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Marine biodiversity beyond national jurisdiction: The launch of an intergovernmental conference for the adoption of a legally binding instrument under the UNCLOS

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Abstract

On 24 December 2017, the United Nations General Assembly adopted Resolution 72/249 dealing with the development of an International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. In line with the Resolution, a new intergovernmental conference met for the first time in September 2018 and will meet three more times before the beginning of 2020, under the auspices of the United Nations, in order to draw up this legally binding instrument under the United Nations Convention on the Law of the Sea. Although Resolution 72/249 sets the future procedural agenda for the collective adoption of such an instrument, it does not provide a specific deadline for the adoption of the future treaty and leaves some uncertainties. Moreover, the ‘package deal’ agreed to in 2011 – comprised of several elements including marine genetic resources, protected areas and environmental impact assessments – will have to be ‘unpacked’ during the negotiating process, underlining the fact that, so far, the substantial issues at stakes remain contentious and uncertainty prevails about the specific content of the future instrument.

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Keywords: UNCLOS, marine biodiversity, biodiversity conservation, sustainable use, high seas, Area, package deal, consensus, areas beyond national jurisdiction, BBNJ

1. Introduction

On 24 December 2017, the United Nations General Assembly (UNGA) adopted Resolution 72/249 dealing with the development of an *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*. As per this Resolution, the UNGA ‘decides to convene an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory committee [which met four times in 2016-2017] on the

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elements and to elaborate the text of an internationally binding instrument under the Convention',¹ launching the final official process of negotiation of a new international treaty dealing with the conservation and sustainable use of marine biodiversity beyond national jurisdiction. It would be the third implementing instrument adopted under the United Nations Convention on the Law of the Sea (UNCLOS).² The first agreement – adopted in 1994, just before the entry into force of the Convention – was related to Part XI of the UNCLOS and the definition of the Area's common heritage of mankind regime, the Area being defined by Article 1(1) UNCLOS as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.³ The second implementing agreement is the UN Fish Stocks Agreement (UNFSA), adopted in 1995.⁴

Resolution 72/249 is, in fact, the achievement of more than ten years of discussions between States within the framework of the UNGA. Although it is just a preliminary step in the long process toward the adoption of a new implementing agreement under the UNCLOS, this step is decisive for the future regime governing more than half of the earth's surface.⁵ Moreover, the particularity of the oceans is that, as compared to the land spaces, they constitute a volume comprised of a huge and diverse biomass. Indeed, they are the 'cradle' of humanity, as life first appeared in the oceans. Although the high seas are often and unduly presented as a 'no man's land', or a real 'far west' by the media,⁶ it is important to stress that they are regulated by the UNCLOS and other international conventions, which form an important basis for all activities taking place in international areas (including the high seas and the Area).

The discussion regarding the need for a new instrument related to marine biodiversity beyond national jurisdiction started in 2004 within the framework of the UNGA, when the *Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine*

1 'International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' UNGA Res 72/249 (24 December 2017) UN Doc A/RES/72/249, para 1: 'Decides to convene an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee on the elements and to elaborate the text of an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, with a view to developing the instrument as soon as possible.'

2 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

3 The technic of amendments (Arts 312-316 UNCLOS), then, was not used to modify the Convention: Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3.

4 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 (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (United Nations Fish Stocks Agreement).

5 Indeed, the high seas represent 64% of the surface of the oceans: see Glen Wright and others, 'Protect the neglected half of our blue planet' *Nature* (6 February 2018) <www.nature.com/articles/d41586-018-01594-1> accessed 1 November 2018.

6 Editorial, 'The High Seas Shouldn't be Like the Wild West' *Bloomberg* (5 April 2016) <www.bloomberg.com/opinion/articles/2016-04-05/the-high-seas-shouldn-t-be-like-the-wild-west> accessed 1 November 2018; Robin McKie, 'The oceans' last chance: "It has taken years of negotiations to set this up" *The Guardian* (5 August 2018) <www.theguardian.com/environment/2018/aug/05/last-chance-save-oceans-fishing-un-biodiversity-conference?> accessed 1 November 2018.



biological diversity beyond areas of national jurisdiction (BBNJ Working Group) was established.⁷ Indeed, Resolution 59/24 adopted on 17 November 2004 indicated that the BBNJ Working Group's mandate was 'to indicate, where appropriate, possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity beyond national jurisdiction'.⁸

At this point, some States believed that the UNCLOS contained several gaps and was insufficient to protect marine biodiversity efficiently beyond national jurisdiction,⁹ while other States argued that the existing legal framework was satisfactory. For example, Article 192 UNCLOS affirms broadly that 'States have the duty to protect and preserve the marine environment'. According to the first group of States, Article 192 does not state precisely the concrete way and means to protect and preserve the marine environment beyond areas of national jurisdiction.¹⁰ The protection of the marine environment in international maritime areas (the high seas and the Area) differs from the protection of the marine environment in areas under national jurisdiction because the principle of the exclusive jurisdiction of the flag State applies in those areas, so States must cooperate in order to take conservation measures, while it is the competence of the coastal State in areas under national jurisdiction. For the latter group, Article 192 is seen as a useful and adequate general basis that does not need to be 'completed' by a legally binding agreement.¹¹ The BBNJ Working Group was thus created to conduct an assessment of the international regime governing activities in areas beyond national jurisdiction. It met several times between 2006 and 2015, in order to identify the potential gaps of the current legal regime regarding marine biodiversity in those areas.

It is noteworthy that, in 2011, the BBNJ Working Group recommended to the UNGA that

a process be initiated [...] with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS.¹²

7 According to the Art 22 of the UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, the UNGA can create subsidiary bodies necessary for the accomplishment of its functions.

8 'Oceans and the law of the sea', UNGA Res 59/24 (17 November 2004) UN Doc A/RES/59/24, para 73. The term 'biodiversity' can be defined according to the Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, Art 2, as 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'.

9 See Kristina Gjerde and others, 'Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction' (IUCN, 2008).

10 This opposition of views was still present in 2014: 'Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly' (5 May 2014) UN Doc A/69/82, para 22.

11 *ibid.*

12 'Oceans and the law of the sea', UNGA Res 66/231 (24 December 2011) UN Doc A/RES/66/231, Annex – 'Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction', para (a).



The mandate of the BBNJ Working Group, then, became more precise and ambitious. It also agreed, during the same meeting, on the existence and the content of a ‘package deal’, which is a series of elements gathering, ‘together and as a whole’, the potential gaps identified so far: the legal regime of marine genetic resources, the possibility to create marine protected areas or any other area management tool, the content and modalities of the obligation to conduct environmental impact assessments, and the obligation and modalities of the transfer of marine technology and capacity building.¹³ These elements currently remain the constitutive elements of a future legally binding instrument.

Finally, after three years of discussions, in order to appreciate the consistency and details of the issues, the BBNJ Working Group held its last meeting in January 2015, leading to the adoption by the UNGA of Resolution 69/292 on 6 July 2015.¹⁴ In this Resolution, the UNGA convened a Preparatory Committee (PrepCom) aimed at the development and elaboration of recommendations to the UNGA on the elements of a draft text of a legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity in international maritime areas. Once the mandate of the PrepCom is fulfilled, and depending on the ‘progress’ achieved, the UNGA will convene an intergovernmental conference to start official discussions on the adoption of this instrument.¹⁵ Accordingly, the PrepCom met four times between 2016 and 2017, and addressed its recommendations to the UNGA in September 2017.¹⁶ These recommendations include the core elements of the future international instrument – clarifying the different options at stake, but leaving them open – which forms a skeleton of a future agreement that States still have to negotiate carefully.

Resolution 72/249 was adopted in this context on 24 December 2017 and convened, as a result of the processes conducted by the PrepCom, an intergovernmental conference with the mandate of negotiating a legally binding instrument under the basis of Resolution 69/292 and the recommendations of the PrepCom. As will be discussed (Section 2), it sets the future agenda and the procedure for the adoption of a new implementing agreement. Moreover, the Resolution recalls the substantial issues at stake: the ‘package deal’ agreed on in 2011, composed of several elements: marine protected areas, marine genetic resources, environmental impact assessment and transfer of marine technology – capacity building. The substantive elements of the package will now have to be ‘unpacked’

13 *ibid.*

14 See Julien Rochette and others, ‘A new chapter for the high seas? Historic decision to negotiate an international legally binding instrument on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction’ (IDDRI, 2015(2)).

15 ‘Development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction’, UNGA Res 69/292 (6 July 2015) UN Doc A/RES/69/292, para 1(a).

16 IISD Reporting Services, ‘Summary of the fourth session of the preparatory committee on marine biodiversity beyond areas of national jurisdiction: 10-21 July 2017’ (*Earth Negotiation Bulletin*, 25 141); ‘Chair’s streamlined non-paper on elements of a draft text of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, and Report of the Preparatory Committee established by General Assembly resolution 69/292’ (21 July 2017); Cymie Payne, ‘Biodiversity in High Seas Areas: An Integrated Legal Approach’ (2017) 21(9) ASIL Insights.



in order to reach a consensus on some very sensitive issues (Section 3). The final outcome of this process remains, all in all, uncertain and raises important challenges and prospects.

2. The procedural steps set by Resolution 72/249: toward a new implementing agreement under the UNCLOS

2.1 A new but incomplete agenda for negotiation of the future international legally binding instrument

Resolution 72/249 sets, first, the procedural steps toward the adoption of a new implementing agreement. After a three-day organizational session, which took place 16-18 April 2018, the inter-governmental conference will meet for four sessions of ten days each. The first session took place 4-17 September 2018,¹⁷ and the three other sessions will occur between March 2019 and the first half of 2020. The Resolution thus sets the agenda for the next two years of discussions; accordingly, the future instrument will probably not be adopted before the end of 2020 at the earliest. Besides, the Resolution does not provide a specific deadline for the adoption of an international instrument: the first paragraph adds only that the process is launched ‘with a view to developing the instrument as soon as possible’, which is not precise at all. Actually, the expression ‘as soon as possible’ is the result of a compromise between the States in favour of the adoption of an implementing agreement before the end of 2020 with a specific deadline, and the States that remain reluctant on the adoption of a treaty and want to keep a margin of appreciation regarding the future of the process.

This compromise on the agenda and lack of precision also characterized other steps in the BBNJ discussions. For instance, the BBNJ Working Group in January 2015 also did not set a specific agenda for the creation and the convening of the PrepCom, waiting for the UNGA to decide on this point in Resolution 69/292, adopted on 15 June 2015. The imprecision of the recommendations of the BBNJ Working Group was the counterpart of the acceptability for all States of the expression ‘legally binding agreement’, instead of the expression ‘international instrument’.¹⁸ Therefore, imprecision appears as a way to protect the interests of the participant States, while leaving the last word and the final decision-making to the UNGA. These compromises are a testimony of the fact that ‘much of

17 For a summary of this session, see the website of the Doalos specially dedicated to the Intergovernmental Conference <www.un.org/bbnj/> accessed 27 December 2018, and the report made by the International Institute for Sustainable Development reporting service: IISD Reporting service, ‘Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018’ (*Earth Negotiation Bulletin*, 25-179, 20 September 2018), <<http://enb.iisd.org/oceans/bbnj/igc1/>> accessed 27 December 2018.

18 ‘Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction to the sixty-ninth session of the General Assembly’ (23 January 2015). See Nathalia Frozel Barros, Pascale Ricard, ‘Analyse d’un compromis: le lancement des négociations pour un accord de mise en œuvre de la CNUDM sur la biodiversité marine au-delà des limites de la juridiction nationale’ (2014) XIX *Annuaire du droit de la mer*, 197.



the actual negotiating process is linguistic in nature, with words debated as much for their symbolic and political significance as for their practical implications', as Bodansky appropriately states.¹⁹

2.2 A consensus-based discussion according to traditional law of the sea

The UNGA in Resolution 72/249 '[d]ecides that the conference shall exhaust every effort in good faith to reach agreement on substantive matters by consensus'.²⁰ Indeed, it became a tradition in the various UN Conferences on the Law of the Sea, since 1968, to expend, as a priority, all efforts to reach a common position by consensus, which helps guarantee the efficient and voluntary application of the instrument by the parties.²¹

In fact, it appeared that only consensus would allow States to reach a balance on very sensitive political and economic issues through the collaboration of different groups gathered according to their common interests, although the UNCLOS was eventually adopted by a vote.²² Thus, Resolution 72/242 also sets that if every effort to reach agreement by consensus has been exhausted, then 'decisions of the conference on substantive matters shall be taken by a two-thirds majority of the representatives present and voting'.²³ This option appears quite realistic in the current context, as some States remain particularly reluctant to the adoption of a new international instrument on marine biodiversity conservation and sustainable use beyond national jurisdiction - such as, to varying degrees, the Russian Federation, the United States and Iceland.²⁴

It is important, however, to keep in mind that the consensus-based decision-making process has been criticized as leading to the adoption of unambitious decisions, pushing the content of the agreement negotiated to the lowest standard, and giving a detrimental veto power to each participant.²⁵ To that end, one can wonder when exactly would it be appropriate to switch from paragraph 17 (dealing with consensus) to paragraph 19 (related to the voting process) of Resolution 72/249 - or, in other words, when to consider that all efforts to reach consensus have been exhausted, without emptying the agreement of all its substance. Eventually, it seems that the use of consensus in these different processes favoured increased participation of States in the discussions.

19 Daniel Bodansky, *The art and crafts of international environmental law* (Harvard University Press 2011) 170; the author adds that 'linguistic debates serve as a proxy for more substantive conflicts, allowing success or failure to be measured not just by the substantive outcomes, but by the inclusion or exclusion of particular terms'.

20 UNGA Res 72/249 (2017) para 17.

21 Suren Movsisyan 'Decision making by consensus in international organizations as a form of negotiation' (2008) 3 21st Century 77, 81.

22 With 130 for, 4 votes against (the United States, Israel, Turkey and Venezuela) and 17 abstentions.

23 UNGA Res 72/249 (2017) para 19.

24 See, eg, 'Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly' (n 10) para 22.

25 See, eg, Willem Riphagen, 'The role of general principles of law and General Assembly resolutions' in Antonio Cassese and Joseph Weiler (eds), *Change and stability in international law-making* (Walter de Gruyter 1988) 46-45; Guillaume Devin and Marie-Claude Smouts, *Les organisations internationales* (Armand Colin 2011) 91.



2.3 Participants to the discussions: the challenge of universal participation

In line with the ‘need to ensure the widest possible and effective participation in the conference’ and in accordance with Resolution 69/292,²⁶ the future instrument will be open to all the United Nations’ members.²⁷ It should not, however, affect the status of either the UNCLOS non-Parties or the content of the related agreements,²⁸ such as the mandate of the regional fisheries or environmental bodies and frameworks. Indeed, some States are not parties to the Convention, including the United States, Turkey, Colombia and Venezuela. These States expressly asked not to be subject to existing conventional obligations without their consent, although the future instrument will fundamentally rest on the UNCLOS. Indeed, non-State Parties to the UNCLOS wish to keep the guarantee that they will not be obliged to ratify it, according to freedom to consent in international law and relativity of treaties.²⁹

Besides, the European Union (EU) will also directly take part in the negotiations, being the only international organization member of the UNCLOS and having an ‘exclusive competence’ for the conservation of marine biological resources, as well as shared competences in other relevant fields, such as fisheries and environment.³⁰ Indeed, the EU has a mixed competence for the conservation and sustainable use of marine biodiversity beyond national jurisdiction,³¹ so the future legally binding instrument dealing with the conservation and sustainable use of marine biodiversity will be a ‘mixed agreement’.³² However, the repartition of these competences appears to be ambiguous: it is difficult to set if the creation of a marine protected area is an issue related to marine biological resources conservation only – and then an exclusive competence of the EU – or also of environmental

26 UNGA Res 72/249 (2017) para 9.

27 So far, not all the UN’s Member States are participating to the discussions, but at least all the major coastal States and fishing nations, and the participation have been increasing, especially for African States.

28 UNGA Res 72/249 (2017) para 10.

29 One can, however, discuss the fact that the UNCLOS is nowadays considered as customary international law. See Tullio Treves, ‘Codification du droit international et pratique des États dans le droit de la mer’ (1991) 223 RCADI 9-287.

30 UNGA Res 72/249 (2017) para 11.

31 Art 4 of the Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/13 states, indeed: ‘2. Shared competence between the Union and the Member States applies in the following principal areas: [...] (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (g) transport; (i) energy; [...]’ meaning that States can adopt protective and reinforced measures where the EU did not. The commercial policy is an exclusive competence of the EU, and the research and development policy has a particular status: Art 3(1)(e) and 4(3) TFEU: ‘In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programs; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs’.

32 Which means that the subject matter of an agreement does not fall under the exclusive competence of the EU, but (also) under the shared competences, so the EU countries also have to sign the agreement.



protection in general, and thus a shared competence between the EU and Member States.³³

The legal basis regarding the participation of the EU in the negotiations on conservation and sustainable use of marine biodiversity beyond national jurisdiction for the development of a legally binding instrument is to be found in Resolution 72/249, according to which the UNGA decided that ‘for the meetings of the conference, the participation rights of the international organization that is a party to the Convention shall be as in the Meeting of states Parties to the Convention and that this provision shall constitute no precedent for all meetings to which Assembly resolution 65/276 of 3 May 2011 is applicable’.³⁴ Resolution 65/276, referred to by the UNGA, is entitled ‘Participation of the European Union in the work of the United Nations’, and gives the EU a status of ‘observer’. The EU, then, can by exception directly participate to the discussions regarding biodiversity beyond national jurisdiction. However, as the future agreement will be ‘mixed’, Member States are also to be represented. The *substantive* ambiguity stressed before on the repartition of competences raises some uncertainties about the *formal* representation of the EU and its Member States.³⁵ This issue was addressed in Council Decision (EU) 2016/455 of 22 March 2016.³⁶ According to Article 4 of

33 This ambiguity already led to difficulties in the Commission for the conservation of the marine flora and fauna in the Antarctic (CCAMLR). The Commission introduced an action on partial annulment against the decision of the Council on the approbation of the presentation on the behalf of the Union *and* its Member States, of a document dealing with the creation of a protected area in the Weddel sea. The case was introduced on 23 November 2015 (C-626/15) and was joint to a second case introduced by the Commission on 20 December 2016 (C-659/16), about the decision of the Council of 10 October 2016 dealing with the establishment of the position of the EU for the 35th annual meeting of the CCAMLR, about the creation of three new protected areas. The Court concluded that the decision on the creation of marine protected areas under the CCAMLR was adopted in the context of the shared competences dealing with the protection of the environment, and that the Council was competent to adopt the contested documents in order to not only ensure internal consistency, as regards the mere definition of shared competences, but also the external coherence of its actions in the context of the Antarctic Treaty System. Joined cases C-626/15 and C-659/16 *Commission v Council* [2018] ECR, para 133.

34 The same formula was used in Res 69/292, according to which the UNGA decided that ‘the rules relating to the procedure and the established practice of the committees of the General Assembly shall apply to the procedure of the preparatory committee, and that, for the meetings of the preparatory committee, the participation rights of the international organization that is a party to the Convention shall be as in the Meeting of States Parties to the Convention’, adding that ‘this provision shall constitute no precedent for all meetings to which Assembly resolution 65/276 of 3 May 2011 is applicable’ (para 1(j)).

35 For Elie Jarmache, ‘*on aurait pu penser la question des compétences résolue et bien établie dans le système européen de prise de décision, et le rôle respectif des différents acteurs bien connu. Force est de constater qu’il n’en est rien*’: Elie Jarmache, ‘Fondements juridiques de l’action de l’Union européenne et application spatiale. “L’espace maritime communautaire” in INDEMER, *Droit international de la mer et droit de l’Union européenne. Cohabitation, Confrontation, Coopération?* (2014 Colloque international, 17-18 octobre 2013, Pedone) 17-24.

36 Council Decision (EU) 2016/455 of 22 March 2016 authorising the opening of negotiations on behalf of the European Union on the elements of a draft text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction [2016] OJ L79/32: This Decision was adopted in the context of the PrepCom, but has the same substance as the decision adopted for the opening of the Intergovernmental Conference in September. The latter, however, is not available online so far. See also, more generally, the document of the Council of the EU, *EU Statements in multilateral organizations – General Arrangements* (2 October 2011, doc. 15901/11), and Catherine Flaesch-Mouglin, ‘Représentation externe et compétences de l’Union européenne: quelques réflexions à propos des arrangements généraux du Conseil relatifs aux déclarations de l’Union dans les organisations multilatérales’ in Chahira Boutayeb (ed), *La Constitution, l’Europe et le droit, Mélanges en l’honneur de Jean-Claude Masclat* (2013, Publications de la Sorbonne) 571.



this Decision,

to the extent that the subject matter of the negotiations falls within the competences of both the Union and its Member States, the Commission and the Member States should cooperate closely during the negotiating process, with a view to ensuring unity in the international representation of the Union and its Member States.

Last but not least, to reach the objective of a ‘universal participation’, the intergovernmental meetings will include observers, such as international organizations, non-governmental organizations (NGOs) and experts, in order to give a voice to the interests of the international community as a whole.³⁷ The participation of civil society in decision-making in international law is one of the principles of international environmental law, as consecrated in Principle 10 of the *Rio Declaration on Environment and Development*, stating that ‘[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level’.³⁸

Nevertheless, the law of the sea has traditionally a strong interstate character, prioritizing the interests of States, in particular coastal States. Conversely, in the adoption of ‘environmental’ conventions or during the conferences of the parties to such conventions, non-State actors play an important role³⁹. As regards the discussion related to marine biodiversity beyond areas of national jurisdiction, thus far, non-State stakeholders are participating by having the opportunity to make statements, after States, during the main discussions. In addition, side events are organized by those actors in order to increase awareness and bring expertise to some specific issues. However, it appears that civil society plays a secondary role in such discussions. During certain sessions of the BBNJ Working Group and PrepCom, indeed, some States were reluctant to open the discussion and asked to meet in small informal closed groups.⁴⁰ The creation of a specific Conference of the Parties for the implementation of the agreement may facilitate the integration and participation of all the relevant stakeholders in the future.

As regards the procedural aspects of the process toward adoption of a new implementing agreement under the UNCLOS, one could conclude that some uncertainty remains concerning the exact future agenda and that some improvements could be made – for instance, concerning opening up participation to NGOs and other non-State actors.

37 UNGA Res 72/249 (2017) paras 12-13.

38 Rio Declaration on Environment and Development (Rio de Janeiro, 13 June 1992) UN Doc A/CONF.151/26 (vol I) 31 ILM 874 (1992).

39 Eg the International Union for the Conservation of Nature or the scientific committee of the organization concerned play an important expert function in the process.

40 Lack of transparency has been mentioned, for instance, in the 2011 and 2012 sessions of the BBNJ Working Group. IISD, ‘Summary of the fifth meeting of the Working Group on marine biodiversity beyond areas of national jurisdiction: 7-11 May 2012’ (*Earth negotiation bulletin*, 25, 83) 9: ‘NGOs had already experienced a closed-door drafting group at last year’s meeting of the Working Group. Notwithstanding the initial modification of the organization of work not to refer to “closed” sessions this year, NGOs and IGOs remained outside the shut doors of the Friends of the Co-Chairs group for the whole of Thursday and Friday morning. This procedural approach was discussed at various points in plenary, with certain countries and the whole NGO cohort questioning whether the General Assembly rules of procedure were being applied.’



3. The substantive issues: unpacking the ‘package deal’, challenges and uncertainties of the future negotiating process

3.1 Origins and functions of the ‘package deal’

The ‘package deal’ agreed on in Resolution 66/231 and referred to in Resolution 72/249 can be seen as a consequence of the expression used in the Preamble of the UNCLOS, according to which ‘the problems of ocean space are closely interrelated and need to be considered as a whole’. Indeed, physically, the ocean space is an integrated whole, entirely connected, and the issues related to the oceans can influence others. Moreover, the notion of biodiversity itself, defined as the variability of life and the interrelations between species, genes and ecosystems,⁴¹ is inherent to the idea of an ‘integral whole’. The use of this notion of ‘package deal’ traduces the idea of a series of elements that are dependent on one another and cannot be considered separately.

Moreover, the notion of ‘package deal’ refers to a negotiating technique, a decision-making process traditionally used in law of the sea discussions⁴² – the UNCLOS being seen as a ‘package deal’ in itself or an overall acceptable treaty – which implies that nothing is individually agreed until everything is agreed. According to Caminos and Molitor, ‘the package deal represented one of the most significant features of the negotiations; i.e., the leitmotif of UNCLOS III’.⁴³ This negotiating technique is thus focused on compromise and consensus,⁴⁴ yet entails consequences, such as the prohibition of reservations to the Convention, according to Article 309 UNCLOS, in order to maintain its consistency. However, following Article 310 UNCLOS, States are able to make a declaration during ratification of the Convention, clarifying a point of interpretation; this ‘compromised’ practice could then be used as a ‘hidden reservation’.⁴⁵ The compromise reached with these two complementary Articles was nonetheless reproduced in the 1995 UNFSA and could be used again in the future agreement on marine biodiversity beyond national jurisdiction as a consequence of the ‘package deal’.

During the intergovernmental conference, States will have to open ‘Pandora’s box’, and try to reach a consensus while choosing between all the available options for each of its component, to make this ‘integral whole’ concrete and acceptable. The ‘package deal’ thus remains a fragile and strong concept at the same time.

41 Art 2 Convention on Biological Diversity.

42 Hugo Caminos and Michael R Molitor, ‘Progressive Development of International Law and the Package Deal’ (1985) 79(4) AJIL 871, 874.

43 *ibid* 884.

44 See Michael Hardy, ‘Decision making at the law of the sea conference’ (1975) 11 RBDI 442, 444.

45 See Daniel Vignes, ‘Les déclarations faites par les États signataires de la Convention des Nations Unies sur le droit de la mer, sur la base de l’article 310 de cette convention’ (1983) 29 AFDI 715-748, and Alain Pellet, ‘Les réserves aux conventions sur le droit de la mer’ in *La mer et son droit, Mélanges offerts à Laurent Lucchini et Jean Pierre Quéneudec* (Pedone 2003) 515.



3.2 Content of the package deal: main issues and available options

3.2.1 Marine genetic resources, including questions on the sharing of benefits

As regards the legal status of marine genetic resources, the ‘gaps’ revealed by the BBNJ Working Group and PrepCom between 2006 and 2017 stressed a clear opposition between developed and developing countries. Indeed, in the 1982 UNCLOS, States focused mainly on the mineral resources of the deep seabed to negotiate the ‘common heritage of mankind’ status for the Area and its resources: according to Article 136, ‘[t]he Area and its resources are the common heritage of mankind’. This formulation might be interpreted broadly, although the definition of the ‘resources of the Area’ appears quite narrow in the UNCLOS.⁴⁶ However, marine genetic resources of the deep seabed are also to be exploited by States⁴⁷ in order to develop medicines, pharmaceutical engineering or cosmetics, for instance, and the lack of precision of the UNCLOS on this point led to a significant disagreement between the different interest groups. On the one hand, developed States were in favour of a strict application of the principle of freedom of access and use for marine genetic resources situated in the high seas but also in the Area. On the other hand, developing countries (mainly the G77⁴⁸ and China) argued that marine genetic resources should also be considered as being the ‘common heritage of mankind’, likewise mineral resources of the Area. This issue remains a crucial point of contention, especially regarding the sharing of benefits.⁴⁹

According to the report of the PrepCom adopted by the UNGA on 31 July 2017,⁵⁰ one of the main disagreements rests on the modalities of the sharing of benefits of the exploitation of resources. The group of African States, and the G77 and China, are defending an extension of the common heritage status for marine genetic resources and an equitable sharing of benefits of their exploitation. However, it seems that other States would be more in favour of free access or an intermediate regime for the genetic resources of the Area and potentially that of the high seas. This intermediate regime could be

46 Art 133 UNCLOS: ‘For the purposes of this Part: (a) ‘resources’ means all solid, liquid or gaseous mineral resources in situ in the Area or at beneath the seabed, including polymetallic nodules; (b) resources, when recovered from the Area, are referred to as minerals.’

47 According to Art 2 of the Convention on Biological Diversity, the notion of ‘genetic resource’ ‘means genetic material of actual or potential value’; see Claudio Chiarolla, ‘Intellectual property rights and benefit sharing from marine genetic resources in areas beyond national jurisdiction: current discussions and regulatory options’ (2014) 4(3) *Queen Mary Journal of Intellectual Property* 171.

48 The Group of 77 (G77) was established on 15 June 1964 by the developing countries signatories of the ‘Joint Declaration of the Seventy-Seven Developing Countries’, issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva, and is still one of the most important group of States in the context of the UN discussions.

49 See Tullio Scovazzi, ‘Negotiating conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction: prospects and challenges’ (2015) 24(1) *The Italian Yearbook of International Law* 63; Elisabeth Druel, Kristina Gjerde, ‘Sustaining marine life beyond boundaries: Options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea’ (2014) 49 *Marine Policy* 90-97.

50 ‘Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction’ (31 July 2017) UN Doc A/AC.287/2017/PC.4/2, para 3.



inspired by 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*,⁵¹ adopted in 2010, which creates a mechanism of bilateral negotiation and agreement on the terms of the sharing of benefits between the State of origin of the resource and the State asking for access. Although it does not apply in areas beyond national jurisdiction, its principles – such as the principle of equity – could be relevant for the construction of a specific regime for marine genetic resources beyond national jurisdictions. Such a specific regime could also be inspired by Article 82 UNCLOS, dealing with the sharing of benefits of mineral resources of the continental shelf beyond 200 nautical miles.⁵² During the first meeting that took place in September, the G77 and China ‘supported an ABS [access and benefit sharing] drawing on the Nagoya Protocol, the International Seabed Authority (ISA), and the ITPGRFA [International Treaty on Plant Genetic Resources for Food and Agriculture]’.⁵³

Secondly, it will be necessary to determine the different types of benefits that would be shared, mainly monetary and non-monetary. Developed States are in favour of an exclusive non-monetary sharing, based on the transfer of knowledge or technology and the research results of the exploitation processes. This question is thus directly related to the articulation of this instrument with the current regime of intellectual property rights, in the framework of the World Trade Organization and the World Intellectual Property Rights Organization.⁵⁴ For instance, it is not necessary under the existing regimes to indicate the origin of the resource used to obtain a patent. Moreover, patenting a microorganism is possible under the TRIPS agreement.⁵⁵ A traceability requirement could, at least, be introduced for marine genetic resources in areas beyond national jurisdiction, if access to those resources is regulated, as required by the group of small island developing States.⁵⁶ Either way, the articulation of the future instrument with the existing regime related to intellectual property rights will need to be clarified. The introduction of special permits could be another way to regulate and control access to marine genetic resources, but it appears very constraining for a number of States and incompatible with the current frameworks. A system of notice-based access, including a dis-

51 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, Nagoya (adopted 29 October 2010, entered into force 12 October 2014) UNEP/CBD/COP/DEC/X/1.

52 Art 82 UNCLOS: ‘1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. 2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production [...] 4. The payments or contributions shall be made through the Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.’

53 IISD Reporting service, ‘Summary of the First Session of the Intergovernmental Conference’ (n 17) 4.

54 *ibid* 5.

55 Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 299, Art 27(3)(b): ‘Members may also exclude from patentability: (b) plants and animals *other than micro-organisms*, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.’

56 IISD Reporting service, ‘Summary of the First Session of the Intergovernmental Conference’ (n 17) 5.



closure of origin and purpose, is another option that was introduced in the discussion in September by Brazil.⁵⁷ This notification process is also favoured, notably by China and Norway, in addition to a code of conduct or guidelines on access.⁵⁸ Finally, *ex situ* monitoring of the utilization of marine genetic resources in areas beyond national jurisdiction will need to be addressed as well, which also depends on the other elements discussed.

Hence, the economic consequences associated with this question of access and sharing of benefits of marine genetic resources still represent a highly important and controversial issue.

3.2.2 Area-based management tools, including marine protected areas

As regards area-based management tools, the participants to the negotiations will have to determine the modalities of a future regime dedicated to the identification and creation of marine protected areas (MPAs) and other management tools. Indeed, the current treaties and regional frameworks only allow for the creation of regional and/or sectorial MPAs. For instance, organizations created by regional seas conventions have the power to create MPAs beyond national jurisdiction in their fields of competence, as is the case for the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), which recently managed to designate an MPA in the Ross Sea after several years of discussions following the designation of the Arcadia Sea MPA.⁵⁹ Moreover, global organizations, such as the International Maritime Organization, have the power to designate sectorial protected areas.⁶⁰ Those protected areas, therefore, are only opposable to the parties of the treaty concerned. In order to reinforce their efficiency as a conservation tool, and also to make it possible to create protected areas even in areas where no regional framework have any spatial competence, the future international agreement would at least encourage and build new tools and processes in order to develop a real network of MPAs beyond national jurisdiction, in conformity with general and identified principles as the ‘ecosystemic approach’.⁶¹

According to the PrepCom during its fourth session, ‘[t]he issues on which there is a divergence of views [...] include: the most appropriate decision-making and institutional set up, with a view

57 *ibid.* 4.

58 *ibid.*

59 CCAMLR Conservation measure 91-05 (2016), *Ross Sea region marine protected area*. See also Conservation measure 91-04 (2011), *General framework for the establishment of CCAMLR Marine Protected Areas*.

60 Eg the MARPOL particularly sensitive areas (PSSAs) are areas needing special protection from activities of navigation, because of their ecological, scientific or socio-economical characteristics.

61 The ecosystemic approach is defined by the CBD as ‘a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way’. It is “based on the application of appropriate scientific methodologies focused on levels of biological organization, which encompass the essential structure, processes, functions and interactions among organisms and their environment”. ‘Ecosystem approach’, Decision V/6 COP 2000, A(1).



to enhancing cooperation and coordination, while avoiding undermining existing legal instruments and frameworks, and the mandates of regional and/or sectoral bodies'.⁶² Thus, the relationship with existing relevant instruments, frameworks and global, regional and sectoral bodies, is one of the main issues to be considered. The future instrument would, at least, 'enhanced cooperation between relevant legal instruments [...] without prejudice to their respective mandates' and 'to the rights of coastal States'.⁶³ Then, it would clearly state 'who would make the decision and on what basis', and clarify the role of each stakeholder. The report adds that '[t]he text would address the question of the involvement of coastal states adjacent to an area for which area-based management tools [...] are proposed'.⁶⁴ Coastal States claim, indeed, that in order to take into account their sovereign rights over their continental shelf, they would necessarily have to consent to the creation of a marine protected area in areas adjacent to their EEZ, especially when the protected area overlaps with their extended continental shelf.

In addition, it could be useful to create a global scientific committee, which would be in charge of the evaluation of marine protected areas or other area-based management projects, the harmonization of the criterion for the designation of protected areas,⁶⁵ and the monitoring of the surveillance and management of those areas.⁶⁶ The difficulty here is the question of the relationship between this organ and the existing global or regional scientific committees of each relevant organization. The global committee could, however, provide for a mechanism of 'international recognition' of the existing regional MPAs, in order to overcome the principle of relativity of treaties and raise the effectiveness of the regional conservation measures. Another tool to overcome the relative effect of regional treaties could be inspired by the 'non-contracting cooperating party' statute already existing in regional fisheries management organizations (RFMOs)⁶⁷ and stemming from Article 8(4) UNFSA.⁶⁸

Finally, as regards marine protected areas, three options have been envisaged for the designation, implementation, monitoring and review processes: a global, regional or hybrid model.⁶⁹ The first

62 IISD Reporting Services, 'Summary of the fourth session of the preparatory committee' (n 16) 12.

63 'Report of the Preparatory Committee established by General Assembly resolution 69/292' (n 50) para 4.2.

64 Eg for the States of the EU, who proposed during the first session in September that the coastal State 'could propose changes to MPA designation if the MPA would undermine their rights under UNCLOS. IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 7.

65 Those criteria could be directly inspired by the existing criteria applying in regional and sectoral organizations, See 'Chair's streamlined non-paper on elements of a draft text' (n 16) 22, para 99.

66 IISD Reporting service, 'Summary of the third session of the preparatory committee on marine biodiversity beyond areas of national jurisdiction: 27 March - 7 April 2017' (*Earth Negotiations Bulletin*, 25, 129) 6.

67 It is the case of the International Commission for the Conservation of Atlantic Tunas: see *Recommendation 03-20 on criteria for attaining the status of cooperating non-contracting party, entity or fishing entity in ICCAT*. The non-contracting cooperating party shall, for instance, 'inform ICCAT of the measures it takes to ensure compliance by its vessels with ICCAT conservation and management measures'.

68 According to which 'Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply'.

69 'Chair's streamlined non-paper on elements of a draft text' (n 16) 21.



approach, a global overarching framework, would lead to the creation of a centralized mechanism, in order to develop a global network of MPAs. The international entity (a conference of the parties and/or scientific committee) would be competent to designate protected areas in areas where no regional framework currently exists, according to recognized criterion (only four regional bodies currently have spatial competence in areas beyond national jurisdiction: the OSPAR Commission, the CCAMLR, the Barcelona System, and the Secretariat of the Pacific Regional Environment Programme). All States and organizations would be associated with the decision-making process. It would also include a list of the existing protected areas, providing for global recognition of those areas, but the difficulty would rest in the definition of the respective function of existing regional and global frameworks, without undermining their mandates, and the association of coastal States. Colombia and Singapore, for instance, declared that they were in favour of such an option during the first session of September.⁷⁰

The second approach, the ‘regional and sectorial approach’, would be defined as a ‘[g]eneral policy guidance to promote cooperation and coordination would be provided at the global level, while recognizing the full authority, without oversight from a global mechanism, of regional and sectorial organizations in decision-making’.⁷¹ According to this approach, the functions and competences of the regional sea organizations and RFMOs would be sufficient and must prevail, so there is no need for a formal and global mechanism. The new instrument would only provide for common criterion and directives, also encouraging enhanced coordination, consultation and cooperation between organizations. It would be absolutely necessary, within such an approach, to encourage the creation of regional frameworks where they do not yet exist. The Russian Federation, for example, has advocated for a strictly regional option.⁷²

The last model is called a ‘hybrid’ or intermediate approach, which would bring together different elements of the other two approaches: ‘[g]eneral guidance and objectives would be developed at the global level to enhance cooperation and coordination and provide a level of oversight to the decision-making and implementation by regional and/or sectorial mechanisms’.⁷³ The protected area would be proposed at the global level, with a determination of the appropriate conservation measures needed. However, the final designation and management would be done at the regional level, where appropriate frameworks already exist. This approach could constitute a compromise and is favoured by different groups and States such as Australia, New Zealand, Chile and Japan.

3.2.3 Environmental impact assessment

The obligation to conduct an environmental impact assessment has been consecrated in several instruments and judicial decisions, namely Article 206 UNCLOS, Article 14 CBD, and by the In-

70 IISD Reporting service, ‘Summary of the First Session of the Intergovernmental Conference’ (n 17) 7-8.

71 ‘Chair’s streamlined non-paper on elements of a draft text’ (n 16) 22.

72 IISD Reporting service, ‘Summary of the First Session of the Intergovernmental Conference’ (n 17) 8.

73 ‘Chair’s streamlined non-paper on elements of a draft text’ (n 16) 21.



ternational Court of Justice in the 2010 *Pulp Mill on the River Uruguay* case, which solidified the obligation's international customary law character where there is a risk of transboundary damage.⁷⁴ However, the general obligation to conduct an environmental impact assessment remains imprecise, as it does not specify the exact process and content of such an assessment.

The PrepCom defined environmental impact assessment as 'a process to evaluate the environmental impacts of activity to be carried out in areas beyond national jurisdiction, with an effect on areas within or beyond national jurisdiction, taking into account interrelated socioeconomic, cultural and human health impacts, both beneficial and adverse'.⁷⁵ Within this general basis, States will have to decide, among other issues, if the obligation to conduct an environmental impact assessment is applicable to all activities at sea or if certain activities could be exempted because of their small impact on marine biodiversity. Moreover, would the obligation only apply to certain activities taking place in areas beyond national jurisdiction, or also to activities on land or at sea that may have an impact on the high seas or the Area?⁷⁶ It may also be important to take into account the cumulative effects of the different activities at sea while assessing an activity through the concept of 'strategic environmental assessment' – but this issue also necessitates further discussion.⁷⁷

Furthermore, the threshold of the 'acceptable' level of impact when conducting of an environmental impact assessment is also one of the elements to be settled by States.⁷⁸ The *Protocol on Environmental Protection to the Antarctic Treaty*⁷⁹ could, to that end, be a useful model⁸⁰. Indeed, Article 8 of the Protocol imposes on State Parties an obligation to carry out environmental impact assessments for their activities in the Antarctic Treaty area identified as having '[more than] a minor or transitory impact', and Annex I details the process to be followed when conducting an assessment according to this threshold.

The process of conducting an environmental impact assessment could either be centralized by a global body in charge of monitoring implementation by the Member States of their obligations, the gathering of the assessments and harmonization of the evaluation's criteria, or remain a duty of individual States coupled with a reporting obligation. The degree of participation of civil society in this

74 *Pulp Mill on the River Uruguay (Argentina v. Uruguay)* (Judgement) [2010] ICJ Rep 14, para 204, reiterated in *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (Judgement) [2015] ICJ Rep 665, para 101-05.

75 'Chair's streamlined non-paper on elements of a draft text' (n 16) 6.

76 IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 10-11.

77 'Report of the Preparatory Committee established by General Assembly resolution 69/292' (n 50) para 5-7. See also IISD Reporting service, 'Summary of the fourth session of the preparatory committee' (n 16) 13: China, the Russian Federation and the US proposed even to 'delete' the section mentioning strategic environmental assessments.

78 IISD Reporting service, 'Summary of the First Session of the Intergovernmental Conference' (n 17) 10.

79 Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) 30 ILM 1461. The Espoo Convention, on environmental impact assessment in a transboundary context, was also mentioned as it could be a relevant model for the new dispositions in this respect. Convention on environmental impact assessment in a transboundary context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309.

80 'Chair's streamlined non-paper on elements of a draft text' (n 16) 30-31.



process also needs to be determined,⁸¹ such as the publication of evaluations or reports, the creation of a ‘clearing house mechanism’, and, importantly, the decision-making following the environmental impact assessment.

3.2.4 Transfer of technology and capacity building

The idea of capacity building for developing States, and the dispositions related to transfer of marine technology,⁸² aim to help such States in the practical and effective implementation of a future agreement. The agreement would also emphasize the need to take geographically disadvantaged States, the least developed countries, and small island developing countries, among others, into consideration. The UNCLOS already deals with the transfer of technology and capacities, notably in Article 266 and more generally in Part XIV on technology transfer. The goal here is then to adapt these dispositions and make them operational in the context of marine biodiversity conservation beyond national jurisdiction. A ‘clearing house mechanism’ or global ‘centre for the exchange of information’ could be created, containing scientific and technical data or repertory of best practices.

The promotion of education and marine scientific research is also fully part of this process. States will have to set the modalities of access to technologies and human or technical resources and boost the development of new means of cooperation. The International Oceanographic Commission of the UNESCO could play an important role in this field. Moreover, cooperation with international organizations, especially the International Seabed Authority as it is developing a sophisticated regime as regards the exploration and future exploitation of the deep seabed resources, is to be developed or reinforced. The question of financing is nonetheless at the heart of this subject and will surely need specific consideration.⁸³ States are also to decide if capacity building and the transfer of technology mechanism is to function on a voluntary basis or if a mandatory approach should be envisaged; the idea of a trust fund is also part of the discussion, and the issue of intellectual property rights reappears here as this may be an obstacle to technology dissemination.⁸⁴

3.3 Transversal issues, beyond the package deal

Beyond the elements of the ‘package deal’, other issues will need to be clarified during the inter-governmental conference. The first issue is the possible institutional arrangements that the conven-

81 *ibid.*

82 Defined as ‘the transfer of instruments, equipment, vessels, processes and methodologies required to produce and use knowledge to improve the study and understanding of the nature and resources of the oceans’: *ibid.* 8.

83 IISD Reporting Services, ‘Summary of the Fourth Session of the Preparatory Committee’ (n 16) 15.

84 IISD Reporting service, ‘Summary of the First Session of the Intergovernmental Conference’ (n 17) 13-14.



tion will settle: some States support a conference of the parties as a decision making body,⁸⁵ others prefer strengthening existing frameworks, including RFMOs. The creation of a scientific or technical body, as already mentioned, is also envisaged, as is a Secretariat. The exact nature and functions of this decision-making body or forum would then need to be more precise. Its functions could be linked to the exchange of information, review of the implementation of the agreement, promotion of cooperation, but also the decision and recommendation making related to implementation. As regards marine genetic resources, a potential role for the International Seabed Authority has been envisaged and will depend on the status and corresponding regime of those resources.

Finally, the instrument 'would address financial issues relating to the operation of the instrument'.⁸⁶ Dispute settlement, which is already addressed in the UNCLOS, could be completed, as well as the dispositions of the UNCLOS related to responsibility and liability. Indeed, the definition of the 'genuine link', the link that is supposed to exist between the flag State and the ship according to Article 91 UNCLOS on the nationality of ships, could be specified in order to combat the phenomenon of flags of convenience and reinforce control over ships. The issue of high seas fisheries and the potential overlap between the future instrument and fisheries is also highly controversial and will be determinant for a number of delegations.⁸⁷ Actually, fishing is one of the greatest threats to the conservation of marine biodiversity. Although fisheries are already dealt with by existing international and regional instruments, such as the 1995 UNFSA, the issues of coordination, coherency and implementation will surely need to be strengthened during future discussions.

Indeed, according to Wright and others, a new agreement 'could strengthen and clarify the overall fisheries management framework and implement a number of overarching provisions to further improve the integration of biodiversity considerations into fisheries management'.⁸⁸ Fisheries could be directly or indirectly included in a future instrument through the area-based management tools and marine protected areas' dispositions, as well as the environmental impact assessment regime, and encouragement to adhere to the relevant international instruments in this field, such as the FAO

85 As regards the potential creation of a COP, an emerging question would be its articulation or relationship with the existing Meeting of the Parties of the UNCLOS. According to Art 319(2) (e) of the Convention, the Secretary-General of the United Nations convenes the Meeting of the Parties when it is 'necessary'. This meeting is actually closer to a 'diplomatic conference' than a COP, compared to the existing conferences resulting from multilateral environmental law agreements, as, for instance, the COP of the CBD, which has the power to adopt decisions. One of its functions is to elect members of the ITLOS (Annex VI, Art 4(4)), or to vote the budget of the Tribunal (Annex VI, Arts 19(1) and 18(7)). It also has an important role regarding the functioning of the International Commission of the Limits of the Continental Shelf, as it adopted some important decisions, like the decision SPOLS/189, in 2008, regarding the fixation of the starting date for the ten years period for the submission.

86 'Chair's overview of the third session of the Preparatory Committee' (2017) 17 <www.un.org/depts/los/biodiversity/prepcom.htm> accessed 1 December 2018.

87 Elisabeth Druel and Kristina M Gjerde, 'Sustaining marine life beyond boundaries: Options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea' (2014) 49 *Marine Policy* 90, 96; Glen Wright and others, 'High seas fisheries: what role for a new international instrument?' (IDDRI Study 03/2016).

88 Wright and others (ibid) 16.



guidelines and treaties, or to join an existing regional framework dealing with fisheries. More generally, the consecration of some general and guiding principles will at least allow for enhanced consistency in the global regime of marine biodiversity beyond areas of national jurisdiction. In this way, a future international instrument would not ‘undermine’ the existing frameworks, but, on the contrary, could *underline* them and make the existing instruments related to fisheries more effective.⁸⁹

All in all, as regards the substance of the future legally binding instrument, there are many options on the table, which become increasingly detailed after each cycle of formal and informal discussion between States. Regarding the most controversial issue, marine genetic resources, the G77 and China may soften its position for the establishment of a benefit sharing mechanism, even if the concrete modalities are not settled. Concerning the area-based management tools, the hybrid approach also leaves space for a compromise to be reached and with an overarching institutional cooperation principle and development of means to that aim, it seems that the construction of global networks of protected areas are worth envisaging. Concerning the other elements, the debate is also becoming more concrete and precise. The first session of the intergovernmental conference, indeed, is a good illustration of the will of States to contribute to the process and make it possible to reach consensus. Resolution 72/249, thus, marked a real shift in international policy on the conservation and sustainable use of marine biodiversity in international maritime areas.

4. Conclusion

The panorama drawn here shows that, so far, neither the content nor the future procedural agenda for the adoption of a future legally binding instrument is agreed yet, so there is little certainty on the future of the process. Thanks to the discussions that took place by the PrepCom, States and the other participants explored the potential issues at stake and available options, making the future work in the framework of the intergovernmental conference more political: to reach the widest and most ambitious possible consensus. Indeed, the protection of marine biodiversity beyond national jurisdiction is a crucial issue for the whole mankind.

The start of negotiations in September 2018 shows that progress has been made and that a positive achievement remains possible: compromise can lead to the adoption of a broad, perhaps ambiguous, but hopefully ambitious agreement. However, one can observe that this useful instrument will undoubtedly be insufficient to ensure that marine biodiversity is effectively conserved in areas beyond national jurisdiction. Other efforts would need to be made in parallel to the new process, as regards for instance land-based pollution, climate change, and the implementation of an international responsibility regime at sea.

⁸⁹ *ibid* 10.