



Note No. 146/2016

The Permanent Mission of Australia to the United Nations presents its compliments to the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs (DOALOS) of the United Nations and has the honour to convey Australia's submission to the Preparatory Committee on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

We would be grateful if DOALOS could make a copy available to the Preparatory Committee Chair.

The Permanent Mission of Australia to the United Nations avails itself of this opportunity to renew to the assurances of its highest consideration.



NEW YORK

6 December 2016

Preparatory Committee on Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ)

Submission by Australia

December 2016

Australia welcomes this opportunity to provide comments to assist the Preparatory Committee (PrepComm) Chair, H. E. Ambassador Eden Charles, in preparation of a non-paper in advance of the Third Session of the PrepComm in 2017.

This submission builds on earlier contributions by Australia, in the lead up to, and during the First and Second sessions of the PrepComm in 2016 and reflects Australia's enduring commitment to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and its two implementing agreements.

1. Introductory comments

We commend participants for the first two sessions of the PrepComm, which explored the elements of a draft text and possible aspects of a workable framework. Now is the time to bring all of these ideas together.

At the halfway mark, participants should remain focused on achieving the overarching objectives of Resolution 69/292, to provide recommendations for the elements of an Implementing Agreement (IA - also called the international legally binding instrument or 'ILBI') for the conservation and sustainable use of biodiversity of areas beyond national jurisdiction (ABNJ).¹

Session 3 will be crucial to progress. At the end of the Third Session of the PrepComm, Australia would like to see the structure of an Implementing Agreement taking shape, participants developing a better understanding of the functions under the IA and therefore the governance requirements.

Key cross-cutting elements, and Australia's views, are set out below:

- *A focused objective*, along the lines of the Article 2 objective of the UN Fish Stocks Agreement (UNFSA),² which is simple and concise, recognising the need to ensure the long-term conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction through effective implementation of the relevant provisions of the Convention. Incorporation of other concepts could be addressed in the context of a preamble, which accords with principles of treaty interpretation.³
- *An articulation of the relationship between the IA and UNCLOS*, which establishes, similar to Article 4 of UNFSA, that nothing in the IA will prejudice the rights, jurisdiction and duties of States under UNCLOS, and that the IA should be interpreted and applied consistent with UNCLOS, UNFSA and the Part XI agreement.

¹ UN Resolution 69/292.

² Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks ('UNFSA') (1995), Article 2.

³ Vienna Convention on the Law of Treaties, 1155 UNTS 331, Articles 31-33.

- *Definitions*, where possible should be consistent with UNCLOS, UNFSA, and the Convention on Biological Diversity (CBD) (including its Nagoya Protocol), and other relevant international instruments, adjusted for the BBNJ context.⁴ This will be essential to ensure coherence across regimes, and to ensure the IA does not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, in accordance with Resolution 69/292.⁵
- *Principles and approaches*: in Australia's view, any new regime should entrench modern approaches to the management of marine space, including the ecosystem approach,⁶ the precautionary approach,⁷ transparency, and decision making on the basis of the best available science and utilising traditional knowledge.⁸ Australia welcomes the fact that considerable common ground has been reached on the inclusion of these approaches. We are attracted to the idea of utilising existing instruments such as UNCLOS, UNFSA, and CBD for expression or interpretation of these key principles – drawing on Article 5 of the UNFSA as a starting point.⁹
- *Relationship to other institutions and their mandates*: in Australia's view, there is value in global standard-setting, via the Implementing Agreement, that catalyses Parties to act at a regional level without undermining existing regional and sectoral efforts, and in keeping with Resolution 69/292.

This approach protects and utilises the competency and integrity of existing regional and sectoral regimes that cover ABNJ, including the International Maritime Organisation (IMO), regional fisheries management organisations (RFMOs), the United Nations Environment Programme (UNEP) Regional Seas Programme, the Antarctic Treaty system and the International Seabed Authority.

- *Governance arrangements* that promote transparency and accountability. This can be achieved through opening meetings to observers where appropriate, and making information about meetings and decisions publicly available. Australia endorses the use of the UNCLOS Part XV dispute resolution framework.

⁴ Convention on Biological Diversity, 1992, UNTS 1760; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity ('Nagoya Protocol') (2014).

⁵ UN Resolution 69/292, operative paragraph 3.

⁶ An ecosystem approach to conservation and management of marine resources does not concentrate solely on the species harvested, but also seeks to avoid significant adverse effects on 'dependent and related species'. First used in CCAMLR Article II, the 'ecosystem approach' has since been increasingly incorporated into fisheries and other law of the sea treaties. It was operationalised in UNFSA, Article 5 (d) and (e), which says coastal and fishing states shall assess the impacts on, and adopt conservation and management measures for, species belonging to the same ecosystem or associated with or dependent upon the target stocks.

⁷ As expressed in Principle 15 of the Rio Declaration on Environmental Development ('Rio Declaration') (1992).

⁸ With reference to, and consistent with other relevant instruments (such as guidance on using traditional knowledge being developed in CBD and the World Intellectual Property Organisation (WIPO)).

⁹ UNFSA, Part II, Article 5.

2. Marine Genetic Resources including questions on access and benefit sharing

Establishing global rules on access to, and sharing of, the benefits of the exploitation of marine genetic resources (MGRs) beyond national jurisdiction is central to the PrepComm mandate under Resolution 69/292. A workable regime should cover access to MGRs and establish benefit sharing rules.

Access to/collection of MGRs

PrepComm participants have underscored the value of encouraging transparency in MGR activities taking place in ABNJ. The goal should be to capture useful information while avoiding duplication. A depository of information on MGR extraction could also serve as a mechanism to trace the provenance of MGRs obtained in ABNJ.

The relationship between Part XIII of UNCLOS, which covers the freedom of marine scientific research, and a scheme governing the extraction of MGRs will need to be considered and addressed by the PrepComm. Australia will seek to ensure the UNCLOS regime for marine scientific research is respected and upheld for the extraction of MGRs, whilst a fair and equitable regime is established for the sharing of benefits from the use of MGRs sourced from ABNJ.

Benefit sharing

Participants have also considered how benefits from the exploitation of marine genetic resources could be shared. An appropriate regime would need to balance the interests of participating states and other entities engaged in the access and use of marine genetic resources. Benefit sharing should contribute to the broad objectives of the IA, such as through activities and projects that assist in conservation and sustainable use of marine biodiversity.

Australia notes there is broad acceptance that any MGR regime should work within existing intellectual property (IP) frameworks. The World Intellectual Property Organization (WIPO) must remain the proper forum for any IP issues related to MGRs in ABNJ.

At the second session, participants heard that a range of meaningful non-monetary benefits can offer significant and immediate returns that support the objectives of the prospective IA. We welcome the proposal by Norway in referring to the list of benefits in the Annex to the Nagoya Protocol, and could support a similar menu of potential benefits under the IA.¹⁰

Noting the length of time from extraction to exploitation of marine genetic resources, as well as the fact that only a very small proportion of extraction activity and scientific endeavour will result in monetary benefits, Australia encourages participants to consider the particular types of benefit that can be shared at particular points in the process. For example, an access and benefit sharing regime under the IA may require MGR research to be published within a specified reasonable timeframe, ensuring that findings are shared with the international community. This could provide value, even in instances where commercialisation is delayed, or does not eventuate.

We note the Clearing House set up to handle access and benefit sharing under the Nagoya Protocol to the CBD provides a mechanism for collecting and publishing research relating to genetic resources within national jurisdictions.¹¹ There may be some ability to use this as a model or expand the Nagoya ABS

¹⁰ Nagoya Protocol, Annex.

¹¹ Nagoya Protocol, Article 14.

Clearing House to hold records and data from BBNJ. This would be consistent with UNCLOS Article 244 which encourages the dissemination of information and knowledge from marine scientific research.¹² However, we also note there would be challenges and tensions in doing so, and suggest participants to the PrepComm explore this further.

At Session 3, participants should explore establishing a Conference of the Parties or similar with a high level regulatory role to oversee the MGR regime.

3. Area-based management tools, including MPAs

Given the broad acknowledgement that area based management tools (ABMTs), including marine protected areas (MPAs), are important tools to meet our objectives for conservation and sustainable use of marine biological diversity beyond national jurisdiction, participants to the PrepComm should continue to explore the types of values that the IA is intended to protect and manage through the use of ABMTs, and how this can be done.

Values

Values to be protected and managed could include biodiversity and key ecosystem processes, habitats and species, including marine areas essential for the survival, function, or recovery of particular stocks or rare or endangered marine species (such as breeding or spawning grounds), or for the support of large ecosystems.

Consideration could also be given to the protection of areas which are vulnerable to impact(s) from human activities, including unique, fragile/sensitive, rare or highly biodiverse habitats and features as well as, as appropriate, representative marine ecosystems and habitats.

Approach to area based management

In addition to identifying the biodiversity values that the implementing agreement would seek to conserve through regulation of human activity, the PrepComm will need to advise on the area-based 'tools' and principles that could be utilised to protect them. Both area-based management tools and environmental impact assessment can play a role in this context.

Australia supports a multi-use approach to area-based management to protect values while allowing for sustainable exploitation of the ocean's economic resources; respect for existing (regional and sectoral) mechanisms that regulate the exploitation of living resources in ABNJ; and clarification and development of States' responsibility to protect and preserve the marine environment under Part XII of UNCLOS.

Development of MPAs should be science-based, including through the protection of representative examples of biodiversity. Australia supports a representative approach to develop MPAs and acknowledges that there may also be a need to use a threats based approach under particular circumstances (e.g. if a species, habitat or ecosystem has been identified as being vulnerable to a particular activity).

¹² UNCLOS Part XIII, Article 244.

Process and governance

We note the valuable exchange of views at Session 2 on how decisions should be made for identifying values and putting in place ABMTs. The PrepComm should aim to find an approach that effectively supports the marine biodiversity conservation and sustainable use objectives of the IA. We reiterate Resolution 69/292, which outlined that this process must not undermine existing regional and sectoral efforts.

Noting that the IA must be fully integrated within the UNCLOS legal architecture, including its two implementing agreements, we look to existing models in the UNCLOS legal architecture, such as those elaborated under Article 8 of the UNFSA.¹³ We see value in global standard-setting, via the IA, that would catalyse IA Parties to act at a regional level.

In the BBNJ context, this would see standards and principles for identifying values being set out in a global instrument, which would then catalyse Parties to take action at the regional level to manage/protect such values where Parties identify them. This model could encourage Parties, at the regional level, to work closely with existing institutions, to establish coordination mechanisms, to consider the adjustment or modification of the mandates of existing institutions, or to consider new approaches or new institutions.

In our view, this approach is worth exploring because it could have the benefit of promoting coordination among existing regional and sectoral regimes without duplicating effort. In acknowledging that some existing bodies such as the IMO, the ISA, and RFMOs have mandates relevant to the protection of biodiversity, it could also have the benefit of drawing upon sectoral and regional expertise.

This approach is consistent with that taken in Part XII, Article 197 of UNCLOS, which recognises the importance of both global and regional decision making in undertaking steps to protect and preserve the marine environment (including taking into account characteristic regional features).¹⁴ Session 3 of the PrepComm should further explore the specific mechanisms for achieving effective, efficient implementation at the regional level.

It will be important to ensure that area based management measures are made in a manner that takes account of action related to conservation and sustainable use of marine biodiversity taken by states within their national jurisdiction, and the interests of those coastal states adjacent to ABNJ in effective and coherent oceans governance.

4. Environmental Impact Assessment (EIAs)

Australia welcomed constructive discussion at PrepComm's Second Session on Environmental Impact

¹³ UNFSA Part III, Art 8(1) calls on relevant states to pursue cooperation (...) either directly or through appropriate subregional or regional organisations or arrangements. Art 8(3) further notes "where 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."

¹⁴ Article 197 of UNCLOS outlines that: "States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features."

Assessments (EIAs), in particular where participants shared their own practical experiences.

Thresholds

While a non-exhaustive list of activities requiring EIAs might offer useful guidance to States, it is not clear how such a list would be compiled, nor how it could be made comprehensive. Such a list may also be difficult to keep up to date. What's more, some activities may appear benign but if conducted in a hypersensitive environment may have a significant impact for which certain management measures should be considered and put in place. Australia is therefore of the view that an EIA regime under the IA should set a defined threshold(s) for environmental impacts that would trigger a requirement to undertake an EIA.

Given broad agreement among participants, the IA should set thresholds at a level that captures impacts that are significant or greater. Following existing treaty formulations, the IA may characterise 'significant impacts' as activity that is likely to have significant adverse effects on biological diversity,¹⁵ or may cause substantial pollution of, or significant harmful changes to, the marine environment.¹⁶ Australia could support thresholds based on UNCLOS Article 206, complemented by an illustrative list of activities.

No activity should be seen as by definition exempt. Initial assessment will be required to determine whether significant impacts are likely and formal EIA assessment and reporting are required as a result. Strategic Environmental Assessments (SEAs) are also a way to ensure cumulative impacts do not exceed significant impacts.

Careful consideration will need to be given to ensuring protection without overly onerous regulatory requirements.

Best practice arrangements

The agreement should establish best practice global standards for how to conduct EIAs, to avoid and mitigate harmful impacts on identified marine ecosystems and values.

Australia recommends requirements for minimum content of assessment reports, for quality control and public availability, including on: activity description; baseline information and duration of proposed activities; severity of impacts; methods used and uncertainties; proposed mitigation measures; and monitoring plans. Stakeholders should have an opportunity to provide inputs before decisions are made, and final decisions and responsibilities should be left with flag States.

To aid decision making, standard conditions can be usefully developed. Different levels of depth and complexity for EIAs might be warranted depending on the scale of the project or impact – and standards/guidance could be developed for this. For example, Australia's domestic regime might require an assessment on Preliminary Documentation for less severe impacts and a full Environmental Impact Statement for more severe impacts.¹⁷ This helps to reduce the administrative burden on applicants and decision-makers in the EIA process.

¹⁵ CBD, Article 14.

¹⁶ UNCLOS, Article 206. A similar formulation is also utilised in the United Nations Environment Programme's (UNEP) 1987 'Goals and Principles of EIAs' document and the International Law Commission's (ILC) 2001 Draft articles on Prevention of Transboundary Harm from Hazardous Activities.

¹⁷ As contained in the Environment Protection and Biodiversity Conservation Act 1999 (Cth), Section 87.

We note broad support for allowing responsibility for conducting EIAs to rest primarily with flag States. Under this approach, Australia could see the EIA being conducted by the operator under the flag States' oversight and review. This is consistent with the approach of UNCLOS, under which States Parties are obliged to assess activities under their jurisdiction or control that may cause substantial pollution or significant and harmful changes to the marine environment.¹⁸ Australia notes that States Parties also have responsibility to regulate activities under their authority, to mitigate against harm to the marine environment.¹⁹ Where an EIA identifies potential cross-boundary harm, consultation with the coastal state should occur.²⁰

The PrepComm may recommend placing EIAs on a registry or information-sharing mechanism, providing transparency and helping to manage some capacity constraints as external parties could provide an additional layer of oversight. Additional capacity building, as discussed below, may be targeted towards developing and supporting the EIA process in capacity-constrained countries.

5. Capacity building

There is a need for BBNJ capacity building and technology transfer that responds to the needs of developing States. UNCLOS requires cooperation in marine scientific research, transfer of marine technology, and the provision of scientific and technical assistance to developing states for the protection and preservation of the marine environment.²¹

Capacity building can assist developing country partners to engage, consistent with SDG Goal 14, in the conservation and sustainable use of the oceans, seas and maritime resources.

Capacity building will have synergies and therefore be closely linked to benefit sharing. Some benefit sharing may also build capacity towards the conservation and sustainable use of biodiversity of areas beyond national jurisdiction. Australia encourages the PrepComm, in designing a benefit sharing regime, to consider where benefit sharing may be utilised to build the capacity of developing countries, and facilitate technology transfer.

Given the large number of existing capacity building and transfer of technology programs taking place at both the international and the local level, the IA could provide greater visibility through a platform that would allow States to articulate needs and be aware of existing opportunities and projects. For example, a 'clearing house' could be created that would collect and disseminate details of implementing agreement Parties' capacity building and technology transfer projects and opportunities for developing State participation.

The establishment of such a mechanism would be consistent with UNCLOS Article 272 which outlines that States "shall endeavour to ensure that competent international organisations coordinate" their capacity building and technology transfer activities, including any regional or global programs.²²

¹⁸ Article 206, UNCLOS.

¹⁹ Article 208(2), UNCLOS.

²⁰ Consistent with general obligations on States to ensure an environmental impact assessment is conducted for activities that risk causing significant transboundary harm or harm to other States, see ICJ Judgment in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (2015) [101] citing *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*; I.C.J. Reports 2010 (I), pp. 55-56 [101] and p.83 [204].

²¹ UNCLOS, Article 202.

²² UNCLOS, Article 272.

Australia would welcome further discussion of this mechanism – we suggest the PrepComm considers how this instrument could be made effective and fit for purpose and how it would relate to other organisations with competency in the field of marine science and technology transfer. Finally, the PrepComm should consider whether a virtual clearing house is also an appropriate tool.

6. Conclusion

Australia is confident significant progress can be made at the Third Session of the PrepComm. Tackling the interrelationships between existing and new institutions, working out what occurs at the global, regional and national level, and how decision making on the various aspects of this might take place will be crucial to that progress. We welcome the ongoing engagement from fellow States, and the ongoing leadership of the Chair towards these important outcomes.

