DEVELOPMENT OF AN INTERNATIONAL LEGALLY-BINDING INSTRUMENT UNDER 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 CROSS-CUTTING ISSUES

5 DECEMBER 2016
The European Union and its Member States wish to thank the Chair for his able stewardship of the first and second sessions of the Preparatory Committee on the development of an International Legally-binding Instrument under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (IA or Implementing Agreement) and welcome the proposed way forward which is conducive to more focused discussions on various elements of the ‘package’. In order to further contribute to the process mandated under the UN GA resolution 69/292, the EU and its Member States submit the following observations relating to the topics addressed by the informal working group on cross-cutting issues. Further submissions will address specific issues relating to the work of the other four informal working groups which functioned during the second session of the PrepCom.

Objectives

In our view, the objective of the proposed IA should be set out as the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

It is our understanding that the provisions of the four major parts of the IA dealing with all four specific elements of the ‘package’ will aim at attaining this objective and provide adequate tools for its achievement.

Broader contextual issues, e.g. sustainable development, the need for a comprehensive global regime or the link between climate change and oceans should not be considered objectives but could be reflected in the preamble of the IA.

Guiding approaches and principles

In order to attain the objective of the IA, primarily the following principles and approaches should apply:

- international cooperation and coordination;
- protection and preservation of the marine environment and its biodiversity, including for the benefit of future generations;
- sustainable use of marine biodiversity;
- ecosystem approach;
- science-based approach;
- precautionary principle;
- polluter-pays principle;
- transparent and open decision-making processes;
- public availability of information.

In connection with the question of approaches and principles there are two aspects to be considered: 1) explicit reference to these approaches and principles in the IA; and 2)
reflecting these approaches and principles in the content of individual provisions of the IA, i.e. making them operational.

As it is noted below, the IA will be an implementing agreement to UNCLOS, hence the freedoms, rights, duties and obligations of States as enshrined in UNCLOS should be respected. Any alteration of those freedoms, rights, duties and obligations would amount to the undermining of their delicate balance. With a view to the fact that the IA will relate to activities in ABNJ, this may concern, inter alia, part VII of UNCLOS. At the same time, due regard must be given to the entitlements of coastal States to the continental shelf beyond 200 nautical miles. 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. Also, the adoption of measures under the IA should be without prejudice to the sovereign decision of a State to proclaim an EEZ.

Definitions

The EU and its Member States note that at this stage it is not possible and not needed to draw an exhaustive list of all definitions, as the terms to be defined will depend on actual provisions of the IA. There may be a need for definitions of terms used in all parts of the IA which will be placed in the introductory part of the IA. Definitions of terms which will appear solely in specific parts of the IA would, accordingly, be included in the relevant part of the IA. Such an approach was used both in UNCLOS and UNFSA.

Taking into account that the IA is an implementing instrument to UNCLOS, there is no need to repeat definitions contained in UNCLOS.

The notion of “areas beyond national jurisdiction” may require a definition. It could be defined as the „high seas and the Area, as defined in the Convention.“

Terms such as marine genetic resources, area-based management tools or marine protected area should also be defined. These definitions may be included under the respective parts of the IA, unless these terms will be used in more than one part of the IA.

Relevant definitions contained in the CBD, such as biological diversity, biological resources or sustainable use, may require technical adaptation for the purpose of putting them into the context of the IA.

It goes without saying that a number of terms will require definition for purely technical purposes, e.g. “Party” to the IA.
Participation in the IA

With the aim to enable the broadest possible participation in the new instrument, the IA should not be limited only to States Parties to UNCLOS. Similarly to Art. 305 in connection with Annex IX of UNCLOS, it should also be open for signature by international organisations allowing for the participation of the European Union.

Relationship with other instruments and frameworks

As the IA is an implementing agreement to UNCLOS, a provision analogous to that of Art. 4 UNFSA would address the issue sufficiently. It should provide that nothing in the agreement shall affect the rights, obligations or jurisdiction of States under the Convention. The agreement shall be interpreted and applied in a manner consistent with the Convention.

As to the relationship with other existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, we wish to recall that in resolution 69/292, the UN GA stated that the BBNJ process “should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”. Accordingly, a without-prejudice-clause would assist in achieving this purpose.

For the purpose of attaining the objectives of the IA through better cooperation and coordination with relevant international organisations and in order to bolster coherence and complementarity of action among them, the IA should envisage a possibility for participation of and/or cooperation with these organisations, within their respective mandates, in practical arrangements under the IA.

Institutional arrangements

The exact institutional arrangements can be considered only after the substantive provisions of the IA are sufficiently developed. However, it is clear already at this stage that the IA should envisage a decision-making body, such as a Meeting/Conference of Parties to the IA. The decision making-body may establish subsidiary organs, such as a scientific committee. A question to whom to entrust the performance of secretarial functions needs also to be addressed.

The possibility of use of the mechanisms already in place should always be duly examined in the first place. Concerning scientific input, taking into account existing processes, due consideration should be given, among others, to the question of what kind of input could be received from the Regular Process,¹ as well as other relevant processes (such as the EBSA Process).

¹ A Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects.
Compliance

The substantive provisions of the IA will be a decisive factor in determining the type of measures aimed at ensuring compliance with the IA. Bearing in mind that also various non-State actors will carry out activities regulated by the IA, the IA should contain provisions requiring States to enact legislation and regulations and/or adopt measures necessary to ensure compliance with the standards and procedures set up in the IA.

Responsibility

The Articles on Responsibility of States for Internationally Wrongful Acts elaborated by the International Law Commission and attached to the UN GA resolution 56/83 represent an authoritative body of international law in this field. They are frequently referred to by international courts as reflecting rules of customary international law. Hence, we do not see the need for any provision on responsibility in the IA.

Dispute settlement

As it is the case of UNCLOS, it would be appropriate to include in the IA a provision concerning the obligation of the Parties to resolve their disputes relating to the interpretation and application of the IA by peaceful means. Due to their nature, most of possible disputes relating to matters under the IA would qualify, at the same time, also as disputes under UNCLOS.

Final clauses

The IA should contain standard final clauses. Their consideration is premature at this stage, though, and should be hence left to the future intergovernmental conference. One of the issues which could be given some consideration at that later stage is the necessity and possibility of provisional application of the IA.