



Opening Statement by H.E. Archbishop Bernardito Auza
Apostolic Nuncio, Permanent Observer of the Holy See to the United Nations,
at the

**Second session of the Intergovernmental Conference on an international
legally binding instrument under the United Nations Convention on the Law of
the Sea (UNCLOS) on the conservation and sustainable use of marine biological
diversity in areas beyond national jurisdiction**

New York, 25 March – 5 April 2019

Madam President,

My Delegation would like to thank you for the *President's Aid to Negotiations* that will serve as a useful tool for our deliberations.

Although our original mandate in resolution 69/292 was situated in negative terms to “not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies,” we should approach our work in a more constructive manner. In this sense, the main objective of the legally binding instrument on which we are working would be to improve existing legal instruments and frameworks by coordinating, reconciling, and supplementing them. Moreover, considering that scientific and commercial activities would be at the core of this instrument, it is our responsibility to preclude the need to renegotiate a global agreement every time a new resource is discovered or a different commercial activity is pursued in areas beyond national jurisdiction (ABNJ). With this in mind, as we deliberate on the specific details of the draft, my Delegation would like to comment on what we see as five legal gaps:

First, **a foundational gap.** The draft lacks a foundational text not only with regard to how to fill in the gaps, but also on which elements are needed to base decisions concerning environmental impact assessments (EIAs) and area-based management tools (ABMTs), to coordinate effectively with other regulatory bodies, or to base capacity building and technology transfer. The absence also means that the agreement would leave the determination of any scientific objectives or means to a scientific and technical body. Identifying lists of activities or “standards and criteria” for what must be done in an assessment or thresholds for reasonable harm cannot substitute for the basic scientific targets or means required. A foundational text would establish a clearer basis with respect to biodiversity and ecosystems warranting special attention and to reconciling them better

with existing provisions of the International Maritime Organization (IMO), International Seabed Authority (ISA) and other regulators.

Second, a **jurisdictional gap**. The draft text refers to “planned activities under the jurisdiction and control of a State Party” as the basis for applying jurisdiction. Jurisdiction in any State or court, however, is based on the relationship of a State to a person, whether a corporate entity, partnership or individual, and not to an activity, planned or otherwise. It seems also obvious that if the activity itself takes place outside the jurisdiction of the State, the State would not have control over it. The caveat provision that offers licensing or funding as the nexus would not satisfy the jurisdictional gap. My Delegation therefore believes that further discussion on this issue is necessary, considering that regulating what happens in ABNJ is at the core of the legally binding instrument on which we are working.

Third, a **legal applicability gap**. Although the draft offers many provisions regarding coordination and cooperation, as well as ideas regarding consultation with other bodies, these measures should better reflect the legal relationship of and between the States, the proponents of the activities, the activities themselves, and other agreements and regulatory bodies. For example, the point regarding its scope could carefully exclude activities that would not be regulated by the legally binding instrument we are working on. A provision could differentiate marine scientific research from activities subject to this instrument. Stipulations regarding anticipated research for baseline studies could be included. Provisions mandating procedural and institutional action with respect to management tools could better integrate engagement of regulatory bodies in the process, for instance by creating an economic and social body, in addition to an environmental one (the scientific and technical body), and allowing all three to come up with risk assessments. Terms regarding due diligence should also be included.

Fourth, an **economic gap**. The lack of provisions regarding business and economic elements, other than with respect to benefit sharing and creation of a voluntary fund, would leave a serious practical and legal gap in the legally binding instrument, especially given that the activities that are anticipated in ABNJ are commercial activities and there is enormous cost in implementing procedural, compliance and enforcement measures. The possibilities of capacity building and technology transfer in the ordinary course of business and the obvious use of financial tools for prevention and mitigation should not be ignored.

Fifth, a **gap concerning “common heritage of mankind” (CHM) and the “freedom of the high seas” (FHS)**. Although the draft presents five options with respect to the CHM and the FHS, without further drafting it is unlikely that the legally binding instrument will offer a legal basis for the consistent application of both rights and obligations in all situations and for all resources. In this regard, my Delegation would like to

suggest a compromise language where the application of the principles would remain unchanged, as stated in UNCLOS, but the meaning of “due regard” in Article 87, *Freedom of the High Seas*, would be further clarified, to include both obligations and benefits of “due diligence” of States.

Madam President,

My Delegation would like to conclude its opening Statement by drawing attention to the Small Island Developing States (SIDS). When one considers that Part VIII, *Regime of Islands*, has only one provision that essentially defines what an island is, it is clear that we have not fully considered the concerns of SIDS. Although conditions have been included regarding special consideration for SIDS with respect to benefit sharing, capacity building and technology transfer, the Holy See urges this Intergovernmental Conference to give greater thought as to how the legally binding instrument on which we are working might be better focused on helping them.

For example, given the critical relationship between the ocean and the people in SIDS, and their particular vulnerability to the consequences of poor conservation and unregulated, unsustainable utilization of resources — including dwindling food supplies sourced from the ocean, death of barrier reefs that serve as protection and fish habitat, rising sea levels, and in view of their geographic isolation from other States — priority should be given to determining and implementing conservation and management measures designed to lessen the negative impacts on them.

Thank you, Madam President.