EDITORIAL

Since 2012, the UN has been committed to addressing, "on an urgent basis ... the issue of the conservation and sustainable use of the marine biological diversity of areas beyond national jurisdiction". In 2015, the UN General Assembly (UNGA) adopted Resolution 69/292, under which a preparatory committee (PrepCom) has held four sessions seeking to develop elements of a draft binding instrument on this issue with an "intergovernmental conference" now to be held before the 73rd UNGA session begins this September. The editors of *EPL* have always had mixed emotions about this possibility, from our first awareness of serious proposals and recommendations to commence negotiations, as early as 1999. Indeed, the Editor's last face-to-face legal discussion with our founder Wolfgang E. Burhenne again focused on this issue – one on which we shared similar views.

While strongly committed to environmental protection and conservation beyond national jurisdiction, we have often doubted the logic of virtually all sides of the marine-biodiversity-beyond-national-jurisdiction issue with regard to pathway selection. For example, in the 1990s and 2000s, experts and negotiators who had taken a primary role in the negotiations of the UN Convention on the Law of the Sea (UNCLOS) faced off against a new wave of experts and negotiators. The former strongly opposed new negotiations, stating that these issues were already covered in UNCLOS. The latter considered the issues to be a *lacuna* in UNCLOS. While agreeing with the former that many biodiversity conservation matters are mentioned in UNCLOS, we also opined along with the new wave that these references require further clarification. We strongly disagreed, however, with the proposal that such clarification should come in the form of a formal binding instrument, citing, *e.g.*, the lack of real "binding" language in the most recently adopted multilateral environmental agreements (MEAs), and noting that the current high level of controversy over marine biodiversity would produce another binding instrument that contains no hard commitments or clear definitions. We also expressed concern that binding instrument negotiations would be so lengthy and rigid that they would not produce the positive and immediate change that was already clearly needed. The passage of 19 years has, alas, borne out our concern.

Perhaps the strongest conclusion of our internal deliberations on this issue related to the sweep and evolution of international law. In the 1970s, for example, international environmental law focused on known problems and sought coordinated ways to solve them. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), for example, grew out of known and established goals and mechanisms. Its negotiations focused on a well researched, shared objective (conservation) and a type of action (international trade controls) with which States had long experience and understanding. As a result, CITES has been a very effective MEA.

The Montreal Protocol on Substances that Deplete the Ozone Layer (MP) presents a similar picture. States began from a shared experience (pollution control) and a well understood international factor (the transboundary nature of pollution and the international interest in protecting the ozone layer). The MP thus uses known and accepted methods (regulatory controls) to address the problem and is widely cited as the most successful MEA.

By the 1990s, however, objectives and negotiations had changed. The goal of the Convention on Biological Diversity (CBD) was nothing less than ensuring the sustainability of all of the components of the entire "green web" of life on Earth – a goal not addressed directly by any national effort, and only partially understood. International consensus on sustainability issues had declined since the 70s. CBD negotiators remembered the high levels of support for research in the areas of biodiversity, conservation and social welfare during the previous three decades and the resulting quantum leap of human knowledge and capacity in these areas. Accordingly, although a "soft" binding instrument (containing few specific commitments or obligations), the CBD anticipated a continuation of intensive research and efforts towards ensuring biodiversity's sustainability. For example, at Article 7, it expected every country to complete, monitor and use a full inventory of the components of biodiversity within its borders or subject to its jurisdiction. Since the CBD's 1993 entry into force, however, support for the relevant research and technical assistance activities has dwindled significantly and this invaluable tool never came into existence.

In all environmental areas, for the past two decades or more, the bulk of current non-commercial (publicly available) environmental/sustainability "research" consists of "desk studies" compiling and recompiling the results of research in more prosperous decades past. In-country/on-site assistance often consists of little more than meetings and seminars. The anticipated flood of technically specific biodiversity knowledge never materialised, and has never been seriously supported. Despite this deficit of support, international negotiations and adjudications are frequently reduced to arguments over the presence or absence of "scientific evidence" on any point, complicated by the increasing reliance on the concept of "precaution" to support insistence on any action we may want to take, without spending the money to research it first.

In this political/legal climate, the negotiation of a binding instrument on marine biodiversity must face numerous difficult challenges. International marine scientists have made many important discoveries regarding biodiversity beyond national jurisdiction since 1990, but are the first to admit that scientific knowledge regarding the world's oceans is very far from complete. Not only do oceans cover 71 percent of the earth's surface, but they are a "volume" – as much as seven miles deep, with different ecosystems and needs at every level. Moreover, many elements of ocean waters are nearly impenetrable by satellite technology. The concept of "valuable ecosystems and resources" that need to be protected is relative. Today, a known seamount or hydrothermal vent is clearly valuable and in need of protection; tomorrow a heretofore unknown one may be discovered of much greater potential value, but not protected by today's binding instrument. The concept of sustainable use, however, suggests that one of them will probably be open to exploitation. Threats to oceans are vast, with new ones arising every day, and, in a world in which research funding is limited, even the most stringent binding instrument adopted today may need to develop a range of "fast response" measures (a tool that is heretofore unknown in MEAs).

A brief review of the PrepCom's report generally suggests that final negotiations are not expected to conclude in September, or any time soon. The report's "draft elements" are divided into two general categories: "non-exclusive elements that generated convergence among most delegations" and "some of the main issues on which there is divergence of views". Unfortunately, even the "convergence" issues are not "draft elements", but simply an outline – a long list of statements on which the instrument should or could include a provision on a certain issue (*e.g.*, scope, objectives, marine genetic resources, *etc.*) – an approach that suggests that the States may not agree on what each provision should say. As of the end of the fourth PrepCom session, some delegates were calling for up to eight weeks of negotiations, before the "international conference" mentioned in Resolution 69/292 could be held. The situation of ocean ecosystems, however, is increasingly dire. We urge negotiators to work as quickly as possible, but not to follow recent examples of using the need for haste as an excuse to adopt an instrument that is little more than a "placeholder" and offers no true basis for commitments and cooperation to save these precious ecosystems.

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DOI 10.3233/EPL-180041