THE NEGOTIATIONS FOR A NEW IMPLEMENTING AGREEMENT UNDER THE UN CONVENTION ON THE LAW OF THE SEA CONCERNING MARINE BIODIVERSITY

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Abstract This article discusses the current negotiations for an Implementing Agreement under the United Nations Convention on the Law of Sea on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. It discusses, in particular, the issue of the relationship of the new agreement with existing and future relevant regional instruments and bodies and the need for cooperation and coordination amongst them, the guiding principles of the new agreement, and the question of implementation and enforcement of the new agreement. These issues and the choices that delegations will make respectively highlight the controversy on the underpinning tenet of the agreement, ie between the 'freedom of the high seas' and the common heritage of mankind. The article concludes with a pessimistic prognosis that, in general, the agreement will fall short of the expectations that many States and international community have had at the early days of the negotiation.

Keywords: public international law, marine biodiversity, Law of the Sea Convention, Implementing Agreement, marine protected areas, marine genetic resources, environmental impact assessments.

I. INTRODUCTION

The fourth session of the Intergovernmental Conference (IGC) on a new implementing agreement under the United Nations Convention on the Law of the Sea (LOSC) concerning marine biological diversity in areas beyond national jurisdiction was scheduled to take place from 23 March to 3 April 2020.[1] This was supposed to be the final session of the IGC, convened on 24 December 2017

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[1] See further information at <https://www.un.org/bbnj/>.

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by the UN General Assembly (UNGA),[2] which would mark the end of a very long and difficult journey. Indeed, the issue of the conservation and sustainable use of biodiversity on the high seas and the deep seabed, commonly referred to as biodiversity beyond national jurisdiction (BBNJ), has been on the agenda of the UNGA since 2004.[3] However, in response to the COVID-19 pandemic, by decision 74/543 of 11 March 2020, the UNGA decided to postpone the fourth session of the conference to the earliest available future date.[4] At the time of writing (1 May 2020), it is not known when the fourth session will be rescheduled.

Yet, regardless of when the fourth session takes place, the omens are not in favour of the 'BBNJ-canoe'[5] reaching its destination any time soon. As the latest version of the negotiating draft text that Ms Rena Lee, the ICG President, published on 27 November 2019 demonstrates, a plethora of important issues remain unsettled.[6] It seems highly unlikely that a compromise will be reached on all of them in the two weeks of the fourth session, and many experienced delegates anticipate a fifth or even a sixth session in 2021.

The quest for an agreement on BBNJ has proven very difficult, not only due to the complexity and significance of the topic, but also because it has proven hard to resolve the controversy that lies at its heart. This controversy is between, on the one hand, the 'freedom of the high seas', including the freedom of marine scientific research for bioprospecting purposes,[7] and, on the other, the common

[2] On 24 December 2017, the UN General Assembly (UNGA) decided by Resolution 72/249 '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 United Nations Convention on the Law of Sea 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'; see UN A/RES/72/249 <http://undocs.org/en/a/res/72/249>.

[3] For an excellent overview of the negotiations up until the end of 2018 see D Freestone, 'The UN Process to Develop an International Legally Binding Instrument under the 1982 Law of the Sea Convention: Issues and Challenges' in D Freestone (ed), *Conserving Biodiversity in Areas beyond National Jurisdiction* (Brill 2019) 16–20. See also on the history of the negotiations KM Gjerde, 'Perspectives on a Developing Regime for Marine Biodiversity Conservation and Sustainable Use beyond National Jurisdiction' in HN Scheiber, N Oral and M-S Kwon (eds), *Ocean Law Debates: The 50-Year Legacy and Emerging Issues for the Years Ahead* (Brill 2018) 354.

[4] See General Assembly Decision to Postpone the fourth session of the Conference (provisionally available as A/74/L.41) (11 March 2020) <https://undocs.org/en/a/74/l.41>.

[5] The President of the Conference, Ms Rena Lee, very often characterises the common effort of the delegates during the BBNJ negotiations as 'all paddling the same canoe'.

[6] See Revised draft text of an agreement 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 (27 November 2019); <https://www.un.org/bbnj/sites/www.un.org.bbnj/files/revised_draft_text_a.conf_.232.2020.11_advance_unedited_version.pdf> (Revised Draft Text).

[7] Bioprospecting is not defined in the LOSC and it is difficult to locate a universally agreed definition of the activity. According to de la Fayette, it can be defined as 'the scientific investigation of living organisms for commercially valuable genetic and biochemical resources'; see LA de La Fayette, 'A New Regime for the Conservation and Sustainable Use of Marine Biodiversity and Genetic Resources Beyond the Limits of National Jurisdiction' (2009) 24 International Journal of Marine and Coastal Law 221, 228. See also J Mossop, 'Marine

heritage of mankind (CHM).[8] As a contemporary iteration of the famous battle between 'mare liberum' and 'mare clausum' in the seventeenth century,[9] this controversy over what will be the tenet underpinning the BBNJ treaty has been haunting the negotiations since day one. In this vein, questions such as whether access to the marine genetic resources (MGRs) of the deep sea-bed will be free or regulated and whether the resulting monetary benefits will be shared, as well as whether the conservation of marine biodiversity in those areas will be a matter, primarily, for the individual user or for the international community to regulate, still persist.

It is trite that the most contentious issue in the course of the negotiations to date has been that of MGRs. Marine organisms, such as microorganisms that survive in extreme conditions of pressure, salinity, and the absence of oxygen and light, offer unique qualities possessing potentially significant commercial value.[10] Such organisms are to be found in the ecosystems of the deep ocean, including seamounts, hydrothermal vents and methane seeps, and in the diverse biological communities of the ocean floor.[11] Although the marine biotechnology industry is still in its infancy, MGRs have already been used in products that have anti-inflammatory, anti-cancer, or other medical properties, where the potential monetary rewards are extremely high.[12]

Given the promising financial prospects of MGRs in areas beyond national jurisdiction (ABNJ), it came as no surprise that the Group of 77 (G-77), as they

Bioprospecting' in D Rothwell, A Oude Elferink, K Scott and T Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 825.

[8] See *inter alia* Article 136 of the UN Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 UNTS 3 (LOSC), according to which this area and its resources are the common heritage of mankind. See also the UN General Assembly Resolution 2749 (XXV) of 17 December 1970 in which the UNGA solemnly declared, *inter alia*, that the area of the 'sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction … as well as the resources of the area, are the common heritage of mankind'. See also JE Noyes, 'The Common Heritage of Mankind: Past, Present, and Future' (2012) 40 Denver Journal of International Law and Policy 447.

[9] On the classical controversy between *mare liberum* and *mare clausum* see *inter alia* W Grewe, *The Epochs of International Law* (transl. and rev. M. Byers) (De Gruyter 2000) 264; R Anand, 'Freedom of the Sea: Past, Present and Future' in W Abendroth and R Gutiérrez Girardot (eds), *Essays in Honour of Wolfgang Abendroth* (Verlag 1982) 215; and E Papastavridis, The Right of Visit on the High Seas in a Theoretical Perspective: *Mare Liberum v. Mare Clausum* Revisited' (2011) 24 LJIL 45.

[10] See D Leary, M Vierros, G Hamon, S Arico and C Monagle, 'Marine Genetic Resources: A Review of Scientific and Commercial Interest' (2009) 33 Marine Policy 183, 185–6.

[11] See *inter alia* J Mossop, *The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities* (Oxford University Press 2016) 21–33; L Glowka, 'The Deepest of Ironies: Genetic Resources, Marine Scientific Research and the Area' (1996) 12 Ocean Yearbook 154, 154; T Scovazzi, 'Special Report: Biodiversity in the Deep Seabed' (1997) 7 Yearbook of International Environmental Law 481, 481; I Kirchner-Freis and A Kirchner, 'Genetic Resources of the Sea' in D Attard, M Fitzmaurice and N Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law: Volume I: The Law of the* Sea (Oxford University Press 2014) 377.

[12] See eg Mossop (n 7) 828.

had done in the 1970s with respect to polymetallic nodules,[13] argued that the CHM principle should apply to MGRs.[14] Indeed, in their view, as reported by Freestone:

> rather than being subject to the open access regime of the high seas as advocated by some States, if the drafters of the LOSC had been aware of these resources—rather than simply being aware of the famous 'manganese nodules'—they would doubtless have specifically included these living resources within the deep sea bed regime.[15]

On the other hand, there are many States[16] that argue that MGRs should be subject to the freedom of the high seas and the application of conventional intellectual property systems.[17] This is reminiscent of the controversy between the freedom of the high seas and CHM prevalent in the Third United Nations Conference on the Law of the Sea (UNCLOS III).[18]

In addition, this controversy is noticeable not only with respect to the sustainable use of marine biodiversity, including the MGRs in ABNJ, but also with respect to the measures necessary to achieve better long-term conservation of marine biodiversity in ABNJ, such as area-based management tools (ABMTs), including marine protected areas (MPAs), and Environmental Impact Assessments (EIAs). These two measures, together with MGRs and capacity-building and transfer of technology (CB & TT), comprise the 'package-deal' that, in 2011, the UNGA agreed to be addressed by the new agreement.[19] MGRs aside, in respect of the other elements of the 'package', the controversy primarily lies not over whether these measures are required in ABNJs, since they are already provided for in the

[13] See GM Danilenko, 'The Concept of the 'Common Heritage of Mankind' (1988) 13 Annals of Air and Space Law 247, 249.

[14] See eg the statement on behalf of the Group of 77 and China at the opening of the Third Session of the IGC (New York, 19 August 2019), underscoring that the goal the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction 'can only be achieved when guided by the bedrock principle of the Common Heritage of Mankind', <http://statements.unmeetings.org/media2/21996878/palestine-obo-g77-and-china.pdf>.

[15] See Freestone (n 3) 17.

[16] See eg Japan, Korea, Iceland, Russia, US in the course of the fourth session of the Preparatory Committee (PrepCom) of the IGC on BBNJ (10–21 July 2017); see 'Summary of the Fourth Session of the Preparatory Committee on Marine Biodiversity beyond Areas of National Jurisdiction' (24 July 2017) 25(141) *Earth Negotiations Bulletin* at <https://enb.iisd.org/download/pdf/enb25141e.pdf> 9.

[17] These include the World Intellectual Property Organization and the World Trade Organization's TRIPS Agreement [*General Agreement on Tariffs and Trade Multilateral Negotiation (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods* (15 December 1993) 33 ILM 81; 15 April 1994, 1867 UNTS 3]. See also B-I Kim and S Lee, 'Existing Legal Framework Relevant to Marine Genetic Resources' in JM Van Dyke, SP Broder, S Lee and J-H Paik (eds), *Governing Ocean Resources: New Challenges and Emerging Regimes: A Tribute to Judge Choon-Ho Park* (Martinus Nijhoff 2013) 503, 503–6.

[18] See for the relevant analogy V Becker-Weinberg, 'Preliminary Thoughts on Marine Spatial Planning in Areas beyond National Jurisdiction' in Freestone (n 3) 85, 87–9.

[19] See UNGA Res 66/119, para 1(b).

LOSC,[20] but over whether their regulation, including the respective decision-making processes, should be global, or whether it should be left to regional arrangements and bodies or individual States. The G77 advocate for the former option. However, the most developed States argue that the majority of these issues are already effectively regulated by regional organisations and that, in any event, it falls upon the individual State to decide upon the necessary regulatory measures.[21]

Against such backdrop, this article discusses the negotiations for this new agreement, the extent to which, when concluded, could meet the objective of the effective conservation and sustainable use of marine biodiversity in ABNJ, and the challenges that lie ahead in making this a reality. Rather than providing an exhaustive treatment of the negotiations to date, this article offers a succinct overview of the background of the negotiations and the current state of affairs with respect to the process and the elements of the 'package'. In so doing, it will underscore a few key elements, in particular: the relationship between the new agreement and existing and future relevant regional instruments and bodies, including the need for cooperation and coordination amongst them; the guiding principles of the new agreement; and the question of implementation and enforcement of the new agreement. These issues, and how delegations will choose to resolve them, highlight the above-mentioned controversy on the tenet underpinning the agreement, which has long bedevilled the negotiations. This article concludes with a pessimistic prognosis that, in general, the agreement will fall short of the expectations that many States, and the international community, had prior to the IGC.[22]

II. BACKGROUND

The obvious gap in the legal framework of the deep seabed, namely the legal treatment of MGRs and the related—and as of yet unresolved—question of its legal regime, has been the main driver of the BBNJ negotiations.[23]

[20] See LOSC arts 204–206 on EIAs, LOSC art 194(5) on MPAs and LOSC Part XIV on CB & TT. See generally on the protection of the marine environment under LOSC: R Churchill, 'The LOSC Regime for the Protection of the Marine Environment – Fit for the Twenty-First Century? in R Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Elgar 2017) 3.

[21] See E Mendehall, E de Santo, E Nyman and R Tiller, 'A Soft Treaty Hard to Reach: The Second Intergovernmental Conference for Biodiversity Beyond National Jurisdiction (2019) 108 Marine Policy 1, 4.

[22] See *inter alia* United Nations Conference on Sustainable Development in Rio de Janeiro in June 2012 ('Rio + 20') Outcome Document 'The Future We Want', annexed to UNGA Res 66/288 of 11 September 2012, para 162; 'Our Ocean, Our Future: Call for Action', Resolution adopted by the General Assembly on 6 July 2017 (A/RES/71/132).

[23] See *inter alia* Mossop (n 7) 837. For the possibility of existing regimes addressing BBNJ see JA Ardron, R Rayfuse, K Gjerde and R Warner, 'The Sustainable Use and Conservation of Biodiversity in ABNJ: What Can Be Achieved Using Existing International Agreements?' (2014) 49 Marine Policy 98.

Already, in November 1995, the Conference of the Parties to the Convention on Biological Diversity (CBD) adopted a decision requiring the Executive Secretary, in consultation with the UN Division for Ocean Affairs and the Law of the Sea (DOALOS), to undertake a study of the relationship between the CBD and LOSC with regard to the conservation and sustainable use of genetic resources on the deep seabed.[24] It was not until 2004, however, that the UNGA established 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 (the BBNJ Working Group), which included the issue of MGRs.[25]

The BBNJ Working Group first convened in 2006 and met several times in the following years, albeit without agreement on the legal and institutional mechanisms required to meet the objective of the conservation and sustainable use of BBNJ. In 2011, however, a consensus was reached and the Working Group finally 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 [the LOSC]'.[26] In addition, the Working Group recommended that this process should address 'together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology'.[27] Such elements remain the constitutive elements of the future BBNJ treaty.

After three years of further discussions, 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. In Resolution 69/292, the UNGA convened a Preparatory Committee (PrepCom) aimed at the development of recommendations on the elements of a draft text of a legally binding instrument on BBNJ.[28] The PrepCom met four times between 2016 and

[24] Second Meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 2) (6–17 November 1995); Decision II/10 para 12 <https://www.cbd.int/decision/cop/?id=7083>.

[25] See 'Oceans and the Law of the Sea', UNGA Res 59/24 (17 November 2004) UN Doc A/RES/59/24, para 73.

[26] '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).

[27] ibid.

[28] '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). See also R Long and M Chaves, 'Anatomy of a New International Instrument for Marine Biodiversity

2017, and submitted its recommendations to the UNGA in September 2017. These recommendations included the core elements of the future BBNJ treaty and paved the way for the adoption of Resolution 72/249 convening the IGC.[29]

III. THE IGC AND THE ELEMENTS OF THE 'PACKAGE'

A. IGC Sessions: Process and Progress

In defining the decision-making process, the UNGA, following the tradition of UNCLOS III,[30] decided that 'the conference shall exhaust every effort in good faith to reach agreement on substantive matters by consensus'.[31] However, taking a more pragmatic stance, Resolution 72/249 also provided 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'.[32] As one commentator rightly notes '[t]his option appears quite realistic in the current context, as some States remain particularly reluctant to the adoption of a new international instrument … such as, to varying degrees, the Russian Federation, the United States and Iceland'.[33]

The first negotiating session (IGC-1) took place between 4 and 17 September 2018.[34] The IGC-1 discussions focused on an 'Aid to Discussions' document,[35] rather than a 'zero draft', which did not help 'switching into negotiating mode' after more than a decade of preliminary discussions on BBNJ.[36]

beyond National Jurisdiction. First Impressions of the Preparatory Process' (2015) 6 Environmental Liability 213.

[29] See (n 2). For an overview of the negotiations up to the start of the IGC, see C Payne, 'Biodiversity in High Seas Areas: An Integrated Legal Approach' 21(9) ASIL Insights (1 September 2017) <https://www.asil.org/insights/volume/21/issue/9/biodiversity-high-seas-areas-integrated-legal-approach>.

[30] See *inter alia* A Boyle and C Chinkin, 'UNCLOS III and the Process of International Law-Making' in TM Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Brill 2007) 371, 377–9; and B Buzan, 'Negotiating by Consensus: Developments in Technique at the UN Conference on the Law of the Sea' (1981) 75 AJIL 324, 334–5.

[31] UNGA Res 72/249 (2017) para 17.

[32] ibid, para 19.

[33] See P Ricard, 'Marine Biodiversity beyond National Jurisdiction: The Launch of an Intergovernmental Conference for the Adoption of a Legally Binding Instrument under the UNCLOS' (2018–19) 4 Maritime Safety and Security Law Journal 84, 89.

[34] For a summary of this session, see the website of the DOALOS specially dedicated to the Intergovernmental Conference <www.un.org/bbnj/>, 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' (20 September 2018) 25(179) *Earth Negotiations Bulletin* <http://enb.iisd.org/oceans/bbnj/igc1/>.

[35] President's Aid to Discussions of 25 June 2018 <http://undocs.org/en/A/CONF.232/2018/3>.

[36] As was informally lamented, it reminded of a 'PrepCom 5' rather than a real negotiating session. See more in 25(179) *Earth Negotiations Bulletin* (20 September 2018) at <http://enb.iisd.org/download/pdf/enb25179e.pdf>15.

Nevertheless, the shared feeling was that some progress had been made at the meeting.[37]

Expectations for IGC-2 were thus high. IGC-1 had given IGC President Rena Lee a mandate to produce a further document to facilitate IGC-2 engaging in text-based (or at least text-led) negotiations. The document produced was titled 'Aid to Negotiations' and included, in accordance with the mandate received at IGC-1, all existing options.[38]

Having as background the President's Aid to Negotiations, delegations at IGC-2 (25 March–5 April 2019) discussed the options included therein on all the topics which had, since 2011, been identified as the 'package', as well as cross-cutting issues, such as the institutional arrangements. Unfortunately, there was no significant progress on the issues previously identified as points of divergence, such as the material scope of any treaty, the types and modalities of benefit sharing of MGRs as well as the institutional arrangements. Indeed, on some issues there remained 'diametrically opposed positions'.[39] Further, the President's Aid to Negotiations, with its numerous options and sub-options, proved rather cumbersome and failed to significantly facilitate the discussions. It came as no surprise that several delegations suggested, first, that, prior to the next meeting in August 2019, IGC President Rena Lee should prepare and circulate a 'no-options' document containing treaty text, and second, that it was high time to revise the meeting format, calling for a more informal set-up to facilitate in-depth negotiations.[40]

The President circulated a draft agreement ('zero-draft') three months prior to the third session,[41] which was held from 19 to 30 August 2019. It was the first time since the IGC had been convened that delegates had the opportunity to work on a 'zero-draft', provided well in advance of the third session and move away from reiterating general comments towards making concrete textual proposals. In addition, the decision to hold some meetings in a more

[37] See Freestone (n 3) 20. See also R Tiller, E de Santo, E Mendenhall and E Nyman, 'The Once and Future Treaty: Towards a New Regime for Biodiversity in Areas Beyond National Jurisdiction' (2019) 99 Marine Policy 239.

[38] UN Doc A/CONF.232/2019/1 <https://undocs.org/A/CONF.232/2019/1>. As the document acknowledged, 'the present document attempts to translate ideas and proposals generated during the discussions thus far into treaty text where possible. While not every individual idea or proposal is expressed specifically in the document, the options presented are an attempt to reflect the general thrust of those ideas and proposals.' para 5.

[39] See 'ICG-2 25 March –5 April 2019' 25(195) *Earth Negotiations Bulletin* at <https://enb.iisd.org/download/pdf/enb25195e.pdf> 18. See also V de Lucia, 'Rethinking the Conservation of Marine Biodiversity beyond National Jurisdiction: From "Not Undermine" to Ecosystem-Based Governance' (4 July 2019) 8(4) ESIL Reflections 3.

[40] See 25(195) *Earth Negotiations Bulletin* (8 April 2019) at <https://enb.iisd.org/download/pdf/enb25195e.pdf> 1.

[41] UNGA, Draft text of an agreement 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, A/CONF.232/2019.6 (17 May 2019); available at: <https://undocs.org/a/conf.232/2019/6> ('zero-draft').

informal setting ('informal-informals'), ie not in a plenary layout, proved to be overall very helpful.

Notwithstanding the fresh air of optimism stemming from the third session, the truth remains that certain fundamental problems persist. It suffices to mention, in particular the divergence of views concerning: how access to MGRs would be regulated, and whether the benefit-sharing would be monetary or non-monetary; the decision-making mechanism with respect to the establishment of MPAs; the nature of CB & TT and whether this would be on a voluntary basis; and the criteria and threshold for an EIA and the relationship with the respective processes under other bodies and instruments.[42] The general sentiment is that 'it will take more than one meeting to address the issues in which divergence exists'.[43]

B. The Four Elements of the 'Package'

1. Marine Genetic Resources (MGRs)

One of the key issues addressed in the 2011 'package', the MGRs, including questions on the sharing of benefits, is probably the most complex and the most controversial aspect of the negotiations. A number of matters have, to date, been particularly contentious in this respect.

First, the scope of the application of the new agreement on MGRs. The MGRs may exist in three possible modes: *in situ* (on site in the ocean), *ex situ* (in collections, and no longer in the ocean, for example in gene banks or a biorepository), and *in silico* (MGRs that exist as digital data representing the genetic sequences of interest).[44] Reflecting the underpinning tug of war between freedom of the high seas and CHM, developed and developing States have very different ideas about whether all of these three modes, including derivatives, should be included in the new agreement as well as about at which stages MGRs should be susceptible to access and benefit sharing. To no surprise, developed States prefer the inclusion of only *in situ* MGRs,[45] while developing States call for all three modes as well as

[42] For the summary of the negotiations see 25(218) *Earth Negotiations Bulletin* (2 September 2019) at <https://enb.iisd.org/download/pdf/enb25218e.pdf> (Third Session: Summary and Analysis). See also the Statement by the President of the Conference at the Closing of the Session, A/CONF.232/2019/10* <https://undocs.org/a/conf.232/2019/10>.

[43] See *Earth Negotiations Bulletin*, ibid, 22.

[44] See *inter alia* T Vanagt *et al.*, 'Mare Geneticum: Towards an Implementing Agreement for Marine Genetic Resources in International Waters' in Freestone (n 3) 267, 278.

[45] See eg the most recent textual proposals on Draft Article 8 ([Scope of] Application [of MGRs]) submitted by the EU and the United States; see Textual proposals submitted by delegations by 20 February 2020, for consideration at the fourth session of the Intergovernmental conference on 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 (the Conference), in response to the invitation by the President of the Conference in her Note of 18 November 2019 (A/CONF.232/2020/3), 4 and 198 respectively

derivatives to be included.[46] The Revised Draft Text sets out all modes of MGRs in bracketed language, i.e. language yet to be agreed, while it seems to be agreed that 'fish and other biological resources as a commodity' would be excluded from the new agreement.[47] Also, further discussion is required on whether MGRs collected before the entry into force of the agreement, but accessed *ex situ* or *in silico* afterwards, would fall within the temporal scope of the agreement.[48]

Second, with respect to access and benefit-sharing, developing States in general support a much stronger set of rules to govern access to MGRs, including both non-monetary and monetary benefit sharing and open access data repositories for the dissemination of *in silico* genetic information obtained in ABNJ.[49] They draw inspiration heavily from other instruments relevant to MGRs, such as the 2010 Nagoya Protocol to the CBD, which is based on an assumption that biodiversity-rich provider countries will regulate access to genetic resources by making access for the user subject to prior informed consent,[50] and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which revolves around a system of facilitated access.[51] On the other hand, the more developed States favour free access to *in situ* MGRs, in line with LOSC provisions on MSR on the high seas, and they insist that benefit sharing should be restricted to non-monetary, including through CB & TT.[52] As reported by the Facilitator on MGRs after IGC-3, 'there was general support for the sharing of non-monetary benefits. However, further discussions will be required on the sharing of monetary benefits and on benefit-sharing modalities.'[53] This divergence of views is reflected in the Revised Draft Text.[54]

<https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_-_28_feb_2020.pdf>.

[46] See eg the relevant textual proposals submitted by Indonesia, ibid, 66 and the Philippines, ibid, 163.

[47] See Draft Article 8 of the Revised Draft Text (n 6).

[48] See Oral Reports of the Facilitators of the Informal Working Groups to the Plenary on 30 August 2019, Annexed to the Statement of the President of the conference at the closing of the third session; A/CONF.232/2019/10; 5; <https://undocs.org/a/conf.232/2019/10>.

[49] See *inter alia* the statements of States in IGC-2 reflected in 25(187) *Earth Negotiations Bulletin* (27 March 2019) at <https://enb.iisd.org/download/pdf/enb25187e.pdf> 21.

[50] See 2010 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, adopted 29 October 2010, entered into force 12 October 2014.

[51] See the International Treaty on Plant Genetic Resources for Food and Agriculture (Rome, 3 November 2001, in force 29 June 2004, 2400 UNTS 303). See also on this treaty and its relevance with the BBNJ negotiations Vanagt *et al.* (n 44) 252–4.

[52] See *inter alia* Tiller *et al.* (n 37) 241. For an account of the arguments per and contra the view that the regime of the high seas applies to MGRs see NY Morris-Sharma, 'Marine Genetic Resources in Areas beyond National Jurisdiction: Issues with, in and outside of UNCLOS' (2017) 20 Max Planck Yearbook of United Nations Law 71, 77–81.

[53] See Oral Reports of the Facilitators of the Informal Working Groups (n 41) 6.

[54] See Draft Article 11 of the Revised Draft Text (n 6). See also textual proposals per monetary benefit-sharing by Indonesia (n 45) 6, Pakistan, ibid, 159, and the Philippines, ibid, 164. For proposals contra monetary benefit sharing see eg Israel, ibid, 105.

2. Area-Based Management Tools

The term Area Based Management Tools (ABMTs) covers a potentially wide range of issues including MPAs and sectoral area restrictions.[55] Notwithstanding the significance of ABMTs in protecting BBNJ,[56] there is no central guidance, eg under LOSC, on their use, but rather a series of fragmented and sectoral approaches.[57] During both the PrepCom and the three IGC sessions, the main issue, vis-à-vis ABMTs, has been whether to give primary authority over designating ABMTs to regional and sectoral bodies or whether to bestow such authority upon the institutions of the new agreement. Addressing this fundamental issue, implicit in which is the aforementioned dichotomy between freedom of the seas and CHM, is of tremendous importance for the future regulation of ABMTs under the new agreement.

Per the Revised Draft Text, proposals for ABMTs are to be submitted, individually or collectively, by States parties to the Secretariat, based on indicative criteria on the identification of areas.[58] The proposals should include, *inter alia*, the spatial or geographical identification of the area, a description of the specific conservation and sustainable use objectives, and relevant measures that are to be applied to the area.[59] There should be a consultation period[60] and the decision-making would rest with the Conference of the Parties (COP), which would either decide on ABMTs complementary to, and/or independently of, the relevant regional instruments or bodies, or recommend the latter to adopt such measures.[61]

3. Environmental Impact Assessments (EIAs)

Concerns about the need for the conservation of biodiversity in ABNJ are reflected in calls not only for the expansion of MPAs in ABNJ, but also for a

[55] See *inter alia* H Thiel, 'Approaches to the Establishment of Protected Areas on the High Seas' in A Kirchner (ed), *International Marine Environmental Law* (Kluwer 2003) 169; and E Molenaar, 'Marine Biodiversity in Areas beyond National Jurisdiction' (2007) 22 International Journal of Marine and Coastal Law 89.

[56] According to the United Nations Sustainable Development Goal 14.5: 'By 2020, conserve at least 10 per cent of coastal and marine areas, consistent with national and international law and based on the best available scientific information' <https://www.un.org/sustainabledevelopment/oceans/>.

[57] See further D Freestone, The UN Process to Develop an International Legally Binding Instrument under the 1982 Law of the Sea Convention: Issues and Challenges' in Freestone (n 3) 9–16.

[58] The list of these criteria is included in the Annex of the Revised Draft Text (n 5).

[59] ibid, Draft Article 17. See the relevant textual proposals by the EU, which distinguishes between proposals in relation to ABMTs and those in relation to MPAs (n 45) 19–20.

[60] ibid, Draft Article 18. See also the relevant textual proposals by Indonesia, adding the need to consult archipelagic States, ibid, 78 and by Monaco, calling for more public participation in this procedure, ibid, 147-8.

[61] See ibid, Draft Article 19. See also the textual proposals of Monaco in favour of the COP having such exclusive decision-making authority, ibid, 149 and the US emphasising the recommendatory nature of the COP in this regard, ibid, 213–14.

more systematic process for the assessment of human impacts on the open oceans.[62] Proposals for such assessments are not limited to new activities; there have also been calls for the strategic assessment of existing activities, some of which have increased, and are continuing to increase rapidly. The tools developed at national and regional levels for such assessments are EIAs and strategic environmental assessments (SEA), together known as environmental assessments (EA).[63]

Pursuant to Article 204 LOSC, an EIA has as its goal "… to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment." In the context of ABNJ, the debate has been whether an EIA would be required any time an activity takes place in the ABNJ in general, or just when activities have a high risk for environmental harm. Delegations have struggled to define this threshold during the negotiations, and there is no obvious consensus.[64] That said, at present, ie prior to IGC-4, delegations seem to agree on the principal matter that there is an obligation to conduct an EIA for planned activities under States' jurisdiction and control which can potentially cause pollution or result in adverse changes to the marine environment, whilst avoiding duplication with existing EIA procedures under relevant instruments, frameworks and bodies.[65] Further, delegations seem to agree with respect to the type of impacts that should be taken into account in the conduct of EIAs, ie both the cumulative impacts and transboundary impacts.[66] In addition, delegations agree on the need to have provisions in the agreement related to: screening; scoping; evaluation and assessment; transparent and inclusive public notification and consultation, including with the adjacent coastal States; publication of EIA reports; and the establishment of procedures for mitigation, prevention and management of potential adverse effects.[67]

However, as was reaffirmed in IGC-3, divergence exists in relation to: the threshold and criteria for an EIA and the degree of 'internationalisation' of the process; the relationship with EIAs under other bodies; and on decision-making, ie whether bodies established under the agreement should play any role in deciding whether an activity should be allowed to go forward

[62] See, *inter alia*, A Oude Elferink, 'Environmental Impact Assessment in Areas beyond National Jurisdiction' (2012) 27 International Journal of Marine and Coastal Law 449; and D Ma, G Suan and F Qinhua, 'Current Legal Regime for Environmental Impact Assessment in Areas beyond National Jurisdiction and Its Future Approaches' (2016) 56 Marine Policy 23.

[63] For mainstreaming these assessments in the law of the sea, see J Harrison, *Saving Oceans through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford University Press 2017) 212–38. See also L Kong, 'Environmental Impact Assessment under the United Nations Convention on the Law of the Sea' (2011) 10 ChineseJIL 651. On EIAs in general see N Craik, *The International Law of Environmental Impact Assessment* (Cambridge University Press 2011).

[64] See Oral Reports of the Facilitators of the Informal Working Groups to the Plenary on 30 August 2019 (n 48) 14.

[65] ibid 14.

[66] ibid 14. See also *Earth Negotiations Bulletin* 'Third Session: Summary and Analysis' (n 42) 11.

[67] See Draft Articles 30–36 of the Revised Draft Text (n 6).

following an EIA.[68] This divergence of views on decision-making reflects the fundamental dichotomy between *mare liberum*, ie the default freedom of the individual State to ultimately decide on its activities on the high seas, and the CHM, which dictates that the relevant decisions should only be made through a collective entity, as for example, the International Seabed Authority in the Area.[69]

4. Capacity-Building and Technology of Transfer (CB & TT).

The last items in the list of issues to be addressed by the new agreement—but by no means the least important—are those concerning CB & TT. Part XIV of LOSC already obliges States to cooperate on matters concerning CB & TT either directly or through international organisations.[70] In particular, Article 268 LOSC captures the key issues covered by this concept which are relevant to the new agreement, including the promotion of the acquisition, evaluation and dissemination of marine technological knowledge and facilitation of the access to such information and data, and the development of the necessary technological infrastructure to facilitate the transfer of marine technology.[71]

That said, if Article 268 functioned well, there would be no need for this issue to be included in the 2011 'package deal'. Indeed, what is required is to find ways to give the obligations under Article 268 teeth in order to achieve conservation and sustainable use of marine resources in ABNJ. To achieve this, the new instrument should both develop and strengthen the capacity of the States that have a need for help, particularly developing States, to request such help. This would allow them to fulfil their rights and obligations under the new agreement. However, the discussion during the negotiations so far have not focused on this specifically, but instead on whether the capacity-building measures should be mandatory or voluntary for States to participate in.[72] As evinced by the bracketed language under draft Article 44(2), this is still under negotiation: '[c]apacity-building and the transfer of marine technology [shall] [may] be provided on a [mandatory and voluntary] [voluntary] [bilateral, regional, subregional and multilateral] basis'.[73]

[68] See Oral Reports (n 48) 12–14 and Earth Negotiations Bulletin, 'Third Session: Summary and Analysis' (n 42) 1.

[69] Powers are granted to the International Seabed Authority (ISA) through which the resources of the Area are administered; see LOSC, Part XV, Section 4.

[70] See in general BA Boczek, *The Transfer of Marine Technology to Developing Nations in International Law* (Law of the Sea Institute 1982); AW González, 'Cutting the Gordian Knot?: Towards a Practical and Realistic Scheme for the Transfer of Marine Technology' in MH Nordquist, T Heidar and N Moore (eds), *Law, Science and Ocean Management* (Martinus Nijhoff 2007) 345.

[71] See art 268 LOSC. For a commentary of this provision see K Bartenstein, 'Article 268' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart 2017) 1778.

[72] On the progress of the negotiations at the IGC-3 on CB & TT see Oral Reports (n 48) 17–19 and *Earth Negotiations Bulletin*, 'Third Session: Summary and Analysis' (n 42) 1–2.

[73] Draft Article 44(2) of the Revised Draft Text (n 6).

Although CB & TT is a separate package, it nevertheless appears to be more of a cross-cutting issue, ie an issue cutting across all packages, and for many delegates was one of the most important elements of all the packages. In fact, during the discussions, CB & TT spilled over into debates about access and benefit sharing related to MGRs and was also connected with the implementation of requirements related to marine conservation and impact assessments. This is reflected in the discussions over a clearing-house mechanism being one of the institutional mechanisms of the new agreement. Such mechanism would constitute an open-access web-based platform serving as a centralised hub to enable States Parties to have access to, and disseminate, information with respect to, *inter alia*, activities in relation to MGRs, EIA Reports, and other relevant technological information.[74]

IV. CROSS-CUTTING ISSUES

A. Scope of Application

Draft Article 3 (1) of the Revised Draft Text states that the agreement applies to areas beyond national jurisdiction, ie the high seas and the Area,[75] which seems to reflect the views of the overwhelming majority of delegations.[76] Echoing the relevant International Maritime Organisation (IMO) conventions,[77] draft Article 3(2) excludes from the scope of the agreement warships, naval auxiliaries and other State vessels. Such exclusion is subject to the caveat that 'each State Party shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Agreement'. Such caveat is woolly and lacks teeth and, as such, draft Article 3(2) is particularly favourable for the major naval powers. In its current form, the provision risks undermining the implementation of ABMTs, such as MPAs in ABNJ, including when States conduct naval exercises therein or even in cases of armed conflict at sea.[78]

[74] See Draft Article 51 of the Revised Draft Text (n 6).

[75] '"Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'; art 1(1)(a) LOSC.

[76] A notable exception has been Turkey calling for the application of the new agreement beyond 200 n.m. regardless of whether a coastal State has declared an EEZ; see 25(209) *Earth Negotiating Bulletin* (20 August 2019) at <https://enb.iisd.org/download/pdf/enb25209e.pdf> 2.

[77] See eg Chapter V, Regulation 1 of the International Convention for the Safety of Life at Sea, adopted 1 November 1974, entered into force 25 May 1980 (1184 UNTS No. 278).

[78] See the non-binding terminology used by the 1994 San Remo Manual on the Law Applicable to Armed Conflict at Sea in this regard: '[t]he parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing: (a) rare or fragile ecosystems; or (b) the habitat of depleted, threatened or endangered species or other forms of marine life'; see International Institute of International Humanitarian Law, *San Remo Manual on International Law Applicable at Armed Conflicts at Sea*, para 11.

B. Relationship with LOSC and Other Relevant Legal Instruments and Bodies

Draft Article 4, entitled 'Relationship between this Agreement and the Convention and other existing relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies', concerns a matter of paramount importance for the new agreement. While the relationship of the new implementing agreement with the LOSC itself has not caused any tension,[79] the relationship with other relevant treaties and bodies, like Regional Fisheries Management Organizations (RFMOs),[80] has aroused great controversy. Draft Article 4(3) provides that '[t]his Agreement shall be interpreted and applied in a manner that [respects the competences of and] does not undermine [existing] relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies'.[81]

This 'not-undermining' clause, which has been dictated by the founding UNGA resolution,[82] might prove to be the Achilles heel of the new agreement, since the need to establish specific mechanisms and measures to facilitate the conservation and sustainable use of marine biodiversity in ABNJ, especially in relation to ABMTs and EIAs, is considered by some delegations to be in conflict with the 'not undermining' clause mandated by Resolution 72/249.[83] A tension between being comprehensive and not undermining existing instruments, frameworks and bodies has been evident during both PrepCom and IGC negotiations to date. It is also reflected in the textual proposals to the Revised Draft Text.[84] Practically, 'not-undermining' entails that all existing regional bodies and all relevant instruments that have any relevance to BBNJ would continue to manage the use of biodiversity in

[79] Draft Article 4(1) reiterates the corresponding provision of the 1995 Fish Stocks Agreement, that is 'Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.' See Article 4 of the Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995, in force 11 December 2011) (1995) 34(6) ILM 1542–1580 ('Fish Stocks Agreement').

[80] See on this R Barnes, 'The Proposed LOSC Implementation Agreement on Areas beyond National Jurisdiction and Its Impact on International Fisheries Law' (2016) 31 International Journal of Marine Coastal Law 1; and D Tladi, 'The Proposed Implementing Agreement: Options for Coherence and Consistency in the Establishment of Protected Areas beyond National Jurisdiction' (2015) 30 International Journal of Marine and Coastal Law 654.

[81] See Article 4(3) Revised Draft Text (n 5). According to the President of the IGC, 'square brackets is used to indicate the following: (a) there are two or more alternative options within a provision; and (b) support has been expressed for a "no text" option, either within a provision or in relation to a provision as a whole', para 7 of the Introductory Note to the Revised Draft Text.

[82] See UNGA Res 72/249, para 7 (n 2).

[83] For example, during IGC-3, States like Republic Korea, the US, Iceland, invoked the 'not-undermining' principle with respect to the ABMTs, EIAs and intellectual property rights concerning MGRs. See *Earth Negotiations Bulletin* (n 42) 8, 11, 20.

[84] cf South Africa proposing to delete art 4 (n 45) 187 with US wishing to enhance the not undermining clause, ibid, 194. See also comments by Monaco which underlines that the new agreement shall not undermine the effectiveness of regional bodies, ibid, 141.

parallel with the new instrument. As such, the new instrument would, most likely, be deprived of any supremacy or of any significant coordinating role to the extent that existing bodes and/or instruments were involved.

At the heart of this clause in legal terms lies the principle *pacta tertiis nec nocent nec prosunt*. Such principle provides that treaties—and, by extension, obligations under them, like on the conservation of BBNJ—bind only their parties and not third party States or international organisations without their consent.[85] In the BBNJ context, this means that, in principle, neither the new agreement nor any future decisions taken by its apparatus, eg on the management measures of a high seas MPA, can bind third party States or other global or regional organisations such as the IMO or RFMOs respectively. That said, various mechanisms could be employed in order to address any ostensible norm-conflicts or fragmentation of standards. For example, the new agreement could include a conflict-clause,[86] or general principles, such as those of, *inter alia*, systemic integration and *lex specialis* might be applied.[87]

In any case, the crux of the matter lies in how the new agreement will envisage itself: either as being an overarching arrangement or as merely complementary to the respective regional bodies' mechanisms. Even though, in principle, the new agreement cannot trump other regional instruments and bodies, it may act as a gap-filler and, as the Fish Stocks Agreement did, make obligatory for its State parties to participate, when available and as appropriate, in the relevant regional or subregional bodies or adhere to their conservation measures.[88]

Indeed, as Kristina Gjerde *et al.* observe

> rather than seeking to exclude particular sectors or otherwise viewing the new instrument through a negative lens, the focus could be on how the new BBNJ can enable, facilitate, and even strengthen existing global, regional, and sectoral bodies and instruments in fulfilling their responsibilities under UNCLOS to protect and preserve the marine environment.[89]

[85] See Article 34 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), 1155 UNTS 331, which is taken as codifying the pre-existing customary law: 'A treaty does not create either obligations or rights for a third State without its consent'.

[86] cf *inter alia* art 103 of the UN Charter, art 311 LOSC and art 22 of the Convention on Biological Diversity (1760 UNTS 79*)*.

[87] See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission* UN Doc A/CN.4/L.682 (13 April 2006), as corrected UN Doc A/CN.4/L.682/Corr.1 (11 August 2006). See also E Roucounas, 'Engagements paralle`les et contradictoires' (1987-VI) 206 Recueil des Cours 9.

[88] cf art 8(3) of the Fish Stocks Agreement (n 78): '[w]here a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement'.

[89] K Gjerde, N Clark and H Harden-Davies, 'Building a Platform for the Future: The Relationship of the Expected New Agreement for Marine Biodiversity in Areas beyond National

This view is reflected in the textual proposals submitted by the International Union for Conservation of Nature (IUCN) to the Revised Draft Text, which suggest that draft Article 4(3) should provide that: 'This Agreement shall be interpreted and applied in a manner that *promotes coherence and cooperation* and does not undermine relevant legal instruments and frameworks and relevant global, regional subregional and sectoral bodies.'[90]

C. The Need for Cooperation and Coordination

Inexorably linked with the 'not-undermining' clause is the question of how State parties and the future BBNJ institutions will interact with other instruments and bodies. Draft Article 6(1) introduces a general obligation that 'States Parties shall cooperate under this Agreement for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and members thereof in the achievement of the objective of this Agreement.' This duty of cooperation and coordination is reiterated in varying formulations with respect to ABMTs,[91] EIAs,[92] and CB & TT.[93]

In turn, the issue of cooperation inevitably depends on how the new agreement will be governed and the extent of the decision-making powers, if any, that the future BBNJ institutions will enjoy. Broadly speaking, there have been three models of BBNJ governance that delegations have envisaged: the regional, the hybrid and the global.[94]

On the one end of the spectrum, under an extreme 'regional model', the new agreement would be carried out exclusively by existing sectoral and/or regional or subregional institutions. For example, whenever AMBTs, such as the establishment of an MPA, would be required, only the relevant competent framework or body (eg the IMO or the relevant RFMO) would decide whether to establish an MPA and what measures to adopt therein. State parties to the new agreement would only make recommendations to the respective framework/body.[95] Unsurprisingly, this model is mostly advocated by States that prefer less global or institutional regulation on the high seas (freedom of the high seas).[96] However, if this were the final outcome of the

Jurisdiction and the UN Convention on the Law of the Sea' (2019) 33 Ocean Yearbook 3, 39. See also Z Scanlon, 'The Art of "Not Undermining": Possibilities within Existing Architecture to Improve Environmental Protection in Areas beyond National Jurisdiction' (2018) 75 ICES Journal of Marine Science 405.

[90] IUCN, Comments submitted on the Revised Draft Text (20 February 2020) (n 45) 245 (emphasis added).

[91] Draft Article 15 of the Revised Draft Text (n 6).

[92] ibid, Draft Article 23(2).

[93] ibid, Draft Article 43(3).

[94] See *inter alia* K Gjerde *et al.* (n 89) 37–8.

[95] See Draft Article 19(2) Alt. 2(c) of the Revised Draft Text (n 6).

[96] For example, in the recent textual proposals (20 February 2020), Iceland reiterated that it 'has from the outset advocated a BBNJ Agreement based on a regional approach, where the agreement

negotiations, the current status of a fragmented and piecemeal approach to sustainable use of marine biodiversity and the concomitant governance gap would inevitably persist.[97]

On the other end of the spectrum, under the 'global model', it is envisioned that the decision-making body would be empowered to take decisions that are both specific and binding upon its parties, including on establishing high seas MPAs and approving EIAs, regardless of the existence of relevant regional instruments and bodies. Under this scheme, promoted mainly by developing States,[98] the new decision-making body, the COP, would also be competent to establish a network of MPAs, recognising the existing MPAs under regional bodies, and thus making the applicable conservation measures in such existing MPAs, as well as any new measures mandated in the new network, binding upon all the parties to the new agreement.[99]

The centre ground is occupied by the hybrid approach, which is the most likely to be finally adopted. The hybrid approach offers a model of institutional arrangements that would advance ocean governance more than the status quo regional approach, but would fall short of the centralised global-level decision-making powers envisioned under the global approach, at least for certain issues such as MPAs. Under this model, the COP would have a complementary role in filling the regulatory gaps wherever and whenever the regional instruments or bodies would either be lacking or unwilling to take the necessary measures to meet the objectives of the new agreement. Whilst this model is the one which has seemed to gain momentum prior to IGC-4,[100] there are still many issues to be settled, particularly concerning MPAs.

For example, with respect to international cooperation concerning ABMTs, draft Article 15 sets out that 'States Parties shall promote coherence and *complementarity* in the establishment of area-based management tools, including marine protected areas, through: (i) Adopting … measures to complement measures designated under relevant legal instruments and

mandates cooperation and coordination among regional and sectoral bodies and where decision making would remain with these existing types of bodies' (n 45) 62. See also the similar approach by the US, ibid, 207–8.

[97] See *inter alia* UNGA, 'Summary of the First Global Integrated Marine Assessment', UN Doc A/70/112 (22 July 2015), para 40. See also The Pew Charitable Trusts, 'Towards a Global Solution for High Seas Conservation' Fact Sheet (March 2017) <http://www.pewtrusts.org/-/media/assets/2017/03/highseas_towards_a_global_solution_for_high_seas_conservation.pdf>; and Becker-Weinberg (n 18) 100.

[98] See for example, the positions of Algeria on behalf of the African States, Mauritius, Argentina, Pakistan, Senegal and South Africa during the third session of PrepCom (5 April 2017); 25(127) Earth Negotiations Bulletin (6 April 2017) at <https://enb.iisd.org/download/pdf/enb25127e.pdf>.

[99] See Article 4(2) Option 1(2) Option 2, of the 2018 President's Aid to Negotiations (n 30). See also Monaco's proposals to the Revised Draft Text (n 45) 148–9.

[100] See eg.textual proposals to the Revised Draft Text in support of this hybrid approach by the EU (n 45) 18, 22–3 and South Africa, ibid, 189.

frameworks and relevant global, regional, subregional or sectoral bodies'.[101] However, when there are no relevant measures in place, the current draft of the new agreement contains two alternatives, which mark the different approaches (global and regional respectively) in this regard: '[(ii) Establishing area-based management tools, including marine protected areas … where there is no relevant legal instrument or …. body.] [2. Alt. to para. 1. (b) (ii) Where there is no relevant legal instrument or …. body … States Parties shall cooperate to establish such an instrument, framework or body and shall participate in its work to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.]'.[102]

The issue of the relationship with other relevant instruments and bodies remains one of the most controversial issues to be resolved in the remaining IGC Session(s) and will directly reflect and impact upon the global nature and effectiveness of the new agreement.

Regardless of whether the new agreement adopts the hybrid approach set out above or not, the question of the modalities for cooperation and coordination remains unresolved. The Draft Revised Text contains scattered references to cooperation/coordination,[103] but lacks a general provision specifying the relevant modalities. On the contrary, it delegates this task to the COP.[104] However, the objective of sustainable use and conservation of BBNJ would be best served by the final text providing for specific institutional mechanisms which would enhance the implementation of the duty to cooperate by, for example, allocating responsibilities and ensuring international supervision.[105] As Gjerde *et al.* rightly underscore,

> one of the lessons of relevance to the BBNJ agreement negotiators is that at least some of UNFSA's [Fish Stocks Agreement's] shortcomings may be attributed to its lack of a global level institutional mechanism with sufficient supervisory powers to 'prevent disparate practices in different subregions or regions' from emerging … The new agreement can enhance implementation by providing a venue for 'interregime learning and cooperation'.[106]

[101] Draft Article 15(1) of the Revised Draft Text (n 6) (emphasis added).

[102] Draft Article 15(1) ibid. Bracketed language reflects divergence of views.

[103] See eg Draft Article 23 on EIAs para 2 [Alt. 1. The Scientific and Technical Body shall consult and/or coordinate with relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies with a mandate to regulate activities [with impacts] in areas beyond national jurisdiction or to protect the marine environment. [*Procedures for consultation and/or coordination shall include the establishment of an ad hoc interagency working group or the participation of representatives of the scientific and technical bodies of those organizations in meetings of the Scientific and Technical Body*].]' (n 6) (emphasis added).

[104] See Draft Article 48 (4)(c) of the Revised Draft Text (n 6).

[105] See generally Y Tanaka, *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea* (Ashgate 2008) 24.

[106] Gjerde *et al.* (n 89) 35. See also on this point MA Young and A Friedman, 'Biodiversity beyond National jurisdiction: Regimes and Their Interaction' (2018) 112 AJIL Unbound 123, 128.

In this vein, the EU wisely proposes in the latest version of textual suggestions (19 February 2020) a new draft Article 15(3) which would provide that:

> Under this Agreement, the Conference of States Parties shall make arrangements for consultation establish a coordination and collaboration mechanism to enhance cooperation with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies with regard to area-based management tools, including marine protected areas, as well as coordination among associated management measures on conservation and [management] [sustainable use] measures adopted under such instruments and frameworks and by such bodies.[107]

Indeed, in the fisheries context, there is evidence of some, albeit fragmented, examples of RFMO coordination: for example, since 2007 the five tuna RFMOs have worked together through the 'Kobe Process' to ensure a harmonised approach to scientific research and the acquisition of data, the adoption of management, control and enforcement measures.[108] Of further note is the development of the Regional Fishery Body Secretariats' Network, which acts as an information exchange for all active RFMOs and which has met biennially since 1999.[109] In addition, there have been synergies between RFMOs and Regional Seas Conventions,[110] such as the Memorandum of Understanding (MOU) between the North-East Atlantic Fisheries Commission (NEAFC) and the OSPAR Commission adopted in September 2008, establishing processes for sharing of information, joint discussions and adopting common approaches to the application of precautionary approaches and ABMTs.[111] Notwithstanding these initiatives, it is regrettable that there is no central mechanism on a global level to facilitate synergies and coordinated actions among the numerous regional frameworks and bodies, either inter- or intra-sectoral.[112] It has been contended, correctly in the author's view, that 'ultimately only multi-sectoral, integrated, cooperative management can ensure the conservation and long-term sustainable use of marine biodiversity in ABNJ. This requires cooperation both intra and inter-sectorally as well as between the sectoral and the conservation agreements'.[113] The new

[107] EU textual proposals on the ABMT/MPA part for IGC4 (19 February 2020) (n 45) 18.

[108] See R Rayfuse, 'Regional Fisheries Management Organizations' in Rothwell *et al.* (n 7) 439, 443. The Reports of the meetings of the Kobe Process are available at <http://www.tuna-org.org>.

[109] See further information at <http://www.fao.org/fishery/rsn/en>.

[110] For Regional Seas Conventions and the UNEP Regional Seas Programme see *inter alia* at <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas>. See also R Bille, L Chabason, P Drankier, EJ Molenaar and J Rochette, *Regional Oceans Governance: Making Regional Seas Programmes, Regional Fishery Bodies and Large Marine Ecosystem Mechanisms Work Better Together* (UNEP Regional Seas Programme 2016).

[111] See Becker-Weinberg (n 15) 120 and further references therein.

[112] See R Warner 'Strengthening Governance Frameworks for Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction: Southern Hemisphere Perspectives' (2017) 32 International Journal of Marine and Coastal Law 607. See also Ardron *et al.* (n 23).

[113] Ardron *et al.* (n 23) 106.

agreement presents a golden opportunity to fill the gap and put in place a mechanism for global, overarching, coordination and cooperation of States' conservation and management efforts.

D. Principles

Another significant issue concerning the new agreement is its 'General Principles', enumerated in draft Article 5 of the Revised Draft Text. Immediately noticeable is the explicit reference to the CHM principle, albeit bracketed, which had not been included in the previous draft discussed at IGC-3.[114] Unsurprisingly, this had prompted strong criticism. For example, Algeria, speaking on behalf of the African Group, lamented that 'adopting a new BBNJ instrument without this principle would be like giving life to a treaty of this importance without a soul, or like putting a ship in the water without a navigational instrument'.[115] The inclusion of the CHM principle in the Revised Draft Text has been met with mixed feelings by the delegations, as evinced by their textual proposals submitted in February 2020.[116] It remains to be seen, however, whether the inclusion of this principle—if indeed it remains in the final text—would be accompanied by its logical consequences, such as mandatory sharing of MGR monetary benefits. Indeed, as the current Revised Draft Text stands, ie without such logical consequences, it is difficult to argue that the centre of gravity of the new agreement has shifted towards CHM and away from *mare liberum*.

Another notable addition, adopted with a clear mandate from IGC-3 (and therefore unbracketed), is the ecosystem approach.[117] As de Lucia observes, 'this is in general good news, as the ecosystem approach, for all its complexities, remains arguably an important framing for the future BBNJ treaty'.[118] Indeed, it would be a lamentable omission not to have the ecosystem approach explicitly mentioned in the third UNCLOS

[114] See art 5 of the zero-draft (n 41).

[115] See Permanent Mission of Algeria, Statement on behalf of the African Union (New York, 19 August 2019 at <http://statements.unmeetings.org/media2/21996848/algeria-obo-african-group.pdf>.

[116] States that have submitted proposals in favour of the CHM principle include Nicaragua (n 45) 158 and South Africa, ibid, 187, while against its inclusion stand the EU 3, Monaco 142 and the US 195 ibid.

[117] Draft Article 5(f) of the Revised Draft Agreement (n 5). On the ecosystem approach see further D Freestone, 'The Conservation of Marine Ecosystems under International Law' in M Bowman and C Redgwell (eds), *International Law and the Conservation of Biological Diversity* (Kluwer 1996) 99 and R Churchill (n 20) 11–12.

[118] See relevant comments by V de Lucia, 'A Very Quick Look at the Revised Draft Text of the New Agreement on Marine Biodiversity in Areas beyond National Jurisdiction' EJIL:Talk! (23 January 2020) at <https://www.ejiltalk.org/a-very-quick-look-at-the-revised-draft-text-of-the-new-agreement-on-marine-biodiversity-in-areas-beyond-national-jurisdiction/#more-17849>.

Implementing Agreement, in circumstances where it was included in the second implementing agreement in 1995, ie the Fish Stocks Agreement.[119] The ecosystem approach may have a number of practical consequences including, *inter alia*, on ABMTs, including MPAs. In particular, the ecosystem approach may reinforce the principle of compatibility, ie the need for those conservation and management measures adopted within areas of national jurisdiction to be compatible with those adopted outside such areas. For example, under Article 7 of the 1995 Fish Stocks Agreement, the conservation and management measures established for the high seas and those adopted for areas under national jurisdiction should be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety.

In the present context, driven by considerations of oceanographic, as well as ecological, connectivity, the principle of compatibility has been interwoven with the 'principle of adjacency', ie determining the role of adjacent coastal States in the managing of ecosystems in ABNJ. A number of delegations, including the Pacific Small Island Developing States, argued that the 'principle of adjacency' was needed to address the interests of adjacent coastal States and that 'activities in ABNJ should not impact activities within national jurisdiction'.[120] In particular, it is envisaged that adjacent coastal States will have a prominent role in designating MPAs as well as in conducting EIAs or collecting MGRs in ABNJ close to areas of national jurisdiction.[121]

Notably, the LOSC does not include the concept of adjacency. That being said, the 1958 Geneva Convention on Fishing did refer to the 'special interests' of adjacent coastal States and the need for consultation between the adjacent States and other State parties for the maintenance of marine living resources;[122] unilateral conservation measures were only envisaged in exceptional circumstances.[123]

The principle relied upon by the LOSC to balance the interests of coastal States and high seas users is that of 'due regard'. Such principle could address the concerns that coastal States have in relation to the issues under

[119] Article 5(c) and (d) of the Fish Stocks Agreement (n 79). See on the ecosystem approach in the Fish Stocks Agreement P Davies and C Redgwell, 'The International Legal Regulation of Straddling Fish Stocks' (1996) 67 BYBIL 199, 260–1.

[120] See PSIDS Submission to the Second Meeting of the Preparatory Committee for 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 (BBNJ PrepCom) (August 2016) at <http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/PSIDS_second.pdf> 3.

[121] See *inter alia* Draft Articles 15(4) on cooperation in AMBTs, 17(4)(c) and (i) on ABMT's proposals, 18(2)(a) on assessment of proposals; Draft Articles 26 and 34 on EIAs; Draft Article 12(4)(c) on MGRs.

[122] See Article 6 of Convention on Fishing and Conservation of the Living Resources of the High Seas (Done at Geneva on 29 April 1958. Entered into force on 20 March 1966) 559 UNTS, at 285.

[123] ibid, Article 7.

discussion vis-à-vis the new agreement. As Oude Elferink rightly notes, 'under the LOSC the concept of "due regard" provides the general benchmark for addressing the relationship between coastal States and States carrying out activities in ABNJ. It is submitted that this also requires including this concept in the ILBI as the benchmark for dealing with the relationship between coastal States and other States.'[124]

Echoing this call for consistency with the terminology of LOSC, the zero-draft[125] as well as the Revised Draft Text both used the principle of 'due regard' to reflect the need to take into account the interests of adjacent coastal States and address their respective concerns. Hence, for example, under Draft Article 15(4) (ABMTs), '[m]easures adopted in accordance with this Part shall not undermine the effectiveness of measures adopted by coastal States in adjacent areas within national jurisdiction and shall have *due regard* for the rights, duties and legitimate interests of all States, as reflected in relevant provisions of the Convention. Consultations shall be undertaken to this end, in accordance with the provisions of this Part.'[126]

The need to have 'due regard' to adjacent coastal States was reiterated on many occasions during IGC-3, both in relation to issues such as ABMTs and more generally.[127] Inevitably, the need to have 'due regard' will be further discussed in the next session(s) in order for the final provisions to be streamlined and made consistent with the conceptual framework of LOSC.[128] However, what this 'due regard' duty would mean in practice is a different question entirely. In light of the relevant case law,[129] it would most likely denote a duty of consultation for States Parties, considering the interests of both the international community as a whole and the adjacent coastal States concerned.

E. Implementation

Strikingly, to date very limited attention has been given to the question of the implementation of the new agreement. It is telling that under the Revised Draft Text, there is only one Article devoted to 'implementation [and compliance]',

[124] A Oude Elferink, 'Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC' in Freestone (ed) (n 3) 56, 69.

[125] See *inter alia* Draft arts 15(5) on ABMTs and 9(4) on MGRs (n 41).

[126] See Draft Article 15(4) Revised Draft Text (n 6) (emphasis added).

[127] See *inter alia Earth Negotiations Bulletin*, Summary and Analysis (n 42) 10, 13.

[128] For example, the EU in its textual proposals with respect to the consultation on and assessment of the proposals for ABMTs (Draft Article 18) expanded the notion of 'adjacency' to include 'any States with a continental shelf subjacent or maritime area adjacent to any proposed marine protected area and States that carry out human activities, including economic activities, in the area shall be invited …',(n 45) 21.

[129] See *inter alia Fisheries Jurisdiction* (United Kingdom v. Iceland), Merits, Judgment, ICJ Rep 1974, at 3, para 78; PCA, *Chagos Marine Protected Area Arbitration* (Mauritius v. U.K.), Case No. 2011-03, Award of 18 March 2015, para 719, and *South China Sea Arbitration* (Philippines v. China), PCA Case No. 2013-19, Award of 12 July 2016A, para 744.

setting out that 'States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure the implementation of this Agreement.'[130] Draft Article 53(2) provides, albeit in language not yet agreed, that '[[e]ach State Party shall monitor the implementation of its obligations under this Agreement and shall, at intervals and in a format to be determined by the Conference of the Parties, report to the Conference on measures that it has taken to implement this Agreement]',[131] while draft Article 53(3) states, again in language not agreed, that: '[[t]he Conference of the Parties shall consider and adopt cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Agreement and to address cases of non-compliance]'.[132] If draft Articles (2)–(3) are not ultimately included in the agreed text, the sole reference to a general obligation of States Parties to ensure the implementation of the agreement, bereft of any further compliance and enforcement mechanisms, will, regrettably, be entirely insufficient.

Similarly, the provision on the implementation of ABMTs seems equally weak. Draft Article 20(1) provides that 'States Parties shall ensure that activities under their jurisdiction or control … are conducted consistently with the decisions adopted under this Part',[133] and that '[n]othing in this Agreement shall prevent a State Party from *adopting more stringent measures* with respect to its vessels or with regard to activities under its jurisdiction or control'.[134] However, the rest of draft Article 20, in particular, the reference to the obligation of the States Parties to '[ensure compliance by vessels flying their flags and enforcement of the measures adopted in conformity with this Part [by their nationals]]'[135] is not yet agreed and remains bracketed. It also telling that amongst the States making textual proposals and comments on the Revised Draft Text, only Pakistan highlighted the need to establish a common system of monitoring, compliance and enforcement of ABMTs.[136]

It follows from the foregoing that the implementation of the new agreement, specifically the implementation of ABMTs, such as MPAs on the high seas, will depend exclusively upon whether flag States exercising their freedoms of the high seas (for example, navigation, fishing, laying submarine cables and pipelines etc.)[137] in the relevant MPAs, are parties to the new agreement or to the relevant regional instrument or body (provided the adoption of the new MPAs remains within the remit of such instruments or bodies). Indeed, due

[130] See Draft Article 53(1) Revised Draft Text (n 6).
[131] Draft Article 53(2), ibid.
[132] Draft Article 53(3), ibid.
[133] Draft Article 20(1), ibid. In its textual proposals to the Revised Draft Text, US suggests deleting this provision (n 45) 214.
[134] Draft Article 20(2), ibid (emphasis added).
[135] Draft Article 20(3), ibid.
[136] See Pakistan's Stance/Proposal on the Discussion of ABMTs and MPAs in ABNJ (n 45) 160.
[137] See Article 87 LOSC and *inter alia* D Guilfoyle, 'The High Seas' in Rothwell (n 7) 203, 206–8.

to the principle of exclusive flag State jurisdiction on the high seas,[138] the implementation of the MPAs, but also of the new agreement more broadly, rests exclusively with the flag State parties to the new agreement.

However, due to the absence of any other mechanism for ensuring compliance and enforcement in the new agreement, it is uncertain how its effective implementation would be secured. A number of mechanisms might be considered. First, provisions, similar to Article 21 of the Fish Stocks Agreement, which provides for the inspection of vessels flying the flag of a State party by another State party on the high seas, regardless of whether the inspected vessel's flag State is member of the relevant RFMO.[139] Second, enhancement of port-State control[140] or control of nationals,[141] which are both mechanisms prevalent with respect to fisheries. Third, compliance committees, similar to those established by the Meeting of the Parties of the Aarhus and Espoo Conventions.[142] Fourth, other surveillance and monitoring measures, for example the use of modern technologies, such Vessel Monitoring Systems, satellite tracking, drones etc.[143] Although not an

[138] On the exclusive jurisdiction principle see *inter alia* RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn Manchester University Press 1999) 208; DP O'Connell, *The International Law of the Sea* Vol II (IA Shearer (ed)) (Clarendon Press 1984) 796; and the recent judgment of the International Tribunal of the Law of the Sea in *The M/V Norstar case* (Panama v. Italy) Case No. 25, Judgment of 10 April 2019, paras 222–224 at <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_Judgment_10.04.pdf>.

[139] See Article 21 Fish Stocks Agreement (n 79). See also E Papastavridis, *Interception of Vessels on the High Seas* (Hart 2013) 201–2.

[140] See *inter alia* Article 23 Fish Stocks Agreement, ibid, and FAO, Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Rome, 22 November 2009, in force 5 June 2016).

[141] See *inter alia* Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regs (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regs (EC) No 1093/94 and (EC) No 1447/1999. L 286/1 Official Journal of the EU (29 October 2008) Article 39; and D Erceg, 'Deterring IUU Fishing through State Control Over Nationals' (2006) 30 Marine Policy 173–9.

[142] See Aarhus Convention on Access to Information, Public Participation in Decision Making in Environmental Matters Signed 25 June 1998, entered into force 30 October 2001. Pursuant to Article 15 of the Convention, Decision I/7 of the Meeting of the Parties in Italy in 2002 established a compliance mechanism for the Convention; see commentary in J Jendroska, 'Aarhus Convention Compliance Committee: Origin, Status and Activities' (2011) 8 Journal for European Environmental & Planning Law 301. Similarly, an Implementation Committee was established by the Second Meeting of the Parties (decision II/4, February 2001) of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991, in force 10 September 1997) 1989 UNTS 310. Generally, on compliance committees in environmental treaties see T Treves, A Tanzi, L Pineschi, C Pitea, C Ragni, FR Jacur (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (Asser Press 2009).

[143] See *inter alia* M Kuruc, 'Monitoring, Control and Surveillance Tools to Detect IUU Fishing and Related Activities' in D Vidas (ed), *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Martinus Nijhoff 2010) 101; and W Gullet and Y Shi, 'Cooperative Maritime Surveillance and Enforcement' in R Warner and S Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016) 378.

exhaustive list, such examples give a flavour of the enforcement and compliance mechanisms which could be adopted.

Such enforcement and compliance measures might subsequently be adopted by the COP pursuant to the draft Article 53(3), a prospect which received a lukewarm reception from States such China and the USA at IGC-3.[144] The adoption of such measures would nonetheless be instrumental to the effective implementation of the new agreement and consequently to the conservation of marine biodiversity in ABNJ.

V. CONCLUDING THOUGHTS

The current state of negotiations does not offer real degree of certainty as to how effective the new agreement will be. It is now almost certain that, at the end of the negotiating road, whether that be at the closure of ICG-4, IGC-5 or even IGC-6, a new Implementing Agreement of UNCLOS on BBNJ will be reached. However, it is better to be realistic about what a BBNJ treaty can, and what it cannot, accomplish within the framework of the agreed upon packages. Despite increasing public concern and scholarly attention to the protection of marine biodiversity, it remains uncertain whether States will come up with a treaty that effectively and comprehensively protects BBNJ. National interests (including those of adjacent coastal States), the 'non-undermining' clause, the reluctance of developed States to share economic benefits on an equal footing, (in particular benefits arising from MGRs) and of the disinclination of regional bodies to compromise their powers, paint a bleak picture and pessimistically suggest that the glass is half-empty. The old, yet ever-present, battle between *mare liberum* and CHM still haunts any treaty effort pertaining to governance of the oceans.

Moreover, to date there has been a notable lack of any discussion on a robust and effective institutional coordination of the competent international and regional bodies, or on an equally robust and effective implementation mechanism for the new agreement.

In sum, there is serious risk that the final document, when adopted, will be a significantly watered-down agreement. It might not be a 'paper treaty' (by analogy to 'paper MPAs', ie MPAs that are ineffective), but it will likely fail to fulfil the initial aspirations of the international community as to the conservation and sustainable use of biodiversity beyond national jurisdiction.

[144] See the statements of China and the USA in *Earth Negotiations Bulletin*, Third Session: Summary and Analysis (n 32) 19. Also, the USA proposed deleting this provision in the textual proposals to the Revised Draft Text (n 45) 233.