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# The relevance of the Southern Ocean to the development of a global regime for marine areas beyond national jurisdiction-an uncommon commons

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The Southern Ocean's areas beyond national jurisdiction (ABNJ) are uncommon in a number of ways. This article first discusses features of the Southern Ocean's uncommonness that may be relevant to the relationship between the Antarctic Treaty System (ATS) and the development of the international legally binding instrument on the conservation and sustainable use of marine biological diversity of ABNJ under United Nations General Assembly Resolution 69/292 (ILBI). Second, the article considers the potential relationship between the ILBI and the ATS. Third, the article discusses the current approach of the ATS to governance of the Southern Ocean's ABNJ by focusing on two particular topics which are to be included in the development of the ILBI. The topics discussed are measures (such as area-based management, including marine protected areas) and marine genetic resources.

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# The Relevance of the Southern Ocean to the Development of a Global Regime for Marine Areas beyond National Jurisdiction—An Uncommon Commons

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## Abstract

The Southern Ocean's areas beyond national jurisdiction (ABNJ) are uncommon in a number of ways. This article first discusses features of the Southern Ocean's uncommonness that may be relevant to the relationship between the Antarctic Treaty System (ATS) and the development of the international legally binding instrument on the conservation and sustainable use of marine biological diversity of ABNJ under United Nations General Assembly Resolution 69/292 (ILBI). Second, the article considers the potential relationship between the ILBI and the ATS. Third, the article discusses the current approach of the ATS to governance of the Southern Ocean's ABNJ by focusing on two particular topics which are to be included in the development of the ILBI. The topics discussed are measures (such as area-based management, including marine protected areas) and marine genetic resources.

## Keywords

areas beyond national jurisdiction (ABNJ) – United Nations General Assembly Resolution 69/292 – international legally binding instrument (ILBI) – Antarctic Treaty System (ATS) – marine protected areas – marine genetic resources

The Southern Ocean (SO) is a special ocean area in many ways. Ecologically, the SO teems with biodiversity.<sup>1</sup> Furthermore, by connecting nearly all of the world's oceans (except the Arctic Ocean), it also makes a vital contribution to global ocean circulation and climate and, therefore, to global marine biological diversity. Legally, the SO is also an uncommon space. Governance of the SO includes relevant global regimes, such as the law of the sea and international environmental law systems, and also a specialised, autonomous regional regime, the Antarctic Treaty System (ATS). The application of legal regimes to the SO is moulded by the unique status of Antarctic continental sovereignty (including the sometimes espoused view of the Antarctic as a global commons). Currently, another relevant global regime for the governance of ocean areas is being developed. In 2015, via its Resolution 69/292 (Resolution 69/292), the United Nations General Assembly (UNGA) decided to develop an international legally binding instrument (ILBI) under the United Nations Convention on the Law of the Sea (LOSC)<sup>2</sup> on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (ABNJ).<sup>3</sup> This article explores the role of the SO's 'uncommonness' in the relationship between SO governance and the ILBI. The article does this by briefly introducing the uncommonness of the SO's ABNJ in relation to boundaries, oceanography and current governance. The article then discusses aspects of the relationship between SO governance and the ILBI that are particular to the SO situation. The article also discusses the current approach to governance of the SO beyond national jurisdiction focussing on the ATS and particularly on area-based management and marine genetic resources.

### An Uncommon Ocean Area

A number of aspects of the SO's uncommonness are relevant to the subject matter of the ILBI. These include the SO's exceptional contribution to marine biological diversity, the nature of its ABNJ and governance thereof. First, the

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- 1 Scientific Committee of Antarctic Research, "Antarctic life is highly diverse and unusually structured", available at <http://www.scar.org/2015/753-antarctic-life-is-highly-diverse-and-unusually-structured>; accessed 14 February 2017.
  - 2 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994), 1833 *UNTS* 396.
  - 3 United Nations 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/Res/69/292, 19 June 2015.

so is of particular significance to global marine biological diversity. It borders the Pacific, Atlantic and Indian Oceans, thereby connecting four of the five world's oceans (including itself). The so is also home to the world's largest and only global ocean current, the Antarctic Circumpolar Current, and some of the world's strongest winds, which power the Antarctic Circumpolar Current's movement. Being the sole location where ocean waters revolve around the Earth and where most of the world's other oceans converge, the so plays a unique role in the oceanic exchange of properties such as water and heat; thus it is uniquely important to global ocean circulation, thereby influencing global climate and global marine biological diversity.<sup>4</sup> In addition to its own uncommonness, the so surrounds a unique continent that is colder, drier and more remote than any other, but is still home to extraordinary biodiversity.

The location of the so's ABNJ is also subject to some peculiarities. The so is, hydrographically, a relatively new ocean: the International Hydrographic Organization (IHO) only provisionally demarcated it as a separate ocean in 2000.<sup>5</sup> Whereas the southern boundary of the so is clearly defined by the Antarctic continent, the northern boundary of the new ocean is not settled. In its 2004 proposed draft, the IHO proposed setting the ocean's northern boundary as 60 Degrees South Latitude (60°S). This has been accepted by a number of states.<sup>6</sup> Due to the differing views of other States, this proposal has not to date been finally endorsed. Australia, for example, considers parts of the northern boundary of the so to extend to its southern continental coastline.<sup>7</sup> Alternative views on the location of the so's northern boundary are based on

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4 Australian Government, 'The Southern Ocean's Global Reach' (2002) 4 *Australian Antarctic Magazine*, available at <http://www.antarctica.gov.au/magazine/2001-2005/issue-4-spring-2002/feature2/the-southern-oceans-global-reach>; accessed 13 February 2017. Also, Group of Experts of the Regular Process, First Global Integrated Marine Assessment. World Ocean Assessment I (United Nations, New York, 2016), chapter 36H, p. 1, available at [http://www.un.org/Depts/los/global\\_reporting/WOA\\_RegProcess.htm](http://www.un.org/Depts/los/global_reporting/WOA_RegProcess.htm); accessed 13 February 2017, at pp. 1, 3.

5 International Bathymetric Chart of the Southern Ocean, "Background", available online at [https://www.iho.int/srv1/index.php?option=com\\_content&view=Article&id=300&Itemid=744&lang=en](https://www.iho.int/srv1/index.php?option=com_content&view=Article&id=300&Itemid=744&lang=en); accessed 13 February 2017.

6 For example, the United States describes the location of the Southern Ocean as the "the body of water between 60 degrees south latitude [sic] and Antarctica". See Central Intelligence Agency, "The World Factbook. Oceans: Southern Ocean. Geography: Southern Ocean", available at <https://www.cia.gov/Library/publications/the-world-factbook/geos/oo.html>; accessed 5 February 2017.

7 Australian Hydrographic Service, "Names and Limits of Oceans and Seas around Australia", available at [http://www.hydro.gov.au/factsheets/WFS\\_Names\\_and\\_Limits\\_of\\_Oceans\\_and\\_Seas\\_Around\\_Australia.pdf](http://www.hydro.gov.au/factsheets/WFS_Names_and_Limits_of_Oceans_and_Seas_Around_Australia.pdf); accessed 13 February 2013.

different oceanographic features, such as the Antarctic Circumpolar Current<sup>8</sup> and the Subtropical Front.<sup>9</sup> Irrespective of some uncertainties regarding its formal boundaries, the SO is widely accepted as a separate ocean entity.

The uncommonness of the SO extends to its governance. The Antarctic region is the subject of a unique regional regime, the ATS, which recognises and is built upon the Antarctic's "special legal and political status".<sup>10</sup> The ATS includes four main instruments: The Antarctic Treaty (Antarctic Treaty); the Convention for the Conservation of Antarctic Seals; the Convention on the Conservation of Marine Living Resources (CAMLRL Convention); and the Protocol on Environmental Protection to the Antarctic Treaty of 1 December 1959 (Protocol on Environmental Protection).<sup>11</sup> The main constituent instruments of the ATS take different approaches to their areas of operation. The Antarctic Treaty, the foundation instrument of the ATS, applies "south of 60° South Latitude" thereby including marine areas within the SO.<sup>12</sup> Later instruments also include statements regarding their scope and spatial application. The CAMLRL Convention extends beyond 60° S to "the area between the latitude and the Antarctic Convergence," provided the area forms part of the Antarctic marine ecosystem.<sup>13</sup> The Protocol on Environmental Protection hints at potential operation beyond the Antarctic environment by extending its area of focus to "dependent and associated ecosystems".<sup>14</sup>

Perhaps the most uncommon feature of the legal regime of the SO derives from the application, or more accurately lack of application, of territorial sovereignty to its land features, and especially to Antarctica, the continent surrounded by the SO. Antarctica is the only continent in the world whose entire territorial sovereignty is contentious. Prior to the adoption of the Antarctic Treaty, seven States (Australia, New Zealand, France, Norway, United Kingdom, Argentina and Chile) claim land territory in Antarctica, the sum of

8 For example, see Group of Experts of the Regular Process (n 4) at p. 1.

9 Australian Government, 'What is the Southern Ocean?' (2002) 4 *Australian Antarctic Magazine*, available at <http://www.antarctica.gov.au/magazine/2001-2005/issue-4-spring-2002/feature2/what-is-the-southern-ocean>; accessed 13 February 2017.

10 Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991, in force 14 January 1998) 30 *ILM* 1461 6, preamble.

11 The Antarctic Treaty (Washington, DC, 1 December 1959, in force 23 June 1961) 402 *UNTS* 71; Convention for the Conservation of Antarctic Seals (London, 1 June 1972, in force 11 March 1978) 1080 *UNTS* 176; Convention on the Conservation of Antarctic Marine Living Resources (Canberra, 20 May 1980, in force 7 April 1982) 1329 *UNTS* 48.

12 Antarctic Treaty, Art. VI.

13 CAMLRL Convention, Art. 1(1).

14 Protocol on Environmental Protection, Art. 2.

which occupies the majority of the continent. Islands within the area of the ATS are also claimed by various States. A further portion of the Antarctic continent is not the subject of any specific claim. In addition, two States, the United States and Russia, each maintain they have the right to claim Antarctic territory in the future. None of these claims to territory or territorial rights have received wide-scale acceptance. In order for a functional regime to exist, this matter is addressed by Article IV of the Antarctic Treaty. Article IV first excepts the treaty from affecting the potential range of parties' positions regarding Antarctic territorial sovereignty, such as renunciation, diminution, recognition or non-recognition of claims, rights or bases to claims.<sup>15</sup> Second, Article IV negates the ability of acts or activities during the life of the Antarctic Treaty to affect, positively or negatively, a claim to or rights of sovereignty. Article IV also disallows new claims from being asserted and existing claims from being enlarged.<sup>16</sup> This approach is reiterated in the CAMLR Convention in relation to the area of application of the Antarctic Treaty.<sup>17</sup>

Content-wise, key philosophical foundations of the ATS, as set out by the Antarctic Treaty, include dedication of the use of Antarctica for peaceful purposes only and the freedom of scientific investigation.<sup>18</sup> Of fundamental importance to the viability of the entire ATS, the Antarctic Treaty also sets out the approach to be taken to continental territorial sovereignty during the Treaty's life.<sup>19</sup> Other significant foci of the Antarctic Treaty include facilitating international scientific cooperation, creating rights of inspection and the exercise of jurisdiction in Antarctica.<sup>20</sup> The preservation and conservation of Antarctic living resources is also linked by the Antarctic Treaty to its principles and objectives.<sup>21</sup> Although this issue is not addressed in detail within the Treaty, a series of legally binding measures were made under the Antarctic Treaty in the years immediately following its adoption and these continue to be in force.<sup>22</sup> The Antarctic Treaty's concern with environmental protection is expanded in subsequent instruments.

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15 Antarctic Treaty, Art. IV(1).

16 Antarctic Treaty, Art. IV(2).

17 CAMLR Convention, Art. IV.

18 Antarctic Treaty, Arts. I, II.

19 Antarctic Treaty, Art. IV.

20 Antarctic Treaty, Art. IX(1)(a)–(e).

21 Antarctic Treaty, Art. IX (1)(f).

22 Recommendation ATCM III–VIII (Brussels, 1964), Agreed Measures for the Conservation of Antarctic Fauna and Flora, available at [http://www.ats.aq/devAS/info\\_measures\\_listitem.aspx?lang=e&id=35](http://www.ats.aq/devAS/info_measures_listitem.aspx?lang=e&id=35); accessed 16 February 2017.

The first ATS instrument to specifically deal with conservation issues was the Convention for the Conservation of Antarctic Seals. The objective of the next treaty to be adopted as part of the ATS, the CAMLR Convention, is the conservation of Antarctic marine living resources.<sup>23</sup> To fulfil this objective, the CAMLR Convention, *inter alia*, includes rational use in conservation,<sup>24</sup> applies conservation principles to harvesting and associated activities, and pioneers the application of ecosystem-based and precautionary approaches to that process.<sup>25</sup> Adopted most recently, the Protocol on Environmental Protection has the very broad objective of “comprehensive protection” of the Antarctic environment, as well as of its “dependent and associated ecosystems”. The Protocol also designates the Antarctic as “a natural reserve devoted to peace and science” and prohibits mineral resource activities (other than scientific research).<sup>26</sup> One of the approaches of the Protocol on Environmental Protection to advance its environmental objectives and principles is to require activities to be planned and conducted according to those plans and their effects to be monitored.<sup>27</sup> The Protocol makes provision for environmental impact assessments<sup>28</sup> as well as, through a series of annexes, for permit-driven fauna and flora controls, waste disposal and waste management, marine pollution prevention, area-based protection and management, and environmental emergencies.

### An Uncommon Relationship with the ILBI

Turning to UNGA Resolution 69/292, the spatial focus of the ILBI is to be marine ABNJ. Resolution 69/292 uses, but does not define, the meaning of ABNJ as a term. The term is also not defined by the LOSC, the instrument under which the ILBI is to be made. However, the LOSC does identify particular ocean spaces as being beyond national jurisdiction or as not including maritime zones subject to national jurisdiction. The LOSC defines the Area as being the seabed and ocean floor and their subsoil areas “beyond the limits of national jurisdiction”.<sup>29</sup> In relation to the water column, the LOSC applies its regime of the high seas in an exclusionary way to all remaining parts of the

23 CAMLR Convention, Art. II (1).

24 CAMLR Convention, Art. II(2).

25 CAMLR Convention, Art. 3.

26 Protocol on Environmental Protection, Arts. 2 and 7, respectively.

27 Protocol on Environmental Protection, Art. 3.

28 Protocol on Environmental Protection, Art. 8 and Annexes I–V, respectively.

29 LOSC, Art. 1(1).



sea other than the exclusive economic zone (EEZ), the territorial sea, a State's internal waters and a State's archipelagic waters<sup>30</sup>—concepts that the LOSC in turn describes by reference to an identified coastal or archipelagic state. In the absence of an explicit definition in Resolution 69/292, this paper assumes the term, “areas beyond national jurisdiction”, used in Resolution 69/292, to comprise the Area and high seas regimes of the LOSC.

The SO is viewed as including substantial ABNJ.<sup>31</sup> Moreover, even if the LOSC's regimes of EEZ and continental shelf were applied in relation to Antarctic land territory, these zones would not occupy all of the waters within the area of application of the ATS. The existence of ABNJ in the SO is also assumed by Article VI of the Antarctic Treaty which specifically refers to high seas, and preserves high seas rights in relation to the Treaty's area of application.<sup>32</sup> Marine areas within national jurisdiction can also be generated by islands, of which the SO contains a substantial number with varying degrees of isolation. However, the location of the actual boundaries of the SO's ABNJ, and thus the area of application of the ILBI, is subject to some particular complications. Ocean areas beyond national jurisdiction can generally be identified by reference to the marine areas within national jurisdiction (such as an EEZ or continental shelf). However, the situation regarding Antarctic terrestrial sovereignty and the operation of Article IV of the Antarctic Treaty mean that the areas within the SO to which the ILBI will apply cannot be wholly identified. The location of such areas may also attract considerable differences of opinion between States, as different States will have different views depending on their position regarding Antarctic territorial sovereignty and the operation of

30 LOSC, Art. 86.

31 Commented upon by, for example, RM Warner, 'Environmental Assessments in the Marine Areas of the Polar Regions' in EJ Molenaar, AG Oude Elferink and DR Rothwell (eds), *The Law of the Sea and the Polar Regions. Interactions between Global and Regional Regimes*, (Martinus Nijhoff Publishers, Leiden, 2013) 139–162, at p. 149. Also J Rochette, S Unger, D Herr, D Johnson, T Nakamura, T Packeiser, A Proelss, M Visbeck, A Wright and D Cebrian, 'The Regional Approach to the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction' (2014) 49 *Marine Policy* 109–117, at p. 111.

32 WM Bush, *Antarctica and International Law. A Collection of Inter-State and National Documents. Volume I* (Oceana Publications, London, 1991) 67. It is also noted that the area of application of the Convention on the Regulation of Antarctic Mineral Resource Activities ((Wellington, 2 June 1988, not in force) 27 *ILM* 868) (CRAMRA) is to be determined by reference to the LOSC's definition of continental shelf embodied in paragraphs 1 to 7 of its Article 76—refer to CRAMRA, Art. 5(3) and Final Act of the Fourth Special Antarctic Treaty Consultative Meeting on Antarctic Mineral Resources (Wellington, 1988).

Article IV of the Antarctic Treaty. For example, in relation to the SO's seabed, a number of the States have submitted information to the Commission on the Limits of the Continental Shelf on the location of their extended continental shelf boundaries under Article 76 of the LOSC. Other claimant States have indicated they may submit such information at a later time.<sup>33</sup> Some claimant States have also proclaimed territorial sea or corresponding EEZ areas adjacent to their claimed Antarctic land territory.

It would be expected that such States would be of the view that the SO's seabed ABNJ would comprise seabed and water column areas beyond the boundaries of their continental shelf and EEZ areas. This position would also seem necessary for consistency with their claims to territorial sovereignty. Conversely, some other States are of the view that the SO's ABNJ reach the land's edge of the Antarctic continent.<sup>34</sup> This is a result of those States' rejection of the claims of other States' Antarctic territorial sovereignty, which in turn means that there is no coastal State to generate such zones under the LOSC. They may also consider the establishment of maritime zones under the LOSC as contrary to Article IV of the Antarctic Treaty. However, some boundaries of the SO's ABNJ can be identified. This results from maritime zones, generated by land features outside the areas of operation of the ATS whose sovereignty is undisputed, having boundaries which protrude into the ATS area. Nevertheless, the area of application of the ILBI in the SO cannot be wholly identified during the life of Article IV of the Antarctic Treaty.

The Preparatory Committee established by Resolution 69/292 (Preparatory Committee) to recommend on elements of a draft text for the ILBI also observed that it was important that the ILBI preserve and be based upon the principles of the LOSC, preserve the LOSC's balance of rights, obligations and interests and implement and strengthen the LOSC.<sup>35</sup> The majority of the ATS's core instruments were done before the LOSC came into force; only the Protocol on Environmental Protection was done later than the LOSC. The core ATS instruments only make limited express reference to the law of the sea system

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33 See discussion in AG Oude Elferink, 'The Continental Shelf in the Polar Regions: Cold War or Black-Letter Law?' 2009 XL *Netherlands Yearbook of International Law* 121–181 at, for example, p. 165.

34 For example, the United States as referred to in S Kaye, *Australia's Maritime Boundaries*, 2nd ed, (Centre for Maritime Policy, University of Wollongong, Wollongong, 2001) at p. 185.

35 Resolution 69/292, para 1(a); "Chair's overview of the first session of the Preparatory Committee", available at <http://www.un.org/depts/los/biodiversity/prepcom.htm>; accessed 16 February 2016, at p. 4.

and the LOSC. There are, however, significant links between the ATS and LOSC beyond the obvious link arising from both systems' regulation of ocean areas. The ATS and the LOSC share significant cross-membership.<sup>36</sup> For example, 46 of the 53 Antarctic Treaty parties are also parties to the LOSC; an additional two States have signed but not ratified the latter Convention.<sup>37</sup> There are variations, however, between the approaches taken by those parties who are both Antarctic Treaty parties and LOSC parties in their application of the LOSC in the Antarctic. For example, some claimant States have articulated maritime zones under the LOSC adjacent to their claimed Antarctic territory, whereas other Antarctic Treaty parties are of the view that all SO circumpolar waters are high seas. As previously discussed, the application of the LOSC's extended continental shelf regime has also been approached differently by different Antarctic Treaty parties.<sup>38</sup>

Situations such as these have led to the observation that the ATS itself has a "mixed implementation" of LOSC provisions.<sup>39</sup> Some provisions of ATS instruments apparently modify or are incompatible with provisions of the LOSC. These situations do not always violate the LOSC's Article 311, which regulates the LOSC's relationship with other instruments. For example, Article 311 may not be contravened by an ATS provision that provides a higher standard of environmental protection than that set down by the LOSC. However, the prohibition of mineral resource activities by the Protocol on Environmental Protection is more problematic.<sup>40</sup> A related issue is Resolution 69/292's requirement that the ILBI be developed under the LOSC. The LOSC does not specifically refer to the Antarctic region (or to any particular ocean region) but does refer to "ice-covered areas" in Article 234 which is concerned with the

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36 CC Joyner, 'The Antarctic Treaty and the law of the sea: fifty years on' (2010) 46 *Polar Record* 14–17, at p. 15 (DOI: <https://doi.org/10.1017/S0032247409990258>, accessed 27 November 2016).

37 Secretariat of the Antarctic Treaty, "Parties", available at [http://www.ats.aq/devas/ats\\_parties.aspx?lang=e](http://www.ats.aq/devas/ats_parties.aspx?lang=e); accessed 15 September 2016. Also United Nations, "Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of 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." Available at [http://www.un.org/depts/los/reference\\_files/status2010.pdf](http://www.un.org/depts/los/reference_files/status2010.pdf); accessed 15 September 2016.

38 See discussion in KN Scott and DL VanderZwaag, 'Polar Oceans and Law of the Sea' in DR Rothwell, AG Oude Elferink, KN Scott and T Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 724–751 at pp. 738–739.

39 *Ibid.*, at p. 739.

40 For further discussion see *ibid.*, at p. 740.

protection and preservation of the marine environment. The situation of the ATS and the LOSC as two discrete systems which are not always compatible and whose relationship has ambiguities<sup>41</sup> may plausibly affect the relationship between the ATS and the future ILBI.

It is possible that the ILBI will be an implementing agreement under the LOSC.<sup>42</sup> This would be consistent with the UNGA requirement that the ILBI be created under the LOSC.<sup>43</sup> The LOSC already has two implementing agreements—the 1994 Part XI Agreement (concerning the non-living resources of The Area) and the 1995 United Nations Fish Stocks Agreement (concerning highly migratory and straddling stocks)—both of which were adopted after the current ATS instruments (apart from Annex VI to the Protocol on Environmental Protection). The General Assembly is seeking the ILBI’s “widest possible acceptance”.<sup>44</sup> Implementing agreements have been discussed as being more closely aligned to the LOSC and providing, for example, a greater political will or support in relation to implementation and thus a potentially different normative status.<sup>45</sup> The relationship between the ILBI and the ATS will also be affected by the fact that the ATS and the LOSC (and thus the ILBI) are discrete systems, with the ATS being established by a group of

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41 *Ibid.* It is noted that the Antarctic Treaty Consultative Meeting (ATCM) agreed this year to respond to any further invitations from the United Nations Secretariat pertaining to the Resolution 69/292 process by recalling the ATS’s sole competence for addressing the conservation and sustainable use of biological diversity in the Antarctic region and remaining silent on acceptance of the invitation. See “Procedure upon receiving invitations from the U.N. Secretariat” (ATCM XL—CEP XX, Beijing 2017) available at [http://www.ats.aq/devAS/ats\\_meetings\\_meeting\\_measure.aspx?lang=e](http://www.ats.aq/devAS/ats_meetings_meeting_measure.aspx?lang=e); accessed 14 August, 2017.

42 The Chair of the fourth session of the Preparatory Committee sometimes referred to the ILBI as an implementing agreement—see “Chair’s non-paper on elements of a draft text of an international legally binding instrument”, available at <http://www.un.org/depts/los/biodiversity/prepcom.htm>; accessed 28 July 2017, at p. 14. The ILBI’s status as an implementing agreement was discussed at meetings 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 (Working Group) established pursuant to para. 73 of UNGA Resolution 59/24 Oceans and Law of the Sea, A/RES/59/24, 17 November 2004. For example, refer to Annex to ‘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, para. 12. Annex to ‘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, paras 11, 27.

43 Resolution 69/292, para 1.

44 Resolution 69/292, paras 1 (g), (h).

45 Hubert (n 3) at p. 3.

States independent of the United Nations. The LOSC and its implementing agreements are United Nations instruments, as will be the ILBI. The nature of the relationship between the ATS and the LOSC may again have a particular bearing on the implementation of the ILBI in relation to the SO.<sup>46</sup>

The ATS is a relatively well-developed legal regime as well as a very particular regional regime. It would appear that the intention of Resolution 69/292 is that the ATS therefore not be undermined by the Preparatory Committee's process for developing the ILBI, given Resolution 69/292's protective attitude towards "existing relevant legal instruments and frameworks" and "relevant global, regional and sectoral bodies".<sup>47</sup> The inter-relationship of global, regional and sectoral approaches to the governance of marine ABNJ was raised at the Working Group,<sup>48</sup> including the importance of recognising that a global governance approach will affect different regions in different ways, thereby making a 'one size fits all' approach inappropriate.<sup>49</sup>

Delegations to the Working Group were also concerned about how a new global regime might relate to existing regional mechanisms.<sup>50</sup> To assist the work of the Preparatory Committee, the United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS) compiled indicative lists of global and regional treaties.<sup>51</sup> The list of regional treaties includes the Antarctic Treaty, the Protocol on Environmental Protection and the CAMLR Convention, thereby indicating that the ATS and its instruments are to be considered, respectively, as a legal framework and instruments that are relevant to the development of the ILBI. The various institutions established within the ATS, such as the Antarctic Treaty Consultative Meeting (ATCM), the Antarctic Treaty Secretariat and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) are presumably "relevant regional bodies" within the meaning of paragraph 3 of Resolution 69/292. This is consistent with the view of other United Nations fora. For example, the Antarctic region, specifically the SO, is listed by the United Nations Environment Programme as one of its regional seas and the CCAMLR is a regional fisheries body identified by the

46 Refer to C Johnson, 'When Worlds Collide: Reflection on the Relationship between the New Regime for Areas Beyond National Jurisdiction and the Antarctic Treaty System' (2017) 9 *Yearbook of Polar Law* (in press).

47 Resolution 69/292, para 3.

48 *Annex to Letter dated 25 July 2014* (n 42), at para 19.

49 *Ibid.*, para 22.

50 *Ibid.*, para 19.

51 UN Division for Ocean Affairs and Law of the Sea, 'Indicative List of Regional Treaties', available at <http://www.un.org/depts/los/biodiversity/prepcom.htm>; accessed 13 February 2017.

Food and Agriculture Organization.<sup>52</sup> The Preparatory Committee may also look to the ATS for possible approaches to developing the ILBI. For example, the International Union for Conservation of Nature (IUCN) refers to aspects of the ATS in its submission on cross-cutting issues to the second session of the Preparatory Committee.<sup>53</sup>

### An Uncommon Approach to ABNJ Governance

The ATS is also uncommon for being one of the few regional frameworks, and perhaps the most advanced of such frameworks,<sup>54</sup> that already deals extensively with both aspects of the subject matter of the ILBI, namely the conservation and sustainable use of marine biological diversity in ABNJ. The achievement of the latter aspect would seem to be a logical result of a system that has had to develop and operate without reference to national jurisdiction and therefore naturally lends itself to a whole-ocean approach.

In relation to conserving and sustainably using marine biological diversity, the Antarctic Treaty, in 1959, refers to preservation and conservation of Antarctic living resources in relation to its principles and objectives.<sup>55</sup> Both the CAMLR Convention<sup>56</sup> and the Protocol on Environmental Protection embrace an ecosystem-based approach to conservation. The objective of the Protocol, for example, is concerned with the comprehensive protection of the Antarctic environment and beyond to its dependent and associated ecosystems.<sup>57</sup> The CAMLR Convention also pioneered the application of the precautionary

52 Food and Agriculture Organization, 'Regional Fishery Bodies (RFBs)', available at <http://www.fao.org/fishery/rfb/search/en>; accessed 5 December 2016.

53 International Union for Conservation of Nature, 'Cross-Cutting Issues. Suggested responses to questions regarding three cross-cutting issues based on the document entitled, "Chair's indicative suggestions of clusters of issues and questions to assist further discussions in the informal working groups at the second session of the Preparatory Committee"', at pp. 4, 7, 15, available at [http://www.un.org/depts/los/biodiversity/prepcom\\_files/Cross\\_cutting\\_issues.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/Cross_cutting_issues.pdf); accessed 4 December 2016.

54 E Druel, P Ricard, J Rochette and C Martinez, *Governance of Marine Biodiversity in Areas Beyond National Jurisdiction at the Regional Level: Filling the Gaps and Strengthening the Framework for Action: Case Studies from the North-East Atlantic, Southern Ocean, Western Indian Ocean, South West Pacific and the Sargasso Sea* (IDDRI and AAMP, Paris, 2012) at p. 43.

55 Antarctic Treaty, Art. IX (1)(f).

56 CAMLR Convention, Art. 1(3).

57 Protocol on Environmental Protection, Art. 2.

approach<sup>58</sup> and the incorporation of rational use into the conservation of marine living resources.<sup>59</sup> Resolution 69/292 requires negotiations on the ILBI to focus on particular topics in order to address its core concern of conserving and sustainably using the marine biological diversity of ABNJ.

The following part of the paper will examine some features of the ATS's current approach to the conservation and sustainable use of marine biological diversity of ABNJ by examining two of these topics, namely, measures such as area-based management tools, including marine protected areas and marine genetic resources including questions related to the sharing of benefits.

### *Measures Such as Area-based Management Tools, Including Marine Protected Areas*

Spatial protection and management are prominent and longstanding features of the ATS. The ATS's main instruments in this regard are the 1980 CAMLR Convention and the 1991 Protocol on Environmental Protection, each of which includes its own system of measures, such as area-based management tools. In furtherance of its objective of conserving Antarctic marine living resources,<sup>60</sup> the CAMLR Convention empowers the CCAMLR, the implementing body of the Convention, through the use of conservation measures, to designate open and closed seasons for harvesting and open and closed areas for conservation purposes, including "special areas" for protection.<sup>61</sup> In relation to marine protected areas, the hallmarks of the CCAMLR approach have been described as comprehensiveness, adequacy and representativeness.<sup>62</sup> The CCAMLR's General Framework for the Establishment of Marine Protected Areas includes in its objectives fundamental reliance on scientific evidence, rational use as

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58 For example, see CAMLR Convention, Art. II(3)(c). For further discussion see, SM Garcia, 'The Precautionary Approach to Fisheries and Its Implications for Fishery Research, Technology and Management: An Updated Review' in UN Food and Agriculture Organization, 'Precautionary Approach to Fisheries. Part 2: Scientific Papers.' (FAO, Rome, 1995), available at <http://www.fao.org/docrep/003/W1238E/W1238E00.htm#TOC>; accessed 13 February 2017).

59 CAMLR Convention, Art. II(1), (2).

60 CAMLR Convention, Art. II (1), (2).

61 CAMLR Convention, Arts. IX.2(f), (g). KN Scott, 'Marine Protected Areas in the Southern Ocean' in Molenaar et al., (n 31) 113–138 at p. 131.

62 For example, Australian Government, 'A Proposal for a Representative System of Marine Protected Areas in the East Antarctic Planning Domain' (Australian Antarctic Division, Hobart, 2016), available at <http://www.antarctica.gov.au/law-and-treaty/ccamlr/marine-protected-areas>; accessed 9 January 2017.

part of conservation (as per the CAMLR Convention),<sup>63</sup> ecosystem protection, climate change resilience and protection from human impact.<sup>64</sup> The framework requires that when a specific CCAMLR marine protected area is created, the instrument creating the area is to identify its spatial boundaries, the area's specific objectives, the period of the area's existence and activities affected by the area. There is also to be a management plan and a research and monitoring plan.<sup>65</sup>

The features of the Protocol on Environmental Protection's system in this regard include extended comprehensive protection (beyond the Antarctic environment to its dependent and associated ecosystems),<sup>66</sup> a systematic approach through an environmental-geographic framework<sup>67</sup> and representativeness of ecosystems. These reflect the Antarctic Treaty's inclusion of the preservation and conservation of living resources in Antarctica as part of its principles and objectives.<sup>68</sup> Through its Annex v, the Protocol on Environmental Protection establishes a two-tiered system of specially managed or protected areas, in relation to which a specific management plan will prohibit, restrict or manage activities.<sup>69</sup> The protected areas, which incur more stringent protections, are envisaged as being identified within a "systematic environmental-geographic framework" and as compiling a series which will include representative examples of major marine ecosystems and a range of other types of areas concerned with environmental values.<sup>70</sup> The system in Annex V applies to both marine and terrestrial areas.<sup>71</sup> Despite this, Annex V would appear to be under-utilised with relatively few marine areas designated under Annex v.<sup>72</sup> In 2009, the ATCM and the CCAMLR—the managing bodies of the Antarctic Treaty and the CAMLR Convention respectively—agree that the CAMLR Convention's

63 I.e., CAMLR Convention, Art. II(2).

64 Conservation Measure 91–04 (2011) General Framework for the establishment of CCAMLR marine protected areas, available online at <https://www.ccamlr.org/node/74905>; accessed 6 March 2017.

65 *Ibid.*, at para 3.

66 Protocol on Environmental Protection, Art. 2.

67 Annex V to the Protocol on Environmental Protection, Art. 3(2).

68 Antarctic Treaty, Art. IX(1)(f).

69 I.e., Antarctic Specially Managed Areas and Antarctic Specially Protected Areas—see Annex v to the Protocol on Environmental Protection, Art. 2. NB: Annex v replaced the previous system of "Specially Protected Areas" and "Sites of Special Scientific Interest"—refer to Annex v, Art. 3.

70 Annex v to the Protocol on Environmental Protection, Art. 3(2).

71 Annex v to the Protocol on Environmental Protection, Arts. 3(1), 4(1).

72 Scott (n 61) at p. 131.



Scientific Committee was the most appropriate body within the ATS to lead “issues relating to spatial protection and management of Antarctic marine biodiversity” (without precluding the Committee for Environmental Protection’s development of marine Antarctic Specially Protected and Managed Areas).<sup>73</sup>

Since then the CCAMLR has attempted to pursue an ambitious agenda towards establishing a network of Antarctic marine protected areas. The “first step” in that network was the South Orkney Islands southern shelf, created by CCAMLR in the same year it became the ATS’s lead body for marine protected areas.<sup>74</sup> The 94,000–km<sup>2</sup> marine protected area is one of the world’s earliest marine protected areas beyond national jurisdiction. In 2016, the CCAMLR created the world’s largest marine protected area beyond national jurisdiction, the Ross Sea region marine protected area, covering a total area of 1.55 million km<sup>2</sup>.<sup>75</sup>

The Ross Sea region marine protected area comprises three discrete zones, each of which serves different conservation purposes. The General Protection Zone, the largest of the zones which itself includes three different areas, aims to protect different representative habitats and bioregions, mitigate or eliminate specified fishing-sourced ecosystem threats and support scientific research and monitoring. The Special Research Zone is notable for including an important continental slope fishing area and providing a scientific reference area concerned with the effects of climate change and fishing and the science-based management of the relevant toothfish fishery. This zone also contributes to representative protection, particularly to some pelagic protection objectives. The third zone, the Krill Research Zone, whose late inclusion was a crucial factor in the marine protected area being accepted, is concerned with research activities related to Antarctic krill.<sup>76</sup> The period of designation

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73 Final Report of the Thirty-second Antarctic Treaty Consultative Meeting (ATCM XXXII, Baltimore, 2009) para 105—available at [http://www.ats.aq/documents/ATCM32/fr/ATCM32\\_froo1\\_e.pdf](http://www.ats.aq/documents/ATCM32/fr/ATCM32_froo1_e.pdf); accessed 6 March 2017. Also, Report of the Twenty-Eighth Meeting of the Commission (CCAMLR-XXVIII, Hobart, 2009) para 14.3—available at <https://www.ccamlr.org/en/ccamlr-xxviii>; accessed 6 March 2017. Also WP55 (France, New Zealand, Russian Federation, United States) Report of the Joint CEP/SC-CAMLR Workshop (ATCMXXXII, Baltimore, 2009), para 7.7—available at [http://www.ats.aq/devAS/ats\\_meetings\\_documents.aspx?lang=e](http://www.ats.aq/devAS/ats_meetings_documents.aspx?lang=e); accessed 6 March 2017. The Committee for Environmental Protection is established by Article 11 of the Protocol on Environmental Protection.

74 Conservation Measure 91-03 (2009) Protection of the South Orkney Islands southern shelf, available at <https://www.ccamlr.org/en/measure-91-03-2009>; accessed 6 March 2017.

75 Conservation Measure 91-05 (2016) Ross Sea region marine protected area, available at <https://www.ccamlr.org/en/measure-91-05-2016>; accessed 6 March 2017.

76 *Ibid.*, at 12–13.

of the Ross Sea region marine protected area is 35 years with any extensions requiring consensus agreement.<sup>77</sup> Further proposals have been submitted to the CCAMLR. For example, two proposals for the establishment of additional marine protected areas in the east and west Antarctic, respectively, were submitted at the 2016 CCAMLR meeting.

Despite the CCAMLR's early commitment to a network of marine protected areas and the reference in the Protocol on Environmental Protection to a "series" of protected areas, this concept has proceeded more slowly than anticipated. The ATS was heavily influenced by the decision at the World Summit on Sustainable Development in 2002 to achieve a representative network of marine protected areas by 2012. The CCAMLR accordingly set a target for itself to achieve a representative system of marine protected areas within the area of the CAMLR Convention by that same year.<sup>78</sup> The timeframe of this target was not realised. More recently, the CCAMLR has referred to the 2020 target cited at the 2012 Conference on Sustainable Development for the conservation of marine areas "through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures".<sup>79</sup> Other ATS tools for spatial protection and management of marine areas (sometimes applied in conjunction with terrestrial protection) include the ATCM's site-specific guidelines for visitors to the Antarctic, which may include the marine environment in relation to, for example, cruising or docking of vessels. Also included are the CCAMLR Ecosystem Monitoring Programme (CEMP) Protected Area and CCAMLR-designated Vulnerable Marine Ecosystem (VME) Risk Areas.<sup>80</sup>

The ATS's approach to spatial protection and management has received attention in relation to the development of the ILBI. As mentioned previously, DOALOS lists CCAMLR and the Antarctic Treaty as regional treaties relevant to the work of the Preparatory Committee.<sup>81</sup> In the course of Preparatory Committee meetings, individual States have also referred to the ATS's actions, for example, as a cooperation and coordination forum for area-based management tools and in relation to the application of time-bound

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77 *Ibid.*, at 6.

78 See reference in Conservation Measure 91-04 (n 64), preamble.

79 Acknowledged in Conservation Measure 91-05 (n 75), preamble.

80 WP34 (United Kingdom) Spatial Protection and Management of Antarctic Marine Biodiversity' (ATCMXXII, Baltimore, 2009), available at [http://www.ats.aq/devAS/ats\\_meetings\\_doc\\_database.aspx?lang=e&menu=5](http://www.ats.aq/devAS/ats_meetings_doc_database.aspx?lang=e&menu=5); accessed 12 February 2012.

81 UN Division for Ocean Affairs and Law of the Sea (n 51).

measures.<sup>82</sup> CCAMLR's approach to marine protected areas has also been noted in some submissions to the Preparatory Committee.<sup>83</sup> More generally, even before the establishment of the Ross Sea region marine protected area, the ATS's CCAMLR-led approach, although not without issues or room for improvement, had received praise for being a particularly progressive and successful regime in relation to the establishment of marine protected areas in ABNJ.<sup>84</sup> The process of coordination between the ATCM-administered and the CCAMLR-administered systems within the ATS has also been viewed as worthy of consideration for application to other regions.<sup>85</sup>

### *Marine Genetic Resources, Including Questions on the Sharing of Benefits*

The ATS has devoted some attention to issues relating to marine genetic resources in its areas of operation and, thus, in SO ABNJ. The term "marine genetic resources", although identified as a key topic for the development of the ILBI, is not explained or defined by Resolution 69/292. Indeed, its definition and use are both issues provoking substantial discussion so far in the development of the ILBI. For example, approaches to defining marine genetic resources were identified by the Chair of the Preparatory Committee as one of the indicative issues or questions that would assist further discussions at the second Preparatory Committee meeting and were then one of the foci of discussion within an informal working group and in plenary at that meeting.<sup>86</sup>

The main instruments of the ATS do not specifically refer to marine genetic resources. They do, however, include relevant provisions dealing with environmental protection and scientific research. In relation to environmental protection, a number of overarching provisions of Antarctic Treaty instruments are relevant to the sub-topic of marine genetic resources within the ILBI's central

82 E Morgera, 'Summary of the Second Session of the Preparatory Committee on Marine Biodiversity Beyond Areas of National Jurisdiction' 2015 (25) *Earth Negotiations Bulletin* 8, available online at <http://www.iisd.ca/oceans/bbnj/prepcom2/>; accessed 16 February 2017.

83 International Union for Conservation of Nature, 'Measures such as Area-based Management Tools, Including Marine Protected', at 1.1, available at [http://www.un.org/depts/los/biodiversity/prepcom\\_files/area\\_based\\_management\\_tools.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/area_based_management_tools.pdf); accessed 4 December 2016. 'Development of an International Legally Binding Instrument under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Process). Written Submission of the EU and Its Member States (25 July 2016)', para. 21.

84 Scott and VanderZwaag (n 38) at 748; Druel et al., (n 54) at p. 49.

85 Scott (n 61) at p. 129.

86 Morgera (n 82) at p. 3.

context of conservation and sustainable use of marine biological diversity. Such provisions include the Antarctic Treaty's concern with preservation and conservation of living resources in its principles and objectives, the Protocol on Environmental Protection's objective of comprehensive protection of the Antarctic environment, and the CAMLR Convention's objective of conservation of Antarctic marine living resources with its inclusion of rational use.<sup>87</sup>

The Protocol on Environmental Protection and the CAMLR Convention also look to establish systems that are relevant to marine genetic resources in the context of their conservation and sustainable use. For example, the Protocol on Environmental Protection creates a system by which activities must be planned and conducted so as to limit adverse impacts. The CAMLR Convention is heavily concerned with regulating the harvesting of marine living resources, and associated activities, according to listed principles concerned with, again, conservation and sustainable use.<sup>88</sup>

Besides environmental protection, a central component of the ATS, especially the Antarctic Treaty itself and the Protocol on Environmental Protection, is scientific research, including marine scientific research (by virtue of the instruments' area of operation including marine areas). For example, the Antarctic Treaty, in Article II, enshrines the continuing freedom of scientific investigation and international cooperation in scientific investigation as central to the Treaty. The Treaty also requires the exchange of information regarding plans for scientific programs in Antarctica, scientific personnel, scientific observation and results "to the greatest extent feasible and practicable". Observations and results are also to be "freely available".<sup>89</sup>

The ATS has also devoted some attention to the related activity of biological prospecting through the work of the ATCM and the CCAMLR. Biological prospecting, also not defined in the core instruments of the ATS, has been described elsewhere as "the process of identifying unique characteristics of marine organisms for the purpose of developing them into commercially valuable products".<sup>90</sup> Such organisms are often described as marine genetic resources when the identifying process is focusing on the organism's genetic attributes.<sup>91</sup>

87 Antarctic Treaty, Art. IX; Protocol on Environmental Protection, Art. 3(1); CAMLR Convention, Arts. II(1), (2).

88 Protocol on Environmental Protection, Art. 3(2); CAMLR Convention, Art. II(3), also Art. IX(2).

89 Antarctic Treaty, Art. III(1).

90 J Mossop, 'Marine Bioprospecting' in Rothwell et al., (n 38) 825–842 at p. 825.

91 *Ibid.*

The issue of biological prospecting has been the subject of three ATCM Resolutions adopted in 2005, 2009 and 2013, respectively.<sup>92</sup> As Resolutions of the ATCM, these instruments are hortatory texts and are not legally binding.<sup>93</sup> One of the key features of these Resolutions is their steadfast casting of biological prospecting as scientific research, thereby attracting the scientific research obligations set out in Articles II and III of the Antarctic Treaty and particularly those requiring the exchange and free availability of scientific observation and results. Indeed, the Article which sets out those particular requirements, Article III(1)(c), is the only Article of any of the ATS instruments to be referred to in each of the ATCM Resolutions.

The Resolutions recommend a number of approaches to the exchange of information, including an annual exchange of information by governments<sup>94</sup> and more recently reporting by governments “as appropriate” in relation to their respective legal regimes and encouraging governments to examine ways to improve information exchange (such as through adapting the ATCM electronic information exchange system).<sup>95</sup> However, the current approach apparently is to rely on governments to draw the attention of national Antarctic programmes and other relevant research institutes to the information exchange expectations set out in Article III(1) of the Antarctic Treaty.<sup>96</sup>

Another key feature of the Resolutions is the affirmation of the ATS as the “appropriate framework” for managing the collection of biological material in the Antarctic Treaty area and for considering its use.<sup>97</sup> Resolution 9 (2009) states that existing ATS arrangements, specifically the Protocol on Environmental Protection and the CAMLR Convention, already address the

92 I.e., Resolution 7 (2005) Biological Prospecting (ATCM XXVIII—CEP VIII, Stockholm) available at [http://www.ats.aq/devAS/info\\_measures\\_listitem.aspx?lang=e&id=352](http://www.ats.aq/devAS/info_measures_listitem.aspx?lang=e&id=352); accessed 6 March 2017; Resolution 9 (2009) Collection and use of Antarctic biological material (ATCM XXXII—CEP XII, Baltimore), available at [http://www.ats.aq/devAS/info\\_measures\\_listitem.aspx?lang=e&id=450](http://www.ats.aq/devAS/info_measures_listitem.aspx?lang=e&id=450); accessed 6 March 2017; and Resolution 6 (2013) Biological Prospecting in Antarctica (ATCMXXXVI—CEPXVI, Brussels) available at [http://www.ats.aq/devAS/info\\_measures\\_listitem.aspx?lang=e&id=559](http://www.ats.aq/devAS/info_measures_listitem.aspx?lang=e&id=559); accessed 6 March 2017.

93 Regarding the status of ATCM decisions, refer to Decision 1 (1995), Measures, decisions and resolutions (ATCM XIX), para. 3, available at [http://www.ats.aq/devAS/info\\_measures\\_listitem.aspx?lang=e&id=221](http://www.ats.aq/devAS/info_measures_listitem.aspx?lang=e&id=221); accessed 6 March 2017).

94 Resolution 7 (n 92), para 2.

95 Resolution 6 (n 92).

96 For example, see Resolution 7 (n 92). Some parties also take the opportunity within the ATCM to encourage greater reporting (e.g., Final Report of the Thirty-ninth Antarctic Treaty Consultative Meeting (ATCM XXXIX—CEP XIX, Santiago, 2016), para 137).

97 For example, see Resolution 6 (n 92), para 1; and Resolution 9 (n 92), para 1.

environmental aspects of scientific research and the collection of biological material in the Antarctic.<sup>98</sup> In addition to the Resolutions, the ATCM has reiterated this view at a number of its meetings.<sup>99</sup>

The ATCM Resolutions also indicate a need to better understand and assess biological prospecting activities, including through further research on the “status and trends” of Antarctic biological prospecting, as well as keeping the question of biological prospecting in Antarctica under review.<sup>100</sup> To this end biological prospecting has been a recurring topic on the ATCM agenda for a number of years. The ATCM also receives relevant information papers from time to time reporting on the status of Antarctic biological prospecting. A 2015 information paper reported that there was a clear and significant marine genetic resource component to current Antarctic biological prospecting.<sup>101</sup> The paper reported “considerable and growing activity in patenting of uses and applications based on Antarctic genetic and living resources” and substantial “scientific and commercial interest” in Antarctic genetic resources and “their biotechnology potential”. Furthermore, recent biological prospecting activities include patents and applications filed in relation to pharmaceuticals, industrial applications and biotechnology, cosmetics, skin-care products, and krill-related patents.<sup>102</sup>

Another outstanding issue for the ATS is the definition of biological prospecting in the Antarctic context. Both Resolution 7 (2005) and Resolution 6 (2013) note this issue in their respective preambles. There have been various suggestions for addressing this issue, including intersessional consideration, the creation of intersessional mechanisms (such as an intersessional contact group)<sup>103</sup> and proposed wording for a working definition for insertion

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98 Resolution 9 (n 92), para 2.

99 For example, see Final Report of the Thirty-seventh Antarctic Treaty Consultative Meeting (ATCM XXXVII—CEP XVII, Brasilia, 2014), para 346—available at [http://www.ats.aq/devAS/ats\\_meetings\\_meeting.aspx?lang=e&id=79](http://www.ats.aq/devAS/ats_meetings_meeting.aspx?lang=e&id=79); accessed 6 March 2017. Also, ATCM, Final Report of the Thirty-eighth Antarctic Treaty Consultative Meeting (ATCM XXXVIII—CEP XVIII, Sofia, 2015), para 388—available at [http://www.ats.aq/devAS/ats\\_meetings\\_meeting.aspx?lang=e&id=80](http://www.ats.aq/devAS/ats_meetings_meeting.aspx?lang=e&id=80); accessed 6 March 2017.

100 Resolutions 6, 7 and 9 (n 92).

101 IP133 (Netherlands) An update on status and trends. Biological prospecting in Antarctic and Recent Policy developments at the international level (ATCM XXXVIII, Sofia, 2015), available at [http://www.ats.aq/devAS/ats\\_meetings\\_documents.aspx?lang=e](http://www.ats.aq/devAS/ats_meetings_documents.aspx?lang=e); accessed 10 March 2017.

102 *Ibid.*, at pp. 3, 4 and 9.

103 Final Report of the Thirty-seventh Antarctic Treaty Consultative Meeting (n 99).

into governments' environmental impact assessments under the Protocol on Environmental Protection.<sup>104</sup>

Despite its continuing consideration of issues concerning biological prospecting, no ATCM has to date adopted any legally binding measures in relation to biological prospecting, far less a regime regulating the conduct of biological prospecting within the Antarctic Treaty area or the collection or use of marine genetic resources. An increasingly current issue for the ATS is the relationship between its approach and other fora's developing approaches to marine genetic resources. The need to be aware of other regimes' actions concerning biological prospecting has been raised a number of times by particular States at both the ATCM and meetings of the CCAMLR.<sup>105</sup> This has included specific reference to the UNGA's development of the ILBI and the Working Group.

It is noted that the issue of benefit sharing in relation to marine genetic resources is not dealt with by the ATS. Some parties have argued that there is a need for the Antarctic Treaty parties to take greater action or collectively progress the issue within their own regime, particularly in light of the UNGA's actions concerning the ILBI.<sup>106</sup> Various approaches for progressing the matter have been suggested at different times, including establishment of an intersessional contact group, the holding of informal intersessional discussions and a Secretariat-prepared paper.<sup>107</sup> These views have not gained sufficient support to result in the ATCM taking further action. Indeed, at the 2015 ATCM, it was noted that states should exercise care in discussing the possible application of other regimes.<sup>108</sup>

There has also been no specific inclusion of biological prospecting matters in the ATCM Multi-year Strategic Work Plan, a new version of which was adopted in 2016. The ATCM's Multi-year Strategic Work Plan currently includes as a priority item a comprehensive review of "existing requirements for information

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104 WP 12 (Belgium) Assessing Bioprospecting in Antarctica' (ATCM XXXVII, Brasilia, 2014), available online at [http://www.ats.aq/devAS/ats\\_meetings\\_documents.aspx?lang=e](http://www.ats.aq/devAS/ats_meetings_documents.aspx?lang=e); accessed 10 March 2017.

105 For example, Final Report of the Thirtieth Antarctic Treaty Consultative Meeting (ATCMXXX, New Delhi, 2007), para 258; Final Report of the Thirty-seventh Antarctic Treaty Consultative Meeting (n 99), para 345; Final Report of the Thirty-eighth Antarctic Treaty Consultative Meeting (n 99), para 387; Final Report of the Thirty-ninth Antarctic Treaty Consultative Meeting (n 96), para 137.

106 For example, most recently, Belgium—see Final Report of the Thirty-ninth Antarctic Treaty Consultative Meeting (n 96), para 137.

107 Final Report of the Thirty-seventh Antarctic Treaty Consultative Meeting (n 99), paras 346, 347.

108 Final Report of the Thirty-eighth Antarctic Treaty Consultative Meeting (n 99), para 388.

exchange and of the functioning of the Electronic Information Exchange System, and the identification of any additional requirements”;<sup>109</sup> information exchange requirements are currently being reviewed by an intersessional contact group. However, despite the recommendation of Resolution 6 (2013) in relation to information exchange, the most recent report of this process makes no particular mention of biological prospecting reporting.<sup>110</sup> The final report of the thirty-ninth ATCM in 2016, the first ATCM following the commencement of the Preparatory Committee’s work, also does not mention this work or the development of the ILBI.

The CCAMLR has also considered issues of biological prospecting, although less frequently. The ATCM has identified the CCAMLR’s role regarding the capacity to regulate harvesting of marine living resources as particularly relevant to the issue of biological prospecting.<sup>111</sup> Biological prospecting was also an agenda item at the meeting of the CCAMLR in 2008. One of the issues raised at the meeting was whether biological prospecting is a reportable activity because it represents rational use of marine resources.<sup>112</sup> The issue of biological prospecting has also been raised at meetings of the CCAMLR in the context of identifying the opportunity for collaboration between the CCAMLR and the ATCM. The view has been expressed that the Antarctic Treaty and Protocol on Environmental Protection apply to biological prospecting “as a scientific activity,” and the CAMLR Convention applies when such prospecting involves the harvesting of resources.<sup>113</sup>

### Possible Future Challenges

The SO and its uncommonness present a number of issues of relevance to the future development of the ILBI. First, the many features—hydrographic,

109 For the ATCM’s current work plan see Decision 6 (2016) Multi-Year Strategic Work Plan for the Antarctic Treaty Consultative Meeting, available at [http://www.ats.aq/devAS/ats\\_meetings\\_meeting.aspx?lang=e](http://www.ats.aq/devAS/ats_meetings_meeting.aspx?lang=e), accessed 10 March 2017; also WP 17 (Australia) Report of the intersessional contact group established to review information exchange requirements (ATCM XXXIX, Santiago, 2016), at 3, available at [http://www.ats.aq/devAS/ats\\_meetings\\_documents.aspx?lang=e](http://www.ats.aq/devAS/ats_meetings_documents.aspx?lang=e); accessed 10 March 2017.

110 WP 17 (*ibid.*).

111 Resolution 9 (n 92).

112 CCAMLR, Report of the Thirty-fifth Meeting of the Commission (CCAMLR-XXXV, Hobart, 2016), para 15.13, available at <https://www.ccamlr.org/en/ccamlr-xxxv>, accessed 10 March 2017.

113 J Jabour, ‘The Potential to Regulate Bioprospecting for Marine Genetic Resources: Two Case Studies’ in R Warner and S Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Taylor & Francis, London, 2016) 324–341 at p. 332.



ecological, and legal, to name a few—that set the SO apart from other ocean areas include features of particular relevance to Resolution 69/292's remit. The SO, for example, contributes significantly to global marine biological diversity, is unusual territorially and has a unique regional governance system concerned with conservation and sustainability. Second, the prospective relationship between the ILBI and the SO's regional governance system, the ATS, raises issues of relevance to the former's development. For example, by focusing on marine ABNJ, Resolution 69/292 is concerned with areas that cannot be currently demarcated in the SO.

Furthermore, given that the ATS is an existing, relevant legal framework that includes existing, relevant legal instruments and regional bodies, the UNGA's intention, as set out in Resolution 69/292, is that the ATS should not be undermined (at least not by the recently completed Preparatory Committee process). As the ILBI is to be an instrument under the LOSC, it is also relevant that the ATS and the LOSC are discrete systems which are not always compatible with or do not always act in full regard of each other.

Third, the SO's main regional governance system, the ATS, has already developed aspects that are relevant to the remit of Resolution 69/292. For example, the ATS's approach to the topic of measures such as area-based management tools, including marine protected areas, is relatively advanced and has resulted in one of the world's first high seas marine protected areas and the world's largest marine protected area. The strengths of the ATS's approach to spatial conservation and management are therefore possible examples for the Preparatory Committee to refer to in the development of the ILBI.

However, the ATS is uneven in its treatment of other topics relevant to the ILBI. The ATS's approach to marine genetic resources and biological prospecting, for example, is arguably underdeveloped. There may therefore be benefit in the developing ILBI and the ATS considering each other's approaches. However, to date, the ATS has remained somewhat distant from the work of the Preparatory Committee and the preceding BBNJ Working Group. For its part, the Preparatory Committee has not apparently given any express consideration to the unique situation and governance challenges applying to the conservation and sustainable use of the marine biological diversity of the SO's ABNJ.

As development of the ILBI proceeds (which is presumed), it is plausible that both the ILBI and the ATS may respectively face challenges as regards each's relationship with the other. Such challenges may include not unduly straining the unique arrangements of the ATS, such as its arrangements regarding Antarctic territorial sovereignty, which have enabled a mature and highly functioning legal regime to develop that contributes tangibly to the

conservation and sustainable use of marine biological diversity. Another challenge will be to proceed in a way that allows the creation of a new legal regime that both enhances the capacity of the ATS and serves the marine biological diversity of all regional ocean spaces, including the 'uncommon commons' of the SO.