



**Submission on behalf of the Member States of the  
Caribbean Community (CARICOM) for the  
Development of an international legally-binding instrument under the  
Convention on the Law of the Sea on the conservation and sustainable  
use of marine biological diversity of areas beyond national jurisdiction  
5 December 2016**

### **Objective**

Pursuant to General Assembly Resolution 69/292 the objective of the new international legally-binding instrument (hereinafter “the BBNJ instrument”) is to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction in compliance with the purpose and objectives of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”).

The BBNJ instrument could also restate the objective of UNCLOS to protect and preserve the marine environment.

### **Core Definitions**

CARICOM considers that the BBNJ instrument shall provide definitions for key terms including:

*1. Areas beyond national jurisdiction:* The United Nations Convention on the Law of the Sea is instructive.

The high seas are all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State, according to the United Nations Convention on the Law of the Sea –“UNCLOS” (article 86). The Area is the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (UNCLOS, article 1).

*2. Marine Biological Diversity:* Guidance can be had from definitions in existing international legal instruments.

### Convention on Biological Diversity: Article 2 -

"Biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

"Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

3. *Marine Genetic Resources*: Guidance can be had from definitions in existing international legal instruments.

### Convention on Biological Diversity: Article 2 -

"Biological resources" includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.

"Genetic material" means any material of plant, animal, microbial or other origin containing functional units of heredity. (See variation at the International Treaty on Plant Genetic Material, Article 2: "Genetic material" means any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity.)

"Genetic resources" means genetic material of actual or potential value.

### Nagoya Protocol: Article 2 -

(e) "Derivative" means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.

4. *Conservation and Sustainable use*: Guidance can be had from existing international legal instruments.

### Convention on Biological Diversity: Article 2 -

"Sustainable use" means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

CARICOM also considers that the following terms should be defined:

Bioprospecting, Marine Scientific Research (see as reference [http://www.un.org/depts/los/doalos\\_publications/publicationtexts/msr\\_guide%202010\\_final.pdf](http://www.un.org/depts/los/doalos_publications/publicationtexts/msr_guide%202010_final.pdf) ), Area based management tools, Marine Protected Areas , Environmental Impact

Assessments, Strategic Environmental Assessments, and Transboundary Environmental Assessments.

## Core Principles

Without exclusivity, CARICOM considers that the following principles should be at the core of the new instrument:

1. *Common Heritage of Mankind:*
2. *Special circumstances of SIDS, including the avoidance of any disproportionate burden to SIDS and LDCs*
3. *Precautionary approach*
4. *Ecosystem based approach*
5. *Integrated approach*
6. *Polluters pay principle*

CARICOM also considers that the instrument should facilitate a science based approach and adaptive management, and should promote transparency, accountability, and equity. The instrument should be consistent with the United Nations Convention on the Law of the Sea (UNCLOS) and not derogate from any established norm, principles, obligations or rights thereunder including the rights of coastal states over their continental shelf, including beyond 200 nautical miles, where applicable.

## Marine Genetic Resources (MGRs)

### Common Heritage of Mankind

CARICOM believes that the Common Heritage of Mankind should govern Marine Genetic Resources (MGRs) in the Areas Beyond National Jurisdiction (ABNJ), in keeping with, Articles 136 and 311 of UNCLOS. With the adoption of the UNCLOS, it was recognized that the freedoms of the high seas are not absolute as they must be exercised with due regard for the interests of other States and with due regard for the conduct of activities in the Area. The consensually agreed resolution 2749 “Declaration of Principles Governing the Seabed and the Ocean Floor and the Subsoil Thereof, beyond the Limits of National Jurisdiction”, also expressed the conviction of the international community that “the exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole”. Consequently, MGRs whether in the Area or in the water column beyond the EEZ are subject to certain core principles that form the basis of the common heritage of mankind concept as reflected in customary international law; requiring peaceful use, non-appropriation, an international regime to govern the management and conservation of resources for future generations and an equitable sharing of benefits. The existing function of the International Seabed Authority (ISA) in regulating the mineral resources of the Area can naturally be extended to regulating research on the MGRs in ABNJ.

It is also useful to compare the rights of the coastal State over the continental shelf which may extend beyond its EEZ under areas of the high seas, with those of the international

community in the Area. Accordingly, the continental shelf appertains to the coastal State ipso jure and ab initio. It therefore does not derogate from the rights that all States enjoy over the high seas. Indeed it assists in defining the composite nature of the freedom of the high seas. The coastal state's rights over its continental shelf extend to the seabed, subsoil, and its resources. Article 77(4) clarifies that "[t]he natural resources referred to in this Part consist of the mineral and other non-living resources ... together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil".

There is no question that the Freedom of the high seas in waters above the continental shelf does not extend to the exploitation of the natural resources of the seabed and subsoil whether living or non-living. These were never considered as part of the traditional notion of the high seas, and no sooner than they became commercially exploitable were they declared to have always had an owner, ipso jure and ab initio. Thus, Article 77(2) of the UNCLOS affirms that the coastal state's rights "are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State."

#### Access and Benefit Sharing

On the issue of access and benefit sharing (ABS), CARICOM believes that the BBNJ instrument should cover both *in situ* MGR and *ex situ* samples of MGR.

Moreover, there are four existing access and benefit sharing models that may be considered in developing an ABS regime for marine genetic resources in areas beyond national jurisdiction – for example:

1. The provisions in the United Nations Convention on Law of the Sea (UNCLOS) relating to Marine Scientific Research;
2. The Convention on Biological Diversity and Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the CBD;
3. The International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty) and the Antarctic Treaty System.

Although none of these instruments can be transplanted, on their own, to access and benefit sharing in the areas beyond national jurisdiction, they provide useful guidance on elements to be addressed in an access and benefit sharing regime for MGRs in ABNJ.

## Area-based Management Tools, including marine protected areas

### Criteria for identification of areas that may require area-based management tools

Bearing in mind the objective and principles that should apply to the BBNJ instrument, the criteria for the identification of areas that may require area-based management tools (ABMTs), including marine protected areas (MPAs), can be done having regard for existing scientific criteria for instance as relevant to the designation of Ecologically or Biologically Significant Marine Areas, Particularly Sensitive Sea Areas, Vulnerable Marine Ecosystems; and/or criteria set out under regional agreements, or any new criteria agreed to by States. There might also be some value in establishing scientific or technical advisory committee(s), as done under the Specially Protected Areas and Wildlife (SPA) Protocol, that could also have a monitoring and reviewing role.

### Process of designation of ABMTs

The process of designation can be initiated by a proposal from a State, a scientific or technical advisory committee under the new instrument, or other intergovernmental organisation(s) within their respective mandates. The process for the designation of ABMTs in areas beyond national jurisdiction could comprise:

1. Submission of proposal
2. Designated evaluating body requests best available science on the proposed area
3. Evaluation of proposal
4. Should the proposal be found to have merit, then the area proposed for management and the measures to be used to conserve the area could be presented to State Parties and recognised international bodies and international governmental organisation under the instrument for approval.

Any overlap between the proposed ABMT and an existing ABMT should be identified and measures for coordination proposed.

### Best available science

The best available science should be taken into account in designating ABMTs. The International Seabed Authority (ISA) provides an already important existing platform, including through the use of a legal and technical commission of recognised experts. Sectoral experts e.g. from FAO, IMO etc., could also have designated seats on the legal and technical commission, to support work in this regard.

## Management Measures

ABMTs should be monitored and reviewed against the objectives identified. The new instrument should establish reporting obligations and timeframes for review. On the latter, it should accommodate for exogenous factors such as climate change.

## **Environmental Impact Assessments**

The new agreement should establish principles governing environmental impact assessment (EIAs), thresholds for triggering EIAs, standards for impact statements, and provisions for reviewing, monitoring and reporting. These parameters could equally apply to strategic environmental assessments (SEAs). The structure of the Espoo Convention could be referenced in developing the provisions for the new BBNJ instrument. Similarly, there could be an indicative list of activities that present significant adverse effects and therefore would require EIAs. The CBD COP 8 Decision VIII/28 “Voluntary guidelines on biodiversity-inclusive impact assessment” may provide useful options for this part of the BBNJ instrument. However, it would be preferable to have EIAs for activities with ‘more than a minor or transitory effect’ as per the Environment Protocol of the Antarctic Treaty System.

CARICOM also believes that the instrument should provide an obligation for the proponent of a proposed activity in ABNJ to notify the State under whose jurisdiction the proponent falls. The activity is then screened to determine whether it meets the threshold triggering an EIA. Any state that could be affected by the proposed activity should so be notified. If the threshold is met, then an EIA is conducted in accordance, at the minimum, with international standards and made publicly available through the mandated channel under the BBNJ instrument.

## Monitoring and Review

As with ABMTs, to ensure environmental integrity, the EIA should be subject to a technical expert review, with recommendations on whether or not the activity should proceed. For purposes of transparency, it would be appropriate if the independent assessment is made public as part of any consultative process. If there is any objection to the assessment, this could be the subject of appeal.

## **Capacity Building and the Transfer of Marine Technology**

### Guiding principles and approaches

In pursuit of the objectives of UNCLOS and the new BBNJ instrument, that is, regarding the exploration, exploitation, conservation and management of marine resources, the protection and preservation of the marine environment, marine scientific research and other activities in the marine environment, the following principles found in UNCLOS should be incorporated namely –

- o Duty to cooperate and collaborate
- o Duty to promote the development of marine scientific and technological capacity of States
- o Duty to provide scientific and technical assistance to developing countries
- o Duty to provide preferential treatment for developing countries

### Scope

Capacity building in pursuance of the general and specific objectives of the new instrument namely:

- o Capacity building in respect of the new Access and Benefit Sharing regime
- o Capacity building for development, implementation and monitoring of Area-based management tools including MPAs
- o Capacity building for conduct and evaluation of EIAs

### Capacity-building

Capacity-building should be needs-based and country driven (based on the needs identified by developing countries in particular SIDS and LDCs). This would ensure equitable and effective participation by all states in the new Instrument – particularly given the budgetary and other constraints faced in particular by SIDS and LDCs. Capacity-building should also be ongoing to take into account developments in scientific knowledge and address new impacts. CARICOM supports the establishment of a monitoring mechanism and reporting requirements to facilitate periodic reviews.

The IOC-UNESCO Guidelines are an important reference point for developing the capacity-building provisions of the BBNJ instrument.

### Transfer of Marine Technology

The BBNJ instrument provisions on transfer of marine technology should cover data and specialised knowledge inclusive of but not limited to, equipment, criteria, protocols, samples, processes, software, methodologies and infrastructure. The 2003 IOC Guidelines on the Transfer of Marine Technology are an important reference in this regard.

### Funding and Institutional arrangements

Such arrangements could be based on both voluntary and monetary proceeds - See Nagoya Protocol and ISA capacity building funding arrangements

## **Cross Cutting Issues:**

### Scope and Participation

In general terms, the BBNJ instrument shall cover all activities taking place in or otherwise having impact in areas beyond national jurisdiction. However, where such activities are

already managed or governed by an existing Agreement, then the BBNJ instrument will apply relevant provisions of the existing Agreement *mutatis mutandis*.

The instrument will make provisions for all elements of the package specified in GA resolution 69/292.

Participation in the instrument should extend to all States and other entities in like manner as the participation in the the United Nations Fish Stocks Agreement (UNFSA).

#### Relationship with other Instruments and Frameworks

CARICOM considers that the BBNJ instrument shall be consistent with the United Nations Convention on the Law of the Sea (UNCLOS). It should support and if necessary strengthen existing arrangements and should not derogate from key principles of UNCLOS as well as the purpose and objectives of UNCLOS. Reference could be had to Article 4 UNFSA, which reads:– *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.*

#### Institutional Arrangement

CARICOM supports the expansion of the mandate of the International Seabed Authority to oversee the implementation of the BBNJ instrument.