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# Anatomy of a new international instrument for marine biodiversity beyond national jurisdiction

## First impressions of the preparatory process

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### Introduction

The ocean supports life on earth and covers over 70 per cent of the surface of the planet. Human activities that impinge on the marine environment are intensifying and there is rising concern about the state of the oceans in general,<sup>1</sup> as well as about biodiversity and fragile ecosystems in particular.<sup>2</sup> Thus it is unsurprising to note that offshore activities are subject to an ever-expanding corpus of international and national law of varying degrees of effectiveness.<sup>3</sup> Moreover, in light of the ephemeral and inter-temporal nature of law,<sup>4</sup> legal rules applicable to ocean-based activities must be kept under constant review and reformed with the passage of time. They must also be capable of addressing new challenges that arise subsequent to their adoption and implementation.<sup>5</sup> This is very much

the case with respect to the 1982 United Nations Convention on the Law of the Sea (UNCLOS),<sup>6</sup> which provides a sophisticated jurisdictional framework for uses of the ocean and sets itself the impressive objective of settling all issues relating to the law of the sea.<sup>7</sup>

Many of UNCLOS's 320 articles and nine annexes set out general norms that are applicable to the use of natural resources, as well as to the protection and preservation of the marine environment.<sup>8</sup> Accordingly, commentators sometimes describe UNCLOS as a framework treaty as it lacks comprehensive rules on discrete uses of the sea, such as seabed mining, fishing and marine scientific research.<sup>9</sup> Indeed, it makes no specific reference to marine biodiversity per se,<sup>10</sup> although it sets out general and specific obligations in Part XII regarding the protection of the marine environment, including the adoption of measures 'to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'.<sup>11</sup> Furthermore, despite its almost universal acceptance and durability over the past 30 years,<sup>12</sup> the cumbersome procedures for the amendment of UNCLOS make it

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[www.ucc.ie/en/media/academic/law/events/2016/RLong-MRodri%CC%81guezChaves\(UCCfinal\)pptx\(1\)\(1\).pdf](http://www.ucc.ie/en/media/academic/law/events/2016/RLong-MRodri%CC%81guezChaves(UCCfinal)pptx(1)(1).pdf).

1 United Nations *First Global Integrated Marine Assessment* (UN 2016) [http://www.un.org/depts/los/global\\_reporting/WOA\\_RPROC/WOACompilation.pdf](http://www.un.org/depts/los/global_reporting/WOA_RPROC/WOACompilation.pdf).

2 *ibid* Pt VI ch 33–53.

3 Donald Rothwell, Alex Oude Elferink, Karen Scott and Tim Stephens (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015); Y Tanaka *The International Law of the Sea* (2nd edn Cambridge University Press 2015); D Rothwell, T Stephens *The International Law of the Sea* (2nd edn Hart Publishing 2016); D Attard (ed) *The IMLI Manual on International Maritime Law Vols 1–3* (Oxford University Press 2014–2016).

4 See Y Tanaka 'Reflections on time elements in the international law of the environment' (2013) 73(2) *Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht* 139–75.

5 A Boyle 'Further development of the 1982 Law of the Sea Convention: mechanisms for change' (2005) 54 *International and Comparative Law Quarterly* 563.

6 1833 UNTS 3/21 ILM 1261 (1982) (entered into force 16 November 1994).

7 UNCLOS preamble recital 1. See Myron Nordquist, Satya Nandan and Shabtai Rosenne (eds) *United Nations Convention on the Law of the Sea 1982: A Commentary Vols 1–6* (Brill 1986–2012) (the Virginia Commentary).

8 UNCLOS Part XII arts 192–237.

9 R Churchill 'The United Nations Convention on the Law of the Sea' in Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (n 3) 23–45 at 29–30, 42–44.

10 The 1992 Convention on Biological Diversity defines biodiversity and provides a framework within national jurisdiction for conservation, sustainable use and benefit sharing. In areas beyond national jurisdiction, the Convention applies to processes and activities carried out under the jurisdiction or control of its parties.

11 UNCLOS art 194(5).

12 As of 5 May 167 States Parties and the European Union. There are 30 non-Parties to the Convention including the United States, El Salvador, Colombia, Venezuela, Peru, Turkey, Israel, Iran, Libya, Cambodia, North Korea, Eritrea, Syria and the United Arab Emirates, as well as 17 land-locked states.

unwieldy in responding to new knowledge and concerns about the utilisation of resources and the deteriorating status of the marine environment and biodiversity specifically.<sup>13</sup>

One of the ways the international community has sought to overcome the amendment difficulties associated with UNCLOS and to flesh out its key provisions on specific uses of the ocean is through the adoption of implementation agreements, including most conspicuously on the regime applicable to the international seabed area in 1994,<sup>14</sup> and on straddling and highly migratory fish stocks in 1995.<sup>15</sup> After a 20 year fallow period, these agreements may soon be accompanied by a third treaty, as steps are currently afoot at the United Nations to negotiate a new legally binding instrument on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, thereby addressing a long-standing lacuna in the Convention.<sup>16</sup>

In view of this development, the aim of this article is to provide some background information on the *raison d'être* for this initiative, to review some of the milestones passed in the process to date and to highlight some of the features of the putative instrument that are under discussion at the United Nations. The article concludes by outlining some of the issues that are at play in the process for regional groupings of states, countries with significant maritime interests, as well as for the non-governmental representatives of civil society more generally.

### Where are the areas beyond national jurisdiction?

A good point of departure for our discussion is the scope *ratione loci* of the new instrument. Put more simply, what is the geographical extent of areas beyond national

jurisdiction (ABNJ)? Instructively, the term 'beyond the limits of national jurisdiction' is used in UNCLOS in the context of the international seabed area (referred to as the Area),<sup>17</sup> where the ocean floor and its mineral resources are the common heritage of mankind.<sup>18</sup> In contrast, the term ABNJ is not a term of art *sensu stricto* under UNCLOS, but in the evolving lexicon of the law of the sea is understood to refer to both the Area and the high seas. The latter for the purpose of the application of the high seas provisions in Part VII of UNCLOS is all parts of the sea that are not included in the exclusive economic zone, in the territorial sea, internal waters or in the archipelagic waters.<sup>19</sup> Accordingly, ABNJ are sea areas beyond the limits of coastal state sovereignty and jurisdiction, where two very distinctive jurisdictional frameworks apply under UNCLOS, namely: the high seas (Part VII) and the regime applicable to the Area (Part XI and Annex III of the Convention).

Three additional points can be made concerning the spatial extent of ABNJ.

First, there are some estimates in the specialist literature that suggest that ABNJ cover 62 per cent of the ocean,<sup>20</sup> but any such measurement is of course only an estimate because the precise boundaries of the Exclusive Economic Zones (EEZs) and continental shelves of many states remain undetermined worldwide. More specifically, the geographical scope of ABNJ will only be settled when coastal states establish their territorial sea, EEZ and continental shelf limits and when these are undisputed by other states, which is particularly problematic in many ocean regions. In particular, the establishment and description by states of the outer limits of continental shelves beyond 200 miles in accordance with the recommendations of the Commission on the Limits of the Continental Shelf (CLCS) will have a major bearing on the spatial extent of ABNJ.<sup>21</sup>

At the time of writing, 67 states have made or are in the process of making a submission to the CLCS claiming

13 The formal amendment procedures are contained in arts 312–313. On the inflexibility of these provisions see Tanaka *The International Law of the Sea* (n 3) 335. On the modification of UNCLOS by practice see I Buga 'Between stability and change in the Law of the Sea Convention: subsequent practice, treaty modification, and regime interaction' in Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (n 3) 46–68.

14 1994 Agreement relating to the implementation of Part XI of the UNCLOS of 10 December 1982, 1836 UNTS 42 (entered into force 28 July 1996).

15 The United Nations 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) 2167 UNTS 88 (entered into force 11 December 2001).

16 See eg G Wright, J Rochette, E Druel and K Gjerde 'The long and winding road continues: towards a new agreement on high seas governance' Study No 01/16 (IDDRI 2015); Centre for International Law, National University of Singapore *Workshop on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction: Preparing for the PrepCom* (3–4 February 2016) Singapore (unpublished report, copy with the authors).

17 UNCLOS art 1.1(1).

18 UNCLOS preamble recital 6.

19 UNCLOS art 86. In contrast to the 1958 High Seas Convention, 450 UNTS 11 (entered into force 30 September 1962), the term 'high seas' is not defined expressly in UNCLOS. See Douglas Guilfoyle 'The high seas' in Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (n 3) 203–53 at 205.

20 The figures of 62 per cent for the high seas part of ABNJ and 54 per cent for the Area, along with 38 per cent for EEZs and 8 per cent for the extended continental shelf of coastal states beyond 200 miles, are the estimates of the spatial coverage of the different maritime spaces under UNCLOS used by the International Seabed Authority (personal communication with the authors). On similar estimates see also Terramar Project 'Educational resources on our world's ocean' <http://theterramarproject.org/education/maps>.

21 UNCLOS art 76.

extended continental shelves pursuant to Article 76 of UNCLOS.<sup>22</sup> Furthermore, in many instances, the making of a submission to the CLCS is dependent on the resolution of disputed maritime boundaries between opposite and adjacent states and these may take many decades to resolve. The precise geographical limits of ABNJ will remain undetermined *pro tem*.

Secondly, a significant portion of high seas in the Atlantic, Indian, Pacific and Arctic Oceans is superjacent to coastal state continental shelf where it extends 200 miles beyond the baseline, the so-called extended continental shelf.<sup>23</sup> States exercise sovereign rights on the extended continental shelf in relation to exploring and exploiting non-living resources, as well as sedentary species.<sup>24</sup> For this purpose, they may also adopt policies to ensure the sustainable management and conservation of the associated biodiversity, including establishing marine protected areas (MPAs) in relation to their continental shelf (though not in the high seas above).<sup>25</sup>

Although there is no specific duty under UNCLOS to conserve and manage continental shelf resources, coastal states have a general obligation to protect the marine environment and to ensure the exploitation of natural resources pursuant to environmental policies.<sup>26</sup> Indeed, the sustainable use and conservation of biodiversity in the water column associated with features on the extended continental shelf, such as seamounts, hydrothermal vents and cold-water coral reefs is therefore of prime concern and importance to states with such extended continental shelves.

Concerns arise in relation to the Mediterranean Sea, where there are significant portions of high seas that come under the scope of Part VII of UNCLOS but where the seabed beneath is part of the continental shelf of states and

not part of the Area.<sup>27</sup>

Hence, the new instrument will have to respect the sovereign rights and duties that coastal states exercise under international law over continental shelf resources, including their associated biodiversity. Indeed, delineating the geographical footprint of such resources presents its own challenges, as deep-sea biodiversity associated with cold-water corals straddles the distinction made under UNCLOS between living and non-living resources, as cycles of growth and decay vary over time.<sup>28</sup> Again, addressing such issues presents its own challenges to the architects of the new instrument, particularly in the context of drafting provisions applicable to high seas MPAs.

The final point is of academic interest only in so far as it relates to the payments or contributions in kind that coastal states have to make to the International Seabed Authority (ISA) for the exploitation of the non-living resources from the continental shelf beyond 200 miles and for the subsequent distribution to developing states.<sup>29</sup> Clearly, UNCLOS does not require coastal states to make similar payments in relation to the use of organisms or plant species if they are exploited from the extended continental shelf for commercial or bio-discovery purposes.

### Why a new instrument?

The new instrument is not evolving in a vacuum but is very much informed by new and increasing scientific information about the impacts of human activities on the marine environment including in ABNJ, as well as by the general thrust of political and legal developments on the landscape of international law as they pertain to the ocean over the past two decades. More specifically, the rationale underpinning the adoption of a new agreement stems from a number of factors, including the inadequacy of UNCLOS and marine environmental instruments in combating the threats posed by human activities to biodiversity in the deep ocean.<sup>30</sup>

Clearly, the risks and the urgency of the threats vary from place to place and with the passage of time, along with the meteorological and oceanographic factors including the effects of climate change, all of which are constantly at play in the ocean environment. Nonetheless,

22 Russia, Brazil, Australia, Ireland, New Zealand, Spain, United Kingdom of Great Britain and Northern Ireland, Norway, France, Mexico, Barbados, Indonesia, Japan, Republic of Mauritius, Republic of Seychelles, Suriname, Kenya, Myanmar, Yemen, Uruguay, Philippines, Cook Islands, Fiji, Argentina, Ghana, Iceland, Denmark, Pakistan, South Africa, Federated States of Micronesia, Papua New Guinea, Solomon Islands, Malaysia, Vietnam, Nigeria, Palau, Côte d'Ivoire, Sri Lanka, Portugal, Tonga, India, Trinidad & Tobago, Namibia, Cuba, Mozambique, Maldives, Bangladesh, Madagascar, Guyana, Tanzania, Gabon, Tuvalu, China, Kiribati, Republic of Korea, Nicaragua, Angola, Canada, Bahamas, Somalia, Cabo Verde, Republic of The Gambia, Republic of Guinea, Guinea-Bissau, Mauritania, Senegal, Sierra Leone.

23 UNCLOS art 76(4)–(6).

24 *ibid* art 77(4).

25 This may include establishing marine protected areas or the adoption of other environmental measures. See J Mossop 'Protecting biodiversity on the continental shelf beyond 200 nautical miles' (2007) 38 *Ocean Development and International Law* 283, 289.

26 UNCLOS arts 192, 193, 194.

27 I Papanicopolulu 'The Mediterranean Sea' in Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (n 3) 604–25 at 611.

28 R Long, A Grehan 'Marine habitat protection in a coastal Member State of the European Union: the case of deep-water coral conservation in Ireland' (2002) 17(2) *International Journal of Marine and Coastal Law* 241, 243.

29 UNCLOS art 82.

30 See eg Wright and others (n 16).

according to the Secretary-General of the United Nations, they include all or some of the following: fishing activities, particularly illegal, unregulated and unreported fishing, overfishing and destructive fishing practices; deep-seabed mining; offshore energy exploration and production operations; shipping; pollution, especially from plastic and acoustic sources; the spread of alien and invasive species; cable-laying; tourism; marine scientific research, including bio-discovery and bioprospecting research activities; ocean acidification, as well as other impacts of climate change.<sup>31</sup> To this list, we can add new and emerging activities such as geo-engineering, ocean fertilisation and carbon sequestration, which are developing rapidly in order to mitigate and adapt to the effects of climate change.

The ocean is host to a great diversity of marine life, including plants, sponges and microbes, with half of animal phyla found only in the sea. That said, the *First Global Integrated Marine Assessment* notes that the pressures on marine biodiversity are increasing and that there is a corresponding reduction in the provision of ecosystem services.<sup>32</sup> There is also a dearth of knowledge on global-scale patterns of biodiversity in the deep sea, which remain 'largely unknown' from a scientific perspective.<sup>33</sup>

In relatively stark terms, the *Assessment* goes on to point out that the carrying capacity of the ocean is near or at its limit owing to human activities and calls on governments to adopt a more coherent approach, particularly in relation to controlling and regulating economic activities that impinge upon the health of the deep ocean.<sup>34</sup> A similar theme runs through the *Global Biodiversity Outlook*, which reports on the progress that has been made in implementing the Convention on Biological Diversity Strategic Plan for Biodiversity 2011–2020 and notes that the objective of conserving 10 per cent of coastal and marine areas (Target 11 of Aichi Biodiversity Targets) is far from being achieved in relation to deep-sea areas, including the high seas.<sup>35</sup>

Ominously, and in uncompromising terms, the *Global Biodiversity Outlook* points out that 'inadequate management of protected areas remains widespread'.<sup>36</sup>

Against this grim scientific backdrop, a new international agreement will help to achieve a number of high-level political commitments in relation to the environmental protection of the ocean. Importantly, Goal 14 of the 2030 Agenda for Sustainable Development aims to improve, amongst other matters, the sustainable management, protection and restoration of marine ecosystems, and calls for the conservation of at least 10 per cent of marine areas by 2020.<sup>37</sup> Similarly, the RIO+20 United Nations Conference on Sustainable Development requires the protection and maintenance of the biodiversity associated with marine ecosystems, as well as its conservation and sustainable use of ocean resources for present and future generations.<sup>38</sup> As will be seen below, in 2012 the Conference committed the United Nations General Assembly to taking a decision on the development of a new instrument on the conservation and sustainable use of marine biodiversity in ABNJ.<sup>39</sup>

At a supranational level, although UNCLOS and its related agreements provide the overarching framework, many multilateral and regional bodies have adopted legally binding measures that are relevant to the protection of ecosystems and biodiversity, both within and beyond national jurisdiction. Amongst others, these instruments and bodies include, most notably, the Convention on Biological Diversity,<sup>40</sup> the Convention on the Conservation of Migratory Species of Wild Animals,<sup>41</sup> the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>42</sup> and the United Nations Framework Convention on Climate Change,<sup>43</sup> the United Nations Food and Agriculture Organization (FAO), the ISA, the International Maritime Organization (IMO), the regional seas bodies under the United Nations Regional Seas Programme,<sup>44</sup> the Arctic Council, over two dozen regional fisheries management organisations, as well as the European Union.<sup>45</sup> Not all of the measures have been successful and, as

31 UN Doc A/59/62/Add.1, 58–61.

32 *First Global Integrated Marine Assessment* (n 1).

33 *ibid* 21, 22 and 46, citing MA Rex, R J Etter *Deep-Sea Biodiversity: Pattern and Scale* (Harvard University Press 2010). There have been a number of initiatives to close the scientific deficit including the establishment of a database on vulnerable marine ecosystems (VMEs) by the FAO and RFMOs that are competent to manage deep-sea fisheries in ABNJ.

34 *First Global Integrated Marine Assessment* (n 1) 40.

35 Secretariat of the Convention on Biological Diversity *Global Biodiversity Outlook 4* (CBD 2014) 16; M Spalding, I Melanie, A Milam, C Fitzgerald and L Z Hale 'Protecting marine spaces: global targets and changing approaches' in A Chircop, S Coffen-Smout and M McConnell (eds) *Ocean Yearbook 27* (Martinus Nijhoff Publishers 2013) 213–48. A recent study indicates that the UN 10 per cent target is too low and that the 2014 World Parks Congress on the basis of existing evidence has called for the designation of 30 per cent of the ocean as highly protected MPAs; see Bethan C O'Leary and others 'Effective coverage targets for ocean protection' (2016) *Conservation Letters* 5.

36 *Global Biodiversity Outlook 4* (n 35) 7.

37 UN General Assembly Resolution 70/1, A/RES/70/1 (21 October 2015) Goal 14.2, 14.5.

38 United Nations Conference on Sustainable Development 'The future we want' annexed to UN General Assembly Resolution 66/288, A/RES/66/288 (11 September 2012) para 162.

39 *ibid*.

40 Convention on Biological Diversity, 1760 UNTS 79 (entered into force 29 December 1993).

41 1651 UNTS 333 (entered into force 1 November 1983).

42 993 UNTS 243 (entered into force 1 July 1975).

43 United Nations Framework Convention on Climate Change, 1771 UNTS 107 (entered into force 21 March 1994).

44 There are 18 regional seas programmes, 14 of which are covered by legally binding instruments.

45 UN Doc A/59/62/Add.1, 63–73.

a result, the regulatory framework and institutional architecture for the protection and use of biodiversity in ABNJ remains disparate and in many respects unfit for purpose.<sup>46</sup>

Similarly, from a legal perspective, the absence of a comprehensive multilateral treaty focused specifically on marine biodiversity in ABNJ makes it increasingly difficult to design and implement regulatory schemes that apply new scientific knowledge about the ocean, ecological systems and the resources that they support. Allied to this, the limited competence of multilateral and regional bodies make them unsuitable to tackle cross-cutting governance and management issues, or effectively to address the cumulative effects of the various anthropogenic impacts on the marine environment. This is exacerbated by the phenomena of non-compliance and with shortcomings in the law of the sea more generally, as well as flag state responsibility in particular.<sup>47</sup>

In order to mitigate the risks outlined above and to deal with regional or worldwide environmental problems, there is also a pressing need for the ongoing codification of new normative approaches to environmental management, including the precautionary principle, ecosystem-based management, the principle that environmental damage should be rectified at source and that the polluter should pay, as well as the principle that preventative action should be taken with a view to ensuring the conservation and sustainable use of biodiversity.<sup>48</sup>

Therefore, from scientific, political, regulatory and normative perspectives, the case supporting further international action through the adoption of a new multilateral legal instrument on marine biodiversity is necessary, if not incontrovertible.

### Some highlights: informal and formal efforts to develop a new instrument

When one now looks back it is easy to see that the ebb and flow of international and regional initiatives to protect biodiversity in ABNJ has taken place in a number of inter-

governmental, non-governmental and academic settings, during a period of well over a decade since the late 1990s. Indeed, the topic of protecting biodiversity and the establishment of high seas MPAs was hotly debated at a number of technical workshops and conferences in Germany, Spain, Australia and Ireland in the early part of the new millennium.<sup>49</sup>

At an inter-governmental level, the protracted and multi-faceted nature of the deliberations on the protection of deep-ocean biodiversity can be traced back to some of the early meetings of the United Nations Informal Consultative Process on Oceans and the Law of the Sea.<sup>50</sup> A major step forward was taken when the UN General Assembly decided in 2004 to establish an expert working group with the expansive title, 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* (BBNJ Working Group), and called upon states and international organisations ‘to take action urgently to address, in accordance with international law, destructive practices that have adverse impacts on marine biodiversity and ecosystems’.<sup>51</sup>

From the outset, the BBNJ Working Group was tasked with a wide mandate, namely: (1) surveying the activities of the UN and other organisations on the conservation and sustainable use of biodiversity in ABNJ; (2) examining the topic from scientific, technical, economic, legal, environmental and socio-economic perspectives; (3) identifying where further studies were needed; and (4) indicating the scope for greater international cooperation and coordination on the subject-matter.<sup>52</sup> Between 2006

49 See in particular *Workshop on the Governance of High Seas Biodiversity Conservation* Cairns, Australia (16–19 June 2003); R Warner ‘Marine protected areas beyond national jurisdiction: existing legal principles and a future international law framework’ in M Haward (ed) *Integrated Oceans Management: Issues in Implementing Australia’s Oceans Policy* (Cooperative Research Centre for Antarctica and the Southern Ocean 2001) 55; R Warner ‘Marine protected areas beyond national jurisdiction: existing legal principles and future legal frameworks’ in H Thiel, J A Koslow (eds) *Managing Risks to Biodiversity and the Environment on the High Seas, Including Tools Such as Marine Protected Areas; Scientific Requirements and Legal Aspects* (German Federal Agency for Nature Conservation 2001) 149; K Gjerde, C Breide (2003) ‘Towards a strategy for high seas marine protected areas: proceedings of the IUCN, WCPA and WWF Experts Workshop on High Seas Marine Protected Areas (15–17 January 2003) Malaga, Spain; IUCN (Gland, Switzerland). See also F Millicay ‘A legal regime for the biodiversity of the area’ in M Nordquist, R Long, T Heidar and J Norton Moore (eds) *Law, Science and Ocean Management* (Martinus Nijhoff 2007) 739–849.

50 See inter alia UNEP *Ecosystems and Biodiversity in Deep Waters and High Seas* UNEP Regional Seas Report No 178 (Gland UNEP/IUCN 2006).

51 Established by UN General Assembly Resolution 59/24, para 73, A/RES/59/24.

52 *ibid.*

46 See R Warner ‘Conserving marine biodiversity in areas beyond national jurisdiction: co-evolution and interaction with the law of the sea’ in Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (n 3) 752–76, especially 758–64.

47 R Churchill ‘The persisting problem of non-compliance with the Law of the Sea Convention: disorder in the oceans’ in D Freestone (ed) *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Martinus Nijhoff 2013) 139–46.

48 On principles, see further discussion below. See also inter alia David Freestone ‘Principles applicable to modern oceans governance’ (2008) 23(3) *International Journal of Coastal and Marine Law* 385; R Long ‘Principles and normative trends in European Union ocean governance’ in C Schofield, S Lee and M Kwon (eds) *The Limits of Maritime Jurisdiction* (Brill/Nijhoff Publishers 2014) 629–726.

and 2015, the BBNJ Working Group convened on nine occasions and undertook much of the heavy lifting in moving the process forward by producing a series of reports, technical papers and presentations on the principal issues relating to the conservation and sustainable use of marine biodiversity in ABNJ, as well as on scope, parameters and feasibility of adopting a new instrument, along with the law and policy options that could be used for this purpose.<sup>53</sup>

A major milestone was achieved in 2011, when the BBNJ Working Group recommended that a process be initiated by the General Assembly to identify gaps in the international legal landscape and ways forward, including the implementation of existing legal instruments, with the possible development of a new multilateral agreement under UNCLOS also presented as an option.<sup>54</sup> Crucially, the BBNJ Working Group also recommended that this process would address four substantive elements in an integrated manner as a ‘package’, namely: (1) marine genetic resources (MGRs), including questions on the sharing of benefits; (2) measures such as area-based management tools, including MPAs; (3) environmental impact assessments; and (4) capacity-building and the transfer of marine technology (referred to below as the 2011 package).<sup>55</sup> The integrated approach and the four elements of the package have shaped all the subsequent deliberations of the BBNJ Working Group, the associated resolutions of the General Assembly and the preparatory phase of the negotiation process at the UN.

The move towards the development of a new instrument should not of course be viewed solely as a BBNJ Working Group initiative in so far as considerable efforts were undertaken by the International Union for Conservation of Nature and multilateral organisations, including the FAO, IMO, ISA and the Intergovernmental Oceanographic Commission (IOC), as well as pursuant to the Convention on Migratory Species, that help advance regulatory schemes to protect biodiversity in ABNJ both directly and indirectly, as well as formulating tools and technical guidance for this purpose.<sup>56</sup> Within the framework of Convention on Biological Diversity, for instance, considerable progress was made on a broad range of issues, including the articulation of the scientific criteria for

identifying ecological or biologically significant areas in need of protection in open waters and deep-sea habitats and guidance on scientific and technical aspects on selecting a representative network of MPAs, as well as on environmental impact assessment of activities in marine and coastal areas, including ABNJ, along with agreement on the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising.<sup>57</sup>

Similarly, there were several regional initiatives to protect deep-sea biodiversity, including measures taken by regional fisheries management organisations (RFMOs), the regional seas bodies including most especially under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) in high seas MPA designation in the north-east Atlantic,<sup>58</sup> as well as new initiatives under existing instruments to introduce conservation measures to protect the unique biodiversity of the Sargasso Sea.<sup>59</sup>

Moreover, additional momentum and a long-overdue sense of urgency were added by states at the 2012 Rio United Nations Conference on Sustainable Development, when they entered into a commitment under the *chapeau* of ‘The future we want’ to build on the work of the BBNJ Working Group and to address conservation and sustainable use of marine biodiversity, including vitally the momentous step of taking a decision on the development of a new instrument before the end of the Sixty-ninth Session of the General Assembly in 2015.<sup>60</sup>

Similarly, the ocean conservation commitments entered into by states at the Sustainable Development Summit in 2015, including the obligation to manage sustainably and to protect marine ecosystems and to avoid significant adverse impacts with a view to achieving productive oceans by 2020, provided a political pledge, a target date and a clear policy backdrop for the subsequent negotiation process on a new instrument.<sup>61</sup> The same year, the Subsidiary Body on Scientific, Technical and Technological Advice to the Convention on Biological Diversity adopted a recommendation encouraging further research on the ‘significance of marine biodiversity for health, including for food security, and the consequences of multiple stressors on marine ecosystems’.<sup>62</sup>

53 <http://www.un.org/depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm>.

54 UN Doc A/66/119, Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Annex para 1(a).

55 *ibid* Annex para 1(b).

56 See R Warner ‘Conserving marine biodiversity in areas beyond national jurisdiction: co-evolution and interaction with the law of the sea’ in Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (n 3) 752–76.

57 *ibid* 767–69 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising, UN Doc UNEP/CBD/COP/DEC/X1 (entered into force 12 October 2014).

58 R Long ‘Stepping over maritime boundaries to apply new normative tools in EU law and policy’ in M Nordquist, J Norton Moore, R Beckman and H Djalal (eds) *Maritime Border Diplomacy* (Martinus Nijhoff Publishers 2012) 213–64.

59 See Warner (n 56) 767–71.

60 UN Doc A/RES/66/288 para 162 at 31.

61 UN Doc A/RES/70/1 at 23–24.

62 UNEP/CBD/SBSTTA/REC/XIX/6 at 3.

## Breakthrough: United Nations General Assembly Resolution 69/292

Following the completion of the work of the BBNJ Working Group in January 2015, a game-changing breakthrough was achieved when the United Nations General Assembly decided in Resolution 69/292 to develop an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.<sup>63</sup> In keeping with previous practice for the preparatory phase of inter-governmental conferences, the General Assembly also decided to establish a Preparatory Committee, which would meet for four sessions in 2016–2017 with a view to making substantive recommendations to the General Assembly on the elements of a draft text of the instrument, taking into account the work of the BBNJ Working Group.<sup>64</sup> With a view to ensuring the broadest possible engagement, participation in the Preparatory Committee is open to all UN member states, members of the UN specialised agencies and parties to the Convention, as well as observers.<sup>65</sup> As such, participation in the preparatory negotiations by non-parties to UNCLOS, such as the United States and Turkey, does not affect their legal status with regard to the Convention or any other related agreements.<sup>66</sup>

A similar *modus vivendi* was also used to good effect in the negotiation phase of the 1994 Implementation Agreement and the 1995 Fish Stocks Agreement. Moreover, with an eye to the future and to ensure the widest possible acceptance of any new instrument in the fullness of time, the Preparatory Committee is compelled to exhaust every effort to reach agreement on substantive matters by consensus where possible.<sup>67</sup> Recognising the *realpolitik* of negotiations at the UN, there is also scope for the Preparatory Committee in the absence of consensus to make recommendations on contested matters.<sup>68</sup>

Instructively, the negotiations must address in an integrated manner, or in the precise language of the resolution ‘together and as a whole’ the four elements identified in the 2011 package, namely MGRs, ‘area-based management tools, environmental impact assessments, capacity-building and the transfer of marine technology’.<sup>69</sup> As an aside, it ought to be mentioned that the consensus and integrated approach is not unusual and reflects the

unique circumstances from which the 2011 package deal emerged and will ensure that each element of the negotiations is given equal weight, with a view to engendering compromise and universal acceptance of the outcome of the process. Indeed, this approach is typical of law of the sea negotiations since the Third United Nations Conference on the Law of the Sea (1973–1982) and has contributed to the extraordinary achievements and almost universal acceptance of UNCLOS over the past three decades.<sup>70</sup>

For obvious reasons, the Preparatory Committee must ensure that the process does not undermine the mandates or instruments adopted by international bodies.<sup>71</sup> Ultimately, the outcome of this process rests with the General Assembly, who are required to make a decision in 2018 on the convening of an inter-governmental conference under the auspices of the UN to consider the recommendations of the Preparatory Committee on the elements of the package and to elaborate the text of an international legally binding instrument under UNCLOS.<sup>72</sup> The requirement of a General Assembly decision was included in the resolution in order to bring on board the sceptical states who were not otherwise ready to accept the start of negotiations of a legally binding instrument. Unmistakably, participation by the representatives of developing countries is fundamental to the successful outcome of the meetings of the Preparatory Committee and the subsequent inter-governmental conference, and a special voluntary trust fund has been established for this purpose.<sup>73</sup> Again, in line with established UN administrative practice, the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs is charged with the onerous task of supporting the work of the Preparatory Committee.<sup>74</sup>

### First meeting: Preparatory Committee

The first session of the Preparatory Committee, which convened at the UN in New York from 28 March to 8 April 2016, marked the end of the informal consultative process and the start of formal negotiations on the development of a new legally binding instrument. The session was chaired by Ambassador Eden Charles who, in his capacity as presiding officer, was appointed by the President of the

63 UN General Assembly Resolution 69/292 (2015), A/RES/69/292 para 1.

64 *ibid* para 1(a)–(b).

65 *ibid* para 1(a).

66 *ibid* para 4.

67 *ibid* para 1(h)–(i).

68 *ibid* para 1(i).

69 *ibid* para 2.

70 See statement by B Zuleta; M Nordquist (ed) *United Nations Convention on the Law of the Sea 1982: A Commentary Vol 1* (Martinus Nijhoff 1985) 7.

71 UN General Assembly Resolution 69/292 (2015), A/RES/69/292 para 3.

72 *ibid* para 1(k).

73 *ibid* para 5.

74 *ibid* para 6.

General Assembly in consultation with the member states. In order to share the burden of the post, the chair is assisted in the general conduct of the work of the Preparatory Committee by a bureau made up of two members from each of the UN regional groups whose roles are limited to assisting the chair solely on procedural issues.<sup>75</sup> The first session was attended by 91 states parties to UNCLOS,<sup>76</sup> 10 non-parties,<sup>77</sup> seven inter-governmental organisations,<sup>78</sup> five specialised agencies and related organisations,<sup>79</sup> five UN Funds and programmes, bodies and offices,<sup>80</sup> as well 17 non-governmental organisations representing civil society.<sup>81</sup>

75 The members of the bureau are from the following states parties to UNCLOS: Morocco and South Africa for the African Group; China and Japan for Asia-Pacific countries; Poland and the Russian Federation for Central and Eastern European countries; Chile and Costa Rica for the Latin America and the Caribbean Group; and Canada and Belgium for the Western European and Others Group.

76 Algeria, Argentina, Australia, Austria, Bangladesh, Barbados, Belgium, Belize, Brazil, Bulgaria, Burkina Faso, Cabo Verde, Cameroon, Canada, Chile, China, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, European Union, Fiji, Finland, France, Gabon, Germany, Ghana, Greece, Honduras, Iceland, India, Indonesia, Iraq, Ireland, Italy, Jamaica, Japan, Kenya, Lebanon, Lesotho, Lithuania, Madagascar, Malaysia, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Morocco, Mozambique, Myanmar, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Palau, Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Russian Federation, Saudi Arabia, Senegal, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, State of Palestine, Sudan, Swaziland, Sweden, Switzerland, Thailand, Togo, Tonga, Trinidad and Tobago, Tunisia, United Kingdom of Great Britain and Northern Ireland, Uruguay, Vanuatu, Viet Nam, Zambia.

77 Venezuela (Bolivarian Republic of), Peru, El Salvador, Turkey, Holy See, Israel, Iran, United Arab Emirates, United States of America, Republic of Korea.

78 Asian-African Legal Consultative Organization, International Renewable Energy Agency (IRENA), International Union for Conservation of Nature (IUCN), Pacific Community (Secretariat of the Pacific Community), Pacific Islands Forum Secretariat, Agreement for the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), South East Atlantic Fisheries Organization (SEAFO).

79 Food and Agriculture Organization of the United Nations, Global Environment Facility, Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (UNESCO-IOC), International Maritime Organization, International Seabed Authority.

80 Department of Economic and Social Affairs, Office of the High Representative for the least developed countries, landlocked developing countries and SIDSs, Secretariat of the Convention on Biological Diversity, United Nations Environment Programme, United Nations University.

81 Fondation Institut de Recherche pour le Développement Durable et les Relations Internationales (IDDRI), Greenpeace International, Institute for Advanced Sustainability Studies (IASS), Interamerican Association for Environmental Defense/Asociación Interamericana para la Defensa del Ambiente (AIDA), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Coastal and Ocean Organization (ICO), International Institute for Environment and Development (IIED), International Organization for Standardization (ISO), Islands First, Natural Resources Defense Council (NRDC), Oceancare, Pew Environment Group, Ship and Ocean Foundation (OPRF), The Sasakawa Peace Foundation, Sylvia Earle Alliance, Blue Mission, Fonds Tara/Tara Foundation, World Wide Fund for Nature (WWF).

Amongst this representation there were only two industry bodies, namely the International Chamber of Commerce and the International Chamber of Shipping. Furthermore, despite the large and disparate numbers of participants in attendance at the first session, the absence of representatives from a significant number of developing countries, and the presence of few experts from national capitals in the delegations of those developing countries that were represented was noticeable with many delegates lamenting the dearth of contributions to the specialist trust fund established for this purpose, with the notable exception of the financial commitment made by the Netherlands.<sup>82</sup> Surprisingly, only one RFMO, the South East Atlantic Fisheries Organization, registered attendance at the first session, despite the importance of the discussion on the material scope of the new agreement and its relationship with the governance and management of high seas fisheries.

The agenda and work programme of the Preparatory Committee was facilitated by the organisation of its work into plenary sessions and into informal Working Groups focusing in greater detail on the substantive topics agreed as part of the 2011 package.<sup>83</sup> In general, the Preparatory Committee engaged in the initial phase of its work programme at the first session in a collegiate, comprehensive and constructive fashion with a view to identifying areas of mutual understanding and agreement, without recourse to the articulation of strong doctrinal views on key matters that lacked common accord.<sup>84</sup> Amongst the topics examined over the two weeks were the scope of the new instrument and its relationship with other instruments, guiding approaches and principles as well as the four substantive topics agreed in 2011 as part of the package deal. Each of these elements constitutes core aspects of the body of the new instrument under discussion and their anatomy thus merits further consideration here.

### Scope and general principles

In line with established practice pertaining to the negotiation and drafting of *lex specialis*, the personal, substantive, geographic and temporal scope of the new instrument will be defined by its subject matter, which is

82 See IISD 'PrepCom 1 highlights' (30 March 2016) 25(98) *Earth Negotiations Bulletin*.

83 UN Doc A/AC.287/2016/ PC.1/L.1 and A/AC.287/2016/ PC.1/L.2. A representative from the following countries chaired the informal working groups in their personal capacities: Brazil the group on MGRs, including questions on the sharing of benefits; New Zealand the group on area-based management tools, including MPAs; the Netherlands the group on EIA; and Singapore the group on capacity-building and the transfer of marine technology.

the conservation and sustainable use of marine biodiversity in ABNJ. The new instrument will be open to parties and non-parties to UNCLOS, including international organisations to which their member states have transferred competence over matters governed by the instrument, most notably the European Union. Matters that may have a bearing on the temporal scope of the instrument include the deadlines set down by the Johannesburg Plan of Implementation to the World Summit of Sustainable Development, as well as the 2030 Agenda for Sustainable Development.<sup>85</sup>

The material scope of the instrument will be shaped by the substantive elements of the 2011 package as well as the parameters set down by the General Assembly in Resolution 69/292, discussed above.<sup>86</sup> Unsurprisingly perhaps, the principal difficulties encountered at the first session of the Preparatory Committee reflected one of the protracted debates at the BBNJ Working Group over the previous ten years, which concerned the relationship between the new instrument and the governance and management of high seas fisheries.<sup>87</sup> Divergent views were expressed on this issue,<sup>88</sup> which will be subject to further discussion and analysis at future sessions of the Preparatory Committee. In similar vein, the inclusion or exclusion of a reference to fish in the definition of MGRs remains contentious, as does the precise link between definitions and scope of the new instrument.<sup>89</sup>

A considerable part of the discussion at the first session focused on how best to fill lacunae on the legal landscape pertaining to the elements of the 2011 package, without

undermining the relationship between existing instruments and international bodies.<sup>90</sup> Less controversially perhaps, there was general agreement that the new instrument should not encroach upon the sovereign rights and the jurisdiction of coastal states in relation to the continental shelf and its resources.<sup>91</sup>

Similarly, there was a broad and animated discussion on the normative principles that ought to be reflected in the new instrument, including reference to the following: the precautionary principle/approach, ecosystem based approach, adaptive management, cooperation, science-based decision-making, the principle of sustainable development, public and indigenous community participation in decision-making and good governance, common but differentiated responsibilities, the polluter pays principle, equitable use of marine life for the benefit of present and future generations, stewardship of the global marine environment, state liability for environmental damage, inter- and intra-generational equity, attention to the special needs and concerns of developing states, including least developed countries, land-locked developing countries and SIDSs, as well as freedom of the high seas.<sup>92</sup>

There are a number of normative approaches to resource management and the protection of the marine environment that are already codified in international law of the sea instruments, including in the Fish Stocks Agreement, which provide a solid precedent that may well be followed by the negotiators.<sup>93</sup> The applicability under the new instrument of the common heritage of mankind principle, which is a peremptory norm of general international law (*jus cogens*), to the use of MGRs, was a major consideration for many of the participants.

### Push for a practical and pragmatic approach to marine genetic resources

The rules that will apply to MGRs are one of the hot topics and substantive elements for negotiation at the Preparatory Committee. Much has been published on the topic,<sup>94</sup> which has its origin in the discovery and commercialisation of novel biomedicines and pharmaceutical products that have

84 Chair's overview of the first session of the Preparatory Committee, Annex II 19–20.

85 United Nations *Transforming our World: the 2030 Agenda for Sustainable Development* UN General Assembly Resolution 70/1 (2015), A/RES/70/1.

86 See discussion associated with note 71 above.

87 See IISD (n 82) 2.

88 See discussion below on the positions at play in the negotiation process. In what appeared to be a minority viewpoint at the first session, the Russian Federation, Japan and Iceland expressed the view that high seas fisheries are regulated and managed under the Fish Stocks Agreement (n 15) and by regional fisheries management organisations and should therefore not come within the material scope of the new instrument. On the other hand, many participants were strongly of the view that fish are a fundamental component of biodiversity and that the application of an ecosystem-based management approach to the conservation and sustainable use of biodiversity necessitates their inclusion within the scope of the instrument. In the latter context, they reasoned that the new instrument ought to complement and strengthen existing treaties and ensure greater accountability and transparency in the work of international fisheries bodies in the conservation and sustainable use of biodiversity. See IISD 'Summary of the First Session of the Preparatory Committee on marine biodiversity of areas beyond national jurisdiction' (11 April 2016) 25(106) *Earth Negotiations Bulletin* 2, 7.

89 See IISD 'PrepCom 1 Highlights: EIAs' (1 April 2016) 25(100) *Earth Negotiations Bulletin* 2.

90 See IISD 'PrepCom 1 Highlights: marine genetic resources' (8 April 2016) 25(105) *Earth Negotiations Bulletin* 1. The rights and obligations that arise from other agreements are preserved by non-prejudice provisions under UNCLOS, the Fish Stocks Agreement (n 15) and the Convention on Biological Diversity, see inter alia UNCLOS arts 237 and 311; Fish Stocks Agreement (n 15) arts 4 and 44; Convention on Biological Diversity art 22.

91 See IISD (n 90) 1.

92 See IISD 'PrepCom 1 highlights: marine genetic resources' (n 90) 1.

93 Fish Stocks Agreement (n 15) art 5.

94 M Vierros, C Suttle, H Harden-Davies, G Burton 'Who owns the ocean? Policy issues surrounding marine genetic resources' (2016) 4 *Limnology and Oceanography Bulletin* 29.

been derived from marine organisms since the late 1950s. In more recent times, there is renewed interest in the exploration and exploitation of deep-sea biodiversity for commercial purposes in light of their novel properties and unique chemical structures.<sup>95</sup> Although not a very accurate indicator of commercial potential, patents have been issued in relation to marine genetic material in 31 countries, nearly all of which relate to research activities in developed countries.<sup>96</sup>

One leading scientific authority has reported, however, that all of the marine bio-discovery breakthroughs have come from organic materials sourced from sea areas within national jurisdiction.<sup>97</sup> Furthermore, the chances of success are remote (a 1:4000 chance) with only seven approved drugs discovered from research on 28,000 marine compounds until 2016, none of which is considered to be a runaway success story commercially.<sup>98</sup> Nonetheless, the chance of discovery from marine sources is still higher than comparable terrestrial sources of biodiversity.<sup>99</sup>

The lead-in time for commercialisation of products from marine compounds is in the order of decades and returns on scientific discoveries are relatively modest, given the costs associated with conducting deep-ocean science and the follow-up work on interesting leads, as well as clinical trials on new products.<sup>100</sup> That said, pre-clinical and clinical research on the pharmacology of marine-derived chemicals sourced from the deep ocean is considered to be in its infancy.<sup>101</sup> Moreover, the future looks promising, as there is an exciting and innovative pipeline of new products under development from marine sources.<sup>102</sup>

Against this background, one of the contentious topics for deliberation at the Preparatory Committee is the definition of MGRs,<sup>103</sup> as well as the legal rules that ought

to apply to research, their conservation and sustainable use, along with the arrangements for the equitable sharing of the benefits derived from research and the commercial use of genetic material.<sup>104</sup> The issues are further compounded by the fact that the spatial distribution of MGRs is not geographically discrete or unique to ABNJ, in so far as they can be located in sea areas that are both within and beyond national jurisdictions.<sup>105</sup> In addition, scientists do not require ongoing access to *in situ* material after the initial sampling of such material and scientific activities may have little or no impact on the conservation of biodiversity.<sup>106</sup> Other prominent challenges include the traceability of MGR source material as the bio-discovery process may take decades from sampling at sea to product commercialisation, along with difficulties associated with the regulation of rapidly changing scientific fields, such as developments in research and developments associated with synthetic biology.<sup>107</sup>

Much of the difficulty in relation to this element of the 2011 package stems from the absence of consensus at the Preparatory Committee on a definition of MGRs and, following on from this lacuna, the applicability of the definitions of similar terms in other instruments, including the Convention of Biological Diversity,<sup>108</sup> the Nagoya Protocol<sup>109</sup> and the FAO International Treaty on Plant Genetic Resources.<sup>110</sup> At the same time, there are also diverging views regarding the precise legal status of such resources in ABNJ and whether they fall solely within the scope of the high seas provisions of UNCLOS including the freedom of scientific research,<sup>111</sup> or whether they can be considered as part of the Area and its resources and thus subject to the principle of the common heritage of mankind<sup>112</sup> and the access and benefit-sharing regime, taking into consideration the interests and needs of developing states.<sup>113</sup>

95 Examples of drugs developed from marine compounds include: the development of Prialt for pain from the Philippino cone snail and Halaven for cancer from Japanese deep water sponges. See M Jaspar 'Bioprospecting from marine genetic resources from areas beyond national jurisdiction' (unpublished presentation NYU 2 April 2016). See also <http://marinepharmacology.midwestern.edu/>.

96 IISD (n 88) 6.

97 See Jaspar (n 95).

98 J A DiMasi, H Grabowski and R Hansen 'Innovation in the pharmaceutical industry: new estimates of R&D costs' (2016) 47 *Journal of Health Economics* 20 [http://csdd.tufts.edu/news/complete\\_story/cost\\_study\\_press\\_event\\_webcast](http://csdd.tufts.edu/news/complete_story/cost_study_press_event_webcast).

99 See Jaspar (n 95).

100 *ibid.*

101 *ibid.*

102 *ibid.* These include 250 marine-derived compounds at the pre-clinical phase; 15 at Phase I, 10 at Phase II, 3 at Phase III, with seven others at the clinical trials phase.

103 Drawing from the definitions of 'genetic material' and 'genetic resources' in art 2 of the Convention on Biological Diversity, the term 'marine genetic resources' is sometimes used in the specialist literature to refer to 'marine plants, animals and microorganisms, and parts thereof containing functional units of heredity that are of actual or potential value'.

104 See IISD 'PrepCom 1 highlights: marine genetic resources' (n 92) 1, 2; IISD 'PrepCom 1 highlights: capacity building' (7 April 2016) 25(104) *Earth Negotiations Bulletin* 1, 2; IISD 'PrepCom 1 highlights: EIAs' (n 89) 2; IISD 'PrepCom 1 highlights: definitions and scope' (4 April 2016) 25(101) *Earth Negotiations Bulletin* 1, 2.

105 See Jaspar (n 95).

106 *ibid.*

107 *ibid.*

108 See Convention on Biological Diversity (n 40).

109 UN Doc UNEP/CBD/COP/DEC/X1 (entered into force 12 October 2014).

110 International Treaty on plant genetic resources for food and agriculture, 2400 UNTS 303 (entered into force 29 June 2004).

111 See discussion of the positions at play below, in particular the statements of the United States, Russian Federation and Japan on this issue.

112 See discussion of the positions at play below, in particular the statements of the Group of 77 and China, as well as the Pacific SIDS.

113 *ibid.*

A corollary of this dilemma is whether a uniform legal regime and regulatory coherence ought to apply to the MGRs of both the seabed and the water column, given that organisms may move through the seabed, on the seabed and in the water column at different stages of their life cycles.<sup>114</sup> Much of the difficulty in this regard stems from Part XI of UNCLOS, which defines 'resources' in unambiguous terms to mean 'all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules'.<sup>115</sup> This of course may be contrasted with the absence of a definition of resources in the 1970 UN General Assembly Resolution 25/2749, A/RES/25/2749.

A further issue that needs to be resolved by the Preparatory Committee is the applicability or otherwise of the rules on access and benefit sharing set out in the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, in particular Article 10 thereof,<sup>116</sup> as well as the FAO International Treaty on Plant Genetic Resources.<sup>117</sup> Again, as the law currently stands, the scope of these instruments does not apply fully or directly to the MGRs of areas beyond national jurisdiction. Related matters discussed by the Preparatory Committee concerned the extent of *in situ*, *ex situ* and *in silico* access to genetic material and biological data, as well as the material scope of the new instrument and its applicability to all MGRs and all potential uses of biodiversity across different sectors. The role of the ISA, if any, in the administration and management of an access and benefit-sharing regime, as well as the role of the World Intellectual Property Organization in relation to intellectual property rights and patent law, were highlighted during the discussion.<sup>118</sup>

In light of the cut and thrust of the discussions, making recommendations on the design of an access and benefit-sharing regime that is both practical and pragmatic and which does not undermine Parts VII and XI of UNCLOS, as well as the 1994 Implementation Agreement, or that hampers marine scientific research, remains one of the key challenges to be overcome at future sessions of the Preparatory Committee. One potential solution canvassed by a number of participants is the development of a *sui generis* regime under the new instrument that is applicable to MGRs in ABNJ.<sup>119</sup>

### Search for consensus on area-based management tools

The rules on the application of area-based management tools (ABMTs), in particular the use of MPAs in ABNJ, is another key topic under discussion at the Preparatory Committee.<sup>120</sup> The new negotiations thus present an opportunity to discuss how best to operationalise international commitments, including the target set by the Conference of the Parties to the Convention on Biological Diversity and reflected in Goal 14.5 of the 2030 Agenda for Sustainable Development that 10 per cent of coastal and marine areas are to be 'conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures' by 2020.<sup>121</sup>

Reflecting perhaps the era of the UNCLOS negotiations in the 1970s and early 1980s, the terms 'area-based management tool' and 'marine protected area' are not used in the Convention. They are defined and applied nonetheless by multilateral and regional bodies for the purpose of protecting specific aspects of the marine environment and for achieving fisheries management objectives, including those pursuant to the Fish Stocks Agreement and other regional treaties.<sup>122</sup> Although the former agreement provides a model on how to reconcile the relationship between regional and global frameworks, it is important to emphasise that up to now, in the absence of the new instrument, it has not been possible to designate or implement ABMTs at a multilateral level with a view to achieving biodiversity conservation or sustainable use objectives in ABNJ.<sup>123</sup>

In light of the absence of an overarching framework and a common global approach underpinned by international law, the Preparatory Committee discussed a broad suite of issues, including the general principles and procedures that ought to apply to the identification, designation and management of ABMTs, the establishment of a global network of MPAs, scientific criteria and the universal standards on the setting of management objectives and the establishment of monitoring programmes, as well

114 Chair's compilation of issues raised during the first session of the Preparatory Committee at 7 [http://www.un.org/depts/los/biodiversity/prepcom\\_files/PrepCom\\_1\\_Chair's\\_Overview.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf).  
115 UNCLOS art 133.

116 See UN Doc UNEP/CBD/COP/DEC/XI (n 109).

117 See International Treaty on plant genetic resources for food and agriculture (n 110).

118 See IISD 'PrepCom 1 highlights: marine genetic resources' (n 92) 2.

119 See eg statement made by Indonesia (28 March 2016) <http://statements.unmeetings.org/media2/7656866/indonesia.pdf>.

120 See IISD 'PrepCom 1 highlights: marine genetic resources' (n 92) 2; IISD 'PrepCom 1 highlights: capacity building' (n 104) 1; IISD 'PrepCom 1 highlights: objectives and principles' (5 April 2016) 25(102) *Earth Negotiations Bulletin* 1.

121 United Nations Environment Programme UN Doc UNEP/CBD/COP/10/27 annex. See also reflected in the 2002 Plan of Implementation of the World Summit on Sustainable Development, as well as the UN *2030 Agenda for Sustainable Development* (n 85) Goal 14.5.

122 United Nations Environment Programme UN Doc UNEP/CBD/COP/10/27 annex decision X/2 s IV target 11.

123 UN General Assembly Resolution 69/292 (n 63).

as the crucial mechanisms for ensuring compatibility and coordination, with similar measures taken by multilateral and regional bodies.<sup>124</sup> There was no consensus on the establishment of a global body to oversee the establishment of high seas MPAs.<sup>125</sup>

Again, many participants at the first session of the Preparatory Committee expressed the view that any new arrangements should use the International Union for Conservation of Nature categories of protected areas, along with drawing from the experience concerning spatial designations under IMO instruments, areas of particular environmental interest by the ISA and the identification of ecological and biologically significant areas under the Convention on Biological Diversity, and the protection of vulnerable marine ecosystems by RFMOs amongst others.<sup>126</sup> In the light of the discussion, it is evident that the future work of the Preparatory Committee will have to address the definition of ABMTs including MPAs, along with the rules governing the review of the establishment of MPAs by states and international organisations.<sup>127</sup>

Many other related issues remain outstanding and were not discussed in any great detail at the first session of the Preparatory Committee, including the most appropriate mechanisms for ensuring effective enforcement of and compliance with ABMTs, the pre-eminence of flag state jurisdiction on the high seas under UNCLOS, the relationship with enforcement and compliance models operated by regional seas organisations and the RFMOs, as well as the application of multilateral and regional measures to non-parties to the new instrument. In relation to the latter and with a view to fostering a level playing-field, however, there may be scope for the adoption of a similar approach to non-parties as the one that applies to high seas fisheries pursuant to the Fish Stocks Agreement.<sup>128</sup>

### Environmental impact assessment

Closely related to the topics of ABMTs and MGRs is environmental impact assessment (EIA) and strategic environmental impact assessment (SEA). The latter are well established procedural tools that provide for the scientific and technical evaluation of the impacts of activities, as well as the effects of policies, plans and programmes on the

environment.<sup>129</sup> Ultimately, the purpose of any such assessment is to ensure that the environmental effects are assessed before a decision is taken to authorise or approve the proposed activities, plans, programmes or projects. Again the necessity of applying these tools is evident from UNCLOS, which imposes a general obligation on states to assess the potential effects of activities under their jurisdiction or control when they have reasonable grounds for believing that they will cause pollution or environmental damage.<sup>130</sup> Moreover, the ISA has agreed standards in relation to thresholds and baseline obligations for assessing the impacts of exploration activity.<sup>131</sup>

The duty to undertake EIA received the imprimatur of the International Tribunal on the Law of the Sea in the *Seabed Mining Advisory Opinion*, which advised that EIA is an obligation under UNCLOS and a general obligation under customary international law.<sup>132</sup> There are many other EIA regimes that arise under sector-specific treaties and regional frameworks, including procedures adopted by the FAO and RFMOs in relation to deep-sea fishing activities.<sup>133</sup>

Although there is considerable development in the jurisprudence of the international court and tribunals on the subject-matter of EIA within national jurisdiction and in a trans-boundary setting, including its normative status under customary international law,<sup>134</sup> there are, however, no

129 See inter alia Neil Craik *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press 2010) passim; S Bell, D McGillivray and O Pedersen *Environmental Law* (8th edn Oxford University Press 2013) 452–97; P Sands, J Peel *Principles of International Environmental Law* (3rd edn Cambridge University Press 2012) 604.

130 UNCLOS art 206.

131 M Lodge 'The deep seabed' in Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (n 3) 226–53 at 240–43.

132 ITLOS Case No 17 Advisory Opinion on responsibility and liability for international seabed mining (2011) 50 ILM 458 para 145 'The environmental impact of certain activities at an early stage of planning process'.

133 On the obligation to undertake EIA under several marine environmental treaties see Rothwell and Stephens *The International Law of the Sea* (n 3) 524–25. The Convention on Environmental Impact Assessment in a Transboundary Context 1989 UNTS 310 (entered into force 10 September 1997) and its complementary Protocol on Strategic Environmental Assessment, 2685 UNTS (entered into force 11 July 2010) are relevant to the members of the United Nations Economic Commission for Europe and provide an obligation to assess impacts at an early stage in the planning process: art 8, Protocol on Protection of the Environment to the Antarctic Treaty 1991 (entered into force 14 January 1998). Non-binding instruments include the Convention on Biological Diversity Voluntary Guidelines for the consideration of Biodiversity in EIAs and SEAs in marine and coastal areas <https://www.cbd.int/doc/publications/imp-bio-eia-and-sea.pdf>. See also FAO, *International Guidelines for the Management of Deep Sea Fisheries in the High Seas* <http://www.fao.org/docrep/011/i0816t/i0816t00.HTM>.

134 See eg *Pulp Mills on the River Uruguay Case (Argentina v Uruguay)*, ICJ Reports 2010 *Certain activities carried out by Nicaragua in the border area (Costa Rica v Nicaragua)*, Provisional measures, Order of 8 March 2011, ICJ Reports 2011 (I) *Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the International Seabed Area* Advisory Opinion (2011) ITLOS.

124 See discussion of the positions at play below, eg the EU, G77 and China. See also IISD (n 88) 9, 10, 11.

125 See IISD (n 88) 9 for the view expressed by the Russian Federation. See also statement by the Russian Federation (in Russian, 28 March 2016) <http://statements.unmeetings.org/media2/7656834/russian-federation.pdf>.

126 See IISD (n 88) 9 for an example of the position expressed by the EU.

127 *ibid* 17.

128 Fish Stocks Agreement (n 15) arts 8, 33.

multilateral procedures or institutional structures governing the conduct of EIA or SEA that are specific to the conservation or sustainable use of marine biodiversity in ABNJ.

Following on from this, the matters raised at the first session of the Preparatory Committee related to the following: the nature of activities subject to assessment; the procedures and thresholds that ought apply to EIA/SEA; transparency and the requirement of public notification; the governance arrangements for decision-making; the need to strengthen the normative obligation that arises under UNCLOS so that potential impacts are considered before activities are undertaken in ABNJ and the need to assess cumulative impacts, as well as guidance on reporting, monitoring and the management of information resulting from assessments, including a centralised mechanism for information-sharing and review.<sup>135</sup> Significantly, the issue of considering the full range of pressures on the environment and its associated ecosystems and cumulative impacts was a recurrent theme of the Preparatory Committee's deliberations of EIA.<sup>136</sup>

Other matters addressed included the feasibility of establishing a new body to oversee assessments and to act as a central repository for reports and a clearing-house mechanism similar to the one that applies under the Convention on Biological Diversity.<sup>137</sup> Again, the procedural aspects of EIA/SEA and the role of the flag states and inter-governmental organisations, along with the relationship of the new agreement with the specific assessment requirements under other regional and sectoral instruments, requires further consideration by the Preparatory Committee.

## Capacity building and the transfer of marine technology

Capacity building in the field of marine scientific research and the development and transfer of marine technology through bilateral, regional and multilateral programmes are key aspects of UNCLOS.<sup>138</sup> Regrettably, the implementation of the relevant provisions in UNCLOS remains largely unsatisfactory from a practical perspective and creates a serious challenge for developing states in implementing the Convention and deriving economic and environmental benefits from offshore resources.<sup>139</sup> There has been some progress at an international level, however,

including the adoption of the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology in 2003.<sup>140</sup>

Against this background of inaction, a number of themes permeated the discussion of this vital topic at the Preparatory Committee, including the views that the new instrument ought to develop specific means to implement Parts XIII and XIV of UNCLOS through strengthening existing capabilities and capacities and an improvement in funding, as well as greater engagement with public and private scientific bodies in the relevant specialist fields, such as genomics and ocean engineering technologies.<sup>141</sup> There were some suggestions that Part XIV of UNCLOS could be incorporated *mutatis mutandis* into the new instrument.<sup>142</sup>

Within the broader discussions many participants reiterated the importance of taking into consideration UNDP criteria on capacity building, which address the strengthening of human, scientific, technological, organisational and institutional resources.<sup>143</sup> In addition, many participants expressed the view that technology transfer should be based upon the Guidelines on the Transfer of Marine Technology developed by the International Oceanographic Commission,<sup>144</sup> and that these guidelines should be applied expansively to tools, equipment, criteria, protocols, samples, processes, software, methodologies and infrastructure.<sup>145</sup>

The topic of scientific capacity and technology transfer were viewed by many participants at the first session as a *conditio sine qua non* of the new instrument and as a cross-cutting feature in relation to the other elements of the 2011 package.<sup>146</sup> Apart from calls for the adoption of 'meaningful and tangible measures' in the new instrument, some participants at the Preparatory Committee also placed emphasis on the establishment of a global financing mechanism and an ad hoc body with responsibility for coordination and prioritisation of capacity-building measures and the implementation of technology transfer systems.<sup>147</sup>

135 See IISD 'PrepCom 1 highlights: EIAs' (n 89) 1, 2.

136 See discussion of the positions at play below, eg G77, China and EU.

137 See IISD (n 89) 16.

138 UNCLOS pts XIII, XIV.

139 See Tanaka *The International Law of the Sea* (n 3) 370–75.

140 UNCLOS art 271. Intergovernmental Oceanographic Commission *IOC Criteria and Guidelines on the Transfer of Marine Technology (CGTMT)* (UNESCO 2005) <http://unesdoc.unesco.org/images/0013/001391/139193m.pdf>. The IOC has also published a paper on its potential contribution to a new instrument under UNCLOS on the protection of biodiversity; see IOC/INF-1338 (17 May 2016).

141 See IISD 'PrepCom 1 highlights: EIAs' (n 89) 2.

142 See IISD (n 88) 15.

143 See also United Nations Development Programme *Capacity Development Practice Note* (2008) at 6 [http://www.adaptation-undp.org/sites/default/files/downloads/pn\\_capacity\\_development1.pdf](http://www.adaptation-undp.org/sites/default/files/downloads/pn_capacity_development1.pdf).

144 See Intergovernmental Oceanographic Commission (n 140).

145 See IISD (n 88) 14.

146 *ibid* 15, in particular the statement delivered by the African Group.

147 *ibid* 15, 16.

## Institutions, dispute settlement and liability

There were preliminary discussions at the first session on vesting the ISA with additional powers in relation to the non-living resources of the Area, as well as the most appropriate institutional structures to oversee and review the implementation of EIA/SEA and the ABMTs.<sup>148</sup> There was also some discussion of the dispute settlement provisions in UNCLOS and the Fish Stocks Agreement and their applicability to disputes arising under the new instrument, as well as the necessity of establishing an objective liability regime in relation to activities that adversely impinge upon the conservation and sustainable use of biodiversity in ABNJ.<sup>149</sup> Attention was drawn to the provisions on liability under UNCLOS,<sup>150</sup> as well as the draft Articles on the Responsibilities of States for Internationally Wrongful Acts, along with the distinction that could be drawn between state responsibility and operator liability.<sup>151</sup> All of these matters will figure highly in the future work of the Preparatory Committee.

### Some of the positions at play

At the first session of the Preparatory Committee it was evident that states, international bodies, regional groups and the representatives of civil society all share the view that it is important to ensure the conservation and sustainable use of marine biodiversity in ABNJ. That said, despite the constructive engagement and the forthright exchange of views in the early stage of the process, different positions were expressed on various elements of the 2011 package, some of which are summarised below.<sup>152</sup>

The largest group of countries in the United Nations, the Group of 77 (G77) and China, were active and vocal participants at the first session of the Preparatory Committee and advocated the view that the legal regime applicable to MGRs in ABNJ should reflect the common heritage of mankind principle.<sup>153</sup> Moreover, the establishment of an access and benefit-sharing scheme pertaining to MGRs must cover monetary and non-monetary aspects of the use of biodiversity and that the mandate of the ISA could be expanded for the purpose of

administering such a scheme.<sup>154</sup> G77 and China are also in favour of establishing a mechanism under the new agreement for ensuring international coordination and cooperation in applying ABMTs and establishing MPAs in ABNJ,<sup>155</sup> as well as addressing designation, monitoring and compliance functions.<sup>156</sup>

In relation to environmental impact assessment of activities in ABNJ, G77 and China believe that there is a need to reflect on the different aspects of assessment, such as the nature of activities, the nature of impact, whether it is cumulative impact or transboundary environmental impact, as well as the threshold that triggers the need to proceed with EIAs.<sup>157</sup> Unsurprisingly, G77 and China believe that capacity building in marine scientific research and the transfer of marine technology to developing states is a crucial cross-cutting thematic topic that impinges upon each of the four substantive elements of the 2011 package.<sup>158</sup> Furthermore, the new instrument should aim to improve the implementation of Parts XIII and XIV of UNCLOS and the IOC Guidelines.<sup>159</sup> According to G77 and China, additional elements to be considered at future Preparatory Committee sessions could include the rules governing dispute settlement and governance arrangements applicable to ABNJ, along with funding mechanisms for capacity building and technology transfer.<sup>160</sup>

The EU and its 28 Member States were among the first to champion the adoption of a legally binding instrument under UNCLOS and remain firmly committed to ensuring that the preparatory process is a success.<sup>161</sup> On the substantive elements of the 2011 package, the EU is of the view that access to and use of MGRs in ABNJ should not be prohibitive, but facilitative and conducive to advancing

148 *ibid* 16.

149 *ibid*.

150 UNCLOS art 235.

151 Chair's compilation of issues (n 114) 18.

152 A detailed summary of the issues raised is available at Chair's overview of the first session of the Preparatory Committee, Annex I.

153 See IISD (n 88) 3. See also statement by Thailand on behalf of the G77 and China (30 March 2016) <http://statements.unmeetings.org/media2/7656941/73-thailand-g77.pdf>.

154 Statement by Thailand on behalf of G77 and China (n 153); statement by Thailand on behalf of G77 and China (1 April 2016) <http://statements.unmeetings.org/media2/7657086/1-april-10am-mgrs-including-the-sharing-of-benefits.pdf>.

155 Statement by Thailand on behalf of G77 and China (n 153).

156 Statement by Thailand on behalf of G77 and China (4 April 2016) <http://statements.unmeetings.org/media2/7657084/4-april-10am-area-based-management-tools-mpas.pdf>.

157 Statement by Thailand on behalf of G77 and China (31 March 2016) <http://statements.unmeetings.org/media2/7656966/75-thailand-g77.pdf>.

Statement by Thailand on behalf of G77 and China (5 April 2016) <http://statements.unmeetings.org/media2/7657083/4-april-3pm-eias-1-.pdf>.

158 Statement by Thailand on behalf of G77 and China (n 157).

159 Statement by Thailand on behalf of G77 and China (6 April 2016) <http://statements.unmeetings.org/media2/7657081/6-april-10am-transfer-of-marine-technology-1-.pdf>.

160 Statement by Thailand on behalf of G77 and China (28 March 2016) <http://statements.unmeetings.org/media2/7656842/thailand-g77-china.pdf>.

161 Statement by the European Union (28 March 2016) <http://statements.unmeetings.org/media2/7656889/european-union.pdf>.

research and development.<sup>162</sup> In this context, and reflecting a strict literal interpretation of the relevant provisions of UNCLOS, the EU noted that living organisms found in, on or under the seabed of the Area do not come within the meaning of ‘resources of the Area’ and, in their view, are therefore not part of the common heritage of mankind.<sup>163</sup>

Nonetheless, the EU espoused the view that guidance could be obtained on access and benefit-sharing schemes applicable to MGRs from the schemes advanced by the 2001 FAO International Treaty on Plant Genetic Resources and the 2010 Nagoya Protocol. Significantly, the EU is opposed to a ‘first come, first served’ approach to the use of biodiversity on the basis that this undermines sustainability.<sup>164</sup> On the second element of the 2011 package, the new instrument ought to create a mechanism to enable the establishment and management of a global network of ecologically representative and effectively managed MPAs in ABNJ.<sup>165</sup>

Moreover, the EU suggests that proposals for the designation of MPAs should come from states parties, collectively or individually, with a role for civil society. Any proposal in this regard should be based on the best available scientific information, follow an ecosystem approach and the precautionary principle and should, at a minimum, include the following elements: a description of impacts; conservation objectives; spatial boundaries; and a management plan.<sup>166</sup> According to the EU, the new agreement should include criteria for the undertaking of an EIA or SEA in line with best international practice, in particular thresholds or criteria for the screening of activities to be assessed on the type and information to be included in the reports.<sup>167</sup> The new agreement should provide a legal basis for capacity building and transfer of technology, including the development of joint scientific research carried out in cooperation with institutions in developing countries.<sup>168</sup>

The Pacific Small Island Developing States strongly supports the application of the common heritage of mankind principle and the establishment of access and

benefit-sharing arrangements to MGRs under the new instrument that reflects the basic principle of equity, which should include monetary and non-monetary benefits.<sup>169</sup> They also support the development of rules governing ABMTs,<sup>170</sup> the application of EIA in ABNJ<sup>171</sup> and the codification of effective measures to enhance capacity building and technology transfer.<sup>172</sup>

The United States (US) is not party to UNCLOS but recognises the Convention as reflective of general customary international law.<sup>173</sup> As is well known, the US is a staunch defender of high seas freedoms under international law and has long since been averse to applying the common heritage of mankind principle to the use of biodiversity in ABNJ. Thus, it is unsurprising to note that, at the first session of the Preparatory Committee, the US expressed doubt as to whether a regime on MGRs benefit sharing could be negotiated, but nonetheless articulated the view that any such regime ‘must not impede innovation, marine exploration, science and entrepreneurship, or settled practice in relation to intellectual property rights’.<sup>174</sup>

On the other issues identified in the 2011 package, the US is keen to promote science-based decision-making and to ensuring that a possible new instrument could be used to conserve marine biodiversity. The US is therefore supportive of using tools such as MPAs and EIA for this purpose, both within and beyond national jurisdiction.<sup>175</sup> The US is also supportive of the development and implementation of procedures to assess the potential environmental impacts of activities that may cause substantial pollution of or significant and harmful changes to the ocean and marine ecosystems, as well as taking into account cumulative impacts.<sup>176</sup> The US supports marine scientific research capacity building but has stipulated that

162 Statement by the European Union (30 March 2016) <http://statements.unmeetings.org/media2/7656969/73-european-union.pdf>.

163 *ibid.*

164 *ibid.*

165 Statement by the European Union (30 March 2016) <http://statements.unmeetings.org/media2/7656968/74-european-union.pdf>.

166 *ibid.*

167 Statement by the European Union (30 March 2016) <http://statements.unmeetings.org/media2/7657011/75-european-union.pdf>.

168 Statement by the European Union (31 March 2016) <http://statements.unmeetings.org/media2/7658026/eu-statement-7-cbmt-as-delivered-on-31-03-2016-.pdf>.

169 Statement by Nauru on behalf of Pacific Small Island Developing States (30 March 2016) <http://statements.unmeetings.org/media2/7656940/73-nauru-psids.pdf>.

170 Statement by Nauru on behalf of Pacific Small Island Developing States (30 March 2016) <http://statements.unmeetings.org/media2/7656960/74-nauru-psids.pdf>.

171 Statement by Nauru on behalf of Pacific Small Island Developing States (30 March 2016) <http://statements.unmeetings.org/media2/7656995/75-nauru-psids.pdf>.

172 Statement by Nauru on behalf of Pacific Small Island Developing States (31 March 2016) <http://statements.unmeetings.org/media2/7657031/76-nauru-psids.pdf>.

173 Clearly this is an over-simplification of the normative value of UNCLOS. On the customary status of key provisions in the Convention see J Ashley Roach (2014) ‘Today’s customary international law of the sea’ (2014) 45(3) *Ocean Development and International Law* 239.

174 Statement by the United States (30 March 2016) <http://statements.unmeetings.org/media2/7656957/73-usa.pdf>.

175 Statement by the United States (30 March 2016) <http://statements.unmeetings.org/media2/7656979/74-usa.pdf>.

176 Statement by the United States (31 March 2016) <http://statements.unmeetings.org/media2/7657010/75-usa.pdf>.

the inclusion of provisions on the transfer of marine technology in the new agreement must be on a voluntary basis, and on mutually agreed terms and conditions.<sup>177</sup> In marked contrast to a number of other participants, the US supports the inclusion of the impacts of fisheries on biodiversity in the deliberations of the Preparatory Committee.<sup>178</sup>

Australia is a long-standing proponent of biodiversity conservation, both within and beyond national jurisdiction. In relation to MGRs, Australia expressed a preference for a light-touch approach to access and benefit sharing of MGRs, which should not act as a disincentive to research and be fully compatible with existing intellectual property rights regimes.<sup>179</sup> In addition, Australia noted the importance of using the best available science for the identification of areas requiring protection in ABNJ and the application of international best practice in the design of the rules applicable to EIAs and SEAs.<sup>180</sup>

Canada is in favour of using the best available science in decision-making processes and in the application of management tools.<sup>181</sup> Norway is keen to ensure that the new instrument maintains the balance of interests reflected in UNCLOS.<sup>182</sup> In addition, Norway takes the view that the new instrument must establish a regime for the utilisation of MGRs, including access and benefit sharing and promote capacity building and transfer of marine technology, as well as lay down rules on ABMTs, including MPAs, and for EIAs.<sup>183</sup>

Japan expressed the view that biodiversity protection measures that restrict the freedom of the high seas should only be considered on a case-by-case basis.<sup>184</sup> With regard to MGRs, Japan takes the view that the freedom of the high seas and freedom of marine scientific research in particular apply.<sup>185</sup> MPAs are useful tools for conservation and sustainable use of marine resources but again should only be used in ABNJ when scientifically warranted and on

a case-by-case basis.<sup>186</sup> Japan supports the development of EIA guidelines under the new instrument and these should take into consideration the unique nature of each body of water, be based on scientific evidence and avoid a one-size-fits-all approach to assessment.<sup>187</sup>

The Russian Federation expressed the view that the common heritage of mankind principle does not apply to living resources and hence there is no legal basis to expand the mandate of the ISA to address MGRs.<sup>188</sup> Moreover, as high seas fisheries are regulated pursuant to the Fish Stocks Agreement and by regional organisations, they should not be included within the material scope of the new instrument.

Finally, the High Seas Alliance, which is made up of 32 non-governmental organisations, represented civil society at the first session of the Preparatory Committee.<sup>189</sup> The High Seas Alliance recommended that the new instrument should establish a sui generis regime governing access to MGRs and benefit sharing.<sup>190</sup> Moreover, the instrument should also codify normative principles that apply to the management of human activities that impinge upon the marine environment of ABNJ, including the precautionary principle and the ecosystem-based management.<sup>191</sup>

In relation to MPAs, the new instrument should enable the establishment of a global system of ecologically representative, connected and effectively managed MPAs and marine reserves, including representative networks. It should also require states to cooperate, including through competent sectoral and regional organisations, on the establishment and effective management of MPAs through the adoption of complementary conservation measures.<sup>192</sup> The High Seas Alliance expressed the view that the new instrument should also establish a framework for states to conduct prior to EIAs, including assessments that measure the cumulative impacts of a range of activities, as well as requiring SEAs for programmes, plans or policies. On capacity building, a new instrument should aim to establish an effective means to implement Part XIV of UNCLOS, as well as strengthening programmes for scientific and technical education and training.<sup>193</sup>

177 Statement by the United States (31 March 2016) <http://statements.unmeetings.org/media2/7657019/76-united-states.pdf>.

178 Statement by the United States (28 March 2016) <http://statements.unmeetings.org/media2/7656861/united-states.pdf>.

179 Statement by Australia (30 March 2016) <http://statements.unmeetings.org/media2/7657038/73-australia.pdf>.

180 Statement by Australia (31 March 2016) <http://statements.unmeetings.org/media2/7657106/australia-intervention-on-eias.pdf>.

181 Statement by Canada (30 March 2016) <http://statements.unmeetings.org/media2/7656991/74-canada.pdf>.

182 Statement by Norway (28 March 2016) <http://statements.unmeetings.org/media2/7656858/norway.pdf>.

183 Statement by Norway (28 March 2016) <http://statements.unmeetings.org/media2/7656858/norway.pdf>.

184 Statement by Japan (28 March 2016) <http://statements.unmeetings.org/media2/7656879/japan.pdf>.

185 *ibid.*

186 *ibid.*

187 *ibid.*

188 See IISD (n 88) 4, 6. See also statement by the Russian Federation (28 March 2016) <http://statements.unmeetings.org/media2/7656834/russian-federation.pdf>.

189 High Seas Alliance <http://highseasalliance.org/>.

190 Views submitted to the chair, HE Mr Eden Charles, from non-governmental organisations 'High Seas Alliance suggestions for consideration by the Preparatory Committee' [http://www.un.org/depts/los/biodiversity/prepcom\\_files/NRDC.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/NRDC.pdf).

191 *ibid.*

192 *ibid.*

193 *ibid.*

## First impressions of the preparatory process and next steps

The initial impression of the progress made at the first session of the Preparatory Committee is very positive. The momentum derived from the long discussions over a 10 year period within the BBNJ Working Group and other international bodies has added additional impetus to the formal negotiation process of a new legally binding instrument for the conservation and sustainable use of marine biodiversity in ABNJ. The rapidly deteriorating status of the marine environment and the pressing need for international regulatory action provided a cogent and expedient backdrop for the initial deliberations of the Preparatory Committee. Each of the elements in the 2011 package rank *pari passu* with each other in the negotiations and this approach ensured that many of the issues received due consideration and a degree of scrutiny at the first session. The emergence of strong leadership in the plenary and informal groups will certainly have a major bearing on the capacity of the Preparatory Committee to resolve some of the more thorny issues at the later stages of its work. On the basis of the progress made to date, however, it is easy to conclude that the negotiation of a new instrument is legally and technically feasible.

There was general consensus that the new agreement ought to be aimed at promoting good ocean governance and preserving the delicate balance of rights, obligations and interests codified by UNCLOS and related agreements.<sup>194</sup> On the substantive elements, access to MGRs and benefit sharing in particular remain highly contentious for some participants. Similarly, issues such as the definition and spatial distribution of MGRs, the traceability of genetic material, the development of a regime that reconciles the competing interests of high seas freedoms and the common heritage of mankind of the Area as codified in Parts VII and XI of UNCLOS will need to be explored in far greater detail at forthcoming sessions of the Preparatory Committee.

Significantly, regarding the second element of the 2011 package, the majority of participants supported the use of ABMTs and the establishment of MPAs in ABNJ. One of the challenges for the Preparatory Committee is to recommend specific provisions for inclusion in the new instrument governing the application of the tools in practice, in particular the process for the scientific identification of areas to be protected, as well as the approval, designation, control and monitoring of such areas. Similarly, there is broad agreement amongst participants

about the need to establish a general regime governing the EIA and SEA of activities in ABNJ. Differences were evident, however, on issues such as the scope and the thresholds that should apply to assessments. The further consideration of the criteria, processes and the expertise of existing organisations, including the ISA in applying such procedural tools in the deep ocean, will undoubtedly inform the future deliberations of the Preparatory Committee on this particular topic.

There was general consensus that capacity building and the transfer of marine technology are cross-cutting issues within the elements of the 2011 package. The operationalisation of Parts XIII and XIV of UNCLOS, the criteria and approaches of existing guidelines from UN agencies and the interest of the majority of states in the effectiveness of measures to improve capacity building and technology transfer are the key aspects of this topic that require further analysis at the Preparatory Committee.

Perhaps one of the most difficult issues highlighted at the first session is the design and structures of the institutions that will underpin the new instrument. A variety of positions have emerged from different participants, including the broadening of the mandates of existing bodies such as the ISA or perhaps the creation of a new international body with powers in this regard. There was some emphasis on the need for light and cost-effective arrangements on the basis that form follows function in the design of new institutional structures.<sup>195</sup> The precise institutional structures may well vary across the various elements of the 2011 package.

The next meeting of the Preparatory Committee is scheduled to run from 26 August to 9 September 2016 and will continue to explore the substantive elements of the 2011 package.<sup>196</sup> In addition, a new working group will review the cross-cutting issues that are common to all of the elements of the package, namely: scope, principles, dispute settlement and any additional matters that states raise during the inter-sessional period.<sup>197</sup> The outcome of the second session is expected to consist of an identification of the issues that require further deliberation, along with the matters that could form the basis of draft elements of the new agreement to be included in the recommendations of the Preparatory Committee to the General Assembly at its seventy-second session in line with UN General Assembly Resolution 69/292.

<sup>194</sup> See IISD (n 88) 3, 5, 6, 10, 11.

<sup>195</sup> Chair's compilation of issues (n 114) 9.

<sup>196</sup> See IISD (n 88) 17.

<sup>197</sup> *ibid.*