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 (BBNJ PROCESS)

WRITTEN SUBMISSION OF THE EU AND ITS MEMBER STATES
(25 JULY 2016)
I. Introduction

1. Further to the invitation by the Chair of the PrepCom, conveyed in the letter of 18 December 2015 and in the Chair’s overview of the first session of the Preparatory Committee (PrepCom), to delegations to submit their views intersessionally, the EU and its Member States have the honour of submitting the following.

2. The EU and its Member States wish to thank the Chair for preparing the comprehensive overview and for his able stewardship of the first session of the PrepCom which promoted a constructive discussion by all delegations and ensured that we were able to progress in unpacking the different elements of the ‘package’. The EU and its Member States share and support the Chair’s general observations on the first session.

3. Further, the EU and its Member States believe that the Chair’s compilation of issues (the Compilation) reflects the discussion during the first session of the PrepCom. The EU and its Member States support the Chair’s decision to include the Compilation, as it will assist in focussing the discussion during future meetings of the PrepCom, as well as the content of the Compilation. This support is however without prejudice to the position of the EU and its Member States with respect to any of the individual issues as well as any issues that have not been included in the Compilation.

4. The EU and its Member States wish to reiterate their support for the Chair’s road map as proposed and agreed at the first session of the PrepCom and, thereafter, further elaborated in the Chair’s overview.

5. In the following sections of this submission, the EU and its Member States will (a) suggest issues for inclusion in the Compilation; and (b) provide some observations in relation to the issues included in the Compilation following the structure of the five informal working groups that will be convened in the second session of the PrepCom to discuss (i) cross-cutting issues; (ii) marine genetic resources, including questions on the sharing of benefits; (iii) measures such as area-based management tools, including marine protected areas; (iv) environmental impact assessments; and (v) capacity-building and the transfer of marine technology.

II. Suggested issues to be included in the Compilation

6. The EU and its Member States would respectfully suggest including the following issues in the Compilation which were referred to in the first session of the PrepCom.

Under the heading ‘overall objective’:

- to include a reference to the internationally agreed commitments relevant to the conservation and sustainable use of marine biological diversity in ABNJ, including those adopted under The Future We Want, the Strategic Plan for Biodiversity 2011 - 2020 and the Sustainable Development Goals.

Under the heading ‘relationship to other instruments and frameworks’:


Under the heading ‘guiding approaches and principles’:

- to make reference to the rights of States for their nationals to fish on the high seas and the corresponding duties in relation to the conservation and management of the living resources of the high seas.

- to make reference to the different available bases of jurisdiction under UNCLOS (flag State jurisdiction, coastal State jurisdiction and port State jurisdiction).
III. Observations in relation to issues included in the Compilation

A. Cross-cutting issues

7. Without prejudice to their relation to (and inclusion under) the four elements of the package of negotiations, the EU and its Member States understand the cross-cutting issues in any case to include the issues addressed under the following headings of the Compilation: (a) overall objective; (b) relationship to other instruments and frameworks; (c) guiding approaches and principles; (d) scope; and (e) institutional arrangements, responsibility, dispute settlement and final clauses.

8. An important issue the EU and its Member States wish to highlight is the relationship between the UNCLOS and the proposed International Legally-Binding Instrument under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (IA or Implementing Agreement), in particular the requirement to preserve the delicate balance of rights, obligations and interests achieved in the UNCLOS. Any measures adopted under the IA must be in accordance with the rights, duties and jurisdiction of States under the UNCLOS as well as other implementing agreements under UNCLOS. Due regard must thus be given to the entitlements of States to and in respect of maritime areas, including the continental shelf beyond 200 nautical miles. In particular, any measures adopted in relation to the water column, such as the establishment of a marine protected area overlying any part of a coastal State’s continental shelf, should respect the sovereign rights of that coastal State. It follows that any measures adopted under the IA must have due regard for and be without prejudice to the mandate and competence of the International Seabed Authority (ISA) as reflected in UNCLOS and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

9. Under this heading, we also wish to reiterate that the IA should not undermine existing, relevant legal instruments and frameworks and the functioning of relevant global, regional and sectoral bodies. Nevertheless, we would like to reiterate that the majority of existing bodies entrusted with competences potentially affecting marine biodiversity beyond areas of national jurisdiction have a sectoral and/or regional mandate, and none of them have global responsibility concerning this subject as a whole conferred on them. The IA should fill this gap and provide the added value of a global approach in order to move from fragmentation to coherence.

10. It follows that the IA should expand on the principle of cooperation and coordination which is an obligation under the UNCLOS with regard to the protection and preservation of the marine environment. We maintain that this is necessary since it is impossible for any State to achieve, on its own, the goals we have set ourselves, that is to say, the conservation and sustainable use of biodiversity in areas beyond national jurisdiction. Therefore, we consider that in order to ensure that the IA can successfully meet its agreed objectives, an appropriate institutional framework should be adopted. In this respect, the position of the EU and its Member States is that ‘form follows function’. We maintain that we first need to discuss the specific functions required to achieve the objectives before discussing the appropriate institutional framework.

11. We further believe that the Implementing Agreement should address the relationship with non-parties to the IA with a view to encouraging these entities to act in accordance with the provisions of the Implementing Agreement. In addition, given its importance, we would be in favour of having the principle of good faith incorporated in the IA.

B. Marine genetic resources, including questions on the sharing of benefits

12. The EU and its Member States welcome a pragmatic approach, which means avoiding a legal debate on whether marine genetic resources fall under the High Seas regime (UNCLOS, Part VII) or form part of the common heritage of mankind (UNCLOS, Part XI). The determination of the legal status of marine genetic resources originating in areas beyond national jurisdiction is not a precondition for including relevant provisions in a future Implementing Agreement.

13. We are open and willing to hear more on possible benefit-sharing mechanisms or approaches. In line with the overall goal of the Implementing Agreement, any such mechanism or approach should be conducive to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, marine scientific research conducted in accordance with UNCLOS and biotechnological innovations.
C. Area-based management tools, including marine protected areas

Background

14. Within the wider spectrum of area-based management tools, the EU and its Member States consider the IA’s key added value will lie in the establishment of marine protected areas (MPAs) to conserve and sustainably use marine biodiversity in areas beyond national jurisdiction (ABNJ) in respect of the general obligation to protect and preserve the marine environment, in particular in respect of rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species or other forms of marine life. In these MPAs, all relevant activities should be managed to avoid or mitigate their adverse impact on biodiversity with a view to reaching the conservation objectives for that MPA. The MPAs should be identified, established and managed in accordance with the best available science, the precautionary principle, and ecosystem approach. We also note that, depending on the conservation objectives of individual MPAs, different levels of protection may be necessary.

15. In the EU and its Member States’ view, in the current institutional and policy context there are four situations:

(i) the situation where no relevant global, regional or sectoral bodies exist;
(ii) the situation where global, regional, or sectoral bodies exist but they have no mandate to establish area-based management tools (ABMT), including MPAs, in ABNJ;
(iii) the situation where global, regional, or sectoral bodies with relevant mandates exist, but they have not established any ABMT, including MPAs, in ABNJ;
(iv) the situation where global, regional, or sectoral bodies exist and they have established, within the remit of their mandates, ABMTs, including MPAs, in ABNJ.

The EU and its Member States believe that the IA should create a mechanism that takes into account all of these situations.

16. The IA should create a mechanism to enable the establishment and management of a global network of ecologically representative and effectively managed MPAs in areas beyond national jurisdiction with the aim of achieving the conservation and sustainable use of marine biological diversity. To this end, the IA should describe a number of general criteria for the identification of areas to be protected, on the basis of which more detailed scientific and adaptable criteria can subsequently be developed and updated. In order to identify which areas are eligible to become MPAs under the IA, the process under the Agreement should be based on scientific and technical input, including from existing processes. Relevant scientific information could be drawn, inter alia, from such processes as the description of Ecologically or Biologically Significant Marine Areas (EBSAs) under the Convention on Biological Diversity and the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects (Regular Process).

17. Proposals for the designation or recognition of MPAs under the IA should come from States Parties, collectively (including stemming from relevant global, regional, or sectoral bodies or arrangements) or individually. The IA could also reflect how civil society can play a role and/or provide input regarding proposals for the designation of potential MPAs.

18. A proposal for the designation of an MPA under the IA should be based on the best available scientific information, follow an ecosystem approach and the precautionary principle, and should at a minimum include the following elements:

(a) description of the biodiversity values of the area (what we want to protect);
(b) description of impacts including identification of threats and possible activities with adverse impact (what we are protecting the areas from);
(c) description of comprehensive conservation objectives (what is to be achieved with the designation);
(d) spatial boundaries (where is the area to be designated);
(e) Priority elements for a management plan.

19. The EU and its Member States acknowledge that MPAs in ABNJ established by global, regional or sectoral bodies may already exist or may be created by such bodies, and we believe that a procedure for their endorsement under the IA to give them global recognition should be considered, providing that they respect the criteria included in, or developed under, the IA.
20. Inspiration for the specification of elements to be included in an MPA proposal could be drawn from existing instruments. In our region, we have, for example, positive experiences with the 1995 Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention), the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) as well as national and regional legislation (e.g. Natura 2000 areas in the EU).

21. Another example of where the EU and several of its Member States have positive experiences with the development of MPA proposals is the Convention on the Conservation of Antarctic Marine Living Resources (Conservation Measure 91-04, 2011).

Procedure for/decision on adoption of MPAs

22. The EU and its Member States believe that the procedure for the establishment of an MPA under the IA should include a dialogue/consultation following the initial proposal and preceding the adoption of the final decision. This dialogue/consultation should be open to a wide range of stakeholders, including all States (not only States Parties to the Implementing Agreement), existing relevant global, regional or sectoral bodies, and civil society.

23. The final decision on the designation of an MPA should be taken by States Parties to the IA, taking into account scientific advice, cover the elements identified in the proposal for the designation of MPA and contain a management plan on the basis of priority elements contained in the proposal.

Implementation, compliance and review

24. In line with the principle of flag State jurisdiction under the Convention, obligations to enact, with respect to their vessels or with regard to activities and processes under their jurisdiction, measures resulting from the designation of an MPA in ABNJ are incumbent, first and foremost, on States Parties to the IA. In this regard, the establishment of an appropriate time-limit by which States Parties should enact/implement appropriate management measures for activities and processes under their jurisdiction which have an impact on reaching the conservation objectives of the MPA should be considered.

25. Nevertheless, taking into account the fact that a number of international organisations have mandates and competences which can be related to the conservation objectives of the adopted MPAs, the IA should establish a mechanism for coordination and cooperation with those organisations. States Parties should work, within those competent international organisations of which they are members, on the development of MPA management measures for which the organisations have a legal remit/mandate/competence.

26. States which are not Parties to the IA should be notified of the designation of an MPA. Such States should be encouraged to consider appropriate management measures for activities and processes under their jurisdiction which have an impact on the conservation objectives of the MPA, taking into account general obligations under Article 197 of the UNCLOS and under customary international law.

27. The IA should, *inter alia*, establish, (regular/cyclical) mechanisms:

- for States Parties to the IA, individually or through competent international organisations, to report on implementation of measures emanating from an MPA management plan;
- to review the effectiveness of MPAs (including their management plans) established under the IA, in relation to their conservation objectives (the EU and its Member States believe the World Ocean Assessment could make a valuable contribution).

28. It should be possible to amend or update an MPA and related conservation and management measures based on best available scientific information (adaptive management). However, neither the establishment of an MPA nor the implementation of conservation measures should be time-bound or temporary.
D. Environmental impact assessments

Status quo and overall objectives

29. The EU and its Member States note the increasingly common practice of undertaking environmental assessments at the level of certain plans and programmes (strategic environmental assessment, or SEA) and/or at project level (environmental impact assessment, or EIA), in terrestrial as well as in coastal and marine areas within national jurisdiction, as well as the recognition of the role of these tools in recent case law.

30. Environmental assessments are an important tool in areas beyond national jurisdiction for integrating environmental considerations prior to engaging in or authorising activities that may cause substantial pollution of or other significant and harmful changes to the marine environment in those areas, as they enable the identification of measures necessary for avoiding or mitigating such effects.

31. The development of elements for an IA should take into account existing international principles and obligations in relation to environmental assessments. These include:

   a) the obligations under Articles 192 (to protect and preserve the marine environment), 194 (to prevent, reduce and control pollution, and not to cause damage to other States or ABNJ) and 197 (international cooperation) as well as those under Articles 204, 205 and 206 of the UNCLOS (to assess the potential effects of planned activities that may cause substantial pollution of or other significant and harmful changes to the marine environment, to publish reports of the results of such assessments, and to keep the effects of activities under surveillance);

   b) Principles 2 (inter alia, not to cause damage to the environment of areas beyond the limits of national jurisdiction), 15 (precautionary approach) and 17 (environmental impact assessment) of the Rio Declaration on Environment and Development;

   c) the obligations under Articles 3 (not to cause damage to areas beyond national jurisdiction), 4b (application to processes and activities under Parties’ jurisdiction or control, regardless of where their effects occur) and 14 (impact assessment and minimisation of adverse impacts) of the CBD;

   d) the Regulations of the ISA on prospecting and exploration of mineral resources of the Area;

   e) the Madrid Protocol on Environmental Protection to the Antarctic Treaty and its Annex I on Environmental Impact Assessment;

   f) the London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and its Annexes 1 and 2;

   g) the UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment;

   h) provisions on environmental impact assessment under several regional sea conventions, such as those for the Mediterranean (Barcelona Convention), the West and Central African Region (Abidjan Convention), the Wider Caribbean Region (Cartagena Convention), the Western Indian Ocean (Nairobi Convention) and the South Pacific Region (Noumea Convention);

   i) relevant international jurisprudence, including in particular the ICJ judgment in the Pulp Mills case and the ITLOS Advisory Opinion in Case No. 17.

32. The EU and its Member States also note the existence of relevant guidelines and other non-binding tools, such as:

   - CBD’s Voluntary Guidelines for the Consideration of Biodiversity in Environmental Impact Assessments and Strategic Environmental Assessments in Marine and Coastal Areas
   - The FAO’s International Guidelines for the Management of Deep-sea Fisheries in the High Seas; and
• Guidelines for Environmental Impact Assessment in Antarctica (Resolution 4 (2005)), ATCM XXVIII, as amended by a resolution of ATCM XXXIX.

33. While experience with these binding instruments and non-binding tools may not be universally shared, they can provide a useful starting point for the IA. However, in the absence of a holistic framework, we note with concern:

- that, currently, no globally agreed procedure exists to effectively implement Articles 204, 205 and 206 of the UNCLOS in order to achieve the protection and preservation of the marine environment; and
- the resulting difficulty in assessing the potential cumulative effect of all relevant activities in ABNJ, in particular the cumulative effect of activities, including new and emerging ones.

34. If we are to achieve the targets of healthy and productive oceans under Goal 14 and of halting biodiversity loss under Goal 15 of the 2030 Agenda for Sustainable Development, the deterioration of the marine environment and its biodiversity must be countered through the application of the precautionary approach associated with the assessment of the impact of all relevant human activities.

Specific objectives

35. The IA should establish rules and procedures for:

(a) the undertaking by States Parties of EIAs and SEAs of planned activities (including projects, policies, plans and programmes) under their jurisdiction or control in areas BNJ;
(b) reporting on the outcomes of those assessments, so as to give effect to the requirements of Articles 204, 205 and 206 of the UNCLOS.

36. The IA should include general objectives or principles guiding the undertaking of environmental assessments and measures subsequently taken, such as the principle of 'no net loss' of biodiversity, the 'mitigation hierarchy' (avoidance > mitigation > compensation), the ecosystem approach and the precautionary principle.

37. EIAs and SEAs that are already used by regional fisheries management organisations or under regional seas conventions and other regional or sectoral instruments should be built upon to arrive at a more global approach, incorporating cumulative impacts.

38. While emphasizing that environmental assessments should be carried out independently of an area’s (potential) protected status, the EU and its Member States are of the opinion that EIAs and SEAs could also contribute information relevant for the designation and management of MPAs under the IA.

Criteria for conducting EIAs and SEAs

39. The IA should include thresholds or criteria (referring, for example, to the severity, likelihood and type of impacts) for the screening of activities to be assessed, for the scoping of assessments (to guide their adaptation to different circumstances), and on the type and amount of information to be included in the assessment reports.

40. The IA should establish a process for regularly updating, as needed (without reopening the IA itself), the above-mentioned criteria. We are also open to considering whether there is a requirement for a process to develop and update lists of activities that are always subject to prior environmental assessments before being authorised by the competent national authorities. Environmental assessments to be carried out under the IA should, inter alia, be:

(a) based on the best available science;
(b) based on information gathered prior to and comments made during public consultation (possibly through a dedicated communication platform), including with other States, in particular potentially affected States where those can be identified, and, where appropriate, with competent international organisations and with civil society;
(c) in line with international best practice such as under the Espoo Convention.
41. Environmental assessment reports made pursuant to the IA should, *inter alia*, include:

   (a) a description of the assessed activities and the likelihood that they will cause substantial pollution of, or other significant and harmful changes to, the marine environment in ABNJ and its biodiversity;
   
   (b) a description of the measures for avoiding, preventing, mitigating and, where necessary and possible, redressing any substantial pollution of, or other significant and harmful changes to, the marine environment.

**Obligations under the IA**

42. Any State Party to the IA should:

   (a) be required to ensure that EIAs and/or SEAs are carried out, according to the agreed criteria, prior to engaging in or authorising activities (including policies, plans and programmes) that may cause substantial pollution of, or other significant and harmful changes ('harmful effects') to, the marine environment in ABNJ;
   
   (b) ensure that any such harmful effects are identified and taken into account in any decision-making process and such activities are consistent with States' obligations under the UNCLOS to protect and preserve the marine environment, including through the adoption of suitable measures to avoid or mitigate any such harmful effects;
   
   (c) following the principle of due diligence linked to the requirement of Article 204 of the UNCLOS, monitor the effects of activities (including policies, plans and programmes) carried out after an environmental assessment and compliance with any conditions (such as prevention, mitigation or compensation measures) related to the authorisation of those activities;
   
   (d) make available reports on environmental assessments and on subsequent measures and monitoring results public (possibly through a website).

**Review of implementation and compliance**

The IA should provide for a follow-up procedure in order to review compliance with the agreed rules and procedures for completed EIAs and SEAs. This could be integrated into a horizontal compliance mechanism covering other parts of the Agreement.

**E. Capacity-building and the transfer of marine technology**

43. Capacity-building and the transfer of marine technology is viewed by the EU and its Member States as a means of increasing, disseminating and sharing knowledge on the conservation and sustainable use of marine biodiversity in ABNJ, and of empowering all States to fully take part in the achievement of the Implementing Agreement’s objectives. The EU and its Member States agree with other delegations on the need for meaningful capacity-building that is responsive to the needs of developing States. These needs should be identified by developing States and take into account the aims of the Implementing Agreement, i.e. the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. This way, the Implementing Agreement will play an important role in ensuring the implementation of the Sustainable Development Goals (SDGs), in particular SDG 14.

44. The EU and its Member States welcome a discussion on the modalities to foster capacity-building and the transfer of marine technology that can respond to the needs identified. This should be done whilst keeping in mind existing initiatives, models and mechanisms of cooperation and coordination at global and regional levels, as well as the need to enhance synergies and avoid duplication.

45. The Implementing Agreement should support the implementation of the provisions of Part XIV of the UNCLOS on the development and transfer of marine technology. The Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology, the Addis Ababa Action Agenda, the United Nations General Assembly resolutions on oceans and the law of the sea and the Rio+20 document ‘The Future We Want’ should serve as important inspiration with regard to issues related to the transfer of marine technology.

46. Areas in respect of which cooperation in technology and technology transfer is possible should be identified. Relevant marine technology can be expensive and privately owned, hence the
facilitation of multi-stakeholder partnerships is key to promoting and developing the transfer of marine technology. The transfer of marine technology should be conducted on mutually agreed terms and conditions.