcome that was eventually adopted by consensus comprised:

- non-exclusive elements of a draft ILBI text that generated convergence among most delegations;
- a list of main issues on which there is divergence of views, with the indication that both do not reflect consensus; and
- a recommendation to the UN General Assembly to take a decision, as soon as possible, on convening an IGC.

IGC Organizational Meeting: The IGC organizational meeting took place at UN Headquarters in New York from 16-18 April 2018. Delegates agreed to:

- focus IGC-1 on substantive discussions based on the elements of the package;
- take consensus-based decisions on the preparation process of a zero draft; and
- mandate the President to prepare a concise document that identifies areas for further discussion and that does not contain treaty text, which would not constitute the zero draft.

Intersessional Highlights

Ocean Risk Summit: The first Ocean Risk Summit convened from 8-10 May 2018 in Bermuda, bringing together scientists, business leaders, and policy makers to discuss: our changing ocean; managing and reducing ocean risk; building resilience; and applied solutions. It served as a platform to showcase the latest research on the interrelated changes taking place in the ocean, covering issues from threats to global food security and human health, to the impacts of hurricanes on communities, ecosystems, and businesses.

ICP 19: The 19th meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (ICP-19) (18-22 June 2018, New York), themed around anthropogenic underwater noise, focused on: potential management approaches, including area-based management tools and EIAs; and the characterization of anthropogenic underwater noise as a form of transboundary pollution to be mitigated.

“The High Seas, What’s at Stake?” Conference: The conference took place in Paris, France, on 21 June 2018. Representatives of governments, research institutions, and civil society discussed diverging views on the protection of BBNJ, and expectations for the negotiations of the ILBI focusing on: “Why we must act now?”, “What obstacles must be removed?” and “What can we expect from negotiations in New York?”

CBD SBSTTA-22: The 22nd meeting of the CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) was held from 2-7 July 2018 in Montreal, Canada. SBSTTA-22 addressed, *inter alia*, protected areas and other effective area-based conservation measures (OECMs), marine and coastal biodiversity, and biodiversity and climate change. On ecologically or biologically significant marine areas (EBSAs), agreement was found on the modalities for modifying EBSAs in ABNJ, but views diverged over: calling for further collaboration and information sharing regarding the use of scientific information related to EBSAs in the application of relevant area-based management tools; and highlighting that modifications of EBSAs in ABNJ should be made without prejudice to developments in the BBNJ process. On OECMs, SBSTTA recommended: welcoming voluntary guidance on integration of protected areas and OECMs into the wider land- and seascapes and on mainstreaming these into sectors, as well as voluntary guidance on governance and equity; adopting a definition of OECMs; and encouraging parties to take into account the considerations in achieving Aichi Target 11 (protected areas and OECMs) in marine and coastal areas.

ISA 24: The 24th session of the International Seabed Authority (ISA) was held from 16-20 July 2018 for the Council, and from 23-27 July for the Assembly in Kingston, Jamaica. The Council considered: models for a financial payment system; draft regulations on deep-seabed mining; contractors’ non-compliance issues; and the possible operationalization of the Enterprise. While the Council made progress on the draft exploitation regulations, it recognized the need for further work on the payment mechanism, environmental protection, and the Enterprise. The Council also requested the Legal and Technical Commission to use information, as appropriate, on existing measures, means, and actions on environmental protection in ABNJ, such as regional fisheries management organizations’ restrictions, Specially Protected Areas under the Antarctic Treaty, EBSAs, Particularly Sensitive Sea Areas under the International Maritime Organization, MPAs under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), and voluntary and unilateral initiatives. Delegates also considered a proposal by Belgium, supported by the African Group, calling for a contact group to look at overlaps between the work of the ISA and the BBNJ process. The Assembly adopted a budget for 2019-2020 and a strategic plan for 2019–2023, with many welcoming the open consultation that preceded the latter and the placing of the ISA’s mandate in the context of the Sustainable Development Goals (SDGs).