



A review of the contribution of ISA to the objectives of the 2023 Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdictions





Contents

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DISCLAIMER

A review of the contribution of the International Seabed Authority to the implementation of the objectives of the 2023 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction

The report, commissioned by the International Seabed Authority (ISA) Secretary-General, assesses the implications of the 2023 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction for the work of ISA. The review of the 2023 Agreement focuses on access and benefit-sharing of marine genetic resources, area-based management tools, environmental impact assessments and capacity-building. The report highlights the need for coherence between the 2023 Agreement and ISA's mandate, emphasizing that ISA will remain the principal regulator of activities in the Area. The report suggests ISA's existing practices in ABNJ and environmental impact assessments will be crucial, although they will need to interact with new treaty bodies. It also explores the complex implications of marine genetic resources provisions for ISA. The report underscores ISA's potential to significantly contribute to capacity-building and technology transfer and recommends strengthening relationships with the new treaty bodies through formal agreements and active engagement by states to ensure coordinated implementation.

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| | |
|---|-----------|
| Acknowledgments | 4 |
| Abbreviations | 5 |
| Foreword by the Secretary-General..... | 7 |
| Executive Summary | 8 |
| | |
| 1. Introduction | 11 |
| 1.1 Background | 11 |
| 1.2 Scope and purpose of the report | 11 |
| 1.3 Structure of the report | 12 |
| | |
| 2. Overview of the 2023 Agreement | 13 |
| 2.1 Background and negotiating process | 13 |
| 2.2 Overarching scope, structure and status of the 2023 Agreement | 20 |
| | |
| 3. Analysis of the substantive provisions of the 2023 Agreement | 26 |
| 3.1 Marine genetic resources: analysis of key provisions | 26 |
| 3.2 Area-based management tools: analysis of key provisions | 29 |
| 3.3 Environmental impact assessment and strategic environmental assessment: analysis of key provisions | 35 |
| 3.4 Capacity-building and technology transfer: analysis of key provisions | 38 |
| | |
| 4. The role of the International Seabed Authority in relation to the conservation and sustainable use of biodiversity in areas beyond national jurisdiction..... | 41 |
| 4.1 Status and objectives of the International Seabed Authority | 41 |
| 4.2 Contribution of the International Seabed Authority to the negotiations of the 2023 Agreement | 36 |
| 4.3 Contribution of the International Seabed Authority to the objectives of the 2023 Agreement in relation to marine genetic resources | 46 |
| 4.4 Contribution of the International Seabed Authority to the objectives of the 2023 Agreement in relation to area-based management tools | 54 |
| 4.5 Contribution of the International Seabed Authority to the objectives of the 2023 Agreement in relation to environmental impact assessment and strategic environmental assessment | 60 |
| 4.6 Contribution of the International Seabed Authority to the objectives of the 2023 Agreement in relation to capacity-building and technology transfer | 63 |
| | |
| 5. General institutional cooperation and coordination between the International Seabed Authority and the treaty bodies to be established under the 2023 Agreement | 69 |
| 5.1 Observer status | 70 |
| 5.2 Administrative and contractual arrangements | 71 |
| 5.3 Other practical arrangements for cooperation | 71 |
| | |
| 6. Conclusions | 73 |
| | |
| Annex | 74 |
| Figures and boxes | 80 |
| References | 81 |



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The Secretariat also extends its gratitude to all representatives of Member States, contractors and other stakeholders, including non-governmental, international and regional organizations, who agreed to be interviewed for this report.

Finally, we thank graphic designer Melissa Horvat and the ISA Communications Unit, especially Jaimie Abbott, Besmir Fidahić, Shanique Gregory and Philip Janikowski, for their work in preparing this publication.



Abbreviations

| | |
|----------------|---|
| ABMT | area-based management tools |
| ABNJ | areas beyond national jurisdiction |
| AHOEIWG | ad Hoc Open-ended Informal Working Group |
| APEI | areas of particular environmental interest |
| CBD | Convention on Biological Diversity |
| CCZ | Clarion-Clipperton Zone |
| COP | Conference of the Parties |
| DSI | digital sequence information |
| EIA | environmental impact assessment |
| EIS | environmental impact statement |
| EMP | environmental management plan |
| IGC | Intergovernmental Conference |
| IMO | International Maritime Organization |
| ISA | International Seabed Authority |
| ITLOS | International Tribunal for the Law of the Sea |
| JTRC | Joint Training and Research Centre |
| LTC | Legal and Technical Commission |
| MPA | marine protected areas |
| NEAFC | North-East Atlantic Fisheries Commission |
| PSSA | particularly sensitive sea areas |
| REMP | regional environmental management plans |
| SIDS | small island developing States |
| STB | Scientific and Technical Body |
| UNCLOS | United Nations Convention on the Law of the Sea |

Foreword by Michael W. Lodge, Secretary-General



When the 2023 Agreement enters into force, it will inevitably have an impact on the system of global ocean governance.

I am pleased to share this important report on the role of the International Seabed Authority (ISA) in implementing the objectives of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (2023 Agreement).

The 2023 Agreement is a significant achievement in our global endeavour to conserve and sustainably use marine biodiversity. It introduces new measures for sharing the benefits from the use of marine genetic resources, as well as processes for establishing area-based management tools, standards for conducting environmental impact assessments, and a suite of tools to promote capacity-building and technology transfer. In so doing, the Agreement builds on a substantial corpus of existing international law and practice, administered through a wide range of international organizations, bodies and processes. As States consider ratifying the 2023 Agreement it will be important to consider carefully how these diverse organizations, bodies and processes can best contribute to the effective implementation of the Agreement.

The present report is a first contribution to that process and analyses how the provisions of the 2023 Agreement align with the ISA's mandate and activities and what are likely to be some of the challenges and opportunities ahead.

The report emphasizes the need for maintaining coherence between the 2023 Agreement and the existing UNCLOS framework, including the 1994 Agreement on the Implementation of Part XI of UNCLOS (the first implementing agreement under UNCLOS). The report identifies areas where ISA, with its 30 years of experience

in protecting the marine environment, can make a direct contribution to the objectives of the 2023 Agreement. It also highlights provisions that are likely to require further clarification.

The report underscores the importance of collaboration and effective coordination with the bodies to be established under the 2023 Agreement, particularly in the implementation of area-based management tools. It also addresses the complexities of the provisions relating to the use of marine genetic resources, highlighting the importance of clear and consistent implementation of benefit-sharing and reporting requirements. Additionally, the ISA's expertise in capacity-building and technology transfer is recognized as critical for supporting the implementation of similar provisions under the 2023 Agreement.

I am grateful to all of those involved in the preparation of this report but particularly to the Group of Experts who gave freely of their time and expertise and who provided wise guidance on the structure of the report and important insights into the conclusions and recommendations: Ms Gemma Andreone, Ms Azela Arumpac-Marte, Ms Asha Challenger, H.E. Ms Angella Comfort, Mr Alan Evans, Mr Elie Jarmache, Mr Bartosz Jasinski, Ms Khalilah Hackman, H.E. Mr Michael Kanu, Ms Youna Lyon, H.E. Ms Fernanda Millicay, Ms Noorah Mohammed Algethami, Prof. Kentaro Nishimoto, Prof. S. Shanthakumar, Prof. Rudiger Wolfrum, Mr Zhang Dan, Ms Yulia Zhuzhginova. It was a pleasure to work with such a distinguished group and I thank each of them for their contribution.

In the Secretariat, my thanks also go to Dr. Marie Bourrel-McKinnon and Dr. Giovanni Ardito from the Executive Office of the Secretary-General, who managed this project from inception to delivery. Above all, my thanks to Prof. James Harrison from the University of Edinburgh, who served as our expert consultant and did the hard work of drafting the report.

When the 2023 Agreement enters into force, it will inevitably have an impact on the system of global ocean governance. As a key building block of the architecture of that system, this will bring new responsibilities and offer new opportunities to the ISA. The report encourages ISA members to engage actively to ensure effective and coordinated implementation of the 2023 Agreement.

Executive Summary

This report examines the contribution of the International Seabed Authority (ISA) to the implementation of the objectives of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (2023 Agreement) and its implications for the work of ISA. The report has been commissioned by the ISA Secretary-General to inform discussions about preparing for the entry into force and future implementation of the 2023 Agreement. The report carries out an analysis of how the provisions of the 2023 Agreement may be relevant to the mandate of ISA and considers how its existing work can contribute to the overall objective of promoting the conservation and sustainable use of biological diversity of areas beyond national jurisdiction.

The analysis covers all four elements of the 2023 Agreement, namely access and benefit-sharing of marine genetic resources, area-based management tools (ABMT), environmental impact assessment and monitoring, and capacity-building and technology transfer. The study also considers how to promote coherence between the two regimes in the future by identifying potential opportunities for ISA to proactively engage with the institutional arrangements to be established under the 2023 Agreement.

One of the main purposes of this report is to consider how the key obligations and procedures set out in the 2023 Agreement may apply to activities in the Area. In doing so, the report highlights a number of significant ambiguities in the 2023 Agreement, which will need to be resolved in order to fully understand its implications for activities in the Area and the work of ISA. This report does not purport to offer precise solutions to these issues, which will have to be considered by States as they look towards the future implementation of the 2023 Agreement. Rather, the report identifies the different possible interpretations, and it considers how different options may impact the Part XI regime.

An overarching consideration throughout the report is the need to interpret and apply the 2023 Agreement "in the context of and in a manner consistent with [United Nations Convention on the Law of the Sea (UNCLOS)]" (article 5(1)) and "in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies" (article 5(2)). Both of these general requirements inform the meaning to be ascribed to the substantive provisions of the 2023 Agreement. They must also be taken into account by the treaty bodies to be established by it in the exercise of their decision-making powers. These requirements have a particular bearing on the implications of the 2023 Agreement for the work of ISA, given that UNCLOS confers an exclusive mandate on ISA to organize and control activities in the Area on behalf of the international community as a whole, including the regulation of any impacts of such activities on marine biological diversity. It is clear, both from the final text and also the drafting history of the 2023 Agreement, that the drafters did not intend to modify or amend UNCLOS. Therefore, ISA will continue to play the principal role in regulating activities in the Area, even after the entry into force of the 2023 Agreement. This understanding has important implications for the manner in which the substantive provisions of the 2023 Agreement are interpreted.

In relation to both ABMT and environmental impact assessments, the 2023 Agreement appears to demand a degree of deference to the mandate of existing institutions, including ISA. It follows that the work of ISA in these areas

will continue to be vital in meeting the objectives of the 2023 Agreement. That is not to say that the 2023 Agreement has no implications for ISA in these two areas. In particular, there will need to be some interaction between ISA and the treaty bodies to be established under the 2023 Agreement. ISA will be a crucial stakeholder in the development of guidance to give effect to the 2023 Agreement, in the establishment of mechanisms to promote coordination and cooperation under the 2023 Agreement, and in consultations on proposals for ABMT under the 2023 Agreement.

In relation to marine genetic resources, the provisions of the 2023 Agreement raise complex questions for the work of ISA. Although ISA does not directly regulate access to marine genetic resources of the Area, there are elements of ISA's work that may interface with the relevant provisions of the 2023 Agreement, particularly when it comes to the generation of information about deep-seabed ecosystems as part of the exploration process, and the dissemination of results and analysis from such activities. The report examines how the provisions of Part II of the 2023 Agreement may be applied to the collection of biological samples by contractors under Part XI of UNCLOS, identifying potential challenges for the interaction of the applicable legal rules. The report identifies that there is an urgent need for clarity on which States will be responsible for ensuring that the notification, reporting and benefit-sharing requirements of Part II of the 2023 Agreement are implemented in order to allow ISA to consider what steps may need to be taken to address the implications for activities in the Area. The report underlines that it will be important to ensure that whatever guidance is developed by the treaty bodies under the 2023 Agreement in this context is coherent with the procedures already in place for activities in the Area. It also considers options for ISA to align its work with the requirements of the 2023 Agreement.

One area in which ISA can potentially make a significant contribution to the objectives of the 2023 Agreement is in relation to capacity-building and technology transfer. These issues have been at the heart of the Part XI regime since its inception. ISA has carried out a number of capacity-building and technology transfer activities to support the active participation of personnel of developing States in the work of ISA and in activities carried out in the Area, including in relation to marine scientific research. The report suggests that States can benefit from the experience of ISA when implementing the capacity-building and technology transfer provisions of the 2023 Agreement while noting that synergistic implementation is most likely to enhance effectiveness for both regimes. ISA has identified the advantages of developing strategic partnerships to deliver capacity development programmes effectively. Once the 2023 Agreement enters into force

and the institutional arrangements are put into place, the Conference of the Parties and the Capacity-Building and Transfer of Marine Technology Committee should become key partners for this purpose.



Photo: BGR

Across all four elements of the 2023 Agreement, there will be implications for the work of ISA, which will have to engage with the processes and treaty bodies established under the 2023 Agreement in order to ensure that its mandate is respected. As a result, the entry into force of the 2023 Agreement will create more responsibilities for the ISA Secretary-General. In this regard, the report considers options for strengthening relationships between ISA and the treaty bodies to be established under the 2023 Agreement, including the possible conclusion of a memorandum of understanding between the secretariats, providing for an exchange of information and consultation on matters of common interest. Beyond strengthening engagement at the level of the secretariat, the report also highlights the importance of engagement by States in order to reach a clear understanding of how the mandates of ISA and the institutions to be established under the 2023 Agreement interact. In particular, those ISA Members who become parties to the 2023 Agreement will have an opportunity to promote coordinated and coherent interaction between the two regimes by actively participating in these processes and encouraging mutual supportiveness. Of course, it cannot be assumed that all ISA Members will become parties to the 2023 Agreement and the differences in membership may lead to some challenges to coordination where different priorities are identified by the respective institutions. Ultimately, the degree to which the 2023 Agreement can overcome fragmentation will depend upon the diplomatic efforts of States and their ability to agree on a coordinated response to common challenges to the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.

How can ISA contribute to the overall objective of promoting the conservation and sustainable use of biological diversity of areas beyond national jurisdiction?



Ensuring more effective protection of some of the most remote ecosystems on the planet and the sustainable use of their biodiversity.

Photo: BGR

1. Introduction

1.1 Background

The adoption of the Agreement under the United Nations Convention on the Law of the Sea (UNCLOS) on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (2023 Agreement) on 19 June 2023 marks the culmination of almost 20 years of discussions about how the international legal framework should evolve to ensure more effective protection of some of the most remote ecosystems on the planet, as well as sustainable use of their biodiversity, including marine genetic resources. On its entry into force, the 2023 Agreement will become an important new source of rules and institutional arrangements for managing activities in areas beyond national jurisdiction (ABNJ). However, the 2023 Agreement will not operate in isolation from the existing legal framework. Rather, it will become part of the broader international legal landscape that already applies to the conservation and management of ABNJ. Therefore, it is critical to understand how this new instrument fits within this existing framework and how the institutional arrangements to be established under the 2023 Agreement will interact with other international frameworks that apply to the same space.

While the 2023 Agreement will only enter into force once it has received 60 ratifications, acceptances or approvals,¹ conversations about preparing for implementation have already begun.² The interaction between the new Agreement and existing instruments relating to the conservation and sustainable use of the marine biodiversity of ABNJ will be an important part of these discussions. As the international community enters this new phase, it is more important than ever to ensure that account is taken of existing regulatory regimes in order to meet the ultimate objective of the 2023 Agreement of addressing the conservation and sustainable use of biological diversity of ABNJ in a "coherent and cooperative manner."³ This report is intended to be the first contribution of the International Seabed Authority (ISA) to this debate.



Photo: Ifremer

1.2 Scope and purpose of the report

As the international organization established by UNCLOS through which States Parties organize and control all mineral resources-related activities in the seabed and ocean floor beyond the limits of national jurisdiction (the Area) for the benefit of humankind as a whole, ISA has a particular interest in understanding the interplay between the 2023 Agreement and the role and mandates assigned to ISA by Part XI of UNCLOS and the 1994 Agreement relating to the Implementation of Part XI of UNCLOS (1994 Agreement). It is for this reason that the ISA Secretary-General has commissioned this study as the contribution of ISA to the implementation of the objectives of the 2023 Agreement.

The present report seeks to:

- a. analyse the provisions of the 2023 Agreement with a view to determining how it may apply to activities carried out under Part XI of UNCLOS;
- b. carry out a mapping exercise to establish linkages between the mandates and activities of ISA and the objectives of the 2023 Agreement; and
- c. identify potential opportunities and challenges with respect to the implementation of the 2023 Agreement and develop recommendations on how ISA should interact with the institutions to be established under the Agreement.

The report is based on an analysis of the relevant legal texts and other documentary materials. Where the report identifies ambiguities in the 2023 Agreement, it does not purport to offer precise solutions to these issues, which will have to be considered by States as they look towards the future implementation of the 2023 Agreement. Rather, the report identifies the different possible interpretations and considers how different options may impact the Part XI regime.

This report was produced by the ISA Secretariat under the overall supervision of Dr. Marie Bourrel-McKinnon, with the assistance of Dr. Giovanni Ardito. The contents and analysis of the report are based on an independent assessment carried out by Professor James Harrison (University of Edinburgh), with guidance and contributions from a panel of experts selected for their knowledge and expertise in relation to the law of the sea, the Part XI regime, the negotiations leading to the adoption of the 2023 Agreement and activities carried out in ABNJ (see Annex).

¹ United Nations. 2023. Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. Available at: https://treaties.un.org/doc/Treaties/2023/06/20230620%2004-28%20PM/Ch_XXI_10.pdf, article 68(1).

² See United Nations. 2023. Letter dated 30 June 2023 from the President of the Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction to the President of the General Assembly (A/77/945). Available at: <https://digitallibrary.un.org/record/4015257?ln=en&v=pdf>. This letter highlights the desire of several delegations to support the early entry into force and implementation of the treaty, including through a preparatory process. United Nations. 2024. Press release: At UN Oceans Meeting, High-Level Officials Commit to Join Forces, Advance Marine Biodiversity Treaty (SEA/2191). Available at: <https://press.un.org/en/2024/sea2191.doc.htm>.

³ 2023 Agreement, preamble.

2. Overview of the 2023 Agreement

1.3 Structure of the report

The report is divided into six sections, including this introduction.

Section 2 provides a general introduction to the 2023 Agreement. This section will briefly explain the key elements of the negotiating process leading up to the adoption of the 2023 Agreement before exploring the general scope and structure of the final treaty text. This section will also analyse the overarching provisions found in Part I of the Agreement, which set out the relationship between the 2023 Agreement and UNCLOS, the 1994 Agreement and other international instruments.

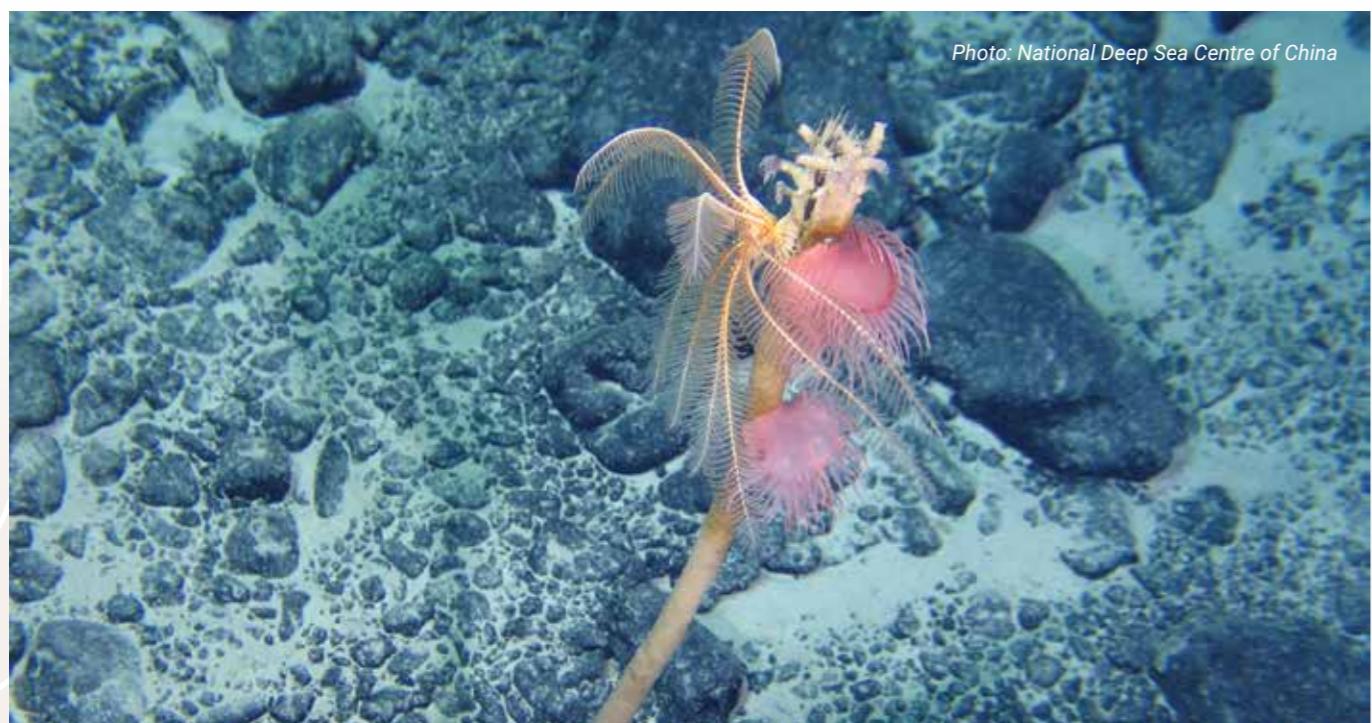
Section 3 will carry out a detailed analysis of the substantive provisions of Parts II-IV of the 2023 Agreement, which lay down new rules relating to the four main elements of the package deal addressed by the Agreement, namely marine genetic resources, area-based management tools (ABMT), environmental impact assessment (EIA) and capacity-building and technology transfer. The section will identify the particular objectives of each Part, what new rules and procedures will be introduced by the Agreement and how the Agreement addresses the relationship between its institutional arrangements and other relevant international instruments, frameworks and bodies. Where relevant, the analysis will highlight areas where further interpretation or development of the Agreement may be necessary in order

to fully understand the implications of the Agreement for the work of existing international institutions.

The analysis of the 2023 Agreement in section 3 sets up the discussion in section 4 of how the work of ISA may contribute to the objectives of the Agreement. Section 4 begins by explaining the status of ISA as an autonomous international organization established under UNCLOS with an exclusive mandate to regulate activities in the Area. The section will then carry out a mapping exercise of the existing work of ISA in relation to each of the four substantive parts of the 2023 Agreement. For each part, the analysis will explain the existing mandate of ISA and highlight how the work of ISA contributes towards the objectives of the 2023 Agreement. Looking to the future, it will consider opportunities for ISA to engage with the new treaty bodies, procedures and mechanisms to be established under the 2023 Agreement (and vice versa), including the indication of key issues that may need to be addressed in order to ensure effective cooperation and coordination takes place under the 2023 Agreement.

Section 5 turns to the overall relationship between ISA and the treaty bodies to be established under the 2023 Agreement and considers a number of practical steps that may be taken to promote collaborative relations between them.

Finally, section 6 draws together the main themes and recommendations identified throughout the report with a view to ensuring a coherent and collaborative approach to the operation and implementation of the 2023 Agreement.



2.1 Background and negotiating process

2.1.1 Specific issues to be addressed in the negotiations

While threats to marine biodiversity do not only exist in ABNJ, the focus on these areas in the discussions leading to the conclusion of the 2023 Agreement was a result of concern about regulatory gaps in relation to some activities or areas, as well as the challenges of achieving a coordinated and cross-sectoral approach to conservation and sustainable use which takes into account the cumulative impacts of marine activities in ABNJ.⁴ Questions about the regulation of the collection and use of marine genetic resources of ABNJ for inter alia biotechnology (sometimes referred to as "bioprospecting") were also raised. Discussions on this topic began in a variety of intergovernmental forums in the late 1990s, only a few years after UNCLOS entered into force.⁵ The issue was also raised at ISA as it started to develop its rules and regulations relating to polymetallic sulphides and cobalt-rich ferromanganese crusts and the Secretary-General noted in his 2002 Report to the Assembly that it is often difficult to distinguish between certain activities carried out during exploration and "bioprospecting". As a result, the report noted that "there is a considerable overlap, as well as potential for conflict, between the Authority's responsibilities for the protection of the marine environment and activities directed at bioprospecting", whilst stressing that "bioprospecting", even if considered an exercise of high seas freedoms, still needed to be carried out with due regard to the interests of other States, as well as with due regard for activities in the Area. Given the wider issues raised, discussions shifted to the UN General Assembly, which called for further examination of the topic.⁶ As a result, this topic received increased attention at the fifth meeting of the Informal Consultative Process on Oceans and the Law of the Sea in 2004, which led to a decision by the UN General Assembly to establish an Ad Hoc Open-ended Informal Working Group (AHOEWG) dedicated to studying issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.⁷

After several years of debate, the AHOEWG recommended that the UN General Assembly initiates a process to ensure that the legal framework for the conservation and sustainable use of marine biodiversity in ABNJ effectively addressed four key issues, namely marine genetic resources, ABMT, EIA and capacity-building and technology transfer.⁸ These issues were to become the four elements of a package¹⁰ that would drive further discussions in the AHOEWG from 2011 to 2015,¹¹ and later negotiations at the Preparatory Committee¹² and then at the Intergovernmental Conference (IGC) to conclude an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity in ABNJ convened by the UN General Assembly in 2017.¹³

While each element of the package related generally to the overall theme of the conservation and sustainable use of biodiversity of ABNJ, the four issues themselves were largely independent of each other. Participants in the discussions often had different interests in relation to each issue. Indeed, different challenges arose in relation to each issue. In the context of marine genetic resources, the discussions concerned the lack of concrete rules on access and sharing of the benefits of marine genetic resources located in ABNJ. In relation to ABMT, concerns were focused on challenges of cooperation and coordination between different processes, as well as how to fill gaps in the regulatory framework for certain activities not covered by existing frameworks. On EIA, the discussions centred on the need to operationalize the general rules in UNCLOS relating to EIA and, particularly, to apply them to activities in ABNJ that were not already subject to international regulation. Finally, the need for capacity-building for developing countries to effectively participate in the conservation and sustainable use of biodiversity of ABNJ, as well as the need to operationalize existing rules in Part XIV and IV of UNCLOS, were highlighted as key issues that had to be addressed alongside the other substantive topics. Addressing the issues together as a package opened the possibility for compromises to be struck not only within each of the elements but also across individual elements of the package.

⁴ See United Nations. 2011. Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/66/119). Available at: <https://digitallibrary.un.org/record/707498?ln=en&v=pdf>. Annex, para. 14.

⁵ See CBD COP. 1995. Conservation and sustainable use of marine and coastal biological diversity (CBD COP Decision II/10). Available at: <https://www.cbd.int/decisions/cop/2/10>, para. 12. United Nations. 1996. Law of the sea: report of the Secretary-General (A/51/645). Available at: <https://digitallibrary.un.org/record/228948?ln=en&v=pdf>, para. 231.

⁶ ISA. 2002. Report of the Secretary-General of the International Seabed Authority under article 166, paragraph 4, of the United Nations Convention on the Law of the Sea (ISBA/8/A/5). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-8a-5_0.pdf, para. 51.

⁷ United Nations. 2003. Oceans and the law of the sea: resolution (A/RES/58/240). Available at: <https://digitallibrary.un.org/record/509672?ln=en&v=pdf>, para. 52. This resolution also called the UN Secretary-General to cooperate and liaise with relevant international institutions in preparing an addendum to his annual report on oceans and the law of the sea describing the threats and risks to such marine ecosystems and any conservation and management measures in place. United Nations. 2004. Oceans and the law of the sea: Report of the Secretary-General: Addendum (A/59/62/Add.1). Available at: <https://digitallibrary.un.org/record/534615?ln=en&v=pdf>.

⁸ United Nations. 2004. Oceans and the law of the sea: resolution (A/RES/59/24). Available at: <https://digitallibrary.un.org/record/534999?ln=en&v=pdf>, para. 73.

⁹ See United Nations. 2011. Letter dated 30 June 2011 from the Co-Chairpersons of the Ad Hoc Open-Ended Informal Working Group to the President of the General Assembly (A/66/119). Available at: <https://digitallibrary.un.org/record/707498?ln=en&v=pdf>. Annex.

¹⁰ Ibid. See United Nations. 2017. Internationally Legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: resolution (A/RES/72/249). Available at: <https://digitallibrary.un.org/record/1468985?ln=en&v=pdf>, para. 2.

¹¹ See United Nations. 2015. Letter dated 13 February 2015 from the Co-Chairpersons of the Ad Hoc Open-Ended Informal Working Group to the President of the General Assembly (A/69/780). Available at: <https://digitallibrary.un.org/record/788512?ln=en&v=pdf>. Annex, para. 1(e).

¹² United Nations. 2015. Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: resolution (A/RES/69/292). Available at: <https://digitallibrary.un.org/record/796494?ln=en&v=pdf>.

¹³ United Nations. 2017. International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: resolution (A/RES/72/2490). Available at: <https://digitallibrary.un.org/record/1468985?ln=en&v=pdf>.



L-R: IGC President Rena Lee, Singapore, and René Lefeber, the Netherlands, Facilitator of the informal working group on EIAs



View of the informal working group



The resumed Fifth Session of the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ) adopts, by consensus, the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

19 June 2023



Photo: The United Nations

2.1.2 The mandate of the Intergovernmental Conference

The negotiations at the IGC were guided by the mandate agreed by the UN General Assembly in Resolution 72/249 of 24 December 2017. This mandate provided a political framework for the conduct of the negotiations with the ultimate aim of agreeing on a treaty text that would be acceptable to as many States as possible.

The mandate called for inclusive negotiations¹⁴ open not only to "all States Members of the United Nations, members of the specialized agencies and parties to the Convention",¹⁵ but also open to observers from international organizations and non-governmental organizations.¹⁶ In line with this principle of inclusivity, most of the conference sessions, including many informal working groups, were open to participation by observers. However, the practicalities of this approach proved to be a challenge during some sessions where COVID-19 restrictions had to be applied.¹⁷ It was only towards the end of the process that negotiations were taken behind closed doors in order to achieve necessary trade-offs and to allow compromises to be made on the overall text.¹⁸

The IGC mandate explicitly reflected the desirability of consensus decision-making by providing that "the conference shall exhaust every effort in good faith to reach agreement on substantive matters by consensus."¹⁹ The emphasis on consensus reflects a long-standing practice in the law of the sea, dating back to the Third United Nations Conference on the Law of the Sea, where consensus decision-making was adopted through the so-called Gentlemen's Agreement. A preference for consensus decision-making is also reflected in the working of many law of the sea institutions, either in their rules of procedure²⁰ or through their practice.²¹ The emphasis on consensus is also central in the decision-making process of ISA.²²

The mandate of the IGC also promoted the maintenance of consistency with the existing international legal framework that was applicable to maritime ABNJ. This goal was reflected in two particular provisions of the negotiating mandate.

First and foremost, the mandate highlighted the importance of UNCLOS by expressly stating that "the work and results of the conference should be fully consistent with the provisions of

the United Nations Convention on the Law of the Sea."²³ This principle emerged very early on in discussions when it was recognized that "[UNCLOS] sets out the legal framework within which all activities in the oceans and seas must be carried out, and any action relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction should be consistent with its legal regime"²⁴ There was widespread agreement on the importance of this objective throughout the negotiation process.²⁵ This element of the mandate makes clear that the negotiators did not intend to amend UNCLOS, but rather they were concerned with developing complementary provisions which build upon and elaborate the legal framework enshrined in UNCLOS. This is particularly important in the present context given that it is Part XI of UNCLOS, along with the 1994 Agreement, which establishes ISA and sets out the legal framework for activities in the Area (section 4.1.1 below).

In addition, the mandate also made clear that "this process and its result should not undermine existing relevant legal

instruments and frameworks and relevant global, regional and sectoral bodies."²⁶ This principle highlighted that the negotiation of new rules for the conservation and sustainable use of biodiversity beyond national jurisdiction was not taking place in a vacuum and that any new rules resulting from the negotiations should take into account the range of regional and sectoral instruments, frameworks and bodies already occupying this space. From very early on in the discussions, it was generally recognized that "other organizations, processes and agreements also have an essential role within areas of their respective competence and can and should contribute to an integrated consideration of [issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction]."²⁷ The notion of "not undermining" emerged from the views expressed by some delegations in the AHOEWG that its work "should focus on achieving complementarities to existing mechanisms without infringing of the regulatory scope of existing arrangements or duplicating ongoing efforts."²⁸ The language of "not undermining" began to be used in the

¹⁴ Ibid., para. 9.

¹⁵ Ibid., para. 8.

¹⁶ Ibid., paras 12-15.

¹⁷ See International Institute for Sustainable Development. 2022. Summary report, 7–18 March 2022, 4th Session of the Intergovernmental Conference (IGC) on the BBNJ. Available at: <https://enb.iisd.org/marine-biodiversity-beyond-national-jurisdiction-bbnj-igc4-summary>.

¹⁸ See International Institute for Sustainable Development. 2022. Summary report, 15–26 August 2022, 5th Session of the Intergovernmental Conference (IGC) on the BBNJ. Available at: <https://enb.iisd.org/marine-biodiversity-beyond-national-jurisdiction-bbnj-igc5-summary>.

¹⁹ United Nations. 2017. International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: resolution (A/RES/72/249). Available at: <https://digitallibrary.un.org/record/1468985?ln=en&v=pdf>, para. 17. In the absence of consensus, decisions could be taken by a two-thirds majority vote. Ibid., para. 19.

²⁰ United Nations. 2020. Rules of Procedure of the Meeting of the States Parties (SPLOS/2/Rev. 5). Available at: <https://digitallibrary.un.org/record/3876767?ln=en&v=pdf>, rule 52. This rule provides that the Meeting of States Parties shall conduct its work on the basis of general agreement and it may only proceed to a vote "after all efforts at achieving general agreement have been exhausted."

²¹ See IMO. 2014. Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organisation (LEG/MISC.8). Available at: <https://wwwcdn.imo.org/localresources/en/OurWork/Legal/Documents/LEG%20MISC%208.pdf>. This emphasizes that the IMO operates by consensus in practice.

²² 1994 Agreement, Annex, Section 3, para. 2. See also Rules of procedure of the Assembly of the Authority, rule 61; Rules of procedure of the Council of the Authority, rule 56. For a discussion of ISA decision-making procedures, see section 4.1.1 below.

²³ United Nations. 2017. International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: resolution (A/RES/72/249). Available at: <https://digitallibrary.un.org/record/1468985?ln=en&v=pdf>, para. 6.

²⁴ United Nations. 2006. Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction : transmittal letter dated 9 March 2006 from the Co-Chairpersons of the Working Group to the President of the General Assembly (A/61/65). Available at: <https://digitallibrary.un.org/record/574726?ln=en&v=pdf>, Annex I, para. 3.

²⁵ See United Nations. 2014. Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/82). Available at: <https://digitallibrary.un.org/record/809693?ln=en&v=pdf>, Annex, paras 16, 22 and section A of the Appendix. United Nations. 2017. Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (A/AC.287/2017/PC.4/2). Available at: <https://digitallibrary.un.org/record/1306977?ln=en&v=pdf>, Section A.

²⁶ United Nations. 2017. International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: resolution (A/RES/72/249). Available at: <https://digitallibrary.un.org/record/1468985?ln=en&v=pdf>, para. 7.

²⁷ United Nations. 2006. Report of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction : transmittal letter dated 9 March 2006 from the Co-Chairpersons of the Working Group to the President of the General Assembly (A/61/65). Available at: <https://digitallibrary.un.org/record/574726?ln=en&v=pdf>, Annex I, para. 2.

²⁸ United Nations. 2012. Letter dated 8 June 2012 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group [to Study Issues relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction] to the President of the General Assembly (A/67/95). Available at: <https://digitallibrary.un.org/record/730557?ln=en&v=pdf>, Annex, Section II, para. 29.



Jihyun Lee, International Seabed Authority



Babajide Alo, Nigeria, with Aahde Lahmiri, Morocco



L-R: Janine Coye-Felson, Belize, conferring with Juliette Babb-Riley, Barbados Delegates from Kiribati reviewing draft text



5 March 2023
View of the room during the closing plenary

Photos: The United Nations

AHOIWG from 2014 onwards,²⁹ it was incorporated into the final recommendations of the AHOIWG in 2015³⁰ and further endorsed by the Preparatory Committee.³¹

The question of how a new treaty would interact with existing instruments and institutions was one of the most difficult issues in the negotiations. This was a cross-cutting issue that arose under all four pillars of the negotiations, but one on which there were divergent views. One of the principal challenges in this context was the lack of agreement on what is meant by "not undermining."³² The academic commentary produced during the negotiations identified at least two main understandings of the concept.³³ On the one hand, "not undermining" could be applied to the mandate of an existing institution, meaning that measures should not be adopted under the 2023 Agreement if they fall within the mandate of another institution. On the other hand, "not undermining" could alternatively refer to not undermining the effectiveness of an existing instrument or institution. This would mean that further measures could be adopted if they are compatible with the objectives of existing measures developed by other organizations, even if they apply stricter standards. At the heart of the issue was the question of what powers should be given to any treaty bodies to be established under the new agreement. There were a range of options on the table.³⁴ Different views on the matter continued to be exchanged until late in the negotiations. Ultimately, a balance had to be struck depending on the issues at stake in the different parts of the text.

2.1.3 Key stages in the negotiation of the 2023 Agreement

Negotiations towards an internationally legally binding agreement were launched in 2015 with the decision of the UN General Assembly to establish a Preparatory Committee

²⁹ See United Nations. 2014. Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/82). Available at: <https://digitallibrary.un.org/record/809693?ln=en&v=pdf>. Annex, para. 41: "the need to address the relationship between a new international instrument and existing instruments was highlighted by several delegations. In that context, many delegations noted that any new international instrument should complement, and not duplicate and undermine, existing sectoral instruments and organizations at the global and regional levels, in particular [ISA], [IMO], the Food and Agriculture Organization of the United Nations and regional fisheries management organizations and arrangements." United Nations. 2014. Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/177). Available at: <https://digitallibrary.un.org/record/778768?ln=en&v=pdf>. Annex, paras 19, 31.

³⁰ United Nations. 2015. Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/780). Available at: <https://digitallibrary.un.org/record/788512?ln=en&v=pdf>, Annex, Section I, para. 1(g) noting that "the process [...] should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies."

³¹ See United Nations. Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: Chair's overview of the third session of the Preparatory Committee. Available at: https://www.un.org/depts/los/biodiversity/precom_files/Chair_Overview.pdf, Appendix 5.

³² Ibid.

³³ Scanlon, Zoe. 2017. "The Art of 'Not Undermining': Possibilities within Existing Architecture to Improve Environmental Protections in Areas beyond National Jurisdiction." Edited by Andrew Serdy. ICES Journal of Marine Science 75 (1). Oxford University Press (OUP): 405–416. doi:10.1093/icesjms/fsx209.

³⁴ See United Nations. Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: Chair's overview of the third session of the Preparatory Committee. Available at: https://www.un.org/depts/los/biodiversity/precom_files/Chair_Overview.pdf, Appendix 5 cites the three general approaches.

³⁵ United Nations. 2015. Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: resolution (A/RES/69/292). Available at: <https://digitallibrary.un.org/record/796494?ln=en&v=pdf>.

³⁶ United Nations. 2014. Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/82). Available at: <https://digitallibrary.un.org/record/809693?ln=en&v=pdf>, Section III.

³⁷ Ibid., 17.

³⁸ See United Nations. 2019. Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: note by the President (A/CONF.232/2019/6). Available at: <https://digitallibrary.un.org/record/3811328?ln=en&v=pdf>. The first draft text was presented by the President to the third session of the Conference in 2019.

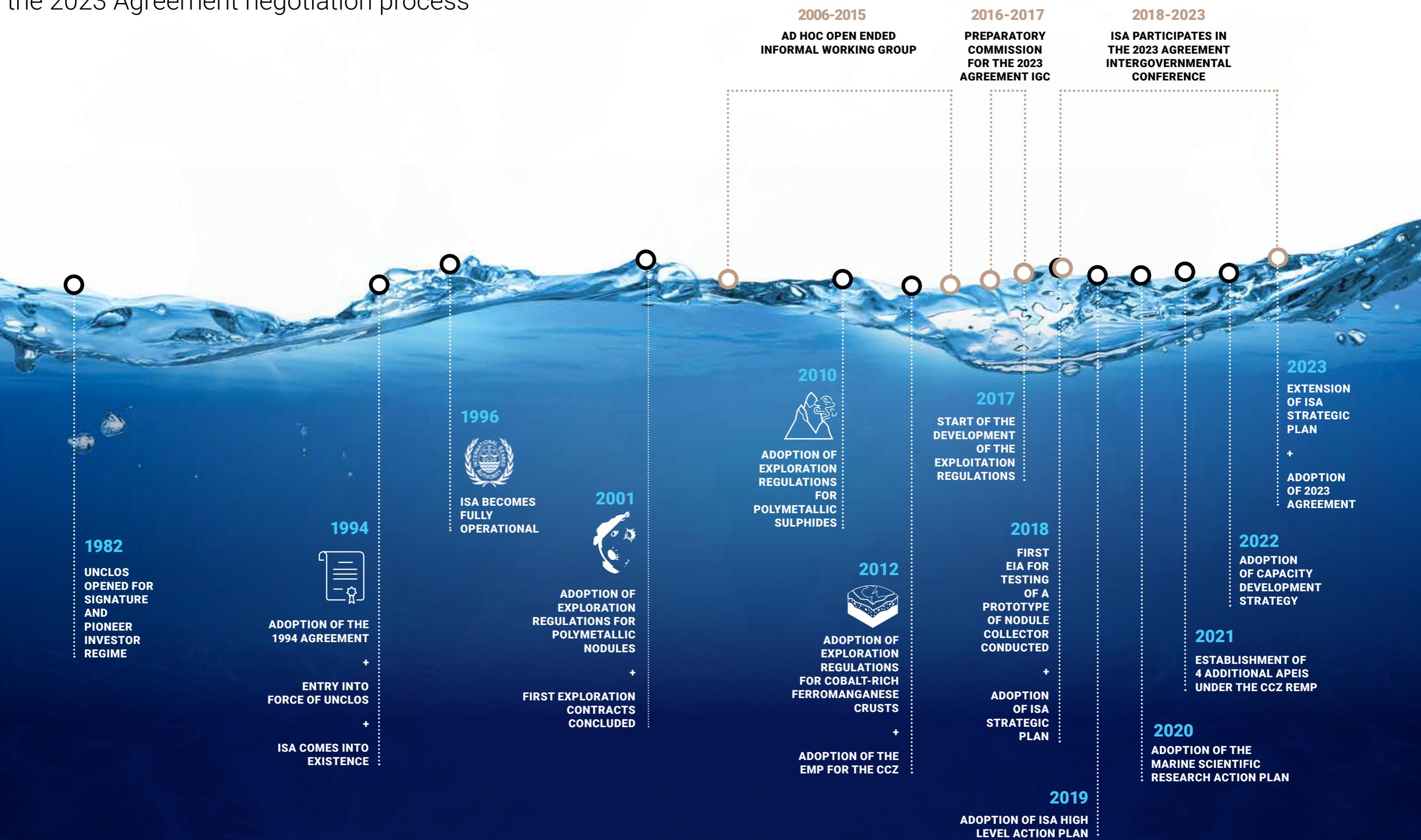
tasked with developing recommendations on elements of an internationally legally binding text.³⁵ The Preparatory Committee met four times between April 2016 and July 2017, chaired at the first two sessions by Ambassador Eden Charles (Trinidad and Tobago) and subsequently by Ambassador Carlos Sergio Sobral Duarte (Brazil). The final report of the Preparatory Committee indicated those elements of a possible treaty where there was general convergence among delegates, as well as the key issues on which there was divergence.³⁶ In particular, it highlighted the need for further discussion on "institutional arrangements and the relationship between the institutions established under an international instrument and relevant global, regional and sectoral bodies,"³⁷ which, as noted above, was a critical issue to be resolved.

The UN General Assembly approved the convening of an IGC in Resolution 72/249 of 24 December 2017. Ambassador Rena Lee (Singapore) was elected as President of the IGC at an initial organizational meeting held in April 2018. After that, the IGC held five sessions between 2018 and 2023. Negotiations largely took place in working groups on each of the four substantive topics, led by a facilitator. Significant intersessional work also took place between September 2020 and November 2021, when it was not possible for the IGC to meet in person due to the COVID-19 pandemic. As the IGC progressed, a draft text emerged,³⁸ which was the subject of broad consultation. This text was progressively refined, although it was not until the fifth session that progress on critical aspects of the negotiations began to emerge.

The text was finally agreed at the end of the resumed fifth session on 3 March 2023. However, further intersessional work was required before the text could be formally adopted at a further resumed fifth session on 19–20 June 2023. While the text was formally adopted by consensus, the Russian Federation dissociated itself from the consensus in an

Figure 1.

Comparative chronology of ISA key milestones and the 2023 Agreement negotiation process



Box 1.

Key principles underpinning Part XI of UNCLOS and the 2023 Agreement

explanation of its position following the adoption of the text.³⁹

The 2023 Agreement will enter into force 120 days after the date of deposit of the sixtieth instrument of ratification, approval, acceptance or accession.⁴⁰ In practice, the effectiveness of the 2023 Agreement will depend upon widespread acceptance. The preamble refers to the "aspiration" of universal participation, but as the experience of the other UNCLOS implementing agreements shows, this can be difficult to achieve in practice. For example, the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995 Agreement) only has 93 parties, more than 25 years after its adoption. As discussed later in this report, different memberships between the institutions established under the 2023 Agreement and the institutions established under UNCLOS, particularly ISA, could affect the implementation of the 2023 Agreement in practice.

2.2 Overarching scope, structure and status of the 2023 Agreement

2.2.1 General objective and principles of the 2023 Agreement

The general objective of the 2023 Agreement is "to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination."⁴¹ The reference to areas beyond national jurisdiction indicates the scope of the Agreement, namely the high seas and the Area,⁴² although there are limited elements of the Agreement which apply to activities within national jurisdiction where they may have adverse effects beyond national jurisdiction.⁴³

Alongside this general objective, the 2023 Agreement lays down 14 principles and approaches to guide its interpretation and

implementation.⁴⁴ Some of these principles are already found in the text of UNCLOS, including "the principle of the common heritage of humankind which is set out in the Convention" and "the freedom of marine scientific research, together with other freedoms of the high seas."⁴⁵ The recognition of these principles reinforces the strong connection between the 2023 Agreement and UNCLOS. Others reflect developments in international environmental law or related fields of international law since the conclusion of UNCLOS.⁴⁶ In this latter category, the following principles are worth highlighting:

- the polluter-pays principle⁴⁷
- the precautionary principle or precautionary approach⁴⁸
- the ecosystem approach⁴⁹
- an integrated approach to ocean management⁵⁰
- an approach that builds ecosystem resilience, including to adverse effects of climate change and ocean acidification⁵¹
- the respect, promotion and consideration of the rights of Indigenous Peoples or local communities in the conservation of biological diversity.⁵²

Not surprisingly, the principles also place a significant emphasis on equity.⁵³

The role of the general objective and principles/approaches is to guide the interpretation and implementation of the 2023 Agreement. They are aimed both at individual parties when giving effect to their rights and obligations under the 2023 Agreement, as well as at the treaty bodies to be established by the Agreement itself. Yet, as principles, they do not necessarily dictate particular outcomes that must be achieved but rather suggest considerations to be taken into account when taking action. Indeed, the principles set out in article 7 may sometimes be in tension, and they will have to be weighed and balanced on a case-by-case basis.

While these principles are aimed at the parties and treaty

³⁹ United Nations. 2023. Report of the intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction at its 5th session (A/CONF.232/2023/5). Available at: <https://digitallibrary.un.org/record/4016005?ln=en&v=pdf>. para. 29. In its explanation, the Russian Federation expressed, inter alia, that the 2023 Agreement undermined the provisions of UNCLOS and that it may allow for intrusion into the mandates of other competent international organizations.

⁴⁰ 2023 Agreement, article 68(1).

⁴¹ 2023 Agreement, article 2.

⁴² 2023 Agreement article 1(2).

⁴³ 2023 Agreement, article 28(2).

⁴⁴ 2023 Agreement, article 7.

⁴⁵ 2023 Agreement, articles 7(b)-(c). See also the principles relating to the use of best available scientific information (article 7(i)) and the principle of the non-transfer of damage, hazards or pollution (article 7(m)).

⁴⁶ See United Nations. 1993. Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992. Volume 1, Resolutions adopted by the Conference (A/CONF.151/26/Rev.1(Vol.I)). Available at: <https://digitallibrary.un.org/record/160453?ln=en&v=pdf>.

⁴⁷ 2023 Agreement, article 7(a).

⁴⁸ 2023 Agreement, article 7(e).

⁴⁹ 2023 Agreement, article 7(f).

⁵⁰ 2023 Agreement, article 7(g).

⁵¹ 2023 Agreement, article 7(h).

⁵² 2023 Agreement, article 7(k). See also article 7(j) on the use of relevant traditional knowledge of Indigenous Peoples and local communities.

⁵³ 2023 Agreement, articles 7(d), (m), and (n).

Part XI of UNCLOS

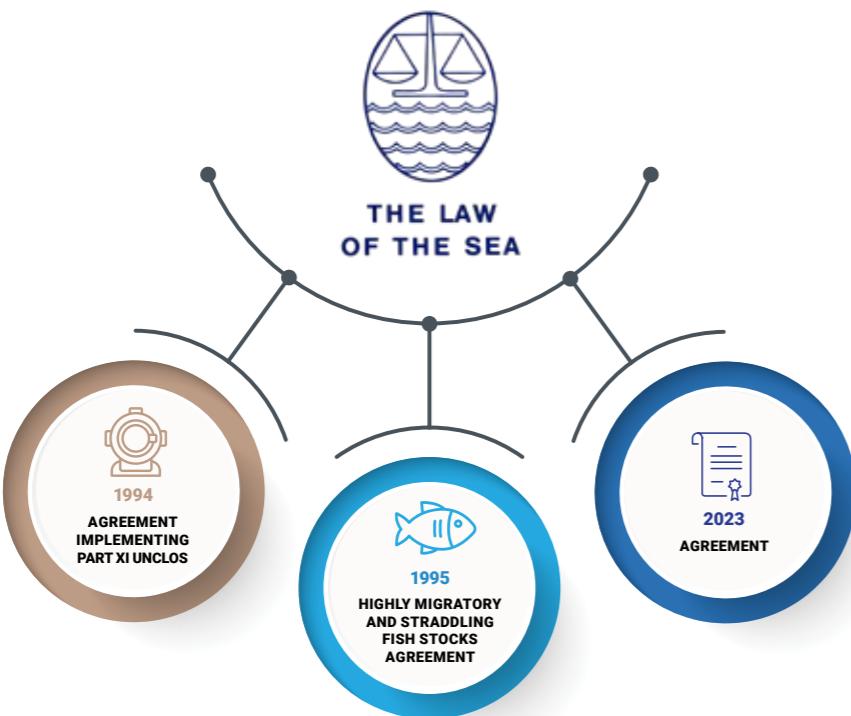
- Common heritage of humankind
- Benefit of humankind
- Equity and fair and equitable sharing of benefits, non-appropriation
- No claim or exercise of sovereignty or sovereign rights over the Area and its resources
- Use of the Area exclusively for peaceful purposes
- International cooperation and mutual understanding
- Participation of developing States in activities in the Area
- Protection of rights and legitimate interests of coastal States
- Reasonable regard for activities in the marine environment protection of human life
- Precautionary approach
- Use of the best available scientific information and best environmental practices
- Preservation of archaeological and historical objects, transparency
- Security of tenure of contracts
- Evolutionary approach

2023 Agreement

- Polluter pays principle
- Principle of the common heritage of humankind which is set out in UNCLOS
- Freedom of marine scientific research, together with other freedoms of the high seas
- The principle of equity and fair and equitable sharing of benefits
- The precautionary principle or precautionary approach, as appropriate
- Ecosystem approach
- Integrated approach to ocean management
- An approach that builds ecosystem resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services
- The use of best available science and scientific information
- The use of relevant traditional knowledge of Indigenous peoples and local communities, where available
- The respect, promotion and consideration of obligations relating to the rights of Indigenous Peoples or of, as appropriate, local communities
- The non-transfer of damage or hazard from one area to another and the non-transformation of one type of pollution into another
- Full recognition of the special circumstances of small island developing States and of least developed countries
- Acknowledgement of the special interests and needs of landlocked developing countries

Figure 2.

The 2023 Agreement in the context of The United Nations Convention on the Law of the Sea



bodies established under the 2023 Agreement, they are also likely to influence the interaction between the 2023 Agreement and other instruments, frameworks and bodies. In this respect, it is worth noting that even though many of the principles and approaches in the 2023 Agreement have emerged since the conclusion of UNCLOS, many of these principles are nevertheless already guiding the implementation of UNCLOS and the work of specific institutions, including ISA, established by UNCLOS itself (section 4.4.1 below).

2.2.2 Relationship with UNCLOS and the 1994 Agreement

The 2023 Agreement has been described as the “third implementing agreement” under UNCLOS,⁵⁴ thereby joining the 1994 Agreement and the 1995 Agreement in this category of instruments. In some respects, the 2023 Agreement is closer in form to the 1995 Agreement, as it is a self-standing treaty to which any State or regional economic integration organization may become a party,⁵⁵ regardless of whether they are a party to UNCLOS.⁵⁶ As such, the 2023 Agreement does not formally

modify or amend UNCLOS. It strictly applies inter partes, meaning that the rights and obligations of States Parties to UNCLOS that do not become a party to the 2023 Agreement do not change.⁵⁷ This understanding is in line with the basic principle of the law of treaties that “a treaty does not create either obligations or rights for a third State or third organization without the consent of that State or that organization.”⁵⁸

Nevertheless, the close relationship between the 2023 Agreement and UNCLOS is reflected in the general objective of the Agreement “to ensure the conservation and sustainable use of marine biological diversity of ABNJ, for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination” (emphasis added).⁵⁹ Furthermore, like the other implementing agreements to UNCLOS, the 2023 Agreement underlines its connection with UNCLOS by providing that it is to be ‘interpreted and applied in the context of and in a manner consistent with the Convention’.⁶⁰ While the final text only refers to UNCLOS, it can be read as implicitly covering the 1994 Agreement, given

⁵⁴ See United Nations. 2023. Compilation of statements made by delegations under item 5, “General exchange of views”, at the further resumed 5th session of the Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, as submitted by 30 June 2023 (A/CONF.232/2023/INF.5). Available at: <https://digitallibrary.un.org/record/4017335?ln=en&v=pdf>, for statements by the African Group, Australia, Greece and the Republic of Korea.

⁵⁵ 2023 Agreement, article 66.

⁵⁶ United Nations. 1994. Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. Available at: https://www.un.org/depts/los/convention_agreements/texts/agreement_part_xi/agreement_part_xi.htm, article 4(2). In contrast, under the 1994 Agreement, a State or entity can only become a party where they have previously established their consent to be bound by UNCLOS.

⁵⁷ 2023 Agreement, article 5(3).

⁵⁸ United Nations. 1986. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf, article 34. United Nations. 1969. Vienna Convention on the Law of Treaties. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, article 34.

⁵⁹ 2023 Agreement, article 2.

⁶⁰ 2023 Agreement, article 5(1).

that “the provisions of [the 1994] Agreement and Part XI shall be interpreted and applied together as a single instrument.”⁶¹ This principle of compatibility means that the 2023 Agreement must always be interpreted taking into account the relevant provisions of UNCLOS, which continue to be applicable to the parties. As discussed in section 4 below, this has significant implications for understanding the relationship between the treaty bodies established by the 2023 Agreement and ISA, as the latter is established by UNCLOS and the 1994 Agreement.

2.2.3 Duty of cooperation and institutional arrangements

The centrality of international cooperation in the regime to be established under the 2023 Agreement is reflected both in its general objectives and its operative provisions, as it is in many other parts of the law of the sea.⁶² Parties to the 2023 Agreement will be under a direct duty to cooperate in the furtherance of the Agreement’s objectives.⁶³ Cooperation will also take place through a variety of institutional arrangements.

First and foremost, the 2023 Agreement establishes its institutional framework through which cooperation for the conservation and sustainable use of the marine biodiversity of ABNJ may take place. At the centre of this institutional framework is the Conference of the Parties (COP), which has a general mandate to review and evaluate the implementation of the Agreement.⁶⁴ The COP will eventually be supported by a secretariat,⁶⁵ a Scientific and Technical Body (STB),⁶⁶ an Access and Benefit-Sharing Committee,⁶⁷ a Capacity-Building and Transfer of Marine Technology Committee⁶⁸ and an Implementation and Compliance Committee.⁶⁹ The COP may also establish further subsidiary bodies to support the implementation of the Agreement.⁷⁰ The powers of the COP and subsidiary bodies in relation to each part of the Agreement will be discussed in section 3 below.

Alongside the establishment of bespoke institutional arrangements, the 2023 Agreement also recognizes that cooperation concerning the conservation and sustainable

use of the marine biodiversity of ABNJ may also take place through other institutions. In this respect, the objective of not undermining instruments, frameworks and bodies, discussed above as a key principle in the negotiations, is explicitly integrated into article 5(2) of the 2023 Agreement, which provides:

“This Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies.”

The incorporation of this principle is significant because it converts the political objective contained in the negotiating mandate of the IGC into a legal norm that influences the contours of rights and obligations under the 2023 Agreement. While article 5(2) applies to the whole Agreement, it is particularly applicable to the interpretation of the powers conferred on the COP and other treaty bodies when carrying out their functions in the different parts of the Agreement.

The language of article 5(2) is ambiguous. Still, it is important to remember that it must also be read alongside more specific provisions in each part of the Agreement that regulate in more detail the relationship between the treaty bodies to be established by the Agreement and other instruments, frameworks and bodies. These provisions will be analysed in more detail in section 3 below.

Furthermore, the principle of not undermining in article 5(2) also includes a positive obligation to promote “coherence and coordination”⁷¹ with competent institutions, frameworks and bodies. This additional element emphasizes the need for the treaty bodies to be established by the 2023 Agreement to actively engage with existing international institutions in the pursuit of the objectives of the 2023 Agreement. In other words, it highlights a procedural dimension of the principle of not undermining other instruments, frameworks and bodies.

This need for active engagement is reinforced by article 8(1) which calls on the parties to cooperate through “strengthening

⁶¹ 1994 Agreement, article 2(1). During the process, ISA had suggested that this text should be amended to expressly include reference to the 1994 Agreement; ISA. 2022. Statement made by the Secretariat of the International Seabed Authority on Cross-cutting issues on Article 4, paragraph 1. Available at: https://www.isa.org.jm/wp-content/uploads/2022/04/statement_on_cross-cutting_issues.pdf. This statement was reiterated by the ISA Secretary-General at the resumed fifth session of the Intergovernmental Conference, 27 February 2023. ISA. 2023. Statement by the Secretary-General of the International Seabed Authority at the resumed fifth session of the Intergovernmental Conference for the conclusion of an internationally legally binding instrument on the conservation and sustainable use of biological diversity in areas beyond national jurisdiction. Available at: https://www.isa.org.jm/wp-content/uploads/2023/03/ISA_Statement_IGCS_resumed_online_version-27.02.23.pdf. The Secretary-General recognized that “even though by necessity, the provisions of Article 2(1) of the 1994 Agreement are binding upon those 151 States that are party to it (as well as any States that may become a party in the future), it is suggested that a specific reference to the 1994 Agreement in [what would become Article 5 of the 2023 Agreement] would support the objective of universal participation in a single regime created by Part XI of UNCLOS and the 1994 Agreement and avoid any possibility of a lack of legal certainty in the interpretation and application of the [2023 Agreement].”

⁶² See UNCLOS, article 138, in relation to the Area: “The general conduct of States in relation to the Area shall be in accordance with the provisions of this Part, the principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security and promoting international cooperation and mutual understanding” (emphasis added).

⁶³ 2023 Agreement, article 8(1).

⁶⁴ 2023 Agreement, article 47(6).

⁶⁵ 2023 Agreement, article 50.

⁶⁶ 2023 Agreement, article 49.

⁶⁷ 2023 Agreement, article 15.

⁶⁸ 2023 Agreement, article 46.

⁶⁹ 2023 Agreement, article 55.

⁷⁰ 2023 Agreement, article 47(d).

⁷¹ 2023 Agreement, article 5(2).

and enhancing cooperation with and promoting cooperation among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.⁷² This provision foresees the strengthening of relationships not only between the treaty bodies to be established under the Agreement and other external institutions, but also between those other institutions. It is this form of inter-institutional cooperation that is demanded by “an integrated approach to ocean management”, as indicated in the general principles of the Agreement⁷³ and the success of the Agreement in addressing biodiversity loss “in a coherent and cooperative manner”⁷⁴ will depend to a large extent on the establishment of effective networks between a wider range of competent institutions, involving prior consultation before decisions are taken.

How these general duties are operationalized will in part depend on how the parties collectively decide to utilize the powers conferred on the treaty bodies established under the Agreement, but individual parties also bear an obligation to fulfil their duty of cooperation by “endeavour[ing] to promote, as appropriate, the objectives of this Agreement, when participating in decision-making under other relevant legal instruments, frameworks, or global, regional, subregional, or sectoral bodies.”⁷⁵ The drafting of this obligation as a duty to “endeavour” recognizes that not all of the members of these other relevant bodies will be a party to the 2023 Agreement and the will of the parties to the 2023 Agreement cannot be imposed on non-parties. Indeed, the drafters were keen to preserve the autonomy of non-parties by explicitly recognizing that “the legal status of non-parties to the Convention or any other related agreements with regard to those instruments is not affected by this Agreement.”⁷⁶ Other institutions remain autonomous and their mandates will not be altered by the entry into force of the 2023 Agreement. Therefore, unless and until there is universal participation in the 2023 Agreement, parties to the Agreement must try to persuade non-parties to adopt measures that are consistent with the Agreement.⁷⁷

2.2.4 Dispute settlement and advisory jurisdiction

The 2023 Agreement provides for the compulsory settlement of disputes concerning the interpretation or application of the Agreement in accordance with Part XV of UNCLOS.⁷⁸ This follows the model of dispute settlement of the 1995 Agreement. Compulsory dispute settlement provides an important means of ensuring that parties comply with their obligations under the 2023 Agreement,⁷⁹ as well as a means of achieving an independent and authoritative interpretation of its terms. Yet, the jurisdiction conferred on courts and tribunals in this connection is limited. To ensure that the Agreement is not used as a basis to initiate litigation in disputes arising under other instruments applicable to ABNJ, the 2023 Agreement explicitly provides that “the provisions of this article shall be without prejudice to the procedures on the settlement of disputes to which Parties have agreed as participants in a relevant legal instrument or framework, or as members of a relevant global, regional, subregional or sectoral body concerning the interpretation or application of such instrument or framework.”⁸⁰ In essence, this provision simply confirms that the dispute settlement regime only applies to disputes regarding the interpretation or application of the Agreement, but it does not solve the question of how a court or tribunal should disentangle disputes arising concurrently under more than one instrument. This is a question that has received different answers from courts and tribunals in the past,⁸¹ and it may largely depend upon the particular characterization of a dispute in the individual circumstances of a case.

One innovation in the dispute settlement provisions of the 2023 Agreement is the conferral of power on the COP to request an advisory opinion from the International Tribunal for the Law of the Sea (ITLOS) “on a legal question on the conformity with this Agreement of a proposal before the [COP] on any matter within its competence.”⁸² This mechanism may be a means of clarifying some key provisions in the Agreement, but it is limited to situations when the COP is dealing with proposals before them. This is likely to be most relevant in the context of ABMT (section 3.2 below). In further recognition of the complex institutional landscape in ABNJ, this provision has also been drafted in such a way as to protect the competence of other relevant institutions by providing that “a request [...]”

⁷² 2023 Agreement, article 8(1).

⁷³ 2023 Agreement, article 7(g).

⁷⁴ 2023 Agreement, preamble.

⁷⁵ 2023 Agreement, article 8(2).

⁷⁶ 2023 Agreement, article 5(3).

⁷⁷ See 2023 Agreement, article 62: “Parties shall encourage non-parties to this Agreement to become Parties thereto and to adopt laws and regulations consistent with its provisions.”

⁷⁸ 2023 Agreement, article 60.

⁷⁹ See 2023 Agreement, article 55 on the provision for an Implementation and Compliance Committee.

⁸⁰ 2023 Agreement, article 60(8).

⁸¹ See Klein, Natalie, and Kate Parlett. 2022. Judging the Law of the Sea. Oxford University Press, pgs. 48-63. A discussion of the different views taken in the case law on this topic, and particularly reactions to the *Southern Bluefin Tuna Arbitration*, Award on Jurisdiction and Admissibility of 4 August 2000. Questions have also arisen about the interaction between UNCLOS dispute settlement and dispute settlement in other areas of international law. In the *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* between Chile and the EU, claims were brought to a Special Chamber of ITLOS at the same time as a related case was brought to a panel of the World Trade Organization. Both cases were amicably settled before decisions were made on the merits.

⁸² 2023 Agreement, article 47(7).

shall not be sought on a matter within the competences of other global, regional, subregional or sectoral bodies [...].”⁸³ This clearly prevents the COP from requesting an advisory opinion on the exercise of powers by independent institutions established under other treaties. Depending on how broadly it is interpreted, it may also extend to preventing a request relating to a proposal where the COP shares powers with other bodies.

2.2.5 Overarching structure of the 2023 Agreement

The 2023 Agreement has 76 articles in 12 parts, as well as two annexes. The main substantive provisions of the Agreement are contained in four distinct parts of the Agreement, each reflecting an element of the package underpinning the negotiations. Parties must accept all parts of the Agreement. Reservations may not be made unless expressly permitted.⁸⁴

Part II of the Agreement is concerned with the fair and equitable sharing of benefits arising from activities with respect to marine genetic resources and the generation of knowledge, scientific understanding and technological innovation.⁸⁵ Parts III and IV relate more directly to the conservation and sustainable use of marine biological diversity by calling for action to establish a comprehensive system of ABMT⁸⁶ and to ensure the carrying out of EIA and monitoring of activities that may have an impact on the marine biological diversity of ABNJ. Part V of the Agreement is concerned with the development of marine scientific and technological capacity with regard to the conservation and sustainable use of marine biodiversity in ABNJ. Indeed, this is a theme that runs throughout the other parts of the Agreement, all of which emphasize the need to develop capacity and support developing States.⁸⁷ The following section will subject each of these substantive parts to a more detailed analysis.

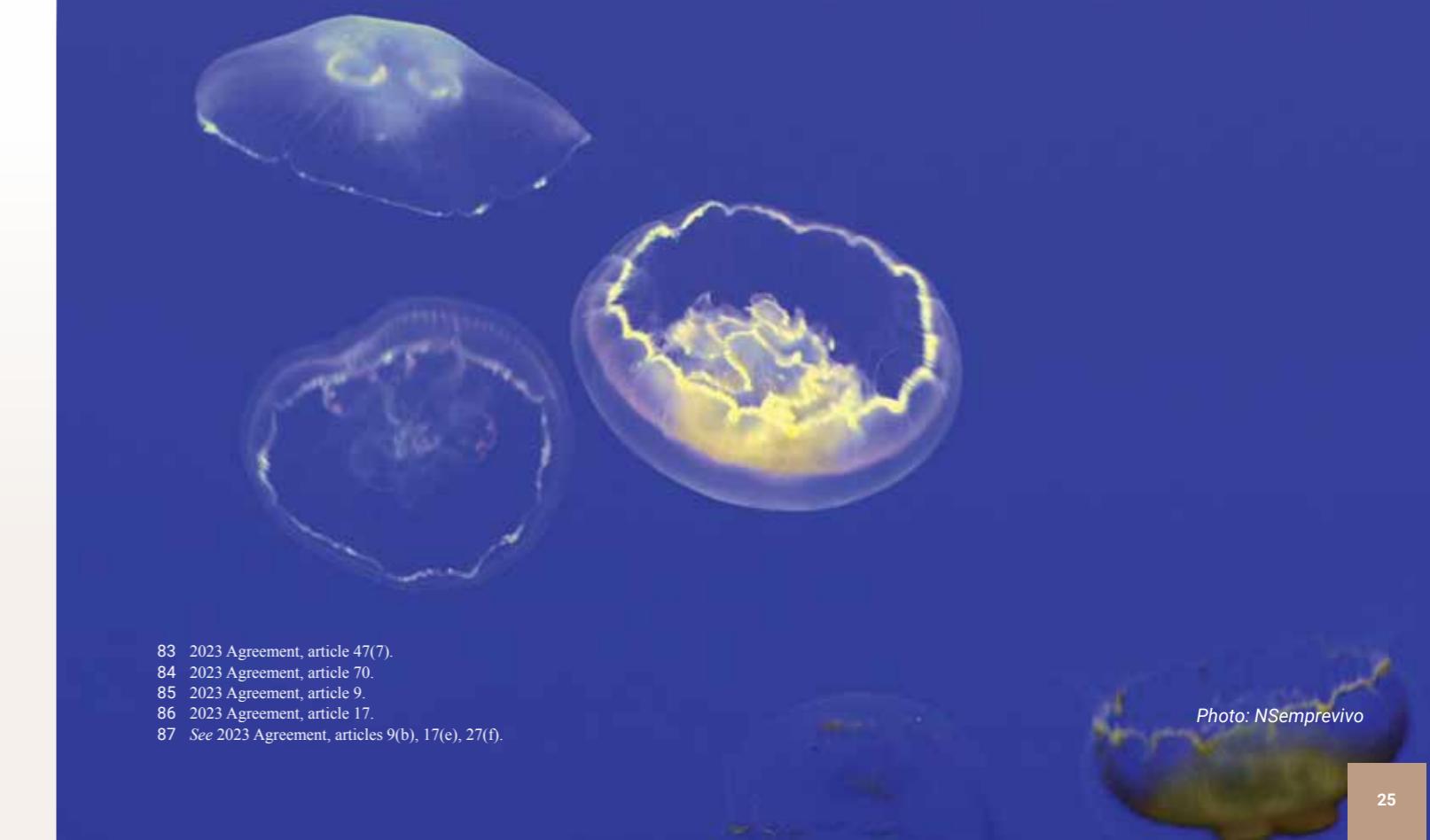


Photo: NSemprevivo

3. Analysis of the substantive provisions of the 2023 Agreement

3.1 Marine genetic resources: analysis of key provisions

3.1.1 Objectives

The primary objectives of Part II of the 2023 Agreement are “the fair and equitable sharing of benefits arising from activities with respect to marine genetic resources and digital sequence information on marine genetic resources of [ABNJ]” and the building of capacity to enable developing countries to carry out such activities.⁸⁸ More generally, it aims to promote “the generation of knowledge, scientific understanding and technology innovation, including through the development and conduct of marine scientific research⁸⁹ and the development and transfer of marine technology.⁹⁰

3.1.2 Scope and definitions

Part II of the Agreement is primarily directed at the regulation of “activities with respect to marine genetic resources of [ABNJ].”⁹¹ Understanding this term is, therefore, critical to understanding the overall scope of Part II.

In the first place, “marine genetic resources” are defined as “any material of plant, animal, microbial or other origin containing functional units of heredity of actual or potential value.”⁹² This definition is largely based upon the meaning ascribed to genetic resources under the Convention on Biological Diversity (CBD).⁹³ The 2023 Agreement does not give a broader definition of what is meant by “activities with respect to marine genetic resources.” Given the centrality of this term for the application of Part II of the 2023 Agreement, this ambiguity is potentially problematic and an issue that will have to be resolved as the provisions of this Part are operationalized through future decisions of the COP. One question that arises is when activities fall under the regime to be established by Part II of the Agreement.

In general, the text would seem to point to a broad application. Firstly, the Agreement tends to refer simply to the “collection” or “sampling” of marine genetic resources without specifying the precise nature of the activity concerned.⁹⁴ While much of the discussion leading up to the Agreement centred around “bioprospecting” as an activity, this is not a term that is ultimately used in the Agreement, in part because of the challenges in distinguishing between “bioprospecting” and marine scientific research more generally.⁹⁵ Rather, the final text suggests that there might be multiple “purposes for which [...] resources will be collected,”⁹⁶ indicating a broad scope of application. A broad interpretation is also supported by the object and purpose of the Part, which is not limited to generating financial benefits from the utilization of marine genetic resources but includes the generation of knowledge more generally. Finally, the decision of the drafters to explicitly exclude fishing and fishing-related activities⁹⁷ and military activities⁹⁸ from the scope of Part II could further support a broad application of its provisions in accordance with the general interpretative principle of *expressio unius est exclusio alterius*. On this basis, unless an activity falls within an express exclusion, Part II can be conceived as applying broadly to any activity involving the collection or sampling of biological material from ABNJ by natural or juridical persons operating under the jurisdiction of a party,⁹⁹ regardless of the purpose of such collection. At the same time, given the need for advance notification, the provisions would seem to be aimed at activities where the collection of marine genetic resources is an intentional and integral part of what is being proposed. What implications such an application will have for ISA and contractors involved in activities in the Area will be considered in section 4.3.3 below.

In addition to the in situ collection of marine genetic resources, the application of Part II also expressly encompasses the generation of digital sequence information (DSI) on relevant marine genetic resources¹⁰⁰ and the subsequent utilization of relevant marine genetic resources or DSI.¹⁰¹ Utilization for these purposes is defined as the conduct of “research and development on the genetic and/or biochemical composition



of marine genetic resources, including through the application of biotechnology.”¹⁰²

In terms of temporal scope, the 2023 Agreement will apply to any activities with respect to marine genetic resources collected after the entry into force of the Agreement and DSI generated after entry into force of the Agreement.¹⁰³ However, the Agreement also applies to the utilization of marine genetic resources and DSI collected or generated before entry into force unless a party makes a declaration excluding such application.¹⁰⁴ Therefore, benefits arising from research or development of genetic material conducted before the entry into force of the Agreement may still be covered by the benefit-sharing requirements of Part II. However, it will depend on how many States make use of the option to restrict the application of the treaty.

3.1.3 Key obligations and procedures

There was some debate during the negotiations of the Agreement as to whether marine genetic resources should be considered as the common heritage of humankind or whether their access should be regulated as a high seas freedom.¹⁰⁵ This issue is side-stepped by the final text, which instead recognizes that such activities “are in the interests of all States and for the benefit of humanity, particularly for the benefit of advancing the scientific knowledge of humanity and promoting the sustainable use of marine biological diversity.”¹⁰⁶ The assumption of the Agreement is that any State may carry out activities with respect to marine genetic resources¹⁰⁷ with no need for prior approval at the international

level. Still, certain key obligations must be satisfied both before and after accessing these resources. Thus, parties must ensure advance notification through the Clearing-House Mechanism of any proposed in situ collection of marine genetic resources,¹⁰⁸ as well as the sharing of additional information following collection¹⁰⁹ and upon subsequent utilization.¹¹⁰ In addition, samples of marine genetic resources and related DSI must be deposited in publicly accessible repositories and databases.¹¹¹ A standard batch identifier will be allocated to each activity notified to the Clearing-House Mechanism¹¹² in order to enhance traceability.

A major ambiguity in the Agreement is which party is responsible for ensuring that information is shared through the Clearing-House Mechanism and that other obligations in Part II are respected. In this respect, the Agreement simply provides that “parties shall take the necessary legislative, administrative or policy measures to ensure that information is notified to the Clearing-House Mechanism in accordance with this Part.”¹¹³ This obligation could be interpreted as applying to the State of nationality of the entities carrying out the collection of marine genetic resources, the flag State of the vessel from which the collection takes place, or some other State involved in the activity. It will be important to clarify this issue, both to promote clarity of the text but also to avoid duplication of notification. This is a topic that may be taken up by the Access and Benefit-Sharing Committee established under article 15 of the Agreement, which shall, *inter alia*, make recommendations to the COP on matters relating to the Clearing-House Mechanism.¹¹⁴ How this regime may apply in the context of activities in the Area will be considered in section 4.3.3 below.

⁸⁸ 2023 Agreement, article 9(a)-(b).

⁸⁹ 2023 Agreement, article 9(c).

⁹⁰ 2023 Agreement, article 9(d).

⁹¹ 2023 Agreement, article 10.

⁹² 2023 Agreement, article 1(8).

⁹³ CBD, 1992, Convention on Biological Diversity. Available at: <https://www.cbd.int/convention>, article 2.

⁹⁴ See 2023 Agreement, articles 10(1) and 12(2). According to article 1(4), “collection in situ” is defined as “the collection or sampling of marine genetic resources in areas beyond national jurisdiction.”

⁹⁵ See United Nations. Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction Chair’s overview of the third session of the Preparatory Committee. Available at: https://www.un.org/depts/los/biodiversity/prepcom_files/Chair_Overview.pdf, Annex I, Appendix I.

⁹⁶ 2023 Agreement, article 12(b).

⁹⁷ 2023 Agreement, article 10(2).

⁹⁸ 2023 Agreement, article 10(3).

⁹⁹ 2023 Agreement, article 11(1).

¹⁰⁰ 2023 Agreement, article 10(1).

¹⁰¹ 2023 Agreement, article 12(8).

¹⁰² 2023 Agreement, article 1(14). Biotechnology is further defined in article 1(3) as “any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.”

¹⁰³ 2023 Agreement article 10(1).

¹⁰⁴ Ibid.

¹⁰⁵ Article 7(b) refers to “the principle of the common heritage of humankind which is set out in [UNCLOS],” but this is accompanied by recognition in article 7(c) of the freedom of marine scientific research.

¹⁰⁶ 2023 Agreement, article 11(6).

¹⁰⁷ 2023 Agreement, article 11(1).

¹⁰⁸ 2023 Agreement, article 12(1)-(2).

¹⁰⁹ 2023 Agreement, article 12(5).

¹¹⁰ 2023 Agreement, article 12(8).

¹¹¹ 2023 Agreement, article 14(3).

¹¹² 2023 Agreement, articles 12(3) and 12(6).

¹¹³ 2023 Agreement, article 12(1).

¹¹⁴ 2023 Agreement, article 15(3).

Box 2.

Benefit sharing – monetary and non-monetary benefits under Part XI of UNCLOS

Forms of non-monetary benefits recognized in Part XI of UNCLOS



Training



Capacity-building



Environmental protection



Increased scientific knowledge



Expansion of world mineral resources



Preferential access rights for developing countries

In order of priority, distribution of monetary benefits are:



Administrative expenses of ISA



Economic Assistance Fund under Article 151(10)



Equitable distribution (Article 140)

An important constraint on the conduct of activities in relation to marine genetic resources in ABNJ introduced by the 2023 Agreement is the need to respect the traditional knowledge associated with marine genetic resources that is held by Indigenous Peoples and local communities. The Agreement requires that such traditional knowledge shall only be accessed with the “free, prior and informed consent or approval and involvement” of these groups and on mutually agreed terms.¹¹⁵ The notification of proposed activities will be an important mechanism for ensuring that this obligation is effectively implemented, as it provides an opportunity for relevant groups to raise their concerns about access to marine genetic resources over which they may possess traditional knowledge.

A number of other obligations concerning the fair and equitable sharing of benefits apply to activities with respect to marine genetic resources collected from ABNJ. Firstly, there is an expectation¹¹⁶ that opportunities will be available for scientists of other States, particularly scientists from developing countries, to be involved or associated with any activity concerning the in situ collection of marine genetic resources in ABNJ.¹¹⁷ There is no precise indication as to what this might entail in practice, although it might be subject to guidance prepared by the COP in coordination with the Access and Benefit-Sharing Committee.¹¹⁸ Secondly, certain non-monetary benefits arising from the collection and digital processing of marine genetic resources must be shared, including access to samples, DSI and relevant scientific data “in accordance with current international practice.”¹¹⁹ Thirdly, anyone proceeding to commercially utilize marine genetic resources collected in areas beyond national jurisdiction may be under an obligation to share monetary benefits therefrom, such as milestone payments or royalties, under a scheme to be agreed by the COP.¹²⁰ The precise effects of this new framework are still to be worked out in future negotiations. The Access and Benefit-Sharing Committee is expected to make recommendations to the COP on this matter.¹²¹ In the meantime, developed parties are expected to make direct payments into a “special fund,” which shall be used to support capacity-building projects and to assist developing country parties in implementing the Agreement.¹²²

¹¹⁵ 2023 Agreement, article 13.

¹¹⁶ Such opportunities are listed in information to be notified in advance under article 12(2)(h), although it is not clear that there is an obligation to offer such opportunities.

¹¹⁷ See 2023 Agreement, article 12(2)(h) and article 14(2)(f)-(g).

¹¹⁸ 2023 Agreement, article 15(3)(a).

¹¹⁹ 2023 Agreement, article 14(2)(a)-(b). See also article 14(3)-(4).

¹²⁰ 2023 Agreement, article 14(5)-(7).

¹²¹ 2023 Agreement, article 15(3).

¹²² 2023 Agreement, article 52(6).

¹²³ 2023 Agreement, article 15(5)-(6).

¹²⁴ See section 2.2.2 and 2.2.3 above.

¹²⁵ 2023 Agreement, article 17(a) and (c).

¹²⁶ 2023 Agreement, article 17(a).

¹²⁷ CBD. 2022. Kunming-Montreal Global Biodiversity Framework (CBD COP Decision 15/4). Available at: <https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>.

¹²⁸ See United Nations. 2023. Compilation of statements made by delegations under item 5, “General exchange of views”, at the further resumed 5th session of the Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, as submitted by 30 June 2023 (A/CONF.232/2023/INF.5). Available at: <https://digitallibrary.un.org/record/4017335?ln=en&v=pdf>, for statements by the European Union, Australia, Belgium, Greece, Iceland, Indonesia, Italy, the Federated States of Micronesia, Singapore and the United Kingdom.

3.1.4 International cooperation and relationship with other institutions

Unlike other parts of the Agreement, little is said in Part II on the relationship between the new regime on marine genetic resources and any other relevant instruments, frameworks or bodies. Rather, the Agreement simply calls for the Access and Benefit-Sharing Committee to consult and exchange information with relevant instruments, frameworks and bodies in preparing recommendations to the COP.¹²³ At the same time, it is important to remember that the operation of this Part is still subject to the overarching requirement in article 5(1) to ensure consistency with UNCLOS and article 5(2) to promote coherence and coordination with other regimes, not to undermine relevant instruments, frameworks or bodies.¹²⁴ The consultation and information exchange process led by the Access and Benefit-Sharing Committee will, therefore, be an opportunity to ensure that these requirements are respected and that any recommendations or guidelines developed by the Committee align with existing practices in specific fields of operation. The interaction of the provisions in Part II of the 2023 Agreement and Part XI of UNCLOS will be considered further in section 4 below.

3.2 Area-based management tools: analysis of key provisions

3.2.1 Objectives

Part III of the 2023 Agreement addresses the development of ABMT for the purpose of promoting the protection, preservation, restoration and maintenance of the marine biodiversity of ABNJ.¹²⁵ The objectives of Part III anticipate the development of “a comprehensive system of [ABMT], with ecologically representative and well-connected networks of marine protected areas.”¹²⁶ Some of this language mirrors elements of target 3 of the Kunming-Montreal Biodiversity Framework adopted by the COP to the CBD in December 2022.¹²⁷ Some delegates suggested that the 2023 Agreement could offer a key delivery mechanism for the achievement of this target in ABNJ.¹²⁸

Specific mention is made in the objectives of this Part of the need to strengthen the resilience of marine ecosystems to anthropogenic stressors, including those relating to climate change, ocean acidification and pollution. This recognizes the broad range of threats to marine biodiversity of ABNJ and the need for management of these areas to address cumulative pressures. It also hints at the need to minimize anthropogenic pressures on certain marine ecosystems in order to increase their resilience to ocean warming, ocean acidification and other slow-onset events related to climate change. At the same time, the development of ABMT should also support socioeconomic objectives, including, but not limited to, food security and cultural values.¹²⁹ Ultimately, a balance may need to be struck between these interests in the design of an area-based management tool and related measures.

Overall, Part II is aimed at strengthening cooperation and coordination in the use of ABMT in pursuit of the general objectives of the Agreement. Furthermore, in line with the themes of capacity-building and technology transfer that are integrated throughout the Agreement, support should be given to developing countries to ensure that they are able to contribute to developing, implementing, monitoring, managing and enforcing ABMT in ABNJ.¹³⁰

3.2.2 Scope and definitions

“Area-based management tool” is defined broadly by the Agreement to cover any “tool, including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation or sustainable use objectives [...].”¹³¹ It is clear from this definition that marine protected areas (MPAs) are only one type of area-based management tool, which can also include specific sectoral measures where they have been adopted with a particular conservation objective in mind. The key difference between an MPA and other forms of area-based management tools falling within the scope of the Agreement is that an MPA will be managed to achieve specific long-term biodiversity objectives, which requires the regulation of all relevant activities that may impinge on those objectives.¹³² MPAs, therefore, require comprehensive and coordinated regulation of activities, which has been one of the major challenges in their successful deployment as a legal

tool in ABNJ to date. However, even the designation of an MPA does not necessarily preclude resource-related activity from taking place. The 2023 Agreement recognizes that an MPA “may allow, where appropriate, sustainable use provided that it is consistent with the conservation objectives.”¹³³

3.2.3 Key obligations and procedures

The main achievement of Part III is the creation of a process through which the parties can collectively recognize areas in need of protection and take appropriate steps to promote the conservation and sustainable use of marine biodiversity therein. While the adoption of ABMT is expressed as an obligation of the COP,¹³⁴ the Agreement leaves a large degree of discretion as to which areas are selected for protection. Precisely how the powers conferred in Part III will be used will, in large part, depend upon practice adopted by the COP, which in turn may also depend upon the number and interests of the parties represented in that institution.

It is individual parties who are responsible for bringing forward proposals for ABMT.¹³⁵ The COP is at the centre of this process, as it is empowered to take “decisions on the establishment of [ABMT], including [MPAs], and related measures.”¹³⁶ The treaty text leaves open the nature of the measures that may be adopted by the COP, but it does not exclude the possibility of the COP adopting specific management measures addressing activities that may take place within the area designated for protection. The relationship between the COP and other institutions in the adoption of management measures and the application of the “not undermining” principle in this context will be considered in section 3.2.4 below.

Before making decisions on ABMT, certain procedural hurdles must be passed. In particular, any proposal must be publicized and subject to a preliminary review by the STB¹³⁷ before being consulted upon more broadly, allowing a wider range of actors, including relevant international institutions, to participate in the process and comment on the merits and other aspects of the proposal.¹³⁸ Following consultation, the proposing State shall “consider the contributions received” and “as appropriate, revise the proposal accordingly or respond to substantive contributions not reflected in the proposal.”¹³⁹ The final proposal shall then be resubmitted to the STB which shall “assess the

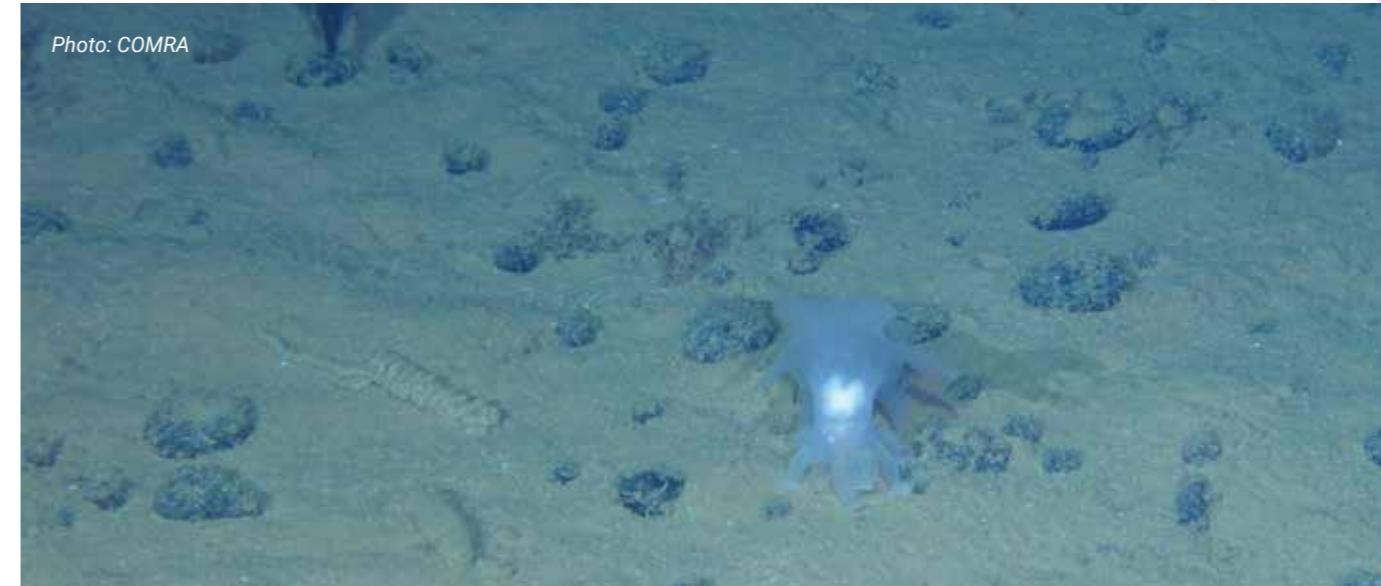


Photo: COMRA

proposal and make recommendations to the [COP].”¹⁴⁰ The COP is not bound by the recommendations of the STB. If consensus cannot be achieved,¹⁴¹ it may be decided by a three-fourths majority of the parties present and voting.¹⁴² Such decisions of the COP are binding on the parties,¹⁴³ although parties may object to a decision that will prevent it from being bound.¹⁴⁴

ABMT adopted by the COP shall be monitored and periodically reviewed by the STB.¹⁴⁵ The precise period for a review is yet to be determined. Based upon such reviews, the COP may amend, extend or revoke ABMT.¹⁴⁶ Thus, the regime for area-based management is likely to be dynamic, adapting over time as new information becomes available.

Alongside its powers to develop long-term ABMT, the COP also has related powers to adopt “emergency measures” where a natural phenomenon or human-caused disaster has caused or is likely to cause serious or irreversible harm to the marine biological diversity of ABNJ.¹⁴⁷ It would appear that this power can be utilized even if an area has not previously been designated as an area in need of protection. How the COP would respond to any such emergency in practice, and the range of potentially foreseeable emergencies that would justify such action, remains to be seen. Still, any emergency measures will be temporary and terminate at the latest two years following their entry into force.¹⁴⁸

¹²⁹ 2023 Agreement, article 17(d).

¹³⁰ 2023 Agreement, article 17(e).

¹³¹ 2023 Agreement, article 1(1).

¹³² 2023 Agreement, article 1(9) defines an MPA as “a geographically defined marine area that is designated and managed to achieve specific long-term biological diversity conservation objectives [...].”

¹³³ Ibid.

¹³⁴ 2023 Agreement, article 22(1)(a) declares “The [COP] [...] shall take decisions on the establishment of [ABMT], including [MPAs], and related measures [...]” (emphasis added).

¹³⁵ 2023 Agreement, article 19(1).

¹³⁶ 2023 Agreement, article 22(1)(a).

¹³⁷ 2023 Agreement, article 20.

¹³⁸ 2023 Agreement, article 21.

¹³⁹ 2023 Agreement, article 21(5).

¹⁴⁰ 2023 Agreement, article 21(7).

¹⁴¹ 2023 Agreement, article 23(2); a decision on whether consensus has been exhausted will be taken by a two-thirds majority vote of the parties.

¹⁴² 2023 Agreement, article 23(2).

¹⁴³ 2023 Agreement, Art 23(3); “decisions [...] enter into force 120 days after the meeting of the [COP] at which they were taken.”

¹⁴⁴ See the constraints on the objections procedure in article 23(5).

¹⁴⁵ 2023 Agreement, article 26(3).

¹⁴⁶ 2023 Agreement, article 26(5).

¹⁴⁷ 2023 Agreement, article 24.

¹⁴⁸ 2023 Agreement, article 24(4).

¹⁴⁹ 2023 Agreement, article 19(2).

¹⁵⁰ 2023 Agreement, article 19(4)(h)-(i).

overlaps are identified at an early stage. Relevant institutions must, therefore, dedicate appropriate time and resources to ensure that they can effectively participate in the consultation process under the 2023 Agreement.

Following the submission of a proposal to the secretariat, a further round of consultations will be facilitated by the secretariat, giving another opportunity for relevant institutions to comment upon the proposal in its final form.¹⁵¹ The proponent of the proposal will be invited to consider and respond to any further comments received during this consultation.¹⁵²

Ultimately, the COP will decide whether to approve a proposal and the related measures proposed in the management plan. A key question that arose in the negotiations is whether the COP could adopt measures that fall within the competence of another instrument, framework or body. Divergent views were expressed on this issue. A compromise was achieved in the final text, which would seem to offer two distinct courses of action to the COP.

Firstly, the COP may address recommendations to other instruments, frameworks or bodies. Article 22(1)(c) thus provides that the COP “[...] may, where proposed measures are within the competence of other global, regional, subregional or sectoral bodies, make recommendations to Parties to this Agreement and to global, regional, subregional or sectoral bodies to promote the adoption of relevant measures through such instruments, frameworks and bodies, in accordance with their respective mandates.”



Photo: BGR

¹⁵¹ 2023 Agreement, article 21(2)(b).

¹⁵² 2023 Agreement, article 21(5).

¹⁵³ 2023 Agreement, article 22(1)(b).

¹⁵⁴ See International Institute for Sustainable Development. 2023. Highlights and images for 20 February 2023. Available at: <https://enb.iisd.org/marine-biodiversity-beyond-national-jurisdiction-bbnj-igc5-resumed-20Feb2023>.

¹⁵⁵ 2023 Agreement, article 22(3).

It would seem that recommendations can be made without any formal interaction with the relevant institutions. However, the effects of recommendations are limited. Where recommendations are aimed directly at another instrument, body or framework, it is clear that those institutions will not be bound to follow the recommendation, and it will be for the institution concerned to decide how to respond in accordance with its decision-making procedures. Where recommendations are directed at the parties, they will then be under an obligation to promote such measures within the relevant instruments, bodies and frameworks in accordance with their obligation under article 8(2) of the Agreement (section 2.2.3 above).

Alternatively, the 2023 Agreement suggests that the COP can take decisions itself on the establishment of ABMT and related management measures. The Agreement does not explicitly preclude such decisions simply because they fall within the competence of another instrument, framework or body. It does make clear that this power can only be exercised if such a decision is “compatible with those adopted by relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies” and it is also taken “in cooperation and coordination with those instruments, frameworks and bodies.”¹⁵³ It is clear from this text that the powers of the COP are constrained, although the precise scope of its powers will depend upon how key terms in this provision are interpreted.

The first major condition in this context is the requirement that measures are compatible with measures adopted by relevant bodies. The choice of this term was the result of debates about how to delineate the interrelationship between the COP and existing institutions involved in adopting ABMT in ABNJ. A number of different formulations had been proposed during the negotiations, with various views being taken by participants.¹⁵⁴ The treaty text does not offer a clear definition of compatibility, which may need to be clarified through the practice of the COP.

Despite this ambiguity, some guidance on the role of the COP may be gleaned from the broader context of the provision. Thus, it is important to read the requirement for compatibility in light of the additional requirement to make decisions “in cooperation and coordination with [relevant] instruments, frameworks and bodies.” This cumulative requirement would seem to suggest that the COP is precluded from acting unilaterally without having engaged directly with the other competent institutions. This interpretation is reinforced by the further prescription in article 22(2) that “in taking decisions under this article, the [COP] must respect the competence of, and not undermine relevant legal instruments and frameworks and relevant global, regional, subregional, and sectoral bodies.”¹⁵⁵ While the

obligation not to undermine other instruments, frameworks and bodies simply repeats the general principle found in article 5(2) of the Agreement, the additional requirement to “respect” the competence of an institution would seem to demand a degree of deference to those institutions. Deference does not imply any role for the COP, however. For example, there may be situations where measures by the COP would be supported by another institution, particularly where an institution has limited membership and is seeking to ensure a broader application of measures to protect marine biodiversity in a particular area. It remains to be seen precisely how the COP will interpret its powers in practice. It must also be remembered that this is a topic on which the COP may seek guidance from ITLOS on whether a particular proposal falls within its competence.

Similar requirements for cooperation and coordination apply to the adoption of emergency measures by the COP. In this case, the Agreement is more explicit in providing that “measures adopted under this article shall be considered necessary only if, following consultation with the relevant legal instruments or frameworks or relevant global, regional, subregional or sectoral bodies, the serious or irreversible harm cannot be managed in a timely manner through the application of the other articles of this Agreement or by the relevant legal instrument or framework or a relevant global, regional, subregional or sectoral body.”¹⁵⁶ In other words, this provision would seem to give priority to the role of other institutions in tackling an emergency, with the COP acting as a safety net where those institutions are unable to act.

The key ingredient for the success of these procedures will be a regular interaction between the COP and other relevant instruments, bodies and frameworks.¹⁵⁷ It is envisaged that the COP will, to some extent, play a coordinating role among existing bodies. For example, other international actors will be invited to provide information to the COP on the implementation of measures that they have taken to achieve the objectives of Part III.¹⁵⁸ It is anticipated that “the [COP] shall make arrangements for regular consultations to enhance cooperation and coordination with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies with regard to [ABMT] [...] as

¹⁵⁶ 2023 Agreement, article 24(2).

¹⁵⁷ 2023 Agreement, articles 17(b) and 22(1)(b).

¹⁵⁸ 2023 Agreement, article 26(2).

¹⁵⁹ 2023 Agreement, article 22(3).

¹⁶⁰ See Johnson, David. 2012. “Can Competent Authorities Cooperate for the Common Good: Towards a Collective Arrangement in the North-East Atlantic.” Environmental Security in the Arctic Ocean, June. Dordrecht: Springer Netherlands, 333–343. doi:10.1007/978-94-007-4713-5_29, p. 341.

¹⁶¹ 2023 Agreement, article 22(4).

¹⁶² See International Institute for Sustainable Development. 2022. Summary report, 7–18 March 2022, 4th Session of the Intergovernmental Conference (IGC) on the BBNJ. Available at: <https://enb.iisd.org/marine-biodiversity-beyond-national-jurisdiction-bbnj-igc4-summary>. United Nations. 2014. Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/177). Available at: <https://digitallibrary.un.org/record/778768?ln=en&v=pdf>, Annex, para. 61.

¹⁶³ United Nations. 2014. Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/82). Available at: <https://digitallibrary.un.org/record/809693?ln=en&v=pdf>, para. 59: “It was stressed, however, that a global framework should not be used to legitimate the unilateral establishment of [MPAs] by regional organizations.”

¹⁶⁴ See e.g. OSPAR Commission. 2023. Aide Memoire, Sixth Meeting under the Collective Arrangement, para. 2.14(c).

¹⁶⁵ See United Nations. 2006. Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its 7th meeting : letter dated 14 July 2006 from the Co-Chairpersons of the Consultative Process addressed to the President of the General Assembly (A/61/156). Available at: <https://digitallibrary.un.org/record/581541?ln=en&v=pdf>, para. 7(f).

well as coordination with regard to related measures under such instruments and frameworks and by such bodies.”¹⁵⁹ The precise nature, form and frequency of such arrangements is not specified. The operationalization of this provision will be an important step in giving effect to Part III of the Agreement. In this connection, it has been identified in the relevant academic literature that a successful collaborative regime of this nature demands transparency and trust among competent authorities.¹⁶⁰ Thus, if these arrangements under the 2023 Agreement are to be effective and promote a spirit of genuine cooperation between the relevant institutions, any arrangements will have to be designed with the active involvement of those institutions. Some practical forms of cooperative arrangements between the bodies to be established under the Agreement and other institutions will be explored in section 5 below.

A distinct coordination mechanism anticipated by article 22(4) of the 2023 Agreement is the establishment of “a mechanism regarding existing [ABMT] including [MPAs], adopted by relevant legal instruments and frameworks or relevant global, regional, subregional or sectoral bodies.”¹⁶¹ What is meant by such a mechanism is particularly unclear. One option that was proposed during the discussions was a mechanism in which existing ABMT could be recognized by the COP, thereby giving them wider application.¹⁶² However, this was a controversial issue that elicited different perspectives.¹⁶³ This has been suggested as one possible objective of a mechanism under article 22(4),¹⁶⁴ but it is by no means the only way of operationalizing this mandate. The treaty text leaves the COP with some discretion on this matter or, indeed, whether to develop a mechanism at all.

While it may be broadly agreed that coordinated management between different international regimes is desirable from the perspective of biodiversity conservation,¹⁶⁵ the challenges of designing such a mechanism should not be underestimated. In particular, the COP is not able to impose any mechanism on existing institutions, and any mechanism should, therefore, be the product of cooperation between the COP and relevant institutions.

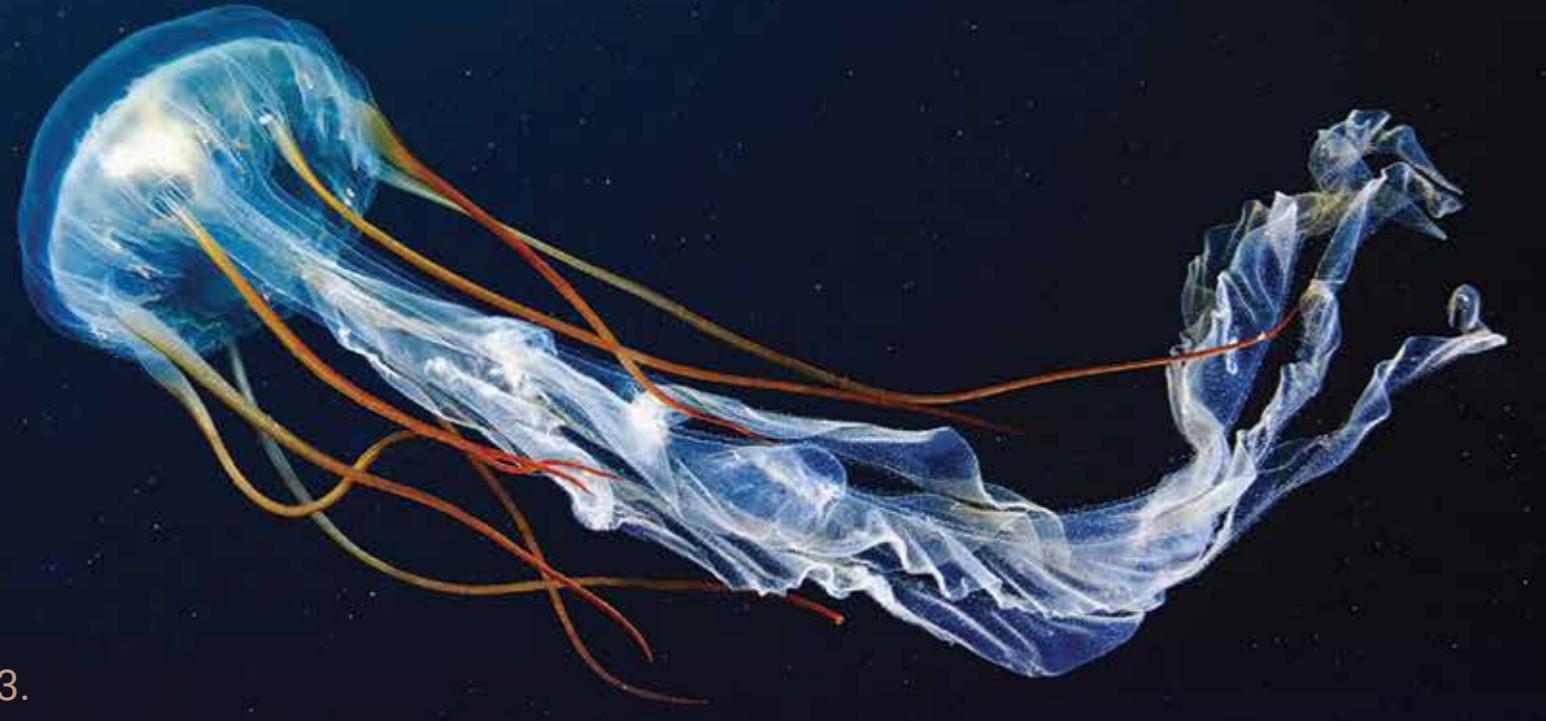


Photo: Alexander Semenov



Box 3.

Lessons learned from the North-East Atlantic: “The Collective Arrangement”

One example of an existing mechanism aimed at promoting cross-sectoral coordination in ABNJ is the so-called Collective Arrangement, formed between the OSPAR Commission and the North-East Atlantic Fisheries Commission (NEAFC) as a platform to facilitate discussion and information exchange, particularly in relation to the protection of ABNJ in the North-East Atlantic.¹⁶⁶ Participants agree to communicate information about areas in which they have adopted area-based management measures¹⁶⁷ and agree to seek to coordinate their activity “to ensure that suitable measures for the conservation and management of these areas are implemented, informed, where appropriate, by conservation objectives established for these areas.”¹⁶⁸ As a primarily administrative arrangement between the secretariats of the participating institutions, the Collective Arrangement is not legally binding, and it does not alter the mandates of the institutions involved. Rather, it is aimed at establishing regular communication between them, particularly through periodic meetings attended both by representatives of the secretariats, but also by contracting parties of the relevant treaties. The Collective Arrangement held its seventh meeting in London in February 2024.

Some participants in the Collective Arrangement have highlighted the potential for the mechanism to contribute to the objectives of the 2023 Agreement as a regional platform for collaboration and cooperation.¹⁶⁹ There are limitations to the

Collective Arrangement as it is currently constituted, however. To date, the OSPAR Commission and NEAFC are the only two organizations to have formally joined the arrangement. However, it is open to other regional and global bodies with a mandate relating to the North-East Atlantic. There is “a standing invitation to others to join the collaboration.”¹⁷⁰ It has been noted that it would be particularly important to engage with relevant global organizations with a management mandate in ABNJ and encourage them to become participants in the Collective Arrangement.¹⁷¹ In practice, a number of other institutions have attended meetings of the Collective Arrangement as observers, including ISA.¹⁷² Yet, there has been some reluctance on the part of other international institutions to join the arrangement formally. In particular, both the International Maritime Organization (IMO) and ISA have refrained from becoming full participants in the Collective Arrangement, in part due to concerns by some of their members about the role of regional seas organizations in the management of ABNJ.¹⁷³ Similar concerns had been expressed by some delegations in the discussions leading towards the 2023 Agreement.¹⁷⁴

At the same time, it has been suggested that engagement between the relevant institutions should be strengthened, in particular when it comes to future discussions on regional environmental management plans (REMPs) or the development

of future proposals for ABMT.¹⁷⁵ This is particularly the case where a regional organization proposes measures that fall within the competence of a competent global organization, such as ISA. The Collective Arrangement may provide one possible forum for such engagement. Still, the ISA Secretary-General has also proposed that the OSPAR Commission “consider a review of the process by which it consults with competent international organizations on matters engaging their competence.”¹⁷⁶ The latest meeting of the Collective Arrangement has also recognized that “notwithstanding the original aim of other organizations joining the Collective Arrangement, other ways of NEAFC and OSPAR engaging with other organizations operating in [ABNJ] should be explored.”¹⁷⁷ In light of the adoption of the 2023 Agreement, it has been acknowledged that the Collective Arrangement may have to evolve in order to address the changes in the broader legal and institutional framework for the conservation and sustainable use of biological diversity of ABNJ.¹⁷⁸ It has been agreed that “the Collective Arrangement should explore ways to bring in other organizations into the arrangement, or cooperation and collaboration with it, in some other way than formal partners.”¹⁷⁹

¹⁶⁶ See NEAFC and OSPAR. 2015. The Process of Forming a Cooperative Mechanism Between NEAFC and OSPAR. Available at: <https://www.ospar.org/documents?v=35111>.

¹⁶⁷ OSPAR Commission. 2014. Collective arrangement between competent international organisations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic, OSPAR Agreement 2014-09 (Update 2018 Annex 2, 2021, Annex 1b, 2023 Annex 1a and 1b). Available at: <https://www.ospar.org/documents?v=33030>, paras 1-2.

¹⁶⁸ Ibid., para. 5.

¹⁶⁹ OSPAR Commission. 2023. Aide Memoire, Sixth Meeting under the Collective Arrangement, para. 2.14(d). OSPAR Commission. 2024. Aide Memoire, Seventh Meeting under the Collective Arrangement. Available at: <https://www.ospar.org/documents?v=54708>, para. 2.20(a).

¹⁷⁰ See OSPAR Commission. 2019. Aide Memoire, Fifth Meeting under the Collective Arrangement, para. 1.2.

¹⁷¹ OSPAR Commission. 2023. Aide Memoire, Sixth Meeting under the Collective Arrangement, para. 2.14(e).

¹⁷² See e.g. OSPAR Commission. 2023. Aide Memoire, Sixth Meeting under the Collective Arrangement, para. 1.2.

¹⁷³ See particularly IMO. 2015. Relations with Intergovernmental Organisations – Note by the Secretariat (A/29/19(c)). ISA. 2023. Statement of the President of the Assembly of the Authority for the 28th session (ISA/28/A/18). Available at: <https://www.isa.org.jm/wp-content/uploads/2023/08/2315647E.pdf>, para. 24.

¹⁷⁴ See United Nations. 2012. Letter dated 8 June 2012 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group [to Study Issues relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction] to the President of the General Assembly (A/67/95). Available at: <https://digitallibrary.un.org/record/730557?ln=en&v=pdf>, para. 37. United Nations. 2014. Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/82). Available at: <https://digitallibrary.un.org/record/809693?ln=en&v=pdf>, Annex I, para. 18.

¹⁷⁵ See ISA. 2024. Status of Consultations between the International Seabed Authority and the OSPAR Commission, Report of the Secretary-General (ISBA/29/C/6). Available at: <https://www.isa.org.jm/wp-content/uploads/2024/03/2404119E.pdf>, para. 13.

¹⁷⁶ Ibid., para. 14. This is also an option that has been identified by some OSPAR contracting parties. See OSPAR Commission. 2023. OSPAR Decision 2000/2 on a Harmonised Mandatory Control System for the Use and Reduction of the Discharge of Offshore Chemicals (OSPAR 23/17/1-E). Available at: <https://www.ospar.org/documents?v=51286>, para. 13.21(f).

¹⁷⁷ OSPAR Commission. 2024. Aide Memoire, Seventh Meeting under the Collective Arrangement. Available at: <https://www.ospar.org/documents?v=54708>, para. 2.12.

¹⁷⁸ See ibid., para. 2.20(b) and (d). See also discussion at the OSPAR Commission. 2023. OSPAR Decision 2000/2 on a Harmonised Mandatory Control System for the Use and Reduction of the Discharge of Offshore Chemicals (OSPAR 23/17/1-E). Available at: <https://www.ospar.org/documents?v=51286>, para. 10.6.

¹⁷⁹ OSPAR Commission. 2024. Aide Memoire, Seventh Meeting under the Collective Arrangement. Available at: <https://www.ospar.org/documents?v=54708>, para. 2.20(c).

3.3 Environmental impact assessment and strategic environmental assessment: analysis of key provisions

3.3.1 Objectives

The general objective of Part IV of the Agreement is to ensure that activities are assessed and conducted to prevent, mitigate and manage significant adverse impacts on the marine environment through the elaboration of a coherent EIA framework that gives consideration to cumulative impacts.¹⁸⁰ It also promotes strategic environmental assessment,¹⁸¹ although these provisions are much weaker, as discussed below. The 2023 Agreement recognizes that the implementation of an effective EIA procedure requires that States have appropriate skills and expertise. To this end, it aims to build and strengthen the capacity of developing country parties.¹⁸²

3.3.2 Scope and definitions

EIA is defined by the Agreement as “a process to identify and evaluate the potential impacts of an activity and to inform decision-making.”¹⁸³ It is important to underline the connection between the EIA process and the process of authorizing an activity. This connection is emphasized by article 28(1), which provides that the impacts of an activity must be assessed before the activity is authorized. Indeed, the scope of the Part is even broader as it also covers monitoring and review of activities after they have been authorized. However, Part IV will only apply to planned activities, and it will not have retroactive application to activities already under way when the Agreement enters into force.

Part IV also contains a provision on strategic environmental assessment,¹⁸⁴ although this term is not defined. As discussed below, this provision would appear to apply to at least two distinct processes.

3.3.3 Key duties and procedures

The purpose of Part IV of the 2023 Agreement is to supplement the provisions of UNCLOS on EIA, monitoring and reporting, namely articles 204, 205 and 206. While there was never any doubt that these provisions established obligations of conduct for States and applied to activities in ABNJ, they

¹⁸⁰ 2023 Agreement, article 27(a), (b), (c) and (e).

¹⁸¹ 2023 Agreement, article 27(d).

¹⁸² 2023 Agreement, article 27(f).

¹⁸³ 2023 Agreement, article 1(7).

¹⁸⁴ 2023 Agreement, article 23.



Photo: NORI

lacked specificity, and there were challenges in applying these rules in a consistent way to a variety of activities taking place in ABNJ, particularly when such activities were not covered by a specific regulatory regime. The Agreement addresses these challenges by elaborating a procedural framework within which EIAs must be conducted, including the specification of screening thresholds,¹⁸⁵ consultation requirements¹⁸⁶ and minimum information that must be included in an EIA report.¹⁸⁷ The Agreement also recognizes, however, that such procedures may not be required when an activity is covered by an existing EIA regime (see section 3.3.4 below). Indeed, the 2023 Agreement does not change who bears the duty to conduct the EIA or to authorize the activity.¹⁸⁸

One of the key substantive developments in the 2023 Agreement is the emphasis on the assessment of cumulative impacts,¹⁸⁹ which are defined as "the combined and incremental impacts resulting from different activities, including known past and present and reasonably foreseeable activities, or from the repetition of similar activities over time, and the consequences of climate change, ocean acidification and related impacts."¹⁹⁰ This gives effect to well-established international guidance,¹⁹¹ but it introduces challenges to the process as it means that minimum baseline evidence from a range of activities must be incorporated into the assessment process. This is one issue on which the STB must develop standards or guidelines.¹⁹² Whereas guidelines are by their very nature voluntary,

standards developed by the STB and adopted by the COP will be incorporated into annexes of the Agreement.¹⁹³ Therefore, they will be binding on parties subject to the requirements of articles 72 and 74 of the Agreement. The development of standards introduces a dynamism to the provisions of Part IV, meaning that the precise requirements may change over time.

If an activity is authorized by a party following an EIA, the Agreement sets out obligations to monitor¹⁹⁴ and periodically review¹⁹⁵ the impacts of the activity. Consultation with States and stakeholders in the review process would appear to be encouraged but not mandated by the Agreement.¹⁹⁶

The Agreement also develops an institutional framework for the exchange of information relating to EIA and monitoring, with the Clearing-House Mechanism to be established under the Agreement providing the mechanism to do so.¹⁹⁷ This mechanism applies to all EIAs carried out for activities in ABNJ, even if they are carried out under another instrument, framework or body.¹⁹⁸

Part IV also makes provision for strategic environmental assessment of plans and programmes developed by parties in relation to activities in ABNJ carried out under their jurisdiction or control.¹⁹⁹ However, this is only an obligation to "consider" conducting such assessments and, therefore, falls short of a strict obligation to do so. Although no further details are provided as to the modalities for this sort of assessment, the

COP is required to develop guidance on the matter.²⁰⁰ At the same time, the COP may initiate what is also called a strategic environmental assessment of an area or region.²⁰¹ This would seem to refer to a distinct sort of assessment of the environmental condition of a particular area or region involving the "collation" and "synthesis" of existing information.²⁰² The conduct of such an exercise is discretionary on the part of the COP, but it is required to develop guidance on the conduct of this sort of assessment.²⁰³

3.3.4 International cooperation and relationship with other institutions

International cooperation will be central to developing the more detailed substantive guidance or standards that will frame the conduct of EIAs by parties under Part IV of the 2023 Agreement, as well as in scrutinizing EIA reports prepared by those parties. The 2023 Agreement indicates three ways in which this cooperation should involve other relevant instruments, frameworks and bodies.

Firstly, as it develops standards and guidelines for the conduct of EIA, the STB is required, as appropriate, to "collaborate with" relevant instruments, frameworks and bodies²⁰⁴ and the COP is mandated to develop mechanisms to facilitate this collaboration.²⁰⁵ Such a mechanism will be a way of identifying good practices already implemented by existing bodies, which can inform the development of guidelines and practices by the STB.

Secondly, during the consultation process, which is mandatory under article 32 of the 2023 Agreement, "relevant global, regional, subregional and sectoral bodies" are among the stakeholders expressly identified as having an interest in the process.²⁰⁶ In particular, the engagement of sectoral bodies may be one way of ensuring that relevant information concerning cumulative impacts in ABNJ can be collated or verified.

Thirdly, and perhaps most importantly for present purposes, the 2023 Agreement anticipates that there will be situations in which the rules and procedures in Part IV will not apply if

alternative EIA procedures already exist. To this end, article 29(4) seeks to avoid duplication of EIA procedures by providing that it is not necessary to carry out the EIA process under the 2023 Agreement if the potential impacts have been assessed and addressed in accordance with other applicable legal frameworks, provided that such assessment is "equivalent to the one required under [Part IV]"²⁰⁷ or the standards applied were designed to prevent, mitigate or manage potential impacts below the threshold in Part IV.²⁰⁸ This exception recognizes that it is appropriate to give preference to EIA procedures developed within specialized regimes, where EIA frameworks can be tailored to particular contexts. Specialization may include, for example, the identification of specific thresholds or the involvement of specialist expertise, depending on the nature of the activity being scrutinized.

The key point about this exception is that it only applies when the assessment carried out under another instrument, framework or body is "equivalent to" or exceeds the standards set by the 2023 Agreement. It is the "assessment" that is the focus of the comparison and must be understood as covering both the content of the report and also the process for its adoption. Indeed, during the negotiations, many delegations underlined the need for "substantive and functional equivalency of [EIAs]."²⁰⁹

Critical to determining when this exception will apply is understanding what is meant by "equivalent." The ordinary meaning of this term suggests that the alternative procedure must be "equal in efficacy."²¹⁰ In general, therefore, equivalence would seem to require a similarity of approach and effectiveness. Still, it does not demand that two processes are identical or that the process under the relevant instrument, framework or body conforms in every respect to the requirements of the 2023 Agreement.²¹¹ Rather, the test of equivalence would seem to permit some flexibility as to the precise steps that are taken. The standard of equivalence must also be interpreted in light of the general principle of "not undermining" in article 5(2) of the Agreement. Some deference to other institutions may thus be expected in this context. This is an important issue on which further clarification would be helpful. How these provisions might apply to the EIAs conducted in relation to activities in the Area will be considered in section 4.5.3 below.

¹⁸⁵ 2023 Agreement, article 30 and article 38(2)(a): the STB may develop standards or guidelines on which activities may require EIA.

¹⁸⁶ 2023 Agreement, article 32.

¹⁸⁷ 2023 Agreement, article 33.

¹⁸⁸ 2023 Agreement, articles 34-37.

¹⁸⁹ 2023 Agreement, articles 31(1)(c).

¹⁹⁰ 2023 Agreement, articles 1(6).

¹⁹¹ UNEP. 1987. Goals and Principles of Environmental Impact Assessment. Available at: https://elaw.org/wp-content/uploads/archive/unep_EIA_guidelines_and_principles.pdf.
principle 4(d); CBD. 2006. Voluntary guidelines on biodiversity-inclusive impact assessment (UNEP/CBD/COP/DEC/VIII/28). Available at: https://www.cbd.int/doc/decisions/cop_08/cop_08-dec-28-en.pdf. Annex, para. 31(f).

¹⁹² 2023 Agreement, article 38(1)(b).

¹⁹³ 2023 Agreement, article 38(3).

¹⁹⁴ 2023 Agreement, article 35.

¹⁹⁵ 2023 Agreement, article 37.

¹⁹⁶ 2023 Agreement, article 37(5) which provides that other States and stakeholders must be kept informed and "may be consulted."

¹⁹⁷ 2023 Agreement, articles 32(1), 33(5), 36(2).

¹⁹⁸ 2023 Agreement, article 29(5).

¹⁹⁹ 2023 Agreement, article 39(1).

²⁰⁰ 2023 Agreement, article 39(4).

²⁰¹ 2023 Agreement, article 39(2).

²⁰² Ibid.

²⁰³ 2023 Agreement, article 39(4).

²⁰⁴ 2023 Agreement, article 29(3).

²⁰⁵ 2023 Agreement, article 29(2).

²⁰⁶ 2023 Agreement, article 32(3).

²⁰⁷ 2023 Agreement, article 29(4)(b)(i).

²⁰⁸ 2023 Agreement, article 29(4)(b)(ii).

²⁰⁹ International Institute for Sustainable Development. 2018. Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas beyond National Jurisdiction. Available at: <https://enb.iisd.org/events/1st-session-intergovernmental-conference-ilegally-binding-instrument-under/>.

²¹⁰ Dictionaries, Oxford. 2012. Paperback Oxford English Dictionary. Oxford University Press.

²¹¹ At one stage, the further revised draft text published in June 2022 included the option that an EIA carried out under relevant legal instruments, frameworks or bodies must "conform to [...] global minimum standards and guidelines" adopted by the COP. This option was subsequently dropped in the draft agreement produced after the resumed fifth session of the conference in March 2023.

An equally important question is who decides on equivalency. In the first instance, it would seem that it is up to the party with jurisdiction or control over an activity to determine that the requirement of equivalence is met, although the party must publish the EIA through the Clearing-House Mechanism under the Agreement.²¹² This procedural step will allow some scrutiny of the party's determination. The question of compliance could then potentially be brought up through the political organs or dispute settlement provisions of the Agreement, should any other party have concerns.

A similar approach is taken to both monitoring and review, meaning that parties may be exempt from complying with the requirements of the 2023 Agreement if activities are subject to monitoring or review under another relevant legal framework.²¹³

In contrast, nothing is said about cooperation and collaboration in the conduct of strategic environmental assessments under article 39, even though it has been recognized in the academic literature on this topic that such an activity "will require a high degree of collaboration between the 2023 Agreement and the numerous global and regional bodies with responsibility for the oceans."²¹⁴ Nevertheless, the general requirement of not undermining, found in article 5(2) of the Agreement, will apply in this context. Thus, in giving effect to these provisions, the COP and STB should consider how they interact with existing bodies in gathering relevant information and the degree to which other bodies will have an opportunity to comment on any assessment as part of the process. Requirements for cooperation and collaboration could be included in guidance to be developed by the COP on strategic environmental assessment.

3.4 Capacity-building and technology transfer: analysis of key provisions

3.4.1 Objectives

Part V of the 2023 Agreement relates to capacity-building and technology transfer. In many respects, these are cross-cutting themes throughout the Agreement, as each of the other parts stresses the need for capacity-building and technology transfer in order to meet their specific objectives.²¹⁵ Indeed, the general objective of Part V is to "assist parties, in particular

developing States Parties, implementing the provisions of this Agreement and to achieve its objectives."²¹⁶ More specifically, the objectives highlight the needs of least developed countries (LDCs), landlocked developing countries (LLDCs), geographically disadvantaged States, small island developing States (SIDS), coastal African States, archipelagic States and developing middle-income countries.²¹⁷ This list covers the vast majority of UN Member States.

3.4.2 Scope and definitions

Neither capacity-building nor technology transfer are specifically defined by the Agreement. However, there is a broad definition of "marine technology" which makes it clear that it goes beyond equipment to include inter alia "information and data [...] on marine sciences" and "expertise, knowledge, skills, technical, scientific and legal know-how and analytical methods related to the conservation and sustainable use of marine biological diversity."²¹⁸ In this respect, there is arguably a blurring of capacity-building and technology transfer, reinforced by article 44 and Annex II, both of which provide non-exhaustive lists of different types of capacity-building and technology transfer without distinguishing between the two concepts.

In terms of scope, capacity-building and technology transfer under the Agreement relate specifically to the ability of States to promote the objectives of the Agreement, namely the conservation and sustainable use of marine biological diversity of ABNJ, rather than capacity-building or technology transfer more generally. Of course, there may be spillover effects on the capacity of States to achieve related objectives.

3.4.3 Key duties and procedures

The main legal effect of the 2023 Agreement is to reinforce the obligation to cooperate in capacity-building and technology transfer already embedded in UNCLOS,²¹⁹ albeit in the specific context of the conservation and sustainable use of the marine biodiversity of ABNJ. One of the key achievements of the Agreement is the development of a set of principles (referred to as modalities) to guide capacity-building and technology transfer under the Agreement.²²⁰ In particular, it emphasizes the need for capacity-building and technology transfer to be

country-driven and responsive to the needs and priorities of the recipient State.²²¹ It will be for each State to assess its own needs and priorities, either individually or with the assistance of the Capacity-Building and Transfer of Marine Technology Committee to be established under the Agreement.²²² More generally, capacity-building and technology transfer programmes should be based upon an iterative, transparent, participatory and gender-responsive process.²²³ Parties offering assistance must also avoid onerous reporting requirements in their provision of capacity-building and the transfer of technology.²²⁴

In terms of technology transfer, the Agreement promotes fair and most favourable terms, including concessional and preferential terms for developing countries,²²⁵ while recognizing at the same time the rights and interests of the holders of such technologies.²²⁶ The balance to be struck in this respect will be left to the actors concerned through the negotiation of mutually agreed terms and conditions.²²⁷

The 2023 Agreement also establishes a new institutional framework, including a specialist committee,²²⁸ which will be responsible for monitoring and reviewing progress towards the objectives set by this Part of the Agreement.²²⁹ The precise terms of references and modalities for this committee are to be decided by the COP at its first meeting.²³⁰ It is envisaged that the committee will, inter alia, review the support required by developing countries and assess any gaps in meeting those needs,²³¹ as well as evaluate the effectiveness of capacity-building and technology transfer programmes conducted under the Agreement.²³² The Agreement also establishes a series of funds that shall, inter alia, finance capacity-building projects and assist developing countries in the implementation of the 2023 Agreement.²³³ The operationalization of these funds, including agreement on governance and modalities, will be an important task for the COP at its first session.²³⁴

3.4.4 International cooperation and relationship with other institutions

Cooperation is central to the arrangements for capacity-building and technology transfer under the 2023 Agreement. Part V recognizes that capacity-building and technology transfer may be carried out directly between States or through other relevant instruments, frameworks and bodies,²³⁵ and it explicitly calls for the strengthening of cooperation in this respect.²³⁶ This part of the Agreement is, therefore, likely to influence discussions on capacity-building and technology transfer taking place in a wide variety of international institutions where there may be a relevance to the conservation and sustainable use of the marine biodiversity of ABNJ. Section 4.6 below will address the alignment of ISA within this framework.

The 2023 Agreement acknowledges the complex institutional landscape for capacity-building and technology transfer. In this context, it underlines both the need to learn lessons from activities carried out by relevant instruments, frameworks and bodies and also the importance of coordinating activities under the Agreement in order to maximize efficiency and results and to avoid duplication of effort.²³⁷ Unlike other parts of the Agreement, there is little reference to cooperation or coordination between the Capacity-Building and Transfer of Marine Technology Committee and other relevant instruments, frameworks and bodies. Rather, it is anticipated that States will report on their activities directly. It only makes a mention of inputs from regional and subregional bodies on capacity-building and technology transfer.²³⁸ How other international organizations, such as ISA, can input into the work of the Capacity-Building and Transfer of Marine Technology Committee is something that should be considered in developing its terms of reference and mandate.

The key ingredient for the success of these procedures will be regular interaction between the COP and other relevant instruments, bodies and frameworks

²¹² 2023 Agreement, article 29(5).

²¹³ 2023 Agreement, article 29(6).

²¹⁴ Hassanali, Kahlil, and Robin Mahon. 2022. "Encouraging Proactive Governance of Marine Biological Diversity of Areas beyond National Jurisdiction through Strategic Environmental Assessment (SEA)." *Marine Policy* 136 (February). Elsevier BV: 104932. doi:10.1016/j.marpol.2021.104932.

²¹⁵ 2023 Agreement, articles 9(b) and (d), 17(e), and 27(f).

²¹⁶ 2023 Agreement, article 40(a).

²¹⁷ 2023 Agreement, article 40(e).

²¹⁸ 2023 Agreement, article 1(10).

²¹⁹ UNCLOS, article 266.

²²⁰ 2023 Agreement, articles 42-43.

²²¹ 2023 Agreement, article 42(4).

²²² Ibid.

²²³ 2023 Agreement, article 42(3).

²²⁴ 2023 Agreement, article 41(3).

²²⁵ 2023 Agreement, article 43(2).

²²⁶ 2023 Agreement, article 43(4).

²²⁷ 2023 Agreement, article 43(2).

²²⁸ 2023 Agreement, article 46(1).

²²⁹ 2023 Agreement, article 46(2).

²³⁰ 2023 Agreement, article 46(2).

²³¹ 2023 Agreement, article 45(2)(b).

²³² 2023 Agreement, article 45(2)(d).

²³³ 2023 Agreement, article 52(6).

²³⁴ 2023 Agreement, article 52(10).

²³⁵ 2023 Agreement, article 41(1).

²³⁶ 2023 Agreement, article 41(2).

²³⁷ 2023 Agreement, article 42(3). See also article 41(2) calling on parties to "[strengthen] cooperation and coordination between relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies."

²³⁸ 2023 Agreement, article 45(3).

4. The role of the International Seabed Authority in relation to the conservation and sustainable use of biodiversity in areas beyond national jurisdiction

4.1 Status and objectives of the International Seabed Authority

4.1.1 Part XI of UNCLOS and the status of the International Seabed Authority

Part XI of UNCLOS designates the Area and its mineral resources as the common heritage of humankind.²³⁹ It follows that activities in the Area, defined by UNCLOS as “all activities of exploration for, and exploitation of, the resources of the Area,”²⁴⁰ are subject to a global regime of regulation. No State or person may “claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with [Part XI].” ISA is designated as “the organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area.”²⁴¹ Therefore, ISA is the international institution charged by UNCLOS with giving effect to the principle of the common heritage of [hu]mankind under Part XI. ISA acts through a number of principal organs, including the Assembly, Council and Secretariat, and subsidiary bodies, including a Finance Committee and the Legal and Technical Commission (LTC).²⁴² The headquarters of ISA is in Jamaica.

In many respects, ISA is in a unique position among the international institutions operating in ABNJ. It is the only such institution whose mandate is conferred directly by UNCLOS, which establishes a universal and uniform global regime for the regulation of activities in the Area. To this end, ISA has powers to adopt, apply and enforce rules and regulations that are binding on States and non-State actors participating in activities in the Area, with no opportunities to opt out from the regulations.

In light of this exclusive mandate, the decision-making processes of ISA have been specifically tailored to promote consensus while also ensuring that key interests in deep-seabed mining and related interests in global mineral production and consumption patterns have a say in the design and adoption of the rules that will apply. This is particularly given effect through the system of chambers, as well as the principle of equitable geographical representation, embedded in rules relating to the composition of the Council, which is the main decision-making organ of ISA.²⁴³ Striking the right

balance between these interest groups was central to the negotiation of the 1994 Agreement, which made important modifications to the framework for decision-making within ISA necessary to facilitate the widespread acceptance of UNCLOS. While procedural in nature, this delicate balance of power is at the core of the Part XI regime. It is an important safeguard in the development of future rules and regulations relating to activities in the Area. It is important to bear this in mind when considering the interrelationship between ISA and the new institutional arrangements under the 2023 Agreement.

Another unique characteristic of ISA compared to other international institutions is the manner in which it directly engages with actors carrying out activities in the Area, whether they are States, State enterprises or natural or juridical persons. Thus, it is ISA that receives applications and authorizes activities in the Area as it enters into legally binding, contractual relations to give effect to the rules and regulations agreed through ISA organs.²⁴⁴ In doing so, ISA can be considered to be acting on behalf of “[hu]mankind as a whole.”²⁴⁵ The existence of this additional layer of legally binding contractual obligations between ISA and actors involved in activities in the Area may also have implications for the manner in which ISA interacts with the new legal regime established under the 2023 Agreement, as discussed further below.

The significance of ISA is also reflected in its broad membership, coextensive with the 169 Parties to UNCLOS (168 Member States and the European Union). A further 29 States participate in the work of ISA as observers.²⁴⁶ This widespread participation demonstrates a general acknowledgement of the mandate of ISA, which has also been repeatedly recognized by the UN General Assembly.²⁴⁷ Given its wide membership and its mandate in relation to the management of the Area, ISA will have a key role to play in sharing its experience of the Part XI regime in order to enhance the realization of the objectives of the 2023 Agreement. The following sections will explore ISA’s mandate in more detail before explaining the achievements of ISA to date that are relevant to the 2023 Agreement.



Part XI of UNCLOS designates the Area and its mineral resources as the common heritage of humankind.

Photo: NORI

²³⁹ United Nations. 1982. United Nations Convention on the Law of the Sea. Available at: https://www.un.org/depts/los/convention_agreements/texts/unclos_e.pdf, article 136.

²⁴⁰ UNCLOS, article 1(3). UNCLOS, article 133(b) defines resources, for this purpose, further as “all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules.”

²⁴¹ UNCLOS, article 157(1).

²⁴² Articles 163(1) and 164 of UNCLOS also foresee the establishment of an Economic Planning Commission. 1994 Agreement, Annex, Section 1, para. 4 provides that “The functions of the Economic Planning Commission shall be performed by the [LTC] until such time as the Council decides otherwise or until the approval of the first plan of work for exploitation.”

²⁴³ 1994 Agreement, Annex, Section 3, para. 15(e).

²⁴⁴ UNCLOS, article 153(3).

²⁴⁵ UNCLOS, article 153(1).

²⁴⁶ ISA. Observers. Available at: <https://www.isa.org.jm/observers>.

²⁴⁷ United Nations. 2023. Oceans and the law of the sea: resolution (A/RES/78/69). Available at: <https://digitallibrary.un.org/record/4031021?ln=en&v=pdf>, preamble.



4.1.2 Mandate and strategic objectives of the International Seabed Authority

The overarching function of ISA is to organize and control activities in the Area²⁴⁸ in order to "foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the overall development of all countries."²⁴⁹ In this context, ISA shall develop rules, regulations, policies and procedures to promote "the development of the resources of the Area"²⁵⁰ and their "orderly, safe and rational management."²⁵¹ Furthermore, these activities must be carried out for the benefit of humankind as a whole, and ISA must promote the equitable sharing of financial and other benefits arising from activities in the Area.²⁵² At the same time, the need to take measures to ensure "the effective protection for the marine environment from harmful effects which may arise from such activities" is expressly built into the Part XI regime. ISA is given the power to adopt rules and regulations to prevent, reduce and control pollution and other hazards to the marine environment, as well

as to protect and conserve the natural resources of the Area and the prevention of damage to flora and fauna of the marine environment.²⁵³ This mandate to regulate the environmental aspects of seabed mining applies to the marine environment generally, including the water column within and beyond national jurisdiction. There is no hierarchy between these different objectives and, ultimately, ISA must balance all objectives in carrying out its functions.

The economic, social and environmental goals of ISA are further elaborated in its Strategic Plan, adopted for the period 2019-2025,²⁵⁴ which recognizes, *inter alia*, the importance of fulfilling its functions transparently, with the involvement of relevant stakeholders.²⁵⁵ In addition, the Strategic Plan recognizes that ISA has an opportunity, through the fulfilment of its mandate, to contribute to other international objectives and principles, particularly highlighting its contribution to the Sustainable Development Goals adopted by the UN General Assembly in 2015.²⁵⁶

²⁴⁸ UNCLOS, article 157(1).

²⁴⁹ UNCLOS, article 150.

²⁵⁰ UNCLOS, article 150(a).

²⁵¹ UNCLOS, article 150(b).

²⁵² UNCLOS, article 140.

²⁵³ UNCLOS, article 145.

²⁵⁴ ISA. 2018. Decision of the Assembly of the International Seabed Authority relating to the strategic plan of the Authority for the period 2019-2023 (ISBA/24/A/10). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba24_a10-en.pdf. This version of the plan will apply until the end of 2025 by virtue of a decision adopted at the 28th session in 2023. ISA. 2023. Decision of the Assembly of the International Seabed Authority on the second periodic review of the international regime of the Area pursuant to article 154 of the United Nations Convention on the Law of the Sea (ISBA/28/A/16). Available at: <https://www.isa.org.jm/wp-content/uploads/2023/08/2314823E.pdf>, para. 4.

²⁵⁵ ISA. 2018. Decision of the Assembly of the International Seabed Authority relating to the strategic plan of the Authority for the period 2019-2023 (ISBA/24/A/10). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba24_a10-en.pdf, para. 14.

²⁵⁶ Ibid., paras 7, 9-10 and Strategic Direction 1.1. The plan recognizes that the Sustainable Development Goal 14 is particularly relevant to the work of ISA, but that other goals will also have relevance to its work. See ISA. 2021. The Contribution of the International Seabed Authority to the Achievement of the 2030 Agenda for Sustainable Development. Available at: https://www.isa.org.jm/wp-content/uploads/2021/02/ISA_Contribution_to_the_SDGs_2021.pdf.

While ISA has exclusive competence in relation to activities in the Area, UNCLOS expressly recognizes the need for accommodation of other activities taking place in the marine environment. Article 147 of UNCLOS provides that "activities in the Area shall be carried out with reasonable regard for other activities in the marine environment." A reciprocal obligation also applies to other activities in the marine environment, which "shall be conducted with reasonable regard for activities in the Area."²⁵⁷ While these obligations primarily aim to resolve some practical issues of how to accommodate different activities carried out by States and other actors in ABNJ,²⁵⁸ they may also have implications for ISA as the international organization responsible for regulating activities in the Area. To this end, ISA has powers to enter into agreements with, *inter alia*, other international organizations. The ISA Strategic Plan calls for it to "establish and strengthen strategic alliances and partnerships with relevant subregional, regional and global organizations with a view to more effective cooperation in the conservation and sustainable use of ocean resources [...]."²⁵⁹

The manner in which the functions and strategic objectives of ISA align with the specific objectives under Parts II to V of the 2023 Agreement will be considered in the sections below.

4.2 Contribution of the International Seabed Authority to the negotiations of the 2023 Agreement

Since the beginning of the discussions about the need for further legal rules for the conservation and sustainable use of biodiversity of ABNJ, representatives of ISA have participated in and contributed to debates in order to ensure that the existing role and functions of ISA were well understood by negotiators. The participation of ISA was supported by many

²⁵⁷ UNCLOS, article 147(3).

²⁵⁸ See ISA. 2019. Technical Study 24: Deep Seabed Mining and Submarine Cables: Developing Practical Options for the Implementation of the 'Due Regard' and 'Reasonable Regard' Obligations under UNCLOS. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/Technical-Study-24-amazon-jan-2020-eversion.pdf>, p. 19.

²⁵⁹ ISA. 2018. Decision of the Assembly of the International Seabed Authority relating to the strategic plan of the Authority for the period 2019-2023 (ISBA/24/A/10). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba24_a10-en.pdf, Strategic Direction 1.2.

²⁶⁰ See ISA. 2018. Statement by the President of the Assembly of the International Seabed Authority on the work of the Assembly at its twenty-fourth session (ISBA/24/A/12). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba_24a_12-en.pdf, para. 24. ISA. 2019. Statement by the President of the Assembly of the International Seabed Authority on the work of the Assembly at its twenty-fifth session (ISBA/25/A/17). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba_25_a_17-e.pdf, para. 22.

²⁶¹ United Nations. 2023. Final list of participants : Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, 5th session, New York, 15–26 August 2022, 20 February–3 March 2023 and 19–20 June 2023 (A/CONF.232/2023/INF.4). Available at: <https://digitallibrary.un.org/record/4016006?ln=en&v=pdf>.

²⁶² ISA. 2019. Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (General Assembly resolution 72/249), Agenda Item 6: Cross-cutting issues, Joint statement by the International Seabed Authority (ISA) and the International Maritime Organization (IMO). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/04/isa-and-imo-4-3.pdf>.

²⁶³ See United Nations. 2010. Letter dated 16 March 2010 from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group [to Study Issues relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction] to the President of the General Assembly (A/65/68). Available at: <https://digitallibrary.un.org/record/679906?ln=en&v=pdf>, section II, paras 44, 48, 67. United Nations. 2011. Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group [to Study Issues relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction] to the President of the General Assembly (A/66/119). Available at: <https://digitallibrary.un.org/record/707498?ln=en&v=pdf>, section 2, para. 10. United Nations. 2013. Letter dated 23 September 2013 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group [to Study Issues relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction] to the President of the General Assembly (A/68/399). Available at: <https://digitallibrary.un.org/record/759458?ln=en&v=pdf>, Annex, section II, para. 18.

²⁶⁴ International Institute for Sustainable Development. 2018. Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas beyond National Jurisdiction. Available at: <https://enb.iisd.org/events/1st-session-intergovernmental-conference-igc-international-legally-binding-instrument-under>.

²⁶⁵ E.g. Mexico, *ibid.*, 5.

²⁶⁶ See United Nations. 2014. Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/177). Available at: <https://digitallibrary.un.org/record/778768?ln=en&v=pdf>, Annex, para. 55.

of its Member States, who emphasized that "the perspective of [ISA] and its mandate should be taken duly into account in the negotiations."²⁶⁰

ISA was an observer at the IGC,²⁶¹ as it had been at the Preparatory Committee established by UN General Assembly Resolution 69/292 and in the work of the AHOEWG to study issues relating to the conservation and sustainable use of marine biological diversity of ABNJ. In this capacity, the Secretary-General made statements at most IGC sessions, both within the context of the informal thematic working groups and the conference plenary. This included a joint statement made by ISA and IMO in which both organizations underlined their existing work and cooperation in relation to activities in ABNJ and emphasized their support for a legal instrument "which facilitate[s] such cooperation and which do[es] not undermine it and [is] fully consistent with rights and obligations established in UNCLOS, in particular in those areas where there are well developed and detailed frameworks."²⁶²

Alongside direct contributions made by ISA itself, other participants in the negotiation process also referred to the work of ISA in discussing the development of rules for the conservation and sustainable use of the marine biodiversity of ABNJ. Many delegations stressed the importance of recognizing the mandate of ISA in relation to ABNJ in any new international agreement.²⁶³ Furthermore, some delegations also identified the practice of ISA as a source of inspiration for new arrangements under a new treaty. For example, the G-77/China referred to the work of ISA in the context of developing an access and benefit-sharing scheme under the Agreement.²⁶⁴ This work was also highlighted as a potential model for future rules by other delegates.²⁶⁵ Some delegations even suggested at an early stage of discussions that the mandate of ISA could be expanded to cover marine genetic resources,²⁶⁶ although this proposal was not pursued.

Box 4.

The UN General Assembly and the recognition of the role and mandate of ISA in the negotiations of the 2023 Agreement

A proposal was made to work on the establishment of an institutional framework for the conservation and management of marine biodiversity beyond areas of national jurisdiction, taking into account the principles of Part XI of the Convention and the role of the International Seabed Authority.

Some delegations pointed out the importance of recognizing the jurisdiction of existing authorities that were beyond areas of national jurisdiction, in particular, the International Seabed Authority.

Letter dated 16 March 2010 from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, A/65/68, 2010.

Several delegations also recognized the importance of the responsibilities entrusted to the International Seabed Authority regarding marine scientific research and the protection of the marine environment.

Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, A/66/119, 2011

Furthermore, they recalled the importance of the responsibilities entrusted to the International Seabed Authority (the "Authority") regarding marine scientific research in, and the protection of, the marine environment of the Area, and stressed the need to take them into account. The environmental protection provisions of the exploration contracts concluded by the Authority were also highlighted.

Letter dated 23 September 2013 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, A/68/399, 2013



Box 5.

Statements of delegations during the negotiations of the 2023 Agreement

“

CARICOM considers that the International Seabed Authority (ISA) should have a role to support the monitoring of the utilization of MGR.

CARICOM, 2017

Existing funding mechanisms such as the International Seabed Authority Endowment Fund could be models to draw from.

AOSIS, 2017

The International Seabed Authority should be an essential component, as it has a mandate already recognized by UNCLOS. Capacity-building schemes such as those established by the International Seabed Authority, such as the participation of scientists from developing countries in research projects in developed countries, may also be considered.

Argentina, 2017

Building up the capacity building and technology transfer mechanism for the new instrument utilizing existing mechanisms such as a practical approach, which could be explored further. The mechanism under the International Seabed Authority and UNESCO-IOC are some examples.

AOSIS, 2016

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.

CARICOM, 2016

The Group believes that any consideration of a mechanism should take into account existing mechanisms, such as the International Seabed Authority.

G77 + China, 2016

Issues concerning the use and regulation of the seabed primarily reside with the States and the International Seabed Authority. We must ensure that we do not undermine or duplicate relevant instruments, frameworks, or bodies that already exist, including by allowing due time for such bodies to complete internal processes for addressing conservation objectives.

USA, 2016

Co-ordinate between various sectoral and regional bodies with competence over activities in ABNJ, to ensure they are formally aware of, and can have an input into, each other's decisions e.g., International Maritime Organization (IMO), RFMOs and International Seabed Authority (ISA) and regional seas organizations.

IUCN, 2016

”



The work of ISA was also cited by delegates as a source of guidance for developing provisions on EIA²⁶⁷ and strategic environmental assessment.²⁶⁸ In addition, the capacity-building programmes of ISA were invoked by many delegates as an example of good practice,²⁶⁹ with G-77/China cautioning that the development of new treaty rules on this subject should not undermine or duplicate existing provisions by ISA.²⁷⁰ The following sections will explore in more detail how the work of ISA may contribute to the objectives of the 2023 Agreement, as finally agreed and what the consequences of the Agreement are for the Part XI regime.



Photo: The United Nations

4.3 Contribution of the International Seabed Authority to the objectives of the 2023 Agreement in relation to marine genetic resources

4.3.1 Mandate of the International Seabed Authority

The primary mandate of ISA is directed at the organization and control of activities relating to the exploration and exploitation of mineral resources of the Area, which means that regulating access to marine genetic resources does not fall directly

under its competence. At the same time, as discussed below, there are elements of ISA's work that may interface with Part II of the 2023 Agreement, particularly when it comes to the generation of information about deep-seabed ecosystems as part of the exploration and exploitation processes and the dissemination of results and analysis from such activities.

It is widely believed that an adequate understanding of marine ecosystems and the potential effects of deep-seabed mining on the marine environment of the Area is necessary in order to develop a robust regulatory regime for deep-seabed mining. To this end, the collection and sharing of environmental data is addressed in the requirements imposed on contractors during the exploration phase of their activities. Indeed, UNCLOS dictates that "exploration should be of a sufficient duration to permit a thorough survey of the specific area."²⁷¹ It assumes the transfer of any data necessary for ISA to exercise its mandate effectively.²⁷²

In addition, ISA is required more broadly to "promote and encourage the conduct of marine scientific research in the Area, and shall coordinate and disseminate the results of such research and analysis when available."²⁷³ This provision anticipates that ISA will facilitate research by other actors and play a key role in making the results of such research broadly available. Indeed, this mandate was identified as one of the early priorities for ISA by the 1994 Agreement.²⁷⁴ All States have a right to conduct marine scientific research in the Area,²⁷⁵ but ISA has a specific role to foster and facilitate such research under UNCLOS. This need to "continue to promote and encourage the conduct of marine scientific research with respect to activities in the Area [...]"²⁷⁶ is further elaborated in the ISA Strategic Plan.

ISA may even directly carry out "marine scientific research concerning the Area and its resources" or enter into contracts to that end.²⁷⁷ This mandate is broad, and it goes beyond research concerning deep-seabed mineral resources. However, it permits wider research into the Area, which could include research into the biodiversity of the Area.

Regardless of how it is conducted, any research activity carried out in the Area is subject to the general principles set out in Part XI of UNCLOS, as well as related provisions in Part



Photo: Ifremer

XIII. In particular, the regime for marine scientific research in the Area requires that research shall be carried out "for the benefit of [hu]mankind as a whole."²⁷⁸ To further international cooperation to this end, UNCLOS requires parties to "ensur[e] that programmes [of marine scientific research] are developed through ISA or other international organizations as appropriate for the benefit of developing States and technologically less developed States."²⁷⁹ Specific examples include strengthening their research capabilities, training their personnel and fostering their employment in research in the Area.²⁸⁰ Furthermore, parties and ISA are under an obligation to cooperate in promoting the transfer of scientific knowledge relating to activities in the Area so that all States Parties may benefit therefrom.²⁸¹ This obligation must also be read in light of the provisions of Part XIII of UNCLOS, particularly articles 243 and 244, concerning the creation of favourable conditions for the conduct of marine scientific research and the publication and dissemination of information and knowledge of the results from marine scientific research. Opportunities for developing States to take part in research activities under exploration contracts will be addressed in section 4.6 below.

4.3.2 Existing work of the International Seabed Authority and contribution to the objectives of the 2023 Agreement

One of the principal means through which data concerning the living and non-living resources of the Area is determined at present is through the collection of baseline data by parties

to exploration contracts with ISA. These contracts require the contractor to "gather environmental baseline data and to establish environmental baselines, taking into account any recommendations issued by the [LTC]."²⁸² The objective of this activity is to gather

"sufficient information [...] to document the natural conditions that exist prior to test-mining or testing of mining components to gain insight into the natural processes [...]."²⁸³

A list of specific data to be included in baseline studies has been developed by the LTC and it includes data relating to biological communities on the sea floor or in the water column that may be affected by operations.²⁸⁴ This list explicitly anticipates an assessment of in situ communities, including photo-documentation, but also the collection of biological samples.²⁸⁵ Participation in these research activities by personnel from developing countries is to be facilitated by contractors through their obligations to draw up practical training programmes.²⁸⁶

In addition to the obligations of individual contractors to collect data relating to their contract area, ISA also promotes cooperation and coordination between contractors in order to enhance knowledge of deep-sea ecosystems. The development of REMPs is one key driver for such collaboration (section 4.4.2 below). Through a series of workshops, ISA has encouraged contractors to share data, identify data gaps and coordinate their exploration activities.²⁸⁷ These workshops also provide an opportunity for participation by other stakeholders and, therefore, the promotion of wider participation by other researchers in the collection and dissemination of relevant environmental data.²⁸⁸

As well as requiring the collection of certain data by contractors, both UNCLOS and the Regulations developed by ISA dictate what must be done with the results of this research and how the benefits should be shared. In this connection,

²⁶⁷ E.g. India; see International Institute for Sustainable Development. 2018. Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas beyond National Jurisdiction. Available at: <https://enb.iisd.org/events/1st-session-intergovernmental-conference-igc-international-legally-binding-instrument-under>.

²⁶⁸ E.g. CARICOM, *ibid.*, 12.

²⁶⁹ E.g. Mexico, Jamaica and the Philippines, *ibid.*, 13. See also AOSIS, *ibid.*, 14; Nepal and LDCs, *ibid.*, 15.

²⁷⁰ Ibid. See also the anonymous comments reported in International Institute for Sustainable Development. 2022. Summary report, 7–18 March 2022, 4th Session of the Intergovernmental Conference (IGC) on the BBNJ. Available at: <https://enb.iisd.org/marine-biodiversity-beyond-national-jurisdiction-bbnj-igc4-summary>.

²⁷¹ UNCLOS, Annex III, article 17(2)(b)(ii).

²⁷² UNCLOS, Annex III, article 14(1).

²⁷³ UNCLOS, article 143(2).

²⁷⁴ 1994 Agreement, Annex, Section 1, para. 5(h).

²⁷⁵ UNCLOS, article 256.

²⁷⁶ ISA. 2018. Decision of the Assembly of the International Seabed Authority relating to the strategic plan of the Authority for the period 2019–2023 (ISBA/24/A/10). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba24_a10-en.pdf. Strategic Direction 4.1.

²⁷⁷ UNCLOS, article 143(2). Contracts for marine scientific research under this provision are distinct from contracts for exploration or exploitation under other provisions in Part XI.

²⁷⁸ UNCLOS, article 143(1).

²⁷⁹ UNCLOS, article 143(3)(b).

²⁸⁰ Ibid.

²⁸¹ UNCLOS, article 144(2).

²⁸² ISA. 2012. Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (ISBA/18/A/11). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-18a-11_0.pdf; Annex, Regulation 34(1).

²⁸³ ISA. 2023. Recommendation for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, issued by the Legal and Technical Commission (ISBA/25/LTC/6/Rev.3). Available at: <https://www.isa.org.jm/wp-content/uploads/2023/08/2315256E.pdf>, para. 13.

²⁸⁴ Ibid., para. 15(d).

²⁸⁵ Ibid., para. 15(d)(ii).

²⁸⁶ UNCLOS, Annex III, article 15.

²⁸⁷ See ISA. 2019. Technical Study 23: Towards the Development of a Regional Environmental Management Plan for Cobalt-Rich Ferromanganese Crusts in the Northwest Pacific Ocean. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/Technical-Study-23-amazon-Jan-2020-eversion.pdf>, 43.

²⁸⁸ Ibid., 40.



UNCLOS provides that “[ISA] shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area.”²⁸⁹ ISA has explicitly recognized that these benefits include “scientific, oceanographic and environmental knowledge gained and disseminated, as well as samples and data made available for analysis and new environmental technology.”²⁹⁰

In the first instance, contractors are required to report to ISA on the research they have undertaken. The LTC recommendations anticipate that “the contractor should provide [ISA] with all relevant data, data standards and inventories, including raw environmental data.”²⁹¹ Special attention is paid to “data and information which could be relevant for the protection and preservation of the marine environment,” a category that is likely to include information on biological communities. This data must be transmitted to the ISA Secretary-General to be “made freely available for scientific analysis,”²⁹² subject to relevant confidentiality requirements. UNCLOS itself makes clear that “data necessary for the formulation by [ISA] of rules, regulations and procedures concerning the protection of the marine environment and safety, other than equipment and design data, shall not be deemed proprietary.”²⁹³ Therefore, there is an assumption that this information can be made publicly available. To this end, the LTC recommendations provide that an inventory of the data holdings from each

contractor should be made “accessible on the World Wide Web.”²⁹⁴ This data should be provided “no later than four years after the completion of a cruise.”²⁹⁵ The recommendations also anticipate that a contractor will “take all reasonable efforts to ensure that representative examples of any remaining good-quality biological, mineral and molecular samples are archived in the appropriate long-term storage facility when studies are completed, for example, natural history museums, core depositaries, geological institutes and international labelled collections (microbiological).”²⁹⁶

The primary way in which ISA has sought to operationalize the requirements to disseminate information gained through activities in the Area is through a central data repository called the Deep Seabed and Ocean Database, also known as DeepData,²⁹⁷ established in 2019 in order to serve as a one-stop shop for all data collected from research cruises undertaken by contractors since 2012. DeepData has been progressively developed since its establishment. Today, it stores one of the largest collections of biological, geochemical and physical data relating to the Area, including more than 158,000 ecology data records and approximately 289,000 taxonomy data records. ISA has committed to ensuring that DeepData operates as the primary global database for geological and environmental data on the Area by enhancing user-friendly access to the information contained therein.²⁹⁸

²⁸⁹ UNCLOS, article 140(2).

²⁹⁰ See ISA. 2019. Intergovernmental Conference on an international legally binding instrument under the United biological diversity of areas beyond national jurisdiction (General Assembly resolution 72/249) Agenda Item 7 Marine genetic resources, including the questions on the sharing of benefits Statement by the International Seabed Authority. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/04/MGR.pdf>. This is reiterated in the statement ISA. 2019. Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (General Assembly resolution 72/249) Agenda Item 5 General Exchange of Views Statement by the International Seabed Authority. Available at: https://www.isa.org.jm/wp-content/uploads/2022/04/international-seabed-authority_bbnj-igcii_agenda-item-5.pdf.

²⁹¹ ISA. 2023. Recommendation for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, issued by the Legal and Technical Commission (ISBA/25/LTC/6/Rev.3). Available at: <https://www.isa.org.jm/wp-content/uploads/2023/08/2315256E.pdf>; para. 21. See UNCLOS, Annex III, article 14.

²⁹² ISA. 2023. Recommendation for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, issued by the Legal and Technical Commission (ISBA/25/LTC/6/Rev.3). Available at: <https://www.isa.org.jm/wp-content/uploads/2023/08/2315256E.pdf>, para. 21, paras 23, 24 and 26.

²⁹³ UNCLOS, Annex III, article 14(2).

²⁹⁴ ISA. 2023. Recommendation for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, issued by the Legal and Technical Commission (ISBA/25/LTC/6/Rev.3). Available at: <https://www.isa.org.jm/wp-content/uploads/2023/08/2315256E.pdf>, para. 21.

²⁹⁵ Ibid., para. 21.

²⁹⁶ Ibid., para. 22.

²⁹⁷ ISA. DeepData Database. Available at: <https://www.isa.org.jm/deepdata-database>.

²⁹⁸ ISA. 2020. Decision of the Assembly relating to the action plan of the International Seabed Authority in support of the United Nations Decade of Ocean Science for Sustainable Development (ISBA/26/A/17). Available at: https://www.isa.org.jm/wp-content/uploads/2022/07/ISBA_26_A_17-2017623E.pdf.

Box 6.

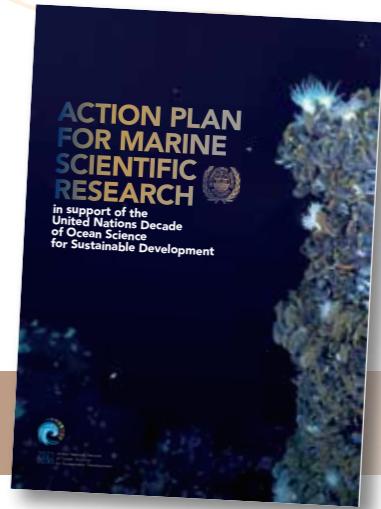
Sustainable Seabed Knowledge Initiative



Box 7.

ISA Action Plan in support of the UN Decade of Ocean Science for Sustainable Development

THE SIX STRATEGIC RESEARCH PRIORITIES OF THE ISA MSR ACTION PLAN



1



SRP 1:
Advancing scientific knowledge and understanding of deep-sea ecosystems, including biodiversity and ecosystems functions, in the Area;



4



SRP 4:
Enhancing scientific knowledge and understanding of potential impacts of activities in the Area;



2



SRP 2:
Standardizing and innovating methodologies for deep-sea biodiversity assessment, including taxonomic identification and description, in the Area;



5



SRP 5:
Promoting dissemination, exchange and sharing of scientific data and deep-sea research outputs and increasing deep-sea literacy;



3



SRP 3:
Facilitating technology development for activities in the Area, including ocean observation and monitoring;

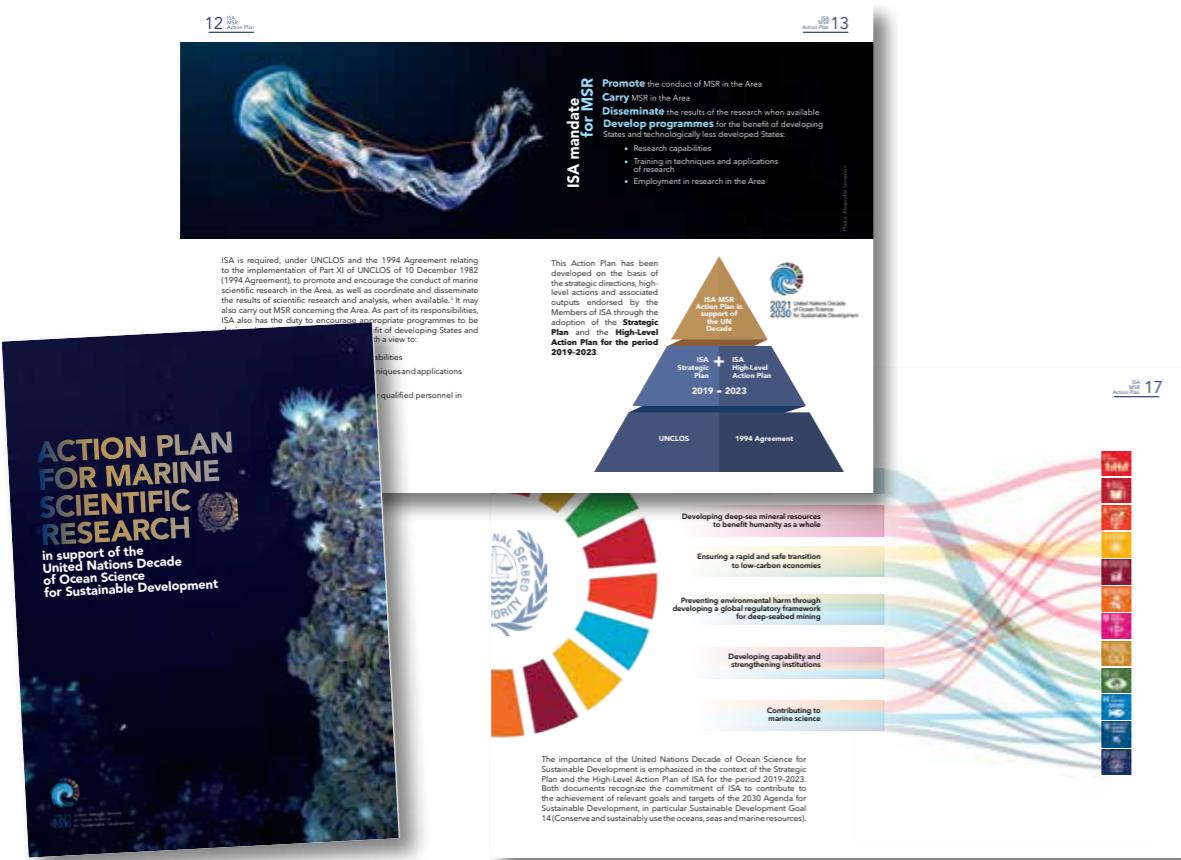


6



SRP 6:
Strengthening deep-sea scientific capacity of Authority members, in particular developing States.





More broadly, ISA has adopted an action plan in support of the United Nations Decade for Ocean Science for Sustainable Development, in which it identifies six strategic research priorities to inform its work in this area.²⁹⁹ As of today, it is the only international organization that have done so. In furthering this programme of work, ISA has highlighted the importance of strategic alliance and partnerships,³⁰⁰ including working closely with the Intergovernmental Oceanographic Commission, the International Hydrographic Organization and other relevant intergovernmental organizations in order to share data and information in an open and transparent manner and avoid duplication of effort.³⁰¹ ISA has directly sought to foster more integrated approaches to the development of marine science relating to deep-sea ecosystems through its Sustainable Seabed Knowledge Initiative, launched in 2022, which aims to bring together a network of experts and stakeholders to generate, assess and disseminate scientific information about deep-sea biodiversity.³⁰² Modalities for the delivery of these objectives include the organization of workshops and the launch of funding opportunities to develop deep-sea science through the establishment of a multistakeholder partnership fund where the specific interests and needs of LDCs, LLDCs and SIDS are represented. The first funding round in July 2023 was designed to support taxonomy projects to describe deep-sea species.³⁰³ In this context, ISA has also directly supported the pursuit of deep seabed science through its support for the establishment of a post-doctoral fellowship in deep-sea taxonomy in collaboration with Ifremer.³⁰⁴

Finally, to highlight the importance of developing a better understanding of deep-sea ecosystems, ISA has launched the ISA Secretary-General's Award for Excellence in deep-sea research, which is designed to recognize the contribution of young researchers from developing countries in this field.³⁰⁵ Since the launch of this initiative, awards have been granted to researchers from Trinidad and Tobago, Brazil, South Africa and the Cook Islands.

4.3.3 Consequences of the 2023 Agreement for activities in the Area and opportunities for cooperation and coordination

Given the potentially broad definition of "activities with respect to marine genetic resources" under the 2023 Agreement, discussed in section 3 above, it is possible that sampling of biological communities by contractors will be qualified under the 2023 Agreement as the in situ collection of marine genetic resources, thereby potentially triggering the obligations to notify certain information to the Clearing-House Mechanism under Part II of the Agreement, if relevant States are a party to the Agreement. It is important to recognize that the potential imposition of these additional duties on a party to the 2023 Agreement will have no implications for the authorization of the activity to be carried out by a contractor, which will remain subject to approval by ISA in pursuit of its mandate under Part XI. Yet, there are likely to be challenges that arise in applying this new regime to activities also regulated by ISA under Part XI of UNCLOS.

²⁹⁹ Ibid.

³⁰⁰ Ibid., 11.

³⁰¹ See ISA. 2018. Decision of the Assembly of the International Seabed Authority relating to the strategic plan of the Authority for the period 2019-2023 (ISBA/24/A/10). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba24_a10-en.pdf. Strategic Direction 4.3.

³⁰² ISA. Sustainable Seabed Knowledge Initiative. Available at: <https://www.isa.org.jm/sski>.

³⁰³ ISA. Sustainable Seabed Knowledge Initiative: Call for taxonomy projects to describe deep-sea species. Available at: <https://www.isa.org.jm/sski/call-for-taxonomy-projects>.

³⁰⁴ ISA. ISA-Ifremer Postdoctoral Fellowship. Available at: <https://www.isa.org.jm/capacity-development-training-and-technical-assistance/isa-ifremer-postdoctoral-fellowship>.

³⁰⁵ ISA. ISA Secretary-General's Award for Excellence in Deep-Sea Research. Available at: <https://www.isa.org.jm/isa-voluntary-commitments/gs-award-for-excellence-in-deep-sea-research>.

One key question is which parties to the 2023 Agreement would have responsibility for ensuring that relevant contractors are complying with the requirements relating to the sharing of information through the Clearing-House Mechanism. As noted in section 3.1.2 above, the 2023 Agreement is ambiguous in this regard, and there is an urgent need for clarity on this point. The sponsoring State could be seen as the most appropriate actor to be responsible for notification in the context of activities in the Area, given its broader responsibilities for ensuring that contractors under their jurisdiction or control carry out their legal commitments.³⁰⁶ However, some challenges arise from demanding compliance by sponsoring States. Firstly, there is a risk that sponsoring States establish duplicatory requirements for contractors who are already subject to similar rules imposed by ISA. Secondly, reliance on sponsoring States could lead to fragmentation, as only sponsoring States who were party to the 2023 Agreement would be bound to apply these requirements to contractors.

An alternative to avoid such fragmentation is to harmonize the requirements for notification or agree on a common mechanism that applies to notifications under Part XI and the 2023 Agreement. Such an approach has the advantages of applying a single regime to all contractors, as well as avoiding duplication by utilizing, where relevant, existing processes to satisfy certain requirements under the 2023 Agreement. Indeed, the arrangements currently in place for the sharing of data arising from exploration activities in the Area would already appear to align broadly with the requirements on benefit-sharing in Part II of the 2023 Agreement. In principle, subject to relevant ISA decisions, the ISA DeepData could fulfil many of the functions demanded by the provisions on the sharing of non-monetary benefits in the 2023 Agreement. As a result, the practice of contractors may not need to change substantially. Such an option is not necessarily precluded by the 2023 Agreement, which expressly anticipates that the Clearing-House Mechanism under the 2023 Agreement may be linked to "relevant global, regional, subregional, national and sectoral clearing-house mechanisms and other gene banks, repositories and databases"³⁰⁷ with the opportunity for the Clearing-House Mechanism to be managed in cooperation with other relevant bodies.³⁰⁸ Indeed, ISA is explicitly identified, alongside other global organizations, as a potential collaborator in this respect.³⁰⁹ Nevertheless, there may need to be some minor adjustments to ISA procedures to ensure alignment between the two regimes. For example, one consequence for ISA's processes, if they were to be used as a means of implementing the 2023 Agreement, would

³⁰⁶ UNCLOS, article 139(1) and Annex III, article 4(4). ITLOS, Seabed Disputes Chamber. 2011. Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Case No. 17, Advisory Opinion. Available at: <https://www.itlos.org/index.php?id=109>.

³⁰⁷ 2023 Agreement, article 51(3)(c).

³⁰⁸ 2023 Agreement, article 51(4).

³⁰⁹ Ibid.

³¹⁰ 2023 Agreement, article 14(3).

³¹¹ ISA. 2018. Rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area, Report of the Secretary-General (ISBA/24/FC/4). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/isba24-fc4-en.pdf>. ISA. 2022. Equitable sharing of financial and other economic benefits from deep-sea mining. Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/policy_benefit_sharing_01_2022-1.pdf.





4.4 Contribution of the International Seabed Authority to the objectives of the 2023 Agreement in relation to area-based management tools

4.4.1 Mandate of the International Seabed Authority

As noted above, the protection and preservation of the marine environment, including its biodiversity and ecosystem functions, is a core part of the mandate of ISA as reflected in article 145 of UNCLOS, which requires ISA to take “necessary measures [...] to ensure effective protection for the marine environment from harmful activities which may arise from activities [in the Area].” This provision goes on to oblige ISA to adopt rules and regulations to prevent pollution and other hazards to the marine environment from activities in the Area, as well as for the “protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.” Environmental protection is an important priority for ISA as identified both in the 1994 Agreement³¹² and the ISA Strategic Plan.³¹³ Indeed, the Strategic Plan makes clear that ISA operates within a framework of additional environmental principles that are not found in UNCLOS or the 1994 Agreement, such as the precautionary approach, the use of best available scientific information in decision-making and access to environmental information.³¹⁴ Many of these principles have also been

directly incorporated into ISA regulations.³¹⁵ The precautionary approach has been recognized by the Seabed Disputes Chamber of ITLOS as a core part of the legal framework shaping the work of ISA.³¹⁶

There are several strands to the environmental mandate of ISA. This subsection will focus on its powers to adopt ABMT. The single mention of such a power in UNCLOS itself is the ability of the Council to “disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment.”³¹⁷ However, the ISA practice has demonstrated that it has a broader competence to adopt other types of ABMT in furtherance of its general powers to protect and preserve the marine environment.³¹⁸ This interpretation is supported by ISA’s work to date in the development of REMPs and the designation of areas of particular environmental interest (APEIs), considered below.

4.4.2 Existing work of the International Seabed Authority and contribution to the objectives of the 2023 Agreement

A REMP is one of the tools developed by ISA to give effect to its mandate to ensure the effective protection of the marine environment from the harmful effects of activities in the Area and to protect and conserve the natural resources of the Area in accordance with article 145 of UNCLOS. Generally speaking, a REMP provides an overarching framework for proactively managing activities within a particular region, including the elaboration of objectives, principles and management tools. REMPs are the result of collaboration between key stakeholders, and they are based on the best available science. Indeed, the process of developing a REMP often involves the compilation of data from relevant sources and the identification of research priorities in order to address any data gaps. A central component of a REMP is the identification of areas that represent the range of habitats, biological communities and ecosystems within the management area and to provide those areas with appropriate levels of protection, including through the designation of APEIs. In doing so, REMPs are a key mechanism through which ISA can contribute to meeting internationally agreed targets relating to MPAs and other

effective area-based conservation measures, including those reflected in Sustainable Development Goal 14.³¹⁹

The first REMP was adopted in 2012 for the Clarion-Clipperton Zone (CCZ) by a decision of the Council,³²⁰ following a series of workshops involving relevant scientific experts. The Council decision was based on article 145 of UNCLOS and the power of the Council to establish specific policies on any matter within the competence of ISA.³²¹ The decision, which established a precedent, provides an important frame of reference for the future action of ISA in this area.

The content of the environmental management plan (EMP) for the CCZ reflects many of the concepts, principles and



approaches found in the 2023 Agreement. It includes an overall vision for the sustainable exploitation of the area that preserves representative and unique marine habitats and species and sets out a number of strategic aims and specific goals to guide ISA’s work in this area, including the facilitation

of cooperative research and promoting the participation of developing countries.³²² It also sets out five guiding principles for the management of the area, namely the common heritage of [hu]mankind, the duty to protect and preserve the marine environment, the precautionary approach, the conservation and sustainable use of biodiversity and transparency.³²³ Explicit reference is also made to the principle of integrated ecosystem-based management.³²⁴ There is, thus, a strong synergy between the principles in the EMP for the CCZ and the principles and approaches contained in the 2023 Agreement (section 2.2.1 above).

For present purposes, the key significance of the decision to adopt the EMP for the CCZ is the provisional designation of a network of nine APEIs in which no application for approval of a plan of work for exploration or exploitation would be granted for at least five years.³²⁵ APEIs are large areas of approximately 160,000 square kilometres, each designed to cover self-sustaining populations of the range of habitats found across the CCZ, including buffer zones designed to protect against any impact from adjacent activities. They can be, therefore, considered as a form of area-based management tool. The term APEI would appear to have been coined by ISA. The APEIs were elaborated, drawing upon principles and best practices relating to protected areas, including guidance developed through the CBD.³²⁶ Following a review process, a further four APEIs were added to the network in 2021.³²⁷

While the REMP is focused on the regulation of deep-seabed mining within the CCZ, it also explicitly “recognizes the need to work in consultation with the many other international organizations and processes related to the protection of the marine environment” in the implementation of the EMP.³²⁸ The Council’s decision to adopt the EMP “encourages further dialogue with all stakeholders to ensure complementarity with regard to the proposed

³¹² 1994 Agreement, Annex, Section 1, paras 5(g) and (k).

³¹³ ISA. 2018. Decision of the Assembly of the International Seabed Authority relating to the strategic plan of the Authority for the period 2019-2023 (ISBA/24/A/10). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba24_a10-en.pdf, Strategic Direction 3.1.

³¹⁴ Ibid., para. 4.

³¹⁵ ISA. 2012. Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (ISBA/18/A/11). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-18a-11_0.pdf, Regulations 2(2), 5(1), and 33(2).

³¹⁶ UNCLOS, article 139(1) and Annex III, article 4(4). ITLOS, Seabed Disputes Chamber. 2011. Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Case No. 17, Advisory Opinion. Available at: <https://www.itlos.org/index.php?id=109>, paras. 131-135.

³¹⁷ UNCLOS, article 160(2)(x).

³¹⁸ M. W. Lodge. 2011. Some Legal and Policy Considerations Relating to the Establishment of a Representative Network of Protected Areas in the Clarion-Clipperton Zone. *International Journal of Marine and Coastal Law* 463-480.

³¹⁹ See ISA. 2019. Technical Study 22: Developing a Framework for Regional Environmental Management Plans for Polymetallic Sulphide Deposits on Mid-Ocean Ridges. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/Technical-Study-22-amazon-Jan-2020-ev.pdf>. ISA. 2019. Technical Study 23: Towards the Development of a Regional Environmental Management Plan for Cobalt-Rich Ferromanganese Crusts in the Northwest Pacific Ocean. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/Technical-Study-23-amazon-Jan-2020-eversion.pdf>.

³²⁰ ISA. Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone (ISBA/18/C/22). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-18c-22_0.pdf. This Council decision approves the environmental plan contained in ISA. 2011. Environmental Management Plan for the Clarion-Clipperton Zone (ISBA/17/LTC/7). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-17lc-7_0.pdf.

³²¹ UNCLOS, article 162(1).

³²² ISA. 2011. Environmental Management Plan for the Clarion-Clipperton Zone (ISBA/17/LTC/7). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-17lc-7_0.pdf, para. 35.

³²³ Ibid., para. 13.

³²⁴ Ibid., para. 35(d).

³²⁵ ISA. Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone (ISBA/18/C/22). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-18c-22_0.pdf, para. 6.

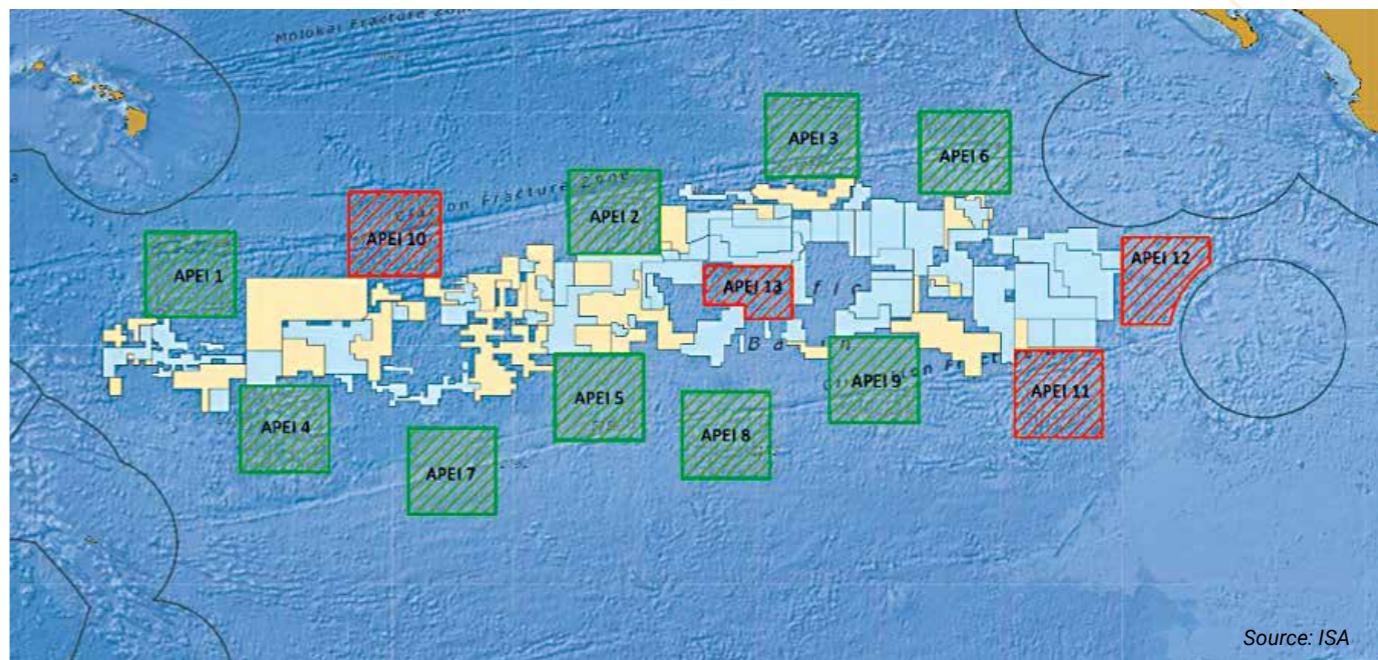
³²⁶ ISA. 2011. Environmental Management Plan for the Clarion-Clipperton Zone (ISBA/17/LTC/7). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-17lc-7_0.pdf, paras. 25 and para. 29.

³²⁷ ISA. Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone (ISBA/18/C/22). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-18c-22_0.pdf, para. 2.

³²⁸ ISA. 2011. Environmental Management Plan for the Clarion-Clipperton Zone (ISBA/17/LTC/7). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-17lc-7_0.pdf, para. 12.

Box 8.

Clarion Clipperton Zone, showing Areas of Particular Environmental Interest



Source: ISA

[APEIs].³²⁹ To date, this has primarily been achieved through the invitation of relevant actors to workshops. However, these workshops have identified that the development of REMPs provides an opportunity to recognize and respond to existing management measures that have been adopted by other competent authorities.³³⁰

Work has already begun on the development of REMPs for other regions in line with Strategic Direction 3.2 of the ISA Strategic Plan and the preliminary strategy for the development of REMPs endorsed by the Council.³³¹ Priority areas for further work (which are the areas where exploration work is taking place) are the Northwest Pacific Ocean, the Indian Ocean triple junction, the South Atlantic Ocean and the Northern Mid-Atlantic Ridge.³³² Discussions on the development of these REMPs have indicated the interest of many participants in paying due consideration to the work of the IGC negotiating the 2023 Agreement.³³³ The Council has also recognized that it is essential that plans are developed transparently.³³⁴ The LTC is preparing guidance, at the request of the Council, on a standardized approach for the development, approval and review of REMPs in the Area. The current draft of this guidance includes a proposed template for plans, as well as the recommended procedure for their adoption, which emphasizes the importance of scientific assessment by experts, as well as broader consultation with stakeholders.³³⁵ This guidance was itself subject to consultation with stakeholders.

ISA also has powers to respond to environmental emergencies arising from activities in the Area, which may be relevant to the adoption of emergency measures by the COP acting under Part III of the 2023 Agreement. Under article 162(2)(w) of

UNCLOS, the Council has the power to issue emergency orders to prevent serious harm to the marine environment arising out of activities in the Area. Limited powers are also devolved to the Secretary-General to take provisional action under the relevant regulations adopted by ISA.³³⁶

Based upon this summary of ISA's work, it is clear that ISA has begun to contribute to the objectives of Part III of the 2023 Agreement through its work on REMPs, and its activity in this respect is expanding. This work of ISA has been welcomed by the UN General Assembly,³³⁷ which also recognizes the importance of adopting rules, regulations and procedures for the effective protection of the marine environment from harmful effects that may arise from activities in the Area.³³⁸ While the exploitation regulations are still under negotiation and there is no final agreement on the draft text, REMPs are mentioned several times in the draft text as a policy instrument relevant to the regulatory framework to be applied by ISA in reviewing applications.³³⁹ It has also been suggested, both in relevant workshops³⁴⁰ and in Council discussions,³⁴¹ that REMPs should be in place before any applications for exploitation contracts in that region are considered. It is likely that future REMPs will set out additional ABMT.³⁴² The Secretary-General has identified that networks of APEIs or similar ABMT designated by ISA "have great potential to contribute to the effective conservation and management of biodiversity in marine [ABNJ] and to help to build the resilience of deep-sea benthic ecosystems to the impacts of climate change on the ocean."³⁴³ This leads to the question of how the 2023 Agreement will impact ISA activities in this area.

³²⁹ ISA. Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone (ISBA/18/C/22). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-18c-22_0.pdf, para. 5.

³³⁰ ISA. 2019. Technical Study 22: Developing a Framework for Regional Environmental Management Plans for Polymetallic Sulphide Deposits on Mid-Ocean Ridges. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/Technical-Study-22-amazon-Jan-2020-ev.pdf>, pgs. 23 and 26.

³³¹ ISA. 2018. Preliminary Strategy for the development of regional environmental management plans for the Area, Report of the Secretary-General (ISBA/24/C/3). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/isba24-63-e.pdf>.

³³² ISA. 2018. Statement by the President of the Council on the work of the Council during the first part of the twenty-fourth session (ISBA/24/C/8). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/isba24c-8-en.pdf>, para. 9.

³³³ ISA. 2019. Technical Study 23: Towards the Development of a Regional Environmental Management Plan for Cobalt-Rich Ferromanganese Crusts in the Northwest Pacific Ocean. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/Technical-Study-23-amazon-Jan-2020-eversion.pdf>, p. 27.

³³⁴ ISA. 2018. Statement by the President of the Council on the work of the Council during the first part of the twenty-fourth session (ISBA/24/C/8). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/isba24c-8-en.pdf>, para. 10.

³³⁵ ISA. 2022. Guidance to facilitate the development of regional environmental management plans: report and recommendation by the Legal and Technical Commission (ISBA/27/C/37). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/12/2212509E.pdf>. In this connect, a consultation has been held on the draft REMP for the Mid-Atlantic Ridge. ISA. Draft regional environmental management plan for the northern Mid-Atlantic Ridge open for consultation until 3 June. Available at: <https://www.isa.org.jm/news/draft-regional-environmental-management-plan-northern-mid-atlantic-ridge-open-consultation>.

³³⁶ ISA. 2012. Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (ISBA/18/A/11). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-18a-11_0.pdf. Regulation 35.

³³⁷ United Nations. 2021. Oceans and Law of the Sea: Resolution (A/RES/76/72). Available at: <https://digitallibrary.un.org/record/3952325?ln=en&v=pdf>, para. 75.

³³⁸ Ibid., para. 64.

³³⁹ ISA. 2019. Draft Regulations on exploitation of mineral resources in the Sea: prepared by the Legal and Technical Commission: standard for the environmental impact assessment process (ISBA/25/C/WP.1). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA_27_C_4-2117327E.pdf. ISA. 2024. Draft regulations on exploitation of Mineral resources in the Area: Consolidated text (ISBA/29/C/CRP.1). Available at: https://www.isa.org.jm/wp-content/uploads/2024/02/Consolidated_text.pdf. Regulation 44 bis.

³⁴⁰ ISA. 2019. Technical Study 22: Developing a Framework for Regional Environmental Management Plans for Polymetallic Sulphide Deposits on Mid-Ocean Ridges. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/Technical-Study-22-amazon-Jan-2020-ev.pdf>, p. 26.

³⁴¹ ISA. 2020. Procedure for the development, approval and review of regional environmental management plans, submitted by the delegations of Germany and the Netherlands, with co-sponsorship by Costa Rica (ISBA/26/C/6). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/isba-26c-6-en.pdf>, para. 1. See also individual State responses to the consultation on guidance to facilitate the development of regional environmental management plans. Available at: https://www.isa.org.jm/wp-content/uploads/2023/03/Germany_REMP_Guidance_Consultation_merged.pdf.

³⁴² ISA. 2022. Regional environmental management plan for the Area of the northern Mid-Atlantic Ridge with a focus on polymetallic sulphide deposits: issued by the Legal and Technical Commission (ISBA/27/C/38). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/12/2212833E.pdf>.

³⁴³ ISA. 2018. Preliminary Strategy for the development of regional environmental management plans for the Area: Report of the Secretary-General (ISBA/24/C/3). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/isba24-63-e.pdf>, para. 6.

4.4.3 Consequences of the 2023 Agreement for the work of the International Seabed Authority and opportunities for cooperation and collaboration

Nothing in the 2023 Agreement affects the mandate of ISA to develop area-based management measures which will apply to activities in the Area. However, the existence of a parallel process for proposing and establishing ABMTs in ABNJ under the 2023 Agreement may have implications for the way in which ISA carries out its work.

A particular challenge may arise in practice if the COP recommends area-based management tools, including MPAs, for areas in which ISA has already entered into contractual arrangements for exploration or exploitation. UNCLOS explicitly provides for security of tenure for contractors³⁴⁴ and the contracts are legally binding on ISA.³⁴⁵ As a result, ISA has limited powers to interfere with the work being carried out under a contract or to revise, suspend or terminate the contract without the agreement of the contractor.³⁴⁶

The submission and consideration of proposals under the procedures set out in Part III of the 2023 Agreement may also have operational implications for ISA. As explained in section 3 above, the procedures for the designation of ABMT present numerous opportunities for stakeholders, including relevant

³⁴⁴ UNCLOS, article 153(6).

³⁴⁵ E.g. UNCLOS, Annex III, article 16: "[ISA] shall, pursuant to Part XI and its rules, regulation and procedures, accord the operator the exclusive right to explore and exploit the area covered by the plan of work in respect of a specified category of resources [...]" (emphasis added). In particular, article 17(2)(b)(iii) further provides that "the duration of exploitation should be related to the economic life of the mining project [...] [and] should be of sufficient duration to permit commercial extraction of minerals of the area [...]" (emphasis added).

³⁴⁶ See UNCLOS, Annex III, articles 18-19.

international institutions, to comment on proposals. Given the global mandate of ISA in the Area, its involvement in these processes will be critical to ensuring that COP decisions are taken "in cooperation and coordination with" ISA and respect its mandate, as required under the relevant provisions of the 2023 Agreement (section 3.2.4 above). The Secretariat will have to dedicate resources to allow it to effectively participate in these consultation processes, and to keep the Council and the Assembly informed, where relevant.

ISA may also wish to develop its own internal procedures for ensuring that any recommendations stemming from the COP of the 2023 Agreement are given prompt and good faith consideration, with clear mechanisms for communicating the results of that consideration back to the COP. After all, it is only through a two-way exchange that effective cooperation and coordination is likely to emerge. To strengthen engagement with the institutional framework established under the 2023 Agreement, ISA should consider developing bespoke cooperative arrangements with the Secretariat of the 2023 Agreement once it is established. This will be considered further in section 5 below.

It must be made clear that engagement by ISA with these processes does not necessarily mean that ISA will be supportive of proposals. In part, this will depend upon the



ISA REMP workshop for the Northwest Pacific, Tokyo, Japan, 2024

views of ISA's membership, which may well differ from the membership of the new institutional arrangements to be established under the 2023 Agreement. How to respond to proposals emanating from the 2023 Agreement will be the prerogative of ISA organs. At the same time, effective engagement by ISA with these processes is a key means to ensuring that the requirement to respect the competence of relevant institutions, and in particular ISA itself, is satisfied. It must not be forgotten in this context that the importance of respecting the mandate of ISA is further underlined by article 5(1) of the Agreement, which requires the whole treaty to be interpreted and applied in a manner consistent with UNCLOS, and therefore with the exclusive competence of ISA to regulate activities in the Area by virtue of Part XI.

A further implication of the 2023 Agreement is that ISA may be called upon to participate in the mechanism for cooperation and coordination anticipated by article 22(4) of the 2023 Agreement. As already noted in section 3.2.4 above, there are important questions about the form and functions of such a mechanism. Ideally, ISA should be involved in early discussions about the design of such a mechanism, including the nature and modalities of any such arrangement.

Beyond that specific mechanism, it is clear that the achievement of the objectives of the Agreement call for

stronger relationships between those institutions involved in ABNJ in order to increase coordination in the use of ABMTs. ISA is not the only organization with powers to adopt relevant ABMT in ABNJ. A key challenge for the COP is to figure out how to operate within the existing institutional landscape, where inter-institutional cooperation already takes place. For its part, ISA already has a network of memoranda of understanding with a number of relevant organizations.³⁴⁷ On the basis of these arrangements, information exchange between these institutions concerning the further development of ABMTs is one step that can be taken to further the objectives of the 2023 Agreement.

Photo: NORI



³⁴⁷ See ISA. Legal documents. Available at: <https://www.isa.org.jm/legal-documents>.

Box 9.

Relationship between the International Seabed Authority and the International Maritime Organization

As the specialized agency of the United Nations with a mandate relating to the safety of international shipping, seafarer training and qualifications, maritime security and the protection of the marine environment from ships, the IMO plays a central role in the development of international standards applicable to activities involving ships operating in ABNJ. Indeed, article 94 of UNCLOS requires flag States to ensure that vessels operating under their jurisdiction comply with generally accepted international regulations, procedures and practices, which will include many of the technical standards adopted by the IMO. There is, thus, a potential overlap between the work of the IMO and ISA whenever international shipping is used to support activities in the Area.³⁴⁸

The IMO and ISA have developed a strong working relationship based on an Agreement of Cooperation signed in 2016.³⁴⁹ This Agreement makes provision for the two organizations to consult each other on matters of common interest with a view to ensuring "maximum coordination of their work" and "harmonizing their efforts as far as possible."³⁵⁰ In furtherance of this mandate, the two organizations proactively exchange information and keep each other informed about their activities and programmes of work.

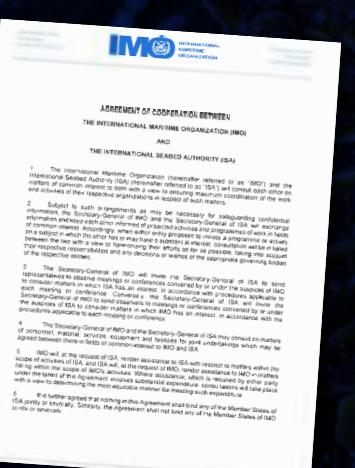
One example of such cooperation is a 2019 report commissioned by ISA in collaboration with IMO exploring how the mandate of IMO interfaces with the regulatory role of ISA. The report underscores the importance of these two global bodies working together in pursuit of their complementary mandates.³⁵¹ It further identifies a number of areas where the two organizations may learn from each other's work in the development of complementary regulatory instruments.³⁵²

One area of particular overlap relevant for present purposes is the mandates of the two organizations relating to the protection of the marine environment and the development of appropriate ABMT. Existing IMO instruments include a number of such measures, including the possibility of navigational and routing measures adopted under the International Convention on the Safety of Life at Sea³⁵³ and the designation of Special

Areas/Emissions Control Areas under the International Convention on the Prevention of Pollution from Ships.³⁵⁴ By virtue of Guidelines adopted by the IMO Assembly, the IMO may also designate "particularly sensitive sea areas" (PSSAs) in accordance with certain ecological, socioeconomic or scientific criteria,³⁵⁵ in which associated protective measures may be adopted. While all PSSAs adopted to date have been in areas within national jurisdiction,³⁵⁶ there is no geographical limit on the powers of the IMO to designate PSSAs. It is possible that this tool could be applied to ABNJ in the future.

Given that measures adopted by IMO apply to many vessels that may be supporting activities in the Area, there may be a need for IMO and ISA to cooperate and coordinate their activities if a PSSA, or similar measure, is proposed in an area that may overlap with a mining site. Similarly, ISA and IMO may need to cooperate if navigational or routing measures are required to ensure the safety of activities in the Area³⁵⁷ or to support the implementation of ABMT adopted by ISA. The relationship agreement between the two institutions will be the primary basis on which such cooperation will take place, although effective coordination will require more than information exchange and communication between the two secretariats.

One example of such cooperation is a 2019 report commissioned by ISA in collaboration with IMO exploring how the mandate of IMO interfaces with the regulatory role of ISA. The report underscores the importance of these two global bodies working together in pursuit of their complementary mandates.³⁵¹ It further identifies a number of areas where the two organizations may learn from each other's work in the development of complementary regulatory instruments.³⁵²



³⁴⁸ UNCLOS, article 139(1) and Annex III, article 4(4). ITLOS, Seabed Disputes Chamber. 2011. Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Case No. 17, Advisory Opinion. Available at: <https://www.itlos.org/index.php?id=109>, para 1.

³⁴⁹ IMO. 2016. Agreement of Cooperation between the International Maritime Organization (IMO) and the International Seabed Authority (ISA). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/04/IMO.pdf>.

³⁵⁰ Ibid., para. 2.

³⁵¹ ISA. 2020. Technical Study 25: Competencies of the International Seabed Authority and the International Maritime Organization in the context of activities in the Area. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/Technical-Study-25.pdf>.

³⁵² Ibid., 55-56.

³⁵³ IMO. 1974. International Convention for the Safety of Life at Sea. Available at: [https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx), Ann.

³⁵⁴ IMO. 1973/78. International Convention for the Prevention of Pollution from Ships. Available at: [https://www.imo.org/en/about/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](https://www.imo.org/en/about/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx).

³⁵⁵ IMO. 2005. Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (A 24/Res.982). Available at: [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofMOResolutions/AssemblyDocuments/A.982\(24\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofMOResolutions/AssemblyDocuments/A.982(24).pdf).

³⁵⁶ IMO. Particularly Sensitive Sea Areas. Available at: <https://www.imo.org/en/OurWork/Environment/Pages/PSSAs.aspx>.

³⁵⁷ ISA. 2020. Technical Study 25: Competencies of the International Seabed Authority and the International Maritime Organization in the context of activities in the Area. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/06/Technical-Study-25.pdf>, 44. Some scrutiny must be given to the existence of major sea-lanes prior to the authorization of mining activities; see UNCLOS, article 147(2)(b).

4.5 Contribution of the International Seabed Authority to the objectives of the 2023 Agreement in relation to environmental impact assessment and strategic environmental assessment

4.5.1 Mandate of the International Seabed Authority

The previous subsection on ABMTs has already explained the general mandate of ISA to protect and preserve the marine environment in accordance with article 145 of UNCLOS. Another way in which ISA has given effect to this mandate is through the development of rules relating to EIA. In this respect, UNCLOS confers a specific power on the LTC to "prepare assessments of the environmental implications of activities in the Area"³⁵⁸ and this is a matter that has to be taken into account by the Council in determining applications for approval of plans of work in the Area. The requirement for EIA by proponents of activities in the Area has duly been developed in the Regulations and Recommendations of ISA, as discussed below.

4.5.2 Existing work of the International Seabed Authority and contribution to the objectives of the 2023 Agreement

Under Regulations adopted by ISA, an applicant for an exploration contract is required to carry out "a preliminary assessment of the possible impacts of the proposed exploration activities on the marine environment" at the time of the application.³⁵⁹ The relatively light-touch nature of this obligation is indicative of the type of activities that are most commonly carried out during the exploration phase of a contract, which effectively overlap with the survey and sampling activities normally carried out as part of marine scientific research. The LTC has identified a range of research methods that it has deemed have no potential for causing serious harm to the marine environment.³⁶⁰

However, it does not follow that EIAs are never required for exploration activities. For exploration activities that may be more impactful on the marine environment, contractors are required to assess the potential effects prior to the commencement of that specific activity.³⁶¹

Box 10. Environmental Impact Assessment Procedures under ISA

An application for approval of a plan of work for exploration must be accompanied by an assessment of the potential environmental impacts of the proposed activities and a description of a programme for oceanographic and baseline environmental studies. Procedures to follow in the acquisition of baseline data and the monitoring to be performed during and after any activities that have the potential to cause serious harm to the environment are described in the Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area.³⁶²

In particular, the LTC has indicated that the following specific activities require prior EIA and an environmental monitoring programme to be carried out during and after the activity:³⁶³

- use of sediment disturbance systems that create artificial disturbances and plumes on the sea floor
- testing of mining components
- test mining
- testing of discharge systems and equipment
- drilling activities using on-board drilling rigs
- sampling with an epibenthic sled, dredge or trawl, or similar technique in nodule fields that exceed 10,000m²
- taking large samples to test land-based processes.

An environmental impact statement (EIS) for these activities must be presented to the Secretariat at least a year before commencing any of these activities in order to allow an appropriate review of the information.³⁶⁴ The LTC has developed detailed guidance on information to be provided by the contractor in their EIS.³⁶⁵

An important part of the process of preparing an EIS is the carrying out of a consultation with relevant stakeholders,³⁶⁶ who are defined in the guidance as "a natural or juristic person or an association of persons with an interest of any kind or with relevant information or expertise."³⁶⁷ Within its environmental statement submitted for review by the LTC, the contractor must explain both the nature and extent of the consultation process as well as how any comments or concerns of stakeholders have been addressed in the EIS.³⁶⁸ There would seem to be some discretion for the contractor to determine the manner in which to identify relevant stakeholders for themselves,³⁶⁹ although it may also be open to the LTC to request further information on the stakeholder consultation if it is not satisfied with the information provided by the contractor. The practice to date has been for consultations to be open to the public, even though this is not expressly demanded by the recommendations.³⁷⁰

A review of the final EIS will be carried out by the LTC with the possibility for the involvement of external experts where it is deemed desirable.³⁷¹ The LTC may also request further information from the contractor before it finalizes its EIS review and the adoption of its recommendation of whether the EIS should be incorporated into the programme of activities under the contract.³⁷² Without the LTC's approval of the EIS, the activity cannot take place.³⁷³ The final version of the EIS will be published on ISA's website alongside the recommendation of the LTC.³⁷⁴

³⁶⁴ Ibid., para. 34.

³⁶⁵ Ibid., para. 38.

³⁶⁶ Under the original version of the recommendations, it was largely left to sponsoring States to determine the conditions of the public consultation exercise. The recommendations were amended in 2022 to place the consultation process directly under the remit of the LTC.

³⁶⁷ Ibid., Annex I, para. 67(a) and (c).

³⁶⁸ Ibid., para. 41(e).

³⁶⁹ Ibid., Annex I, para. 66: "The [EIS] should list any stakeholders that were consulted and describe the process by which they were identified."

³⁷⁰ ISA. Environmental Impact Assessments. Available at: <https://www.isa.org.jm/protection-of-the-marine-environment/environmental-impact-assessments>.

³⁷¹ ISA. 2023. Recommendation for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, issued by the Legal and Technical Commission (ISBA/25/LTC/6/Rev.3). Available at: <https://www.isa.org.jm/wp-content/uploads/2023/08/2315256E.pdf>, para. 41(c).

³⁷² Ibid., para. 41(d).

³⁷³ Ibid., para. 41(f) provides that if the LTC does not recommend incorporation of the EIS into the programme of activities under the contract, the contractor must either provide additional information to satisfy the LTC or resubmit the statement, in which case the process starts again.

³⁷⁴ It must also be published on the website of the contractor; see ibid., Annex I, para. 68.

³⁷⁵ Ibid., para. 40. For this purpose impact reference zones and preservation reference zones should also be designated as part of the EIS; see ibid., para. 38(o). See also Annex I, para. 71 recommending the notification of an impact reference zone and a preservation reference zone prior to test mining.

³⁷⁶ ISA. Environmental Impact Assessments. Available at: <https://www.isa.org.jm/protection-of-the-marine-environment/environmental-impact-assessments>.

³⁷⁷ ISA. 2019. Draft Regulations on exploitation of mineral resources in the Sea: prepared by the Legal and Technical Commission: standard for the environmental impact assessment process (ISBA/25/C/WP.1). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA_27_C_4-2117327E.pdf. ISA. 2024. Draft regulations on exploitation of Mineral resources in the Area: Consolidated text (ISBA/29/C/CRP.1). Available at: https://www.isa.org.jm/wp-content/uploads/2024/02/Consolidated_text.pdf, Part IV, Section 2.

³⁷⁸ ISA. 2022. Draft standard and guidelines for the environmental impact assessment process, prepared by the Legal and Technical Commission (ISBA/27/C/4). Available at: https://www.isa.org.jm/wp-content/uploads/2022/12/ISBA_27_C_4-2117327E.pdf.

³⁷⁹ Ibid., 32.

³⁸⁰ ISA. 2019. Draft Regulations on exploitation of mineral resources in the Sea: prepared by the Legal and Technical Commission: standard for the environmental impact assessment process (ISBA/25/C/WP.1). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA_27_C_4-2117327E.pdf. ISA. 2024. Draft regulations on exploitation of Mineral resources in the Area: Consolidated text (ISBA/29/C/CRP.1). Available at: https://www.isa.org.jm/wp-content/uploads/2024/02/Consolidated_text.pdf, Part IV, section 3 and Annex VII.

³⁸¹ Ibid., Regulation 52.

³⁸² ISA. 2022. Guidance to facilitate the development of regional environmental management plans: report and recommendations by the Legal and Technical Commission (ISBA/27/C/37). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/12/2212509E.pdf>, para. 14(b).

³⁵⁸ UNCLOS, article 165(2)(d).

³⁵⁹ ISA. 2012. Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (ISBA/18/A/11). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isa-18a-11_0.pdf. Regulation 20(1)(b).

³⁶⁰ ISA. 2023. Recommendation for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area, issued by the Legal and Technical Commission (ISBA/25/LTC/6/Rev.3). Available at: <https://www.isa.org.jm/wp-content/uploads/2023/08/2315256E.pdf>, para. 32.

³⁶¹ Ibid., para. 8.

³⁶² ISBA/25/LTC/6/Rev.3

³⁶³ Ibid., para. 33.

4.5.3 Consequences of the 2023 Agreement for activities in the Area and opportunities for cooperation and coordination

It can be seen from the overview above that ISA has already developed an EIA regime for exploration activities. ISA is in the process of developing a more detailed regime to consider the environmental impacts of proposed exploitation activities. Indeed, this is one of the few bespoke EIA procedures to apply to activities in ABNJ. The key question is, therefore, how ISA's rules will interact with the framework for EIA elaborated in Part IV of the 2023 Agreement. It is worth emphasizing at the outset that this is not a question for ISA directly, as contractors will remain obliged to comply with the EIA procedures developed by ISA. Rather, this question will principally arise for States who are a party to the 2023 Agreement, but who are also sponsoring States of contractors authorized by ISA to conduct activities in the Area. The key issue for these States will be whether ISA's procedures are equivalent to the procedures laid down in Part IV of the 2023 Agreement and, therefore, whether they come within the scope of the exception in article 29.

One of the challenges for the application of article 29 is that there may be different understandings of equivalence. It is clear that equivalency covers both the substance of an assessment and the procedure for carrying it out. Key points for comparison may relate to screening, scoping, consultation and reporting. Yet, questions may still arise over the degree of similarity that is demanded. There is an ambiguity in the 2023 Agreement on this point, which would benefit from further standards or guidance.

In interpreting this term, it must be borne in mind that one of the purposes of article 29 is to permit the development and application of specialized EIA procedures by competent institutions. Article 29 must also be interpreted in light of the principle of consistency with UNCLOS in article 5(1) and the principle of "not undermining" in article 5(2) of the 2023 Agreement. In this context, it is relevant that the EIA procedures for activities in the Area are being developed by ISA, as the global intergovernmental organization conferred with the mandate to do so by UNCLOS. States should, therefore, be careful in coming to the conclusion that the procedures developed in this context are lacking in equivalence, as this would lead to duplication of effort and the undermining of a regime that has been designed by the relevant actors to apply to a particular activity.

In this connection, there is also an opportunity for ISA to engage with the STB and COP to ensure that its EIA experiences are shared in the development of future standards under the Agreement, thereby informing the development of the 2023 Agreement and promoting coherence between applicable standards.

³⁸³ ISA. 2018. Decision of the Assembly of the International Seabed Authority relating to the strategic plan of the Authority for the period 2019-2023 (ISBA/24/A/10). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba24_a10-en.pdf, Strategic Direction 5.

³⁸⁴ ISA. Advancing women's empowerment in marine scientific research. Available at: <https://www.isa.org.jm/isa-voluntary-commitments/enhancing-the-role-of-women-in-msr>.

³⁸⁵ UNCLOS, articles 144(1) and 274.

³⁸⁶ 1994 Agreement, Annex, Section 5, para. 1.

³⁸⁷ 1994 Agreement, Annex, Section 5, para. 2.

Another area of potential interaction of ISA and the 2023 Agreement will be the development of guidance and practice on strategic environmental assessments. It is critical that existing institutions, such as ISA, are involved in the development of any guidance on this topic in order to ensure that the 2023 Agreement is interpreted and applied in a manner that does not undermine relevant instruments, frameworks and bodies. As noted above, ISA has some experience in carrying out regional assessments, which could be valuable to the STB and the COP as they develop guidance on this topic. Furthermore, it is difficult to see how an effective regional environmental assessment could be carried out without the participation of ISA, as the global body responsible for managing one of the key activities in ABNJ.

4.6 Contribution of the International Seabed Authority to the objectives of the 2023 Agreement in relation to capacity-building and technology transfer

4.6.1 Mandate of the International Seabed Authority

Capacity-building and technology transfer have been at the heart of the Part XI regime since its inception. Both elements are reflected in the general principles governing the Area, as identified in Section 2 of Part XI of UNCLOS.

On capacity-building, article 148 mandates the "effective participation of developing countries in activities in the Area." The capacity-building for developing countries has been included in the ISA Strategic Plan as a key mechanism for operationalizing this obligation.³⁸³ Indeed, it has been recognized that capacity-building through training in scientific and technical skills is one of the benefits of deep-seabed mining that must be equitably shared under article 144 of UNCLOS. One of the strategic objectives of ISA in this respect is enhancing the inclusion of women in marine scientific research, which it seeks to mainstream across its full range of capacity-building activities.³⁸⁴

Technology transfer was a more controversial aspect of the Part XI regime. While the promotion of technology is central to ISA's objectives,³⁸⁵ the 1994 Agreement modifies the approach to be taken to the topic by emphasizing the transfer of technology on "fair and reasonable commercial terms and conditions or through joint ventures."³⁸⁶ The more stringent provisions in technology transfer contained in the original text of UNCLOS were at the same time disappled.³⁸⁷



Legal and Technical Commission, ISA, 2024

4.6.2 Existing work of the International Seabed Authority and contributions to the objectives of the 2023 Agreement

ISA has carried out various capacity-building and technology transfer activities since its establishment in order to support the active participation of personnel of developing States in the work of ISA and activities carried out in the Area, including in relation to marine scientific research. Given the changes to the rules in Part XI relating to technology transfer, ISA's work in this respect has been focused initially on the transfer of knowledge and expertise, which still falls within the scope of technology transfer as defined by the 2023 Agreement (section 3.4 above). A number of ISA's activities illustrate its approach to capacity development and technology transfer.

Firstly, ISA has a role in the provision of financial support to assist developing countries wishing to develop their scientific and technical capacity relating to activities in the Area. The Endowment Fund for Marine Scientific Research was established by a 2006 ISA Assembly Resolution in order to "promote and encourage the conduct of marine scientific

research in the Area for the benefit of [hu]mankind as a whole, in particular by supporting the participation of qualified scientists and technical personnel from developing countries in marine scientific research programmes."³⁸⁸ Following a review of all capacity development activities implemented since 1994 that was published in 2020, the Endowment Fund was replaced by the Partnership Fund.³⁸⁹ Like its predecessor, the Partnership Fund is designed to support marine scientific research and to support the training of scientists and technical personnel from developing countries and their participation in international research programmes.³⁹⁰ The Partnership Fund is framed more broadly, and it is designed to be more flexible than the previous arrangements.³⁹¹ Contributions to the Partnership Fund can come from ISA itself but also from any State, international organization, contractor, private corporation or philanthropic entity. The Partnership Fund is overseen by a Board that includes representatives from the ISA Secretariat and Member States. It is also possible for observers from other stakeholders to be invited, including representatives of other intergovernmental organizations which may host similar capacity-building programmes.³⁹²

³⁸⁸ ISA. 2006. Resolution establishing an endowment fund for marine scientific research in the Area (ISBA/12/A/11). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba12-a11_1.pdf, para. 2.

³⁸⁹ ISA. 2022. Decision of the Assembly of the International Seabed Authority relating to financial and budgetary matters (ISBA/27/A/10). Available at: https://www.isa.org.jm/wp-content/uploads/2022/12/ISBA_27_A_10-2212174E.pdf.

³⁹⁰ ISA. Secretary-General's bulletin: Terms of reference for the International Seabed Authority Partnership Fund (ISBA/ST/SGB/2022/1). Available at: https://www.isa.org.jm/wp-content/uploads/2023/03/ISBA_ST_SGB_2022_1.pdf.

³⁹¹ ISA. 2020. Review of the Capacity-Building Programmes and Initiatives Implemented by the International Seabed Authority 1994-2019, Report by the Secretariat. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/04/Review-Of-Capacity-Building-Programmes-And-Initiatives-By-ISA.pdf>, 35. One of the major problems with the Endowment Fund was the restriction on only distributing income, as opposed to the capital, of the Fund.

³⁹² Ibid., para. 15.

Box 11.

The International Seabed Authority Partnership Fund



ISA Partnership Fund is a multi-donor trust fund established on 3 August 2022 by the ISA Assembly during its 27th session (ISBA/27/A/10). The Fund aims to promote and encourage marine scientific research in the Area for the benefit of humankind and to contribute to dedicated capacity development programmes and activities aligned with the priority needs identified by developing States members of ISA.

The development of a training course on environmental impact assessment for exploration activities carried out in the Area – including Greece's contribution to the ISAPF, earmarked for this initiative.

Building and developing capacities of least developed countries (LDCs) in deep-sea related sciences, technology and innovation in support of the sustainable development of blue emerging economies – through the United Nations Technology Bank for Least Developed Countries to support: (i) the three-month secondment of two experts from LDCs to work on marine science and technology research project in the ISA Secretariat and (ii) a six-month fellowship for doctoral/post-doctoral visit of a scientist from an LDC at a partner institution in the field of ocean science and technology.

Enhancing capacity and knowledge-sharing in meiofauna research through the establishment of a "MeioScool" in partnership with Ifremer

Development of a data visualization platform for the Area – This project aims to create an accessible platform showcasing the scale and nature of activities in the Area and enhanced understanding of scientific data collected by ISA in the Area.

Diplomatic Deep-sea Academy for Africa – Building on the Memorandum of Understanding between ISA and the International Relation Institute of Cameroon adopted by the Assembly, this initiative seeks to develop a dedicated curriculum on the Law of the Sea, with specific reference to the regime of the Area, for African diplomats, equipping them with the knowledge and skills necessary for effective participation in deep-sea governance.

Enhancing and leveraging the knowledge of African experts in deep-sea research through the establishment of the ISA-Egypt Joint Training and Research Centre – This project will support a series of tailored activities to build capacity of African researchers and to support deep-sea literacy in the context of the recently signed Memorandum of Understanding between ISA and the National Institute of Oceanography and Fisheries of Egypt.

Promoting deep-sea research in the Indian Ocean – This project focuses on increasing institutional capacities of the Member States of the Indian Ocean Rim Association, particularly LDCs and SIDS in matters related to deep-seabed and Law of the Sea and supporting women leadership in deep-sea related activities for qualified women scientists from IORA Members.

Advancing the Caribbean blue economy through the Centre for Excellence for Oceanography and the Blue Economy – This initiative, is dedicated to mapping the immediate capacity needs of Caribbean countries in the field of marine scientific research in the Area and to developing a curriculum in advancing deep-sea research in the Caribbean region.



Secondly, ISA has undertaken a number of projects and initiatives to support the development of capacity and technology transfer in particular regions on the basis of the needs identified by developing States themselves. The Abyssal Initiative for Blue Growth,³⁹³ the Africa Deep Seabed Resources project³⁹⁴ and the Supporting Ocean Economies of LDCs, LLDCs and SIDS project³⁹⁵ were all designed as collaborative projects undertaken with global and regional partners to raise awareness of the provisions of UNCLOS and the 1994 Agreement, as well as the potential for the development of deep-seabed resources within and beyond national jurisdiction, with a view to contributing to the development of the blue economy in developing countries. These projects have been in addition to more general ad hoc regional seminars conducted by ISA to raise awareness and understanding of the regime for the exploration and exploitation of resources in the Area.³⁹⁶

Thirdly, a more recent initiative is the development of national and regional training centres to support capacity-building efforts. The first Joint Training and Research Centre (JTBC) was established in Qingdao, China, following a memorandum of understanding between ISA and the State Oceanic Administration of China in October 2019. The ISA-China JTBC held its first workshop, involving 55 participants from 20 countries, in May 2022.³⁹⁷ The first Egypt JTBC was established following a memorandum of understanding signed by ISA and the National Institute of Oceanography and Fisheries of Egypt in January 2024. Both initiatives aim to promote training and capacity-building opportunities for developing countries pursuant to articles 275 and 276 of UNCLOS. The ISA's Capacity Development Strategy embeds the commitment of ISA to continue dialogue with States and interested organizations concerning the development of a network of national or regional training centres.³⁹⁸

Fourthly, ISA has provided opportunities for capacity-building through training opportunities, both within the organization, for example through its Internship Programme³⁹⁹ and the Junior Professional Officer Programme,⁴⁰⁰ but also directly with contractors. In this latter context, capacity-building is directly built into the regulatory regime established under Part XI of UNCLOS, which requires contractors to "draw up practical programmes for the training of personnel of [ISA] and developing States, including the participation of such personnel in all activities in the Area which are covered by the contract, in accordance with article 144, paragraph 2."⁴⁰¹ Such training provides an important opportunity to offer access to at-sea training and laboratory facilities, which can otherwise be difficult to access given the costs involved. This basic obligation is reiterated in ISA's Regulations⁴⁰² and further elaborated in LTC recommendations, which specify that each contractor should deliver training for the equivalent of at least 10 trainees during each 10-year period of the contract. The training should consider "capacity-building needs of developing countries and the secretariat (Enterprise) when developing their training programmes, so as to ensure as wide a range of skill development as possible."⁴⁰³ For its part, the Secretariat is called upon to develop an information system on the training needs of developing countries to assist contractors in the development of effective training programmes.⁴⁰⁴ It has been emphasized that the LTC also has a key role in ensuring that developing country needs and priorities are reflected in training programmes when making recommendations for the approval of specific contractual arrangements.⁴⁰⁵ The Secretariat has committed to ensuring, where possible, equal participation for qualified women and men from developing countries in these programmes.⁴⁰⁶ It has also sought to maximize the benefits to be derived from participation in these schemes through the establishment of the ISA Capacity Development Alumni Network (iCAN), launched in February 2024.⁴⁰⁷

³⁹³ ISA. Abyssal Initiative for Blue Growth. Available at: <https://www.isa.org.jm/isa-voluntary-commitments/abyssal-initiative-for-blue-growth>.

³⁹⁴ ISA. 2018. Supporting Africa's Blue Economy through the Sustainable Development of Deep Seabed Resources. Available at: <https://www.isa.org.jm/news/supporting-africas-blue-economy-through-sustainable-development-deep-seabed-resources>.

³⁹⁵ ISA. Supporting ocean economies of LDCs, LLDCs and SIDS. Available at: <https://www.isa.org.jm/isa-voluntary-commitments/supporting-ocean-economies-of-ldcslldcs-and-sids>.

³⁹⁶ ISA. 2020. Review of the Capacity-Building Programmes and Initiatives Implemented by the International Seabed Authority 1994-2019, Report by the Secretariat. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/04/Review-Of-Capacity-Building-Programmes-And-Initiatives-By-ISA.pdf>, 47-48.

³⁹⁷ ISA. 2023. The ISA-China joint training and research centre: Annual Report 2022. Available at: https://www.isa.org.jm/wp-content/uploads/2023/07/ISA-China_JTBC_annual_report_2022.pdf, 7.

³⁹⁸ ISA. 2022. Capacity Development Strategy of the International Seabed Authority (ISBA/27/A/5). https://www.isa.org.jm/wp-content/uploads/2022/12/ISBA_27_A_5-2209799E.pdf, Annex I, para. 20.

³⁹⁹ ISA. Internships. Available at: <https://www.isa.org.jm/capacity-development-training-and-technical-assistance/internships>.

⁴⁰⁰ ISA. 2019. Secretary-General's bulletin: Junior Professional Officer programme (ISBA/ST/SGB/2019/1). Available at: https://www.isa.org.jm/wp-content/uploads/2022/12/isba_st_sgb_2019_1-e.pdf.

⁴⁰¹ UNCLOS, Annex III, article 15.

⁴⁰² ISA. 2012. Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (ISBA/18/A/11). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-18a-11_0.pdf, Annex IV, Section 8.

⁴⁰³ ISA. 2013. Recommendations for the guidance of contractors and sponsoring States relating to training programmes under plans of work for exploration: issued by the Legal and Technical Commission (ISBA/19/LTC/14). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-19ltc-14_0.pdf, para. 16.

⁴⁰⁴ Ibid.

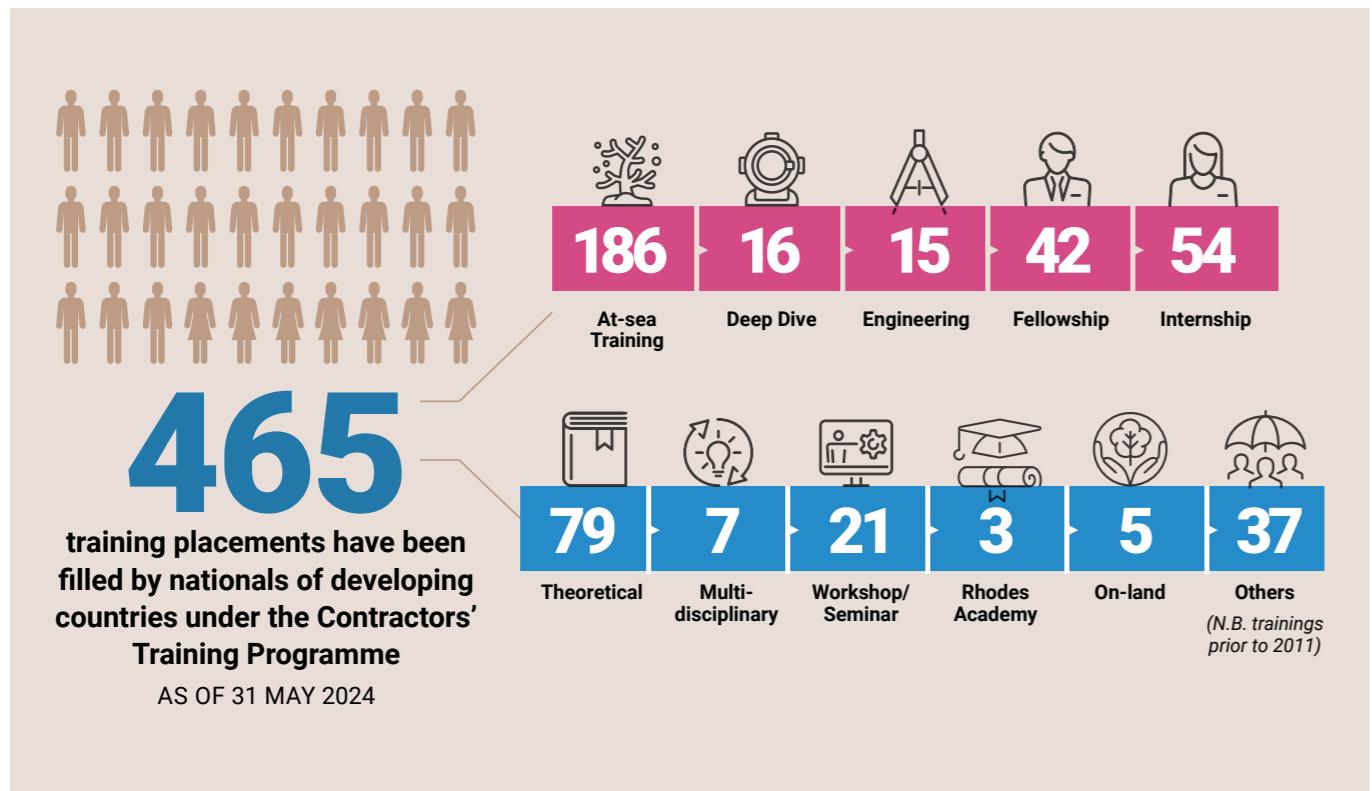
⁴⁰⁵ ISA. 2020. Review of the Capacity-Building Programmes and Initiatives Implemented by the International Seabed Authority 1994-2019, Report by the Secretariat. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/04/Review-Of-Capacity-Building-Programmes-And-Initiatives-By-ISA.pdf>, 22.

⁴⁰⁶ ISA. 2022. Capacity Development Strategy of the International Seabed Authority (ISBA/27/A/5). https://www.isa.org.jm/wp-content/uploads/2022/12/ISBA_27_A_5-2209799E.pdf, para. 27.

⁴⁰⁷ ISA. Calling all former participants of ISA capacity development programmes: Join the ISA – Capacity Development Alumni Network (iCAN). Available at: <https://www.isa.org.jm/join-the-isa-capacity-development-alumni-network-ican>.

Box 12.

Overview of Contractors' Training Programmes, 1994-2004



It can be seen from this brief review of ISA's activities in this area that it has already made significant contributions to the development of the capacity of developing countries in relation to deep-sea science and technology.

Moreover, ISA has more recently undertaken a review of its work in order to ensure that it is delivering its objectives on capacity development. Following this review, the Assembly approved in December 2020 the development of a dedicated strategy for capacity development,⁴⁰⁸ which would embed a "programmatic approach" to the issue. The review identified that ISA needed to realign its activities in order to ensure that it was responding to the priority needs of developing countries as identified by them and delivering clear indicators and targets for each type of activity.⁴⁰⁹ These principles have been embedded in the Capacity Development Strategy adopted by the ISA Assembly in August 2022.⁴¹⁰ The Strategy is implemented by the Secretariat, which presents annual workplans and progress reports to the Assembly.⁴¹¹ Since 2020, ISA has had a specific budget line on

capacity development and technical cooperation, although it has been recognized that further resources are needed to give full effect to the Strategy.⁴¹² The Strategy emphasizes five key areas for action, including:

- ensuring that capacity development programmes and activities are meaningful, tangible, efficient, effective and targeted at the needs of developing States as identified by them
- establishing and furthering strategic partnerships in support of capacity
- strengthening institutional capacities through technology transfer and technical assistance
- advancing women's empowerment and leadership in deep-sea-related disciplines through targeted capacity development activities
- improving deep-sea literacy through better awareness and understanding of the legal regime of the Area and the role and mandate of ISA.

⁴⁰⁸ ISA. 2020. Decision of the Assembly of the International Seabed Authority relating to the implementation of a programmatic approach to capacity development (ISBA/26/A/18). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA_26_A_18-2017635E.pdf, para. 2.

⁴⁰⁹ ISA. 2020. Implementing a programmatic approach to capacity development: Report of the Secretary-General (ISBA/26/A/7). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA_26_A_7-2011093E.pdf, para. 36.

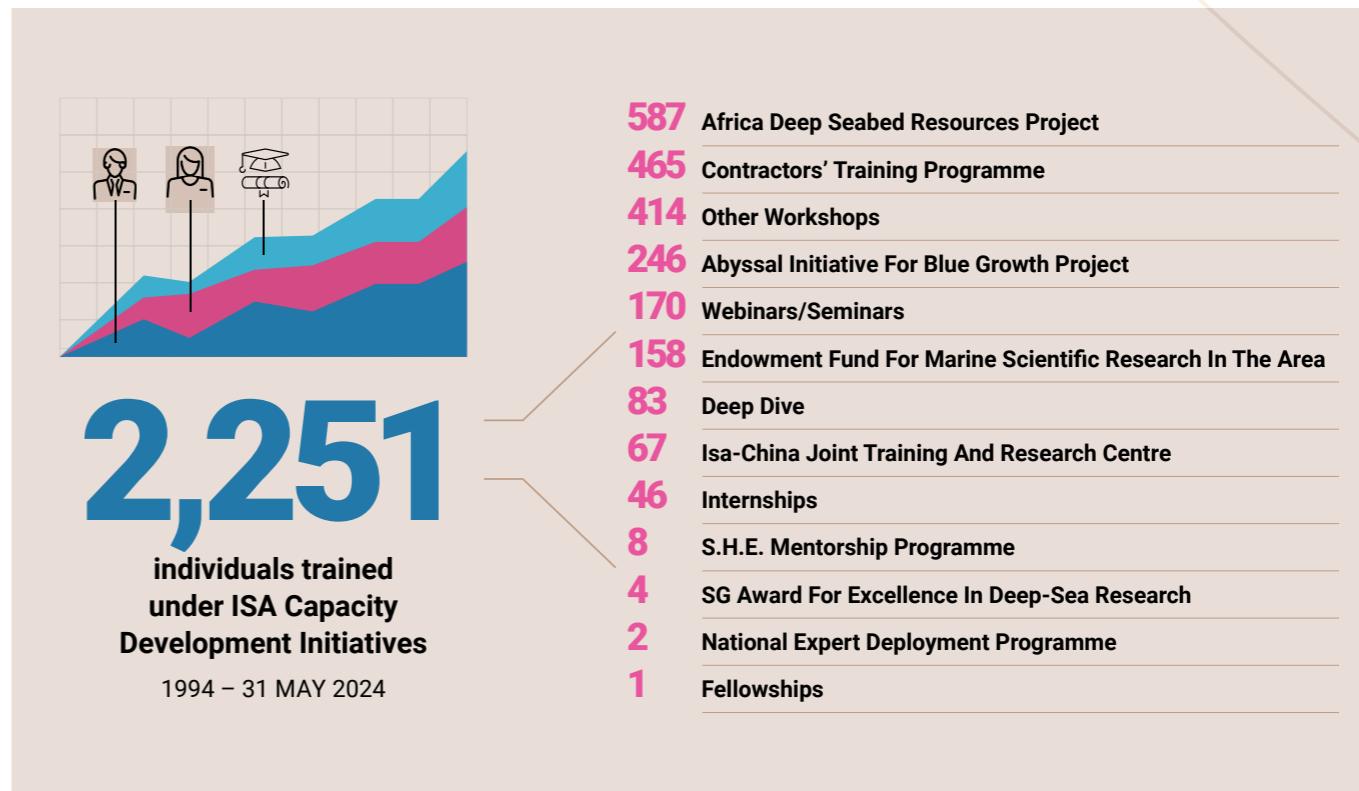
⁴¹⁰ ISA. 2022. Decision of the Assembly of the International Seabed Authority relating to the implementation of a programmatic approach to capacity development (ISBA/27/A/11). Available at: https://www.isa.org.jm/wp-content/uploads/2022/12/ISBA_27_A_11-221217E.pdf, para. 3.

⁴¹¹ ISA. 2022. Capacity Development Strategy of the International Seabed Authority (ISBA/27/A/5). https://www.isa.org.jm/wp-content/uploads/2022/12/ISBA_27_A_5-2209799E.pdf, Annex I, para. 44.

⁴¹² See *ibid.*, paras 38-42.

Box 13.

ISA Capacity Development Programmes in Numbers



ISA has noted the need to keep its provision of capacity development programmes under review. In particular, ISA has committed to reviewing the needs of developing ISA Member States at least every five years to ensure that its capacity development programmes continue to be responsive to their evolving needs.⁴¹³

4.6.3 Consequences of the 2023 Agreement for the work of the International Seabed Authority and opportunities for cooperation and coordination

The work of ISA in relation to capacity-building has evolved significantly in the past few years. The adoption of the Capacity Development Strategy marks a major milestone in this process. It will be remembered that this is one area where a number of participants in the negotiation of the 2023 Agreement highlighted the work of ISA as a model for developing a framework for capacity-building and technology transfer (section 4.2 above). Overall, the objectives of the Capacity Development Strategy would appear to align with the objectives of the 2023 Agreement and it mirrors the key principles and modalities included in Part V of the Agreement.

⁴¹³ *Ibid.*, para. 11.

⁴¹⁴ ISA. 2022. Capacity Development Strategy of the International Seabed Authority (ISBA/27/A/5). https://www.isa.org.jm/wp-content/uploads/2022/12/ISBA_27_A_5-2209799E.pdf, Annex I, para. 11.

⁴¹⁵ ISA. 2020. Decision of the Assembly of the International Seabed Authority relating to the implementation of a programmatic approach to capacity development (ISBA/26/A/18). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/ISBA_26_A_18-2017635E.pdf, para. 4 and Annex containing the Terms of Reference for national focal points.

5. General institutional cooperation and coordination between the International Seabed Authority and the treaty bodies to be established under the 2023 Agreement

A reoccurring theme that arises in the analysis of the implications of the 2023 Agreement for the work of ISA is the need for strong interaction between ISA and the treaty bodies to be established under the 2023 Agreement. This need is reflected directly in the 2023 Agreement, which identifies the promotion of “cooperation and coordination with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies” as one of the functions of the COP.⁴¹⁷ The Agreement leaves open the nature of the arrangements to be made in furtherance of this mandate, simply referring to “appropriate processes.”

Article 169 of UNCLOS also provides for the Secretary-General of ISA to make arrangements, with the approval of the Council, for consultation and cooperation with international and non-governmental organizations recognized by the United Nations Economic and Social Council. On this basis, ISA has admitted 32 intergovernmental organizations as observers to its meetings.⁴¹⁸ It has also entered into formal agreements or memorandums of understanding with nine of these institutions.⁴¹⁹ The Strategic Plan also includes a goal to “establish and strengthen strategic alliances and partnerships with relevant subregional, regional and global organizations with a view to more effective cooperation in the conservation and sustainable use of ocean resources, consistent with UNCLOS and international law [...].”⁴²⁰ When it enters into force, the 2023 Agreement will be a part of the relevant international legal framework for achieving this strategic goal, and it will arguably be a key priority for developing alliances and partnerships.

The question becomes how to achieve this objective. There will, of course, be opportunities to contribute to ad hoc consultations undertaken under the various parts of the Agreement, as discussed above. This section will consider how the two regimes can build a more systematic relationship in which they regularly share information and exchange views concerning the achievement of their mutual objectives. Several modalities for such an arrangement present themselves, as discussed below.

⁴¹⁷ 2023 Agreement, article 47(6)(c).

⁴¹⁸ ISA. Observers. Available at: <https://www.isa.org.jm/observers>.

⁴¹⁹ ISA. Legal documents. Available at: <https://www.isa.org.jm/legal-documents>. Most recently, ISA has negotiated a memorandum of understanding with the Food and Agriculture Organization of the United Nations, which was presented to the Council for approval at its twenty-ninth session in 2024. ISA. 2024. Memorandum of understanding between the Food and Agriculture Organization of the United Nations and the International Seabed Authority: Note by the Secretary-General (ISBA/29/C/2). Available at: <https://www.isa.org.jm/wp-content/uploads/2024/02/2403026E.pdf>.

⁴²⁰ ISA. 2018. Decision of the Assembly of the International Seabed Authority relating to the strategic plan of the Authority for the period 2019–2023 (ISBA/24/A/10). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isa24_a10-en.pdf. Strategic Directions 1.2 and Strategic Direction 1.5: “strengthen cooperation and coordination with other relevant international organisations and stakeholders in order to promote mutual ‘reasonable regard’ between activities in the Area and other activities in the marine environment and to effectively safeguard the legitimate interests of members of ISA and contractors.”

Box 14. The ISA Capacity Development Strategy

THE KEY ELEMENTS OF THE STRATEGY COVER FIVE INTERRELATED RESULT AREAS

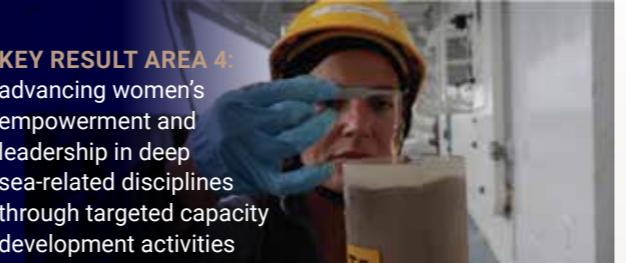
KEY RESULT AREA 1: ensuring that capacity development programmes and activities are meaningful, tangible, efficient, effective and targeted at the needs of developing States as identified by them



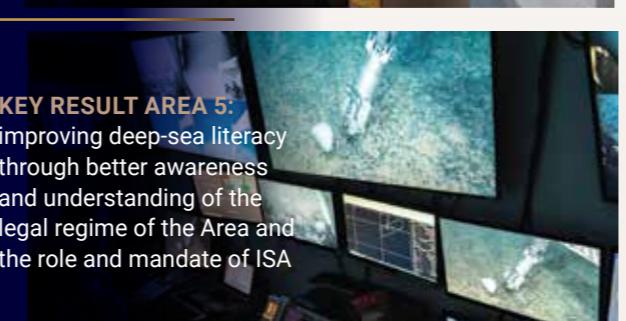
KEY RESULT AREA 2: establishing and furthering strategic partnerships in support of capacity



KEY RESULT AREA 3: strengthening institutional capacities through technology transfer and technical assistance

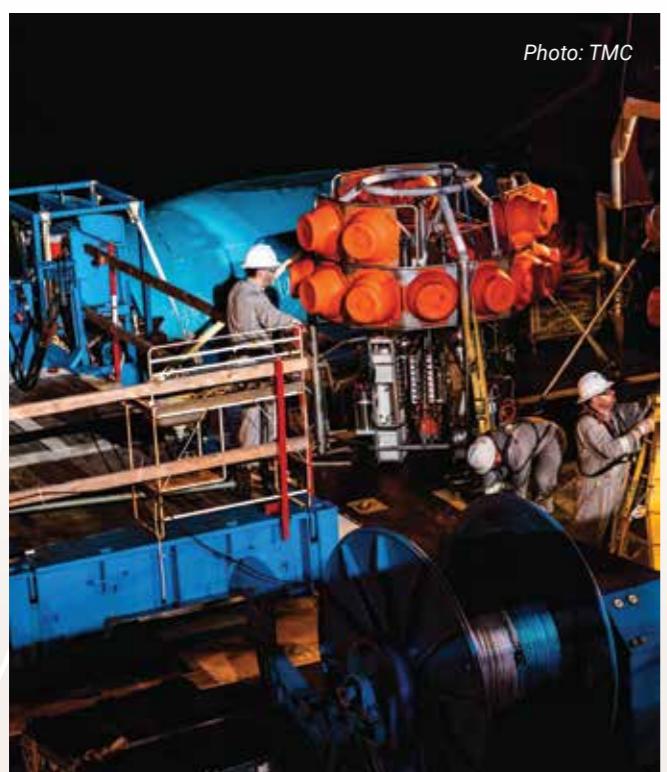


KEY RESULT AREA 4: advancing women's empowerment and leadership in deep sea-related disciplines through targeted capacity development activities



KEY RESULT AREA 5: improving deep-sea literacy through better awareness and understanding of the legal regime of the Area and the role and mandate of ISA

The challenge for both regimes is their effective delivery. In this respect, a synergistic implementation is most likely to enhance effectiveness. It must be recognized that the 2023 Agreement does not impose obligations on ISA directly. However, there are clearly opportunities for ISA to become a platform for the delivery of the objectives of Part V of the 2023 Agreement. ISA has identified the advantages of developing strategic partnerships to deliver capacity development programmes effectively.⁴¹⁶ Once the 2023 Agreement enters into force and the institutional arrangements are put into place, the COP and the Capacity-Building and Transfer of Marine Technology Committee should become key partners for this purpose. ISA may even become a formal partner in the delivery of capacity-building initiatives under Part V of the 2023 Agreement. The options for joint projects delivered between ISA and the institutions to be established under the 2023 Agreement will be considered in section 5 below.



⁴¹⁶ ISA. 2022. Capacity Development Strategy of the International Seabed Authority (ISBA/27/A/5). https://www.isa.org.jm/wp-content/uploads/2022/12/ISBA_27_A_5-2209799E.pdf. Annex I, para. 17.

Box 15. Memoranda of Understanding established by ISA



ISA and Intergovernmental Oceanographic Commission (UNESCO)



ISA and the International Cable Protection Committee



ISA and the OSPAR Commission



ISA and SPC



Agreement of Cooperation between ISA and IMO



Agreement of Cooperation between ISA and IHO



ISA and AALCO (Asian-African Legal Consultative Organization)



ISA and IORA (Indian Ocean RIM Association)



ISA and the Ministry of Natural Resources (State Oceanic Administration) of the People's Republic of China



ISA and the National Institute of Oceanography and Fisheries of Egypt



ISA and the African Union



ISA and Food and Agricultural Organization (FAO)



ISA and International Labour Organization (ILO)



5.1 Observer status

One option directly presented by the 2023 Agreement is participation as an observer in the meetings of the COP and other treaty bodies. To this end, article 48(2) provides that

"all meetings of the [COP] and its subsidiary bodies shall be open to observers participating in accordance with the rules of procedure unless otherwise decided by the [COP]."

Until the COP adopts its rules of procedures, its operation shall be based on the rules of procedure of the IGC,⁴²¹ which, as seen above, permits the participation of ISA in that process. It is likely that this opportunity for participation by observers, including intergovernmental organizations, will be incorporated into the rules of procedure to be adopted by the COP at its first session. The question is how those rules should be drafted.

One option is to simply treat ISA as an intergovernmental organization that must apply for observer status. Alternatively, it would be possible for the rules of procedure themselves to identify ISA as an observer, thus obviating the need for it to apply for observer status, as has been done, for example, in the Rules of Procedure of the Meeting of States Parties to

UNCLOS.⁴²² This approach would allow for the recognition of the mandate of ISA under UNCLOS, reinforce the critical role of ISA in the management of the Area and underline the need for a special close cooperation between ISA and the institutional arrangements to be established under the 2023 Agreement. It would also be justified by the explicit requirement to ensure consistency between the 2023 Agreement and UNCLOS.

The treaty bodies under the 2023 Agreement may also be able to participate as observers in the work of ISA. The rules of procedure of the Assembly on this point refer to participation by five different categories of observers: States, national liberation movements, observers at the Third United Nations Conference on the Law of the Sea, the United Nations, its specialized agencies, the International Atomic Energy Agency and other intergovernmental organizations invited by the Assembly and non-governmental organizations, including those which have demonstrated their interest in matters under consideration by the Assembly.⁴²³ The question that arises in this context is whether the 2023 Agreement establishes an intergovernmental organization that would fall within the scope of these rules. In the past, the legal status of secretariats of multilateral environmental agreements has often been ambiguous.⁴²⁴ While neither the COP nor the Secretariat has been explicitly granted legal personality by the

2023 Agreement,⁴²⁵ it has been recognized that international legal personality can be implied when it is necessary for an entity to carry out its functions.⁴²⁶ It is usually the secretariat that would represent an international organization as an observer on the international stage. In that respect, the 2023 Agreement provides that it is the Secretariat that will "facilitate cooperation and coordination, as appropriate, with the secretariats of other relevant bodies."⁴²⁷ It would, therefore, be appropriate for the Secretariat to apply for observer status at ISA. In this context, it would be up to the ISA Assembly whether to accept such a request. There are examples where the secretariats of other multilateral environmental agreements have been granted observer status at ISA. For example, at its fifth session, the Assembly granted observer status to the CBD Secretariat as an intergovernmental organization.⁴²⁸ This may provide a precedent for treating the secretariat of the 2023 Agreement similarly, although it may depend on the precise character of the body performing these secretariat functions.

5.2 Administrative and contractual arrangements

A further opportunity to develop closer working relations between ISA and the treaty bodies to be established under the 2023 Agreement is the establishment of bespoke administrative and contractual arrangements. Article 50(4)(d) of the 2023 Agreement confers a power on the secretariat to "facilitate cooperation and coordination, as appropriate, with the secretariats of other relevant international bodies and, in particular, enter into such administrative and contractual arrangements as may be required for that purpose for the effective discharge of its functions."

This sort of arrangement is already familiar to ISA, which has entered into memoranda of understanding with a number of intergovernmental entities. Broadly speaking, these arrangements follow a similar pattern, providing for exchange of information and consultation on matters of common interest with a view to promoting a better understanding⁴²⁹ or ensuring maximum coordination of the work and activities of the relevant organizations.⁴³⁰ Some arrangements have more specific content, however, to reflect the particular objectives of the two institutions involved. For example,

⁴²¹ 2023 Agreement, article 47(4).

⁴²² United Nations. 2020. Rules of Procedure for Meetings of the States Parties: United Nations Convention on the Law of the Sea (SPLOS/2/Rev.5). Available at: <https://digitallibrary.un.org/record/3876767?ln=en&v=pdf>, Rule 18(2) and Rule 37 giving the right to the ISA Secretary-General to make written and oral statements concerning any question under consideration by the Meeting.

⁴²³ ISA. 1994. Rules of Procedure of the Assembly of the International Seabed Authority (ISBA/A/6). Available at: https://www.isa.org.jm/wp-content/uploads/2022/04/isba-a-6_0.pdf, Rule 82.

⁴²⁴ UNFCCC. 2021. Administrative, financial and institutional matters: Continuous review of the functions and operations of the secretariat: Legal status of the secretariat: Note by the secretariat. Available at: https://unfccc.int/sites/default/files/resource/note_legal_status_unfccc.pdf. Questions of status have also arisen for Secretariats under other multilateral environmental agreements, such as the Convention on International Trade in Endangered Species and the Convention on Migratory Species.

the memorandum of understanding between the OSPAR Commission and ISA provides for the mutual encouragement of marine scientific research and cooperation in the collection of data, particularly with a view to the ongoing assessment of deep water habitats and species in the sea areas of the North-East Atlantic.⁴³¹ Importantly, the arrangements are subject to data confidentiality, particularly in relation to data submitted by ISA's contractors.⁴³² Another example is provided by the recent MOU concluded between ISA and the Food and Agriculture Organization of the United Nations which specifically mentions the development of scientific approaches for the sustainable management of activities under each Party's respective mandate in areas beyond national jurisdiction as a key focus for cooperation.⁴³³

These arrangements may provide a model for the development of similar arrangements with the Secretariat of the 2023 Agreement, which could be adapted to address the particular shared objectives and mandates of the two regimes.

5.3 Other practical arrangements for cooperation

Beyond the options discussed above, a number of other examples from the practice of international institutions would seem to indicate opportunities for additional practical arrangements to foster collaboration between different regimes.

Firstly, it is possible for engagement between institutions not only at the level of the secretariat but also between other organs. In this respect, UNCLOS explicitly foresees that the LTC "may, where appropriate, consult [...] any competent organ of the United Nations, or its specialized agencies or any international organizations with competence in the subject matter of such consultation."⁴³⁴ Looking at the practice of other international institutions may provide some lessons for such forms of inter-institutional cooperation.

In particular, other regimes have pursued cooperation between scientific bodies in order to ensure better coordination of scientific and technical data and activities. One example from the Antarctic Treaty System is the organization of

⁴²⁵ Article 50(3) simply provides that the Secretariat "shall enjoy legal capacity in the territory of the host State." This is arguably different from international legal personality.

⁴²⁶ See ICJ. 1949. *Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion*. ICJ Reports 174. Available at: <https://www.icj-cij.org/case/4>, 178-179.

⁴²⁷ 2023 Agreement, article 50(d). This can be contrasted with the function of the COP to "promote [...] cooperation and coordination [...]" (emphasis added).

⁴²⁸ ISA. 1999. Statement of the President on the Work of the Assembly at its Fifth Session (ISBA/5/A/14). Available at: https://www.isa.org.jm/wp-content/uploads/2022/06/isba-5a-14_1.pdf, para. 5.

⁴²⁹ See ISA. Memorandum of Understanding between the Intergovernmental Oceanographic Commission of UNESCO and the International Seabed Authority. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/04/ISA-IOC-MOU.pdf>, para. 1.

⁴³⁰ See IMO. 2016. Agreement of Cooperation between the International Maritime Organization (IMO) and the International Seabed Authority (ISA). Available at: <https://www.isa.org.jm/wp-content/uploads/2022/04/IMO.pdf>, para. 1.

⁴³¹ ISA. Memorandum of Understanding between the OSPAR Commission and the International Seabed Authority. Available at: <https://www.isa.org.jm/wp-content/uploads/2022/04/MOU-OSPAR.pdf>, paras 2-3.

⁴³² Ibid., para. 7.

⁴³³ ISA. 2024. Memorandum of Understanding between the Food and Agriculture Organization of the United Nations and the International Seabed Authority (ISBA/29/C/2). Available at: <https://www.isa.org.jm/wp-content/uploads/2024/02/2403026E.pdf>, Annex.

⁴³⁴ UNCLOS, article 163(13).



ISA side event, BBNJ PrepCom, 25 July 2019

joint meetings between the Scientific Committee of the Commission on the Conservation of Antarctic Marine Living Resources and the Committee on Environmental Protection established under the Antarctic Treaty. These scientific organs operate under two autonomous treaties, with a distinct membership but with a clear overlap in geographical application and objectives. A review of the joint arrangements between these scientific bodies emphasized that they "were valuable in enhancing the working relationship between the two bodies and in identifying opportunities for cooperation."⁴³⁵ In a similar vein, it may be possible, when appropriate, for the organization of joint meetings of the LTC and the STB or other relevant treaty bodies under the 2023 Agreement as a means for enhancing synergies between ISA and the objectives of the 2023 Agreement.

It is also possible for cooperation to take the form of longer-term collaborative arrangements between institutions. In the field of international environmental law, it is common for bodies established under different treaties to agree upon a joint programme of work in order to further their common objectives. One example is the Joint Work Programme between the Convention on International Trade in Endangered Species and the Convention on Migratory Species.⁴³⁶ This five-

year work programme identifies a series of specific actions to be taken in cooperation between the relevant bodies, with agreed time frames and clear lines of responsibility for taking the actions forward. The development of such a work programme may be initiated by the secretariats of the institutions, but given the policy and financial consequences, it must be endorsed by the parties. This form of cooperation may be particularly pertinent to the more operational aspects of the 2023 Agreement, such as capacity-building and technology transfer, in which joint or harmonized activities could effectively contribute to the objectives of Part V of the Agreement, as well as the objectives of ISA. This sort of coordination may also lead to the establishment of formal joint projects, such as those capacity-building programmes carried out jointly by the IMO and the United Nations Development Programme relating to ballast water⁴³⁷ or shipping emissions.⁴³⁸ Building on this example, it would be possible for particular capacity-building activities under the 2023 Agreement to be delegated to ISA, under terms of reference agreed with the COP and the Capacity-Building and Transfer of Marine Technology Committee, and potentially with financing from the special fund or the Global Environment Facility Trust Fund to be established in accordance with article 52 of the 2023 Agreement.

⁴³⁵ CCAMLR. 2017. Second Performance Review of the Commission on the Conservation of Antarctic Marine Living Resources, Final Report of the Panel. Available at: <https://www.ccamlr.org/en/document/publications/second-performance-review-ccamlr-%E2%80%99final-report-panel>, para. 10(iii).

⁴³⁶ Convention on the Conservation of Migratory Species of Wild Animals. 2021. 52nd Meeting of the Standing Committee. CMS-CITES Joint Work Programme (UNEP/CMS/StC52/Doc.17). Available at: https://www.cms.int/sites/default/files/document/cms_stc52_doc_17_cms-cites-joint-pow_e_0.pdf.

⁴³⁷ GloBallast. The GloBallast Partnerships Project 2007-2017. Available at: <https://archive.iwlearn.net/globallast.imo.org/the-globallast-partnerships-project-2007-2016/index.html>.

⁴³⁸ GloMEEP. Homepage. Available at: <https://gloimeep.imo.org>.

6. Conclusions

While the adoption of the 2023 Agreement undoubtedly represents a further development in the international legal framework for the conservation and sustainable development of marine biological diversity in ABNJ, the success of the 2023 Agreement will depend both upon a critical mass of States consenting to be bound by the 2023 Agreement, as well as the steps taken by the parties to give effect to the Agreement. There are many aspects of the framework under the 2023 Agreement that require further elaboration through COP decisions, standards or guidance. There are also key provisions that remain ambiguous and call for further clarification if they are to be implemented consistently and effectively. Section 3 of this report has highlighted a number of such questions of interpretation which will be relevant for understanding the implications of the 2023 Agreement for the work of ISA. The report has emphasized the need to ensure that COP decisions are taken in line with the need to ensure consistency with UNCLOS and not to undermine other instruments, frameworks and bodies. The need to avoid duplication was stressed by many delegations through the negotiation of the 2023 Agreement, and it should also inform its implementation.

It is clear from the analysis carried out in this report that ISA will have an indispensable role in contributing to the objectives of the 2023 Agreement. As the global body directly established by UNCLOS to manage and control activities in the Area, including ensuring the effective protection of the marine environment, the involvement of ISA will be critical to promoting the general objective of the conservation and sustainable use of marine biodiversity of ABNJ, as well as the specific objectives of each substantive part of the 2023 Agreement. Section 4 of this report has identified the significant progress that has already been made under the auspices of ISA in developing the legal framework for the conservation and sustainable use of marine biological diversity in the context of activities in the Area. In particular, ISA has made major contributions to the development of scientific knowledge of marine biodiversity in the Area. In doing so, it has made strides in developing capacity and technology transfer to developing countries. ISA is also in the process of developing the regulatory framework for activities in the Area, which includes both EIA and the provision for ABMT. The existing work of ISA thus overlaps with all four substantive parts of the 2023 Agreement.

As a result, important questions arise as to how the actions taken by ISA will interact with the new legal framework to be established under the 2023 Agreement. First and foremost, it is clear that the 2023 Agreement does not alter the mandate of ISA. To the contrary, the inclusion in the 2023 Agreement of a requirement for consistency with UNCLOS underlines that ISA can continue to exercise its responsibilities in overseeing the conduct of activities in the Area under Part XI of UNCLOS and the 1994 Agreement. Nevertheless, the overlap between the work of ISA and the provisions of the 2023 Agreement does call for a clear understanding of whether ISA Members may have additional responsibilities in relation to activities in the Area if they decide to become a party to the 2023 Agreement, particularly in relation to parts II, III and IV of the Agreement.

There is a need for greater clarity over these provisions and how they may interact with Part XI of UNCLOS.

This report is a first step in identifying the key overlaps between the work of ISA and the 2023 Agreement, as well as issues that require further clarification. However, much will depend on how these two regimes interact in practice. There will be implications arising for the work of ISA, which will have to engage with the processes and treaty bodies established under the 2023 Agreement in order to ensure that its mandate is respected. As a result, the entry into force of the 2023 Agreement will undoubtedly create more responsibilities for the ISA Secretary-General, particularly in ensuring that the views of ISA are reflected in consultations and reviews carried out under various parts of the 2023 Agreement. ISA may also need to reflect upon its internal procedures to facilitate such engagement, ensuring communication with key organs and stakeholders. The desirability for ISA to engage with the new processes and frameworks established under the 2023 Agreement could be explicitly recognized in the next ISA Strategic Plan. This is to ensure that ISA is working towards the overall objectives of the 2023 Agreement and particularly promoting the conservation and sustainable development of marine biodiversity in ABNJ coherently and cooperatively while also ensuring that it continues to deliver on its mandate according to the priorities of its Member States.

The success of the 2023 Agreement will also depend on how the treaty bodies to be established by the 2023 Agreement coordinate with ISA and other relevant institutions in order to ensure that they respect the principle of consistency and the principle of not undermining enshrined in article 5 of the 2023 Agreement. On one level, good working relationships between the ISA Secretariat and the Secretariat to be established under the 2023 Agreement will be important for ensuring effective communication and promoting coordination between the two regimes. One possible tool to promote this objective is the development of a memorandum of understanding between ISA and the secretariat of the 2023 Agreement, as considered in section 5 of this report. However, there will also have to be diplomatic engagement on the part of States in order to reach a clear understanding of how the mandates of ISA and the institutions to be established under the 2023 Agreement interact, particularly in relation to clarifying the significant ambiguities identified in this report. In this respect, those ISA Members who become parties to the 2023 Agreement have an opportunity to promote coordinated and coherent interaction between the 2023 Agreement and the Part XI regime by actively participating in these processes and encouraging the mutual supportiveness of the applicable instruments. Of course, it cannot be assumed that all ISA Members will become parties to the 2023 Agreement. The differences in membership may lead to some challenges to coordination where different priorities are identified by the respective institutions. Ultimately, the degree to which the 2023 Agreement can overcome fragmentation will depend upon the diplomatic efforts of States and their ability to agree on a coordinated response to common challenges to the conservation and sustainable use of the marine biodiversity of ABNJ.

Annex I

Group of Experts established to assist the Secretary-General in preparing a report on the contribution of ISA to the implementation of the 2023 Agreement under UNCLOS



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Professor Dr. Gemma Andreone is currently acting Director of the Institute of International Legal Studies of the National Research Council of Italy, where she holds the position of Research Director of International Law. She is Editor in chief of the Maritime Safety and Security Law Journal and member of the Scientific Council of Indemer (Principauté de Monaco). She is legal adviser and solicitor at the Bar of Rome (Italy) and consultant for the Italian Ministry for Enterprises and Made in Italy and for the Italian Ministry for foreign affairs and international cooperation. As member of the Italian delegation, she participated in the BBNJ negotiations from August 2019 to March 2023. To date, she has been coordinator, principal investigator and member of a number of national and international scientific projects and training activities (among others ITLOS Nippon Foundation Training Program, the National Future Biodiversity Center – PNRR, Bluemed CSA.). From 2001 to 2013 she held the position of Professor of International Law and Human rights Law at the University of Naples L'Orientale. Gemma is author of books, articles and papers on the Law of the Sea and Mediterranean Sea governance.



Ms. Azela ARUMPAC-MARTE
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Azela Arumpac-Marte is First Secretary and Legal Adviser at the Permanent Mission of the Philippines to the United Nations in New York. She is currently the Legal Adviser and Sixth Committee expert of the Permanent Mission of the Philippines to the United Nations in New York. She was previously Acting Executive Director of the Office of Treaties and Legal Affairs, and prior to that the head of its Treaties Division, at the Philippines' Department of Foreign Affairs.



Ms. Asha CHALLENGER
Legal Adviser, Permanent Mission of Antigua and Barbuda to the United Nations



H.E. Ms. Angella COMFORT
Permanent Representative of Jamaica to The International Seabed Authority

Ambassador Angella Comfort is the Permanent Representative of Jamaica to the International Seabed Authority, and the Under-Secretary for the Multilateral Affairs Division in the Ministry of Foreign Affairs and Foreign Trade, Kingston, Jamaica

She holds an MSc in Economics from Birkbeck College, University of London and BA in Social Sciences from the University of Westminster, London. She acquired professional post graduate studies-Diplomas in General Management and Project Management from the Management Institute for National Development (MIND), Kingston, Jamaica.

As a current member of the Board of Directors of the Maritime Authority of Jamaica, she is committed to ensuring high standards of corporate governance in maritime matters. She served as High Commissioner of Jamaica to the Republic of South Africa and Non-resident High Commissioner to the Republics of Namibia, Kenya, Botswana, Tanzania, Mozambique, Zimbabwe and Mauritius, and as a Member of the Board of Directors of the Pan African Institute – University of Johannesburg.

She has directed policy departments in the Ministry of Foreign Affairs and Foreign Trade, including the International Organizations Department, and manages the Multilateral Affairs Division, covering Jamaica's involvement and interests within the United Nations and international economic affairs. As the Deputy Permanent Representative of Jamaica to the UN in NY, she covered Sixth Committee legal issues, including UNCLOS and BBNJ, and Fifth Committee administrative and budgetary work. She also acted as Permanent Representative of Jamaica to the United Nations and Chairman of the Group of Latin American and Caribbean Countries (GRULAC).

She represents Jamaica at various UN High-level Meetings, was a member of Jamaica's delegation during its tenure and past Presidency of the UN Security Council, membership of ECOSOC and Chairmanship of the G77 and China, and was elected to a number of UN committees. She was Minister Counsellor at the Jamaican High Commission in London and was integrally involved in the work of the International Maritime Organization, covering international maritime safety, the protection of the marine environment and international shipping. Her active contribution to the work of the IMO, included her appointment as a representative of the Governing Body at IMO Staff Pension Board Meetings.



Mr. Alan EVANS
Head of Policy Unit, National Oceanography Center, United Kingdom

Alan Evans is Head of Marine Policy at the National Oceanography Centre, UK. With 25 years' experience in science and technology research, he uses knowledge generated through marine scientific research to engage with decision makers and at international forum to support the development and delivery of ocean governance frameworks.

Alan has a long-standing working relationship with the ISA, directly contributing to ISA Technical Studies reports as well as supporting ISA Capacity Development initiatives. He also provides a conduit to other NOC experts that can contribute to the mandate of the ISA.

As the only non-Government member of the UK Delegation at the BBNJ Treaty negotiations, Alan provided technical support and advice relating to the four substantive Parts and was the UK representative negotiating Part V on Capacity-Building and the Transfer of Marine Technology at IGC 5. Since the adoption of the Treaty text Alan continues to support the work of the UK Government in preparation to ratify the Agreement.


Mr. Elie JARMACHE

Law of the Sea Expert, Former member of the Legal and Technical Commission of the International Seabed Authority, France

Mr. Elie Jarmache was in charge of Law of the Sea items at the Secretariat General de la mer of France from 2005 to 2018, including continental shelf, deep sea, marine scientific research and the implementation of the EU integrated maritime policy. He had in charge the leading of the French delegation to the CLCS in New York (2006-2018). He has chaired the Advisory body of experts on the LoS (ABE-LOS) dealing with MSR in IOC/UNESCO (2001-2009). He was a member of the Legal and Technical Commission (LTC) of the ISA from 2012 to 2022. Author of publications on the LoS as well as teaching at the French Institut of Political Studies in Paris. Member of the Scientific Committee of INDEMER in Monaco.


Mr. Bartosz JASIŃSKI

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Bartosz Jasiński – geographer and climatologist by education, currently working on a PhD researching climate changes in the Sudeten Mountains. An employee of the Polish government administration for 8 years, for over 5 years dealing with deep-sea mining in the Area, especially legal regulations and exploration research of the ocean floor. From 2022, head of the delegation to the ISA and Polish chief negotiator of exploitation regulations in the Area. Author of the several speeches on Polish activity in the Area at national conferences.


Ms. Khalilah HACKMAN

Minister Counsellor, Permanent Mission of Ghana to the United Nations

A Ghanaian Lawyer and Diplomat with a combined working experience of 20 years in the private and public sectors. She has contributed in several roles to advancing Ghana's foreign policy objectives at national and international levels. Presently, she is the Deputy Director, Legal and Treaties Bureau of the Ministry of Foreign Affairs and Regional Integration. Until February, 2024, she was the Legal Adviser to the Permanent Mission of Ghana to the United Nations and a member of Ghana's delegation to the United Nations Security Council from 2022 to 2023. In 2018, she was an Advisor on African Peacebuilding and Sustaining Peace to the President of the 73rd Session of the United Nations General Assembly.

Khalilah possesses a rich experience of multilateral diplomacy, public international law and international relations having been involved in various inter-governmental processes and multilateral negotiations. Between 2020 and 2023, she provided strategic leadership as the Coordinator of the 47 African Member States of the International Seabed Authority (ISA) and was instrumental in amplifying the voice of Africa in ocean policy and governance. She represented her country at expert level on the Council of the International Seabed Authority and has been instrumental in efforts towards the development of the Deep seabed Mining Code. She was also a member of Ghana's delegation to the intergovernmental conferences on the newly adopted High Seas Treaty (BBNJ) and is a member of the Group of Experts established to assist the Secretary-General of the ISA in preparing a report on the contribution of the ISA to the implementation of the 2023 Agreement under UNCLOS.


H.E. Mr. Michael KANU

Permanent Representative of Sierra Leone to the United Nations and The International Seabed Authority

Michael Imran Kanu (SJD), newly appointed Permanent Representative of the Republic of Sierra Leone to the United Nations in New York, will also concurrently serve as the Ambassador Extraordinary and Plenipotentiary of Sierra Leone to Argentina, Cuba, Mexico, Uruguay, Venezuela, as well as Permanent Representative of Sierra Leone to the International Seabed Authority in Kingston, Jamaica. He is a Member of the Legal and Technical Commission of the International Seabed Authority (2023-2027), and Co-chair of the Review Mechanism of the International Criminal Court and the Rome Statute system.

Dr. Kanu served as Ambassador and Deputy Permanent Representative (Legal Affairs) at the Permanent Mission of the Republic of Sierra Leone to the United Nations in New York (2018-2023). A legal practitioner in Sierra Leone, he previously served as Managing Partner of Kanu & Associates law firm, Prosecutor at the Anti-Corruption Commission of the Republic of Sierra Leone, and Secretary of the General Legal Council, Republic of Sierra Leone.

Dr. Kanu holds a Doctoral of Juridical Science degree in International Business Law (SJD), Central European University; Master of Laws in International Business Law (LL.M), Central European University; Degree of Utter Barrister (B.L), Sierra Leone Law School; and Bachelor of Laws with Honours (LL.B), Fourah Bay College, University of Sierra Leone. He is a United Nations International Law Fellow and recently appointed Visiting Senior Fellow in Practice, the Law School of the London School of Economics and Political Science.


Mrs. Youna LYONS

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H.E. Mrs. Fernanda MILLICAY

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Fernanda Millicay is a career diplomat of Argentina. She began her career at the Legal office of the MFA of Argentina, but also worked at the Multilateral Economic Negotiations and Antarctica Departments, where she specialized in law of the sea, fisheries subsidies, Antarctica and other related issues.

She was awarded the 18th Hamilton Shirley Amerasinghe Memorial Fellowship on the Law of the Sea, and her work "A legal regime for the biodiversity of the Area" was published in 2007. Between 2008 and 2015, she was legal adviser at the Permanent Mission of Argentina to the United Nations, covering general international law, ICC, law of the sea and fisheries. In 2011, she represented the G77 and China at UN law of the sea negotiations, including BBNJ, during Argentina's chairmanship of the Group. In 2013-2014, she was legal adviser to the delegation of Argentina to the Security Council. She was Co-Chair of the UN Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socio-economic Aspects from 2013 to 2015. Between 2016 and 2019, she was Director of Argentina's National Antarctic Program. Since 2020, she is Permanent Representative of Argentina to the International Maritime Organization.


Mrs. Noorah MOHAMMED ALGETHAMI

General Manager of International Treaties, Saudi Arabia and Member of the Legal and Technical Commission of the International Seabed Authority, Saudi Arabia

My education and career have allowed me to gain a strong understanding and experience in various fields of law, with a specialty in international Law, environmental Law, and international treaties, and I have developed over time a skill of legal research and writings. I am looking for a position that will combine my career background, studies, and passion. Since learning and new challenges never stop, I am confident that taking new opportunities is building a wall of success brick by brick.


Mr. Kentaro NISHIMOTO

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Kentaro NISHIMOTO is Professor of International Law at the Graduate School of Law, Tohoku University and Arctic Observation Center, National Institute of Polar Research. At Tohoku University, he is the vice-director of the Center for International Law and Policy. He obtained his PhD in Law in 2011 from the University of Tokyo with the thesis "Territoriality and Functionality in the Historical Evolution of the Law of the Sea." His research has focused on the international law of the sea, including issues such as the history of the law of the sea, sustainable development of ocean resources, and the settlement of maritime disputes. His ongoing research primarily focuses on the BBNJ Agreement, protection of the marine environment, and legal aspects of Arctic ocean governance. He has advised the government of Japan in various capacities, including as an advisor to the Japanese delegation to the BBNJ Preparatory Committee and BBNJ Intergovernmental Conference and as a member of the Subcommittee on the Environmental Impact Assessment for Wind Power Generation of the Central Environmental Council.


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Matters of professional interest include Law of the sea issues; shipping in different maritime zones; implementation of UNCLOS with particular focus on the continental shelf, the Area, rights and obligations of coastal and third States; specific legal regimes of protection, conservation and sustainable use of marine living resources; legal implications of the sea-level rise.

Experience as a Member of the delegation of the Russian Federation at the multi- and bilateral consultations on the law of the sea and polar regions issues, as well as at meetings of international intergovernmental organizations and diplomatic conferences: Antarctic Treaty Consultative Meeting; Commission for the Conservation of Antarctic Marine Living Resources; Conference of the Parties to the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean; International Seabed Authority.


James HARRISON

James Harrison is Professor of Environmental Law at the University of Edinburgh in the United Kingdom. James has broad research interests across environmental law, but with a particular focus on marine environmental protection and the wider law of the sea. He has written extensively on these topics, including on international and domestic fisheries law, the regulation of shipping and dumping, and the legal framework for deep seabed mining. His research outputs include journal articles, book chapters, and two monographs: *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, 2011) and *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment* (Oxford University Press, 2017). Alongside his academic work, James has acted as a legal adviser, consultant, or trainer for a number of governments, inter-governmental organizations and non-governmental organizations. He holds a PhD (2008) and a LLM (2003) from the University of Edinburgh and a LLB (2001) from the University of East Anglia.

Figures and boxes

| | | |
|------------------|--|----|
| Figure 1. | Comparative chronology of ISA key milestones and the 2023 Agreement negotiation process..... | 18 |
| Figure 2. | The 2023 Agreement in the context of The United Nations Convention on the Law of the Sea..... | 22 |
| Box 1. | Key principles underpinning Part XI of UNCLOS and the 2023 Agreement | 21 |
| Box 2. | Benefit sharing – monetary and non-monetary benefits under Part XI of UNCLOS..... | 28 |
| Box 3. | Lessons learned from the North-East Atlantic: “The Collective Arrangement” | 34 |
| Box 4. | The UN General Assembly and the recognition of the role and mandate of ISA in the negotiations of the 2023 Agreement | 44 |
| Box 5. | Statements of delegations during the negotiations of the 2023 Agreement | 45 |
| Box 6. | Sustainable Seabed Knowledge Initiative | 49 |
| Box 7. | ISA Action Plan in support of the UN Decade of Ocean Science for Sustainable Development..... | 50 |
| Box 8. | Clarion Clipperton Zone, showing Areas of Particular Environmental Interest | 57 |
| Box 9. | Relationship between the International Seabed Authority and the International Maritime Organization..... | 59 |
| Box 10. | Environmental Impact Assessment Procedures under ISA..... | 60 |
| Box 11. | The International Seabed Authority Partnership Fund | 64 |
| Box 12. | Overview of Contractors’ Training Programmes, 1994-2024..... | 66 |
| Box 13. | Figures from the ISA Capacity Development Programmes | 67 |
| Box 14. | The ISA Capacity Development Strategy | 68 |
| Box 15. | Memoranda of Understanding established by ISA..... | 69 |



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