

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

IUCN Comments

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International Union for Conservation of Nature
World Commission on Environmental Law - Ocean Specialist Group
&
Environmental Law Centre

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Article 60 Accession

Cross-cutting comments

Suggested Additions to the Text

The following components are not currently found within the text, but could be useful additions to support the objectives and structure of the agreement:

1) A general obligation to protect and preserve marine biodiversity, potentially modeled on UNCLOS art. 192 and the CBD.

States have the obligation to protect and preserve the marine environment, to conserve marine biodiversity in ABNJ and to ensure that use of its components is sustainable. States also have the obl

“connectivity conservation is a conservation measure in natural areas that are interconnected and in environments that are degraded or fragmented by human impacts and development where the aim is to maintain or restore the integrity of the affected natural ecosystems, linkages between critical habitats for wildlife, and ecological processes important for the goods and services they provide to nature and people.”

Adjacency has been used to refer to the proximity of coastal state EEZs to marine ABNJ. Adjacency is thus used in relation to the ocean zones defined by UNCLOS, but it is not itself a legally defined term. It has been argued that coastal states have special rights and duties--some legally defined, others founded in concepts of justice and equity, and yet others stemming from the physical reality that the ocean flows freely across maritime boundaries--that should be reflected in the Agreement, particularly with respect to control over ABNJ activities that might affect coastal states and vice versa, and with respect to access to resources that may be found in both ABNJ and within national jurisdiction. Note that a state (or community) may have an affected interest even though it is neither adjacent nor connected; provisions in the Agreement to set standards for publication of information that is timely, complete, accurate, and easily accessible in a central location will partially address this by ensuring a minimum level of passive notice.

A functional definition of adjacency might be that it occurs where there is connectivity between the coastal state's marine entitlements and marine ABNJ. This would be different from the more common usage that associates adjacency with geographic proximity.

PREAMBLE

Draft Text

Comments

The States Parties to this Agreement,

Recalling the relevant provisions of the United Nations Convention on the Law of the Sea, including the obligation to protect and preserve the marine environment,

Stressing the need to respect the balance of rights, obligations and interests set out in the

Aspiring to achieve universal participation,
Have agreed

PART I GENERAL PROVISIONS

Draft text	Comments
<p>Article 1 Use of terms</p> <p>For the purposes of this Agreement:</p> <p>[1. “Access” means, in relation to marine genetic resources, the collection of marine genetic resources [, including marine genetic resources accessed in situ, ex situ [and in silico] [[and] [as] [digital] [genetic] sequence data [and information]]].]</p> <p>2. “Activity under a State’s jurisdiction or control” means an activity over which a State has effective control or exercises jurisdiction.</p> <p>3. “Area-based management tool” means a tool for a geographically defined area, other than a marine protected area, through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives [and affording higher protection than that provided in the surrounding areas].</p> <p>4. “Areas beyond national jurisdiction” means the high seas and the Area.</p> <p>5. “Convention” means the United Nations Convention on the Law of the Sea of 10 December 1982.</p> <p>[6. “Cumulative impacts” means impacts on the same ecosystems resulting from different activities, including past, present or reasonably foreseeable activities, or from the repetition of similar activities over time, including climate change, ocean acidification and related impacts.]</p> <p>[7. Alt. 1. “Environmental impact assessment” means a process to evaluate the environmental impact of an activity [to be carried out in areas beyond national jurisdiction [, with an effect on areas within or beyond national jurisdiction]] [, taking into account [, inter alia,] interrelated [socioeconomic] [social and economic], cultural and human health impacts, both beneficial and adverse].]</p> <p>[7. Alt. 2. “Environmental impact assessment” means a process for assessing the potential effects of planned activities, carried out in areas beyond national jurisdiction, under the jurisdiction or control of States</p>	<p>1.To distinguish between marine genetic resources and marine resources as commodities, it may be helpful to define “access” in terms of utilization of genetic resources rather than collection (<u>Nagoya Protocol</u> arts. 2, 6):</p> <p>“Access” means, in relation to marine genetic resources, collecting, taking, obtaining or exploiting marine genetic resources for their utilization..</p> <p>1.3. “Area-based management tool” may apply to dynamic mechanisms oceanographically defined in both time and space, which is not captured by the phrase “geographically defined” meaning in an X,Y, Z coordinate space.</p> <p>The definition of ABMTs should not however exclude MPAs, to be consistent with the mandate of the IGC.</p> <p>1.4. “Areas beyond national jurisdiction” - This term does not need to be defined in the instrument. UNCLOS defines marine areas that are within national jurisdiction; the remainder is ABNJ; ABNJ also includes outer space and certain air space. UNCLOS, article 86, defines the “high seas”; article 1 defines a sub-element of the high seas as “the Area”. Further clarification of the UNCLOS definition of “high seas” is found in Article 112, which says in part "on the bed of the high seas beyond the continental shelf". Where the continental shelf extends beyond 200 nautical miles, it is possible for the seabed to be under national jurisdiction while the water column above it is part of the high seas (see comments below at articles 4 and 15). UNCLOS also designates certain rights and duties with respect to air space in ABNJ, for example in article 78: “The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.” The Max Planck Encyclopedia of Public International Law states, “It may be questioned whether the notion of high seas includes the seabed and subsoil. That the high seas are defined by the absence of territorial sovereignty or jurisdiction yields an answer in the affirmative, which is not changed by the existence of sovereign rights on the continental shelf or by the</p>

areas beyond national jurisdiction through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination.

The International Tribunal for the Law of the Sea, in its Deep Seabed Advisory Opinion, para 112, said:

The expression “to ensure” is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1). nt 0.281re f 6u

and analysis of relevant scientific information, including relevant socio-economic information ([IUCN Policy Brief on Governance Principles](#)).

Other principles and approaches that should be considered include:

Recognition and respect for traditional knowledge and the rights of indigenous peoples and local communities (see [CBD art. 8\(j\)](#));
Due regard for all states, other users and the need to protect biodiversity throughout its range;

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and access in the agreement are in line with scientific best practice and should not be a burden on MSR.

8.4. Including resources collected prior to entry into force of the agreement may raise practical challenges, as current records from collections may be insufficient. However, failing to include these resources may create a loophole for researchers to claim their resources were accessed prior to the agreement, and/or a rush to

shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.”

A provision could be added to encourage use of resources for environmentally and socially beneficial purposes, along the lines of Nagoya Protocol [arts. 8](#) and [9](#).

[shall] [may] share benefits arising therefrom [in a fair and equitable manner] with other States Parties, with consideration for the special requirements of developing States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries [, [in accordance with this Part] [and] [modalities to be determined by the Conference of the Parties]].]

[2. Benefits may include [monetary and] non-monetary benefits.]

[3. Benefits arising from the [access to] [utilization of] marine genetic resources of areas beyond national jurisdiction shall be shared at different stages, in accordance with the following provisions:

[(a) Monetary benefits [shall] [may] be shared against an embargo period for [digital] [genetic] sequence data [and information] or upon the commercialization of products that are based on marine genetic resources of areas beyond national jurisdiction [in the form of milestone payments]. The rate of payments of monetary benefits shall be determined by the Conference of the Parties. [Payments shall be made to the special fund];]

[(b) Non-monetary benefits [, such as access to samples and sample collections, sharing of information, such as pre-cruise or pre-research information, post-cruise or post-research notification, transfer of technology and capacity-building,] [shall] [may] be shared upon access to, research on and utilization of marine genetic resources of areas beyond national jurisdiction. Samples, data and related information shall be made available in open access [through the clearing-house mechanism [upon access] [after [...] years]]. [[Digital] [Genetic] sequence data [and information] related to marine genetic resources of areas beyond national jurisdiction shall be published and used taking

[(a) To contribute to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction;]

[(b) To promote scientific research and facilitate access to marine genetic resources of areas beyond national jurisdiction;]

[(c) To build capacity to access and utilize marine genetic resources of areas beyond national jurisdiction [, including through common funding or pool funding for research cruises and collaboration in sample collection and data access where adjacent coastal States may be invited to participate, taking into account the varying economic circumstances of States that wish to participate];]

[(d) To create and strengthen the capacity of States Parties to conserve

[2. States Parties shall cooperate to ensure that intellectual property rights are supportive of and do not run counter to the objectives of this Agreement [, and that no action is taken in the context of intellectual property rights that would undermine benefit-sharing and the traceability of marine genetic resources of areas beyond national ju0.7(not)3.6(9 6)0.6(r)-1.3ontexts

[1. The Conference of the Parties shall adopt appropriate rules, guidelines or a code of conduct for the utilization of marine genetic resources of areas beyond national jurisdiction.] enforcement, is not working properly, since competent national

[2. Monitoring of the utilization of marine genetic resources of areas beyond national jurisdiction shall be carried out through the [clearing-house mechanism] [Scientific and Technical [Body] [Network]] [obligatory prior electronic notification system managed by [the secretariat] [the secretariat and mandated existing international institutions set forth in Part [...]]].]

[3. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that:

[(a) An identifier is assigned to marine genetic resources collected in situ. In the case of marine genetic resources accessed ex situ [and in silico] [[and] [as] [digital] [genetic] sequence data [and information]], such identifier shall be assigned when databases, repositories and gene banks submit the list mentioned in article 51 (3) (b) to the clearing-house mechanism;]

[(b) Databases, repositories and gene banks within their jurisdiction are required to [notify the [clearing-house mechanism] [Scientific and Technical [Body] [Network]]] [send a notification through the obligatory prior electronic notification system managed by [the secretariat] [the secretariat and mandated existing international institutions set forth in Part [...]]] when marine genetic resources of areas beyond national jurisdiction, including derivatives, are accessed;]

[(c) Proponents of marine scientific research in areas beyond national jurisdiction shall submit periodic status reports [to the clearing-house mechanism] [to the Scientific and Technical [Body] [Network]] [through the obligatory prior electronic notification system managed by [the secretariat] [the secretariat and mandated existing international institutions set forth in Part [...]]], as well as research findings, including data collected and all associated documentation.]]

[4. States Parties shall make available to the clearing-house mechanism information on the legislative, administrative and policy measures that have been adopted in accordance with this Part.]

[5. States Parties shall submit reports to the Conference of the Parties about their utilization of marine genetic resources of areas beyond national jurisdiction. The Conference shall review such reports and make recommendations.]

PART III MEASURES SUCH AS AREA -BASED MANAGEMENT TOOLS, INCLUDING MARINE PROTECTED AREAS

Draft text

Article 14 Objectives

1. Depending on the type of tool, specific objectives of area-based management tools, including marine protected areas, may include, as appropriate:

[(a) Enhancing cooperation and coordination in the use of area-based management tools, including marine protected areas, among States, [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies;]

[(b) Implementing effectively obligations under the Convention and other existing international obligations and commitments;]

[(c) Promoting a holistic and cross-sectoral approach to ocean management;]

[(d) Conserving and sustainably using areas requiring protection [under [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies];]

[(e) Establishing a system of ecologically representative marine protected areas that are connected [and effectively and equitably managed];]

Comments

14.1 Several clauses are superfluous from a drafting perspective, including (b), (d), (j), (k), and (l). If these are included, the objective of implementing the obligations under the Convention (14.1(b)) should come first, and should include, drawing on

referred to -- it is not clear how ABMTs adopted beyond national jurisdiction would undermine conservation or sustainable use measures within national jurisdiction, unless the rules are vastly different so as to impede implementation. If anything, the failure to take measures in ABNJ could certainly affect measures in the EEZ, though this point may be better addressed in the section on EIAs. It may be better to refer to compatibility between adjacent approaches for the purpose of ensuring conservation and management, as used in UNFSA art. 7(2).

Area-based management tools established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and sustainable use of marine biodiversity. To this end, coastal States and States undertaking activities on the high seas have a duty to cooperate for the purpose of achieving compatible measures.

15.6 seems unnecessary. In situations where a part of the ABNJ comes within national jurisdiction, logic would suggest that an ABMT established in respect of that area would not apply or would continue to be applied

by the coastal state as a matter of comity, cooperation and self-interest. If 15.6 is retained, the words "or otherwise cease to be in force" should be removed as the risk is that the entirety of an ABNJ could be invalidated due to a small shift in the boundaries between ABNJ and national jurisdiction.

Article 16 Identification of areas requiring protection

1. Areas requiring protection through the [establishment] [designation] of area-based management tools, including marine protected areas, shall be identified on the basis of the best available science, the precautionary [approach] [principle] and an ecosystem approach and take into account relevant traditional knowledge of indigenous peoples and local communities.

2. Criteria for the identification of areas requiring protection through the [establishment] [designation] of area-based management tools, including marine protected areas, under this Part may include:

The precautionary principle and ecosystem approach are fundamental concepts that should be applied throughout the agreement. If they are included in the general principles section they do not necessarily need to be repeated here. However, there may be value in adding proalal

[(a) Uniqueness;]

[(b) Rarity;]

(c) Special importance for the life history stages of species;

(d) Special importance of the species found therein;

(e)

including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone;

(v) Any other relevant information;

(b) [Existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies shall be invited to submit views, including:

(i) Views on the merits of the proposal;

(ii) Any relevant additional scientific inputs;

(iii) Information regarding any existing measures adopted by that instrument, framework or body for the relevant area or for adjacent areas;

(iv) Views regarding any aspects of the conservation and management measures identified in the proposal that fall within the competence of

<p>4. The revised proposal shall be submitted to the Scientific and Technical [Body] [Network], which shall assess the proposal, and make recommendations to the Conference of the Parties.</p> <p>5. The modalities of the consultation and assessment process shall be further elaborated by the [Scientific and Technical [Body] [Network]] [Conference of the Parties], as necessary [, and shall take into account the special circumstances of small island developing States].</p>	
<p>Article 19 Decision -making</p> <p>[1. While respecting [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies in the [establishment] [designation] of area-based management tools, including marine protected areas, the Conference of the Parties shall take decisions on matters related to area-based management tools, including marine protected areas, with respect to:</p> <p>(a) Objectives, criteria, modalities and requirements, as provided for under articles 14, 16[,] [and] 17 [and 18];</p> <p>[Alt. 1</p> <p>(b) Proposals submitted under this Part, on a case-by-case basis and taking into account the scientific advice or recommendations and the contributions received during the consultation and assessment process, including in relation to:</p> <p>(i) The identification of areas requiring protection;</p> <p>(ii) The [designation] [establishment] of area-based management tools, including marine protected areas, and related conservation and management measures to be adopted to achieve the specified objectives, [taking into account] [recognizing] existing measures under relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, as appropriate;</p> <p>(c) Where there are [existing] relevant legal instruments or frameworks or relevant global, regional or sectoral bodies:</p>	<p>19.2. Leaving the decision-making procedures to be determined by the COP could be problematic. Consensus decision-making also creates problems. If the decision is made by majority vote, there will need to be a process for taking into account objections, however it is important the the management measures adopted for ABMTs apply to all States, without reservations.</p>

[3. States Parties shall ensure compliance by vessels flying their flags and enforcement of the measures adopted in conformity with this Part [by their nationals].]

[4. The implementation of the measures adopted under this Part shall not impose a disproportionate burden on small island developing States Parties.]

[5. States Parties shall promote the adoption of measures within [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies of which they are members to support the implementation of the conservation and management objectives of the measures adopted under this Part.]

[6. States Parties shall encourage those States that are entitled to become Parties to this Agreement, in particular those whose activities, vessels, or nationals operate in the area that is the subject of a[n] [established] [designated] area-based management tool, including a marine protected area, to adopt measures supporting the conservation and management objectives of the measures adopted and area-based management tools [established] [designated] under this Part.]

[7. The [existing] relevant legal instruments and frameworks and relevant global, regional or sectoral bodies are responsible for the implementation and enforcement of the conservation and management measures established by those bodies in relation to area-based management tools, including marine protected areas.]

[8. A State Party that is not a participant in a[n] [existing] relevant legal instrument or framework, or a member of a relevant global, regional or sectoral body, and that does not otherwise agree to apply the

including marine protected areas, [established] [designated] under relevant frameworks, instruments and bodies.]

Article 21 Monitoring and review

[Alt.1

conservation and management measures shall be specified. These areas and related measures shall terminate automatically upon the expiration of the time period, unless otherwise decided by the same body that decided on the initial [establishment] [designation]. Any decision on their extension shall take into account the results of monitoring and review and be informed by the best available scientific information and knowledge, including traditional knowledge.]

[Alt.3

The [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies are responsible for monitoring and reviewing the measures that they have established and shall be invited to report to the Conference of the Parties on the implementation of such measures.]

3. The requirement in this Part to conduct an environmental impact assessment applies [only to activities conducted in areas beyond national jurisdiction] [to all activities that have an impact in areas beyond national jurisdiction].

EIA process. States already have obligations to conduct EIAs for activities with impacts in ABNJ, as well as obligations to protect marine biodiversity, under UNCLOS and customary international law (UNCLOS art. 204-206; 1994 Agreement, Annex, Section 1; Pulp Mills Case). It is also consistent with existing rules of many States (e.g., USA, NEPA S 102(2)(c) and Executive Order 12114).

[existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies

1. The conduct of environmental impact assessments pursuant to this Agreement shall be consistent with the obligations under the

shall be set out in an annex to this Agreement and shall be updated periodically].]

[4. Alt. 2.

Environmental impact assessments shall be conducted in accordance with the threshold and criteria [set out in this Part and as further elaborated upon pursuant to the procedure set out in paragraph [...] [, which shall be developed by the [Scientific and Technical [Body] [Network]]].

Article 25 Cumulative impacts

[1. Cumulative impacts shall [as far as possible] be [taken into account] [considered] in the conduct of environmental impact assessments.]

[2. Alt. 1. The process for assessing cumulative impacts in areas beyond national jurisdiction and how those impacts will be taken into account in the environmental impact assessment process for planned activities shall be developed by the Conference of the Parties.]

[2. Alt. 2. In determining cumulative impacts, the incremental effect of a planned activity when added to the effects of past, present and reasonably foreseeable future activities shall be examined regardless of whether the State Party exercises jurisdiction or control over those other activities.]

Cumulative impacts should be assessed on the basis of the ecosystem approach, and include impacts caused by activities on the continental shelf and within national jurisdiction.

It is now considered best practice to consider cumulative impacts in conducting EIA. As EIA is increasingly conducted in ABNJ, the cumulative impacts information developed for particular activities will be common to others and the burden of the cumulative impacts analysis will be correspondingly reduced.

	<p>28.3. Specific procedures for and content of strategic environmental assessments shall be determined by the Conference of the Parties.</p> <p>Alternatively, the process for SEA could be left to be developed by the scientific advisory body.</p>
<p>Article 29 List of activities that [require] [or] [do not require] an environmental impact assessment</p> <p>[1. An indicative non-exhaustive list of activities that [normally] [require] [or] [do not require] an environmental impact assessment [is contained in annex [...]] [shall be [prepared by the Conference of the Parties as voluntary guidelines on the basis of recommendations by the Scientific and Technical [Body] [Network]].]</p> <p>[2. The list shall be regularly updated by the Conference of the Parties.]</p>	

Article 30 Screening

[1. [A State Party] [The proponent of the planned activity] shall [determine] [be responsible for determining] whether an environmental impact assessment is required in respect of [a planned activity under its jurisdiction or control] [the planned activity].]

[2. The initial screening of activities shall consider the characteristics of the area where the planned activity is intended to take place, as well as where the potential effects are going to be felt. Should the planned activity take place in or adjacent to an area that has been identified for its significance or vulnerability, regardless of whether the impacts are expected to be minimal or not, an environmental impact assessment shall be required.]

[3. If [a State Party determines that an environmental impact assessment is not required for a planned activity under its jurisdiction or control] [the proponent determines that an environmental impact assessment for a planned activity is not required], [the approval of the

<p>Article 31 Scoping</p> <p>[1. States Parties shall establish procedures to define the scope of the environmental impact assessments that shall be conducted [under the provisions of this Part].]</p> <p>[2. Such scope shall include, the identification of key environmental [, social, economic, cultural and other relevant] [impacts] [issues], including [identified cumulative impacts], using the best available scientific information and traditional knowledge [, alternatives for analysis] [and a determination of the potential effects of the planned activity, including a detailed description of potential environmental consequences].]</p>	<p>The document produced during the scoping stage should include the alternatives under consideration, so that benefits of the activity can be maximized and negative impacts can be avoided. Too narrow a set of alternatives or excluding a “no action” alternative at this stage is likely to lead to a predetermined result. The detailed analysis is undertaken in the “impact assessment and evaluation” step, (article 32).</p> <p>31.2. Such scope shall include, the identification of key environmental [, social, economic, cultural and other relevant] impacts, including cumulative impacts, using the best available scientific information and traditional knowledge; alternatives for analysis, including the alternative of not conducting the activity.</p>
<p>Article 32 Impact assessment and evaluation</p> <p>[1. A [State Party that has determined that a planned activity under its jurisdiction or control] [proponent that has determined that a planned activity] requires an environmental impact assessment under this Agreement shall ensure that the prediction and evaluation of impacts in such an assessment is conducted in accordance with this Part, using the best available scientific information and traditional knowledge [, and an examination of alternatives].]</p> <p>[2. Nothing in this Part precludes States Parties, in particular small island developing States, from conducting joint environmental impact assessments.]</p> <p>[3. Alt. 1. A State Party may designate a third party to conduct an environmental impact assessment required under this Agreement. Environmental impact assessments conducted by such third parties must be submitted to the State for review and decision-making.]</p> <p>[3. Alt. 2. The environmental impact assessment shall be conducted by an independent consultant appointed by a panel of experts designated by the Scientific and Technical [Body] [Network].]</p> <p>[4. A pool of experts shall be created under the Scientific and Technical [Body] [Network]. States Parties with capacity constraints may commission those experts to conduct and evaluate environmental impact assessments for planned activities.]</p>	<p>32.1. The conduct of the EIA is subject to States’ due diligence obligation to conduct an adequate EIA for activities under their jurisdiction and control in ABNJ. The Law of the Sea Tribunal said that states must adopt appropriate rules and measures, and a ‘certain level of vigilance in their enforcement and the exercise of administrative control.’ <u>Deep Seabed Mining Advisory Opinion</u>, ITLOS Reports 2011, para.115 (citing Pulp Mills case); <u>Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission</u> ITLOS Reports 2015, para 131.</p> <p>32.1. When an environmental impact assessment is required under this Agreement, the responsible State shall ensure that the evaluation of the proposed activity and its alternatives, including a no action alternative and an assessment of cumulative effects, is conducted in accordance with this Part, using the best available scientific information and traditional knowledge.</p> <p>32.3. The question of who will carry out and assess the EIAs, and who will bear the cost, is critical. The relevant state or states is responsible for the EIA. If Alt. 1 (or the alternative of not including this subparagraph) is chosen, the assurance of adequacy is reinforced by review of the assessment at each step of the way by the Scientific Body and by the public (which includes interested states, interested scientists, commercial interests, and civil society organizations and individuals with interests and expertise). Strong transparency measures are therefore even more important if the EIA is not prepared by an independent body. Alt. 2 makes sense in terms of not having</p>

	<p>proponents do their own EIA which could lead to bias. However, it leaves open the question of cost. Alt. 2 burdens the international body, and if the proponent is required to pay for the EIA (which is usual), some potential complication.</p> <p>32.4. Assistance to states with limited EIA capacity can be a component of capacity building measures in the Agreement. This can include support for development of model laws, regulations, and administration; technical training in assessment; support for provision of information needed to perform assessment; and actual performance of the EIA assessment. This capacity support should not supplant the obligation for commercial proponents of activities in ABNJ to pay for EIA of their proposed activities.</p>
<p>Article 33 Mitigation, prevention and management of potential adverse effects</p> <p>[States Parties shall establish procedures for the prevention, mitigation, and management of potential adverse effects of authorized activities under their jurisdiction or control. Such procedures shall include the identification of alternatives to the planned activity.]</p>	<p>Alternatives typically include options for prevention (no impact), mitigation (avoid, minimize and compensate for impacts). Where an activity will have an impact, these alternatives should always be included and they should demonstrate how the proposed measures will offset any harmful effect on marine biodiversity.</p> <p>The Iron Rhine arbitration elaborated on the threshold for applying the ‘no harm’ rule: ‘where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate such harm ... This duty, in the opinion of the Tribunal, has now become a principle of general international law.’ (Iron Rhine Arbitration)</p>
<p>Article 34 Public notification and consultation</p> <p>[1. States Parties shall ensure early notification to stakeholders about planned activities under their jurisdiction or control and effective, time-bound opportunities for stakeholder participation throughout the environmental impact assessment process, including through the submission of comments, before a decision is made as to whether to proceed with the activity.]</p> <p>[2. Stakeholders in this process include potentially affected States, where those can be identified, [in particular adjacent coastal States] [, indigenous peoples and local communities with relevant traditional knowledge in adjacent coastal States,] relevant global, regional and sectoral bodies, non-governmental organizations, the general public,</p>	<p>A central repository for all EIA-related documents, including screening documents, will be necessary to ensure an effective marine ABNJ EIA process. The repository should include EIA documents produced under other instruments to enhance public access, facilitate assessment of cumulative effects, and minimize duplication of effort.</p> <p>34.2-3 - As public participation and transparency measures are often passive and place the burden on interested entities to monitor publication sites, these concerns could be addressed by requiring notification in a prescribed form to identified entities in addition to deposit and publication via the central repository. This level of detail is more appropriate in an annex or appendix, while the authorization to develop such procedures should be in the Agreement.</p>

academia [, scientific experts] [, affected parties,] [adjacent communities and organizations that have special expertise or jurisdiction] [, interested and relevant stakeholders] [, and those with existing interests in an area].]

[3. Public notification and consultation shall be transparent and inclusive [, and targeted and proactive when involving adjacent small island developing States].]

[4. Substantive comments received during the consultation process [from adjacent coastal States] shall be considered and [addressed] [responded to] by States Parties. States Parties shall give particular regard to comments concerning potential transboundary impacts. States Parties shall make public the comments received and the descriptions of how they were addressed.]

[5. States Parties [undertaking an environmental impact assessment pursuant to this Agreement] shall establish procedures allowing for access to information related to the environmental impact assessment process under this Agreement. [Notwithstanding this, States Parties shall not be required to disclose non-public information or information that would undermine intellectual property rights or other interests].]

[6. [All States and, in particular] Adjacent coastal States [, including small island developing States,] shall be [kept informed of] [consulted actively [, as appropriate,] in] the monitoring, reporting and review processes in respect of [an activity approved under this Agreement] [activities in areas beyond national jurisdiction].]

[7. Procedures may be developed by the Conference of the Parties to facilitate consultation at the international level.]

Notification and consultation should be as broad as possible, and not limited to specified groups such as potentially affected States or adjacent communities. All people who live on this Earth hold a stake in the health of the oceans, and may have expertise to contribute to the assessment. This includes other states, scientists, commercial entities, and civil society organizations and individuals.

34.5 - Confidentiality of information provisions can be used to conceal relevant information, particularly if the decision regarding what information to withhold is discretionary. The following is recommended to guard against this:

34.5 ... Information claimed to be confidential shall be made available to the Scientific Body for its review. The fact of its redaction shall be indicated in public documents.

See: [EIA repository for the Madrid Protocol to the Antarctic Treaty](#), See also, [UNCLOS](#) art. 205; [Antarctic Treaty](#), art. 7(5); [Espoo Convention](#), art. 1-6. See also [International Association for Public Participation](#)

A provisio

(a) A description of the planned activity [and its purpose] [, including a description of the location of the planned activity];

(b) A description of the results of the scoping exercise;

(c) A description of the marine environment likely to be affected;

(d) A description of the potential effects of the planned activity on the marine environment, including [social, economic, cultural and other relevant impacts,] and [reasonably foreseeable potential direct, indirect,] [cumulative and transboundary impacts], [as well as an estimation of their significance] [, including a description of the likelihood that the assessed activity will cause substantial pollution of or other significant and harmful changes to the marine environment in areas beyond national jurisdiction and its biodiversity];

(e) A description [, where appropriate,] of reasonable alternatives to the planned activity, including the no-action alternative;

[(f) A description of the worst-case scenario that could be expected to occur as a result of the planned activity;]

(g) A description of any measures for avoiding, preventing [, minimizing] and mitigating impacts [and, where necessary and possible, redressing any substantial pollution of or significant and harmful changes to the marine environment] [and other adverse social, economic, cultural and relevant impacts];

(h) A description of any follow-

<p>[(n) An environmental management plan, including a contingency plan for responding to incidents that have an impact on the marine environment;]</p> <p>[(o) The environmental record of the proponent;]</p> <p>[(p) A review of the business plan for the planned activity;]</p> <p>(q) A description of consultations undertaken in the environmental impact assessment process, including with relevant global, regional and sectoral bodies.</p> <p>[3. Further [details] [guidance] regarding the required content of an environmental impact assessment report [shall] [may] be developed by the Conference of the Parties as an annex to this Agreement and shall be based on the best available scientific information and knowledge, including traditional knowledge. [[These details] [This guidance] shall be reviewed regularly].]</p>	
<p>Article 36 Publication of [assessment] reports</p> <p>States Parties shall publish and communicate the reports of the results of the assessments in accordance with [articles 204 to 206] [article 205] of the Convention [, including through the clearing-house mechanism].</p>	<p>Publication is an ongoing obligation, from the screening stage on. This obligation stems in part from the customary international law obligation to provide notice to affected states, as well as best practice for EIA.</p>
<p>[Article 37 Consideration and review of [assessment] reports]</p> <p>[The environmental impact assessment reports prepared pursuant to this Agreement shall be considered and reviewed on the basis of approved scientific methods [by the Scientific and Technical [Body] [Network]].]</p>	<p>All EIAs (and screening documents) can be reported to a central repository with full transparency, archiving, and an independent international reviewer.</p> <p>Options for review include:</p> <p>Secretariat staff:</p> <ul style="list-style-type: none"> • Provides initial review of all projects and activities at screening stage • Tagging to identify activities taking place in sensitive areas • Refers to standing scientific body where needed for several reasons (sensitivity of impacted resources; large scale of activity; novelty of activity)

Standing scientific body:

- Accepts EIAs further review where needed
- Advises on EIA process (intersecting with capacity building and tech transfer),
- Provides comment at
- Elevates concerns to the COP, to a regional/sectoral body, or to a specialized expert scientific body

Specialized Scientific agencies, organizations, universities

- Provide scientific and technical information during each step of the consultation process to implement conservation, sustainable use objectives and ecosystem approach and adaptive management by supplying best scientific information

[2. No decision allowing the planned activity to proceed shall be made where the environmental impact assessment indicates that the planned activity would have severe adverse impacts on the environment.]

[3. Decision-

Article 4 0 Reporting

[1. Alt. 1. States Parties shall report on the effects of authorized activities in accordance with articles 204 to 206 of the Convention.]

[1. Alt. 2. States Parties shall ensure that the [environmental impacts of the authorized activity] [the results of the monitoring required under article 39] are [periodically] reported on.]

[1. Alt. 3. [States Parties] [and] [[Existing] relevant legal instruments and frameworks and relevant global, regional or sectoral bodies] shall [periodically] report on [the environmental impacts of the authorized

[(c)

1. States Parties, directly or through [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, shall [promote] [ensure] [facilitate] cooperation, [in accordance with [this Agreement] [Part XIV of the Convention],] [in accordance with their capabilities,] in capacity-building and the transfer of marine technology to assist [States Parties that need and request it, in particular] developing States Parties in achieving the objectives of this Agreement.

2. Capacity-building and the transfer of marine technology under this Agreement shall be [carried out] [promoted] through enhanced cooperation [, including through North-South, South-South and triangular cooperation, cooperation with other relevant stakeholders, including industry and the private sector] and through strengthening cooperation, coordination and synergies between [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.

3. In giving effect to the duty to [cooperate] [promote cooperation] under this article, States shall give full recognition to the special requirements of developing States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries.

appropriate. Cooperation is an international obligation and should be ensured.

The current wording could be interpreted as imposing an obligation to engage with the private sector; the words “industry and the private sector” should be deleted, or a qualifier such as “as appropriate” inserted.

Article 44 Modalities for capacity -building and the transfer of marine technology

1. Capacity-building and the transfer of marine technology [shall] [may] be provided on a [voluntary] [bilateral, regional and multilateral] basis.

2. Capacity-building and the transfer of marine technology shall be transparent and country-driven [, and shall, as far as possible, not duplicate existing programmes]. Capacity-building and the transfer of marine technology shall be guided by lessons learned, including those from capacity-building and the transfer of marine technology activities under existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, and should be an effective, iterative

1. In support of the objectives set out in article 42, the types of capacity-building and transfer of marine technology are set forth in the annex.]

[Alt.3

1. The Conference of the Parties [shall] [may] develop [guidelines on] [an indicative, non-exhaustive and flexible list of] [a broad set of categories of] types of capacity-building and transfer of marine technology and may establish a subsidiary body for that purpose.]

2. [The types of capacity-building and transfer of marine technology set out in paragraph 1 of this article] [The list set forth in the annex] [The guidelines] [shall] [may] be reviewed, assessed and adjusted periodically by the Conference of the Parties to reflect technological progress and innovation and to respond and adapt to the evolving needs of States and regions.

Article 47 Monitoring and review

1. Capacity-building and the transfer of marine technology activities undertaken in accordance with this Agreement shall be monitored and reviewed periodically.

2. The monitoring and review referred to in paragraph 1 shall be aimed at:

(a) Reviewing the needs and priorities of developing States Parties in terms of capacity-building and transfer of marine technology, including the support required, provided and mobilized, and gaps in meeting requirements from developing States Parties;

(b) Measuring performance on the basis of objective indicators and reviewing results-based analyses, including the output, progress and effectiveness of capacity-build

to fully meet their obligations and exercise their rights under this Agreement.

3. Monitoring and review shall be carried out by the Conference of the Parties, which shall decide upon the details and modalities of such review and monitoring, including with regard to any subsidiary body that it may wish to establish in this respect.

4. The monitoring and review of capacity-building and transfer of marine activities under this Agreement shall include all relevant actors involved in the process, including at the regional level.

5. In supporting the monitoring and review of capacity-building and the transfer of marine technology, States Parties [and committees on regional capacity-building and the transfer of marine technology] may submit, on a voluntary basis, reports, which may be made publicly available, on capacity-building and the transfer of marine technology given and received. States Parties shall ensure that reporting requirements for developing States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries, are streamlined and not onerous.

PART VI INSTITUTIONAL ARRANGEMENTS

Draft text

Comments

Article 48 Conference of the Parties

1. A Conference of the Parties is hereby established.

2.

provisions in order to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.]

Article 49 Scientific and Technical [Body] [Network]

1. A Scientific and Technical [Body] [Network] is hereby established.
2. The [Body] [Network] shall be composed of experts, taking into account the need for multidisciplinary expertise [, including traditional knowledge expertise], gender balance and equitable geographical representation.
3. The [Body] [Network] may also draw on appropriate advice from existing arrangements, such as the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, as well as other scientists and experts, as may be required.

[4 Alt. 1. Under the authority and guidance of the Conference of the Parties, [and upon its request,] the [Body] [Network] shall:

- (a) Provide scientific and technical advice to the Conference of the Parties;
- [(b) Have advisory competence with regard to marine genetic resources, including questions on the sharing of benefits;]
- [(c) Elaborate a benefit-sharing mechanism;]
- [(d) Monitor the utilization of marine genetic resources of areas beyond national jurisdiction;]
- [(e) Possess recommendatory functions with respect to measures such as area-based management tools, including marine protected areas, including regarding:

[(g)

[(a) Activities related to marine genetic resources of areas beyond national jurisdiction, including notices of forthcoming in situ collection of marine genetic resources, research teams, ecosystems where the marine genetic resources are collected, the [digital] [genetic] properties of the marine genetic res

to building capacity for skills development in activities covered in this Agreement [, as well as availability of funding];]

[(f) Requests for capacity-building and the transfer of marine technology on a case-by-case basis, including patent monitoring services, and other relevant legal services;]

(f) Facilitate international cooperation and collaboration, including scientific and technical cooperation and collaboration.

[5. The clearing-house mechanism shall recognize the special circumstances of small island developing States [and archipelagic developing States], facilitate access to the mechanism to enable those States to utilize it without undue obstacles or administrative burdens, and include information on activities to promote information-sharing, awareness-raising and dissemination in and with those States, as well as provide specific programmes for those States.]

[6. The clearing-house mechanism shall be managed by [the secretariat] [the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization, in association with relevant organizations, including the International Seabed Authority and the International Maritime Organization, and shall be informed by the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology].]

[7. Due regard shall be given to the confidentiality of information provided under this Agreement.]

[PART VII FINANCIAL RESOURCES [AND MECHANISM]]

Draft text

Comments

[Article 52 Funding]

[1.

intergovernmental organizations, non-governmental organizations and natural and juridical persons, and through public-private partnerships.

3. States Parties shall ensure that, for the purposes of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, developing States are granted preference by international organizations in the allocation of appropriate funds and technical assistance and the utilization of their specialized services.

4. A voluntary trust fund to facilitate the participation of representatives of developing States Parties in the meetings of the bodies under this Agreement shall be established by the Conference of the Parties. It shall be funded through voluntary contributions.

[Alt.1

5. In addition to the voluntary trust fund, a special fund [may] [shall] be established by the Conference of the Parties to:

(a) Fund capacity-building projects, including effective projects on the conservation and sustainable use of marine biological diversity;

(b) Fund activities and programmes, including training, related to the transfer of technology;

(c) Assist developing States Parties to implement this Agreement;

(d) Finance the rehabilitation and ecological restoration of marine biological diversity of areas beyond national jurisdiction;

(e) Support conservation and sustainable use programmes by holders of traditional knowledge in local communities;

(f) Support public consultations at the national and regional levels;

(g) Undertake any other functions as agreed by the States Parties.

5 bis. The special fund shall be funded through:

(a) Voluntary contributions;

[(b) Mandatory sources, including:

(i) Contributions from States Parties and royalties and milestone payments resulting from the utilization of marine genetic resources;

This section lacks ambition, in particular any reference to funding being put in place in a way to achieve the aims of the BBNJ. This could include phrasing such as "sufficient to put in place, monitor and enforce MPAs and other ABMTs to IUCN standards that achieve effective protection of marine connectivity and biodiversity" or similar.

52.5 bis (c) Endowments should not be limited to States Parties, but could also be provided by philanthropic donors.

52.5(d) Some part of monetary benefits from marine resources, including MGR, could be directed to this fund.

A fund based on the "polluter pays" principle could be established to ensure that harm to biodiversity resulting from noncompliance with this agreement is restored or mitigated by benefits to the injured ecosystem components, modeled on national legislation and Stockholm Principle 22, (e.g., [EU Council Directive 2004/35/EC](#) on environmental liability; [U.S. Oil Pollution Act of 1990](#)). The source of funds would be financial compensation collected from responsible parties; an international body would act as trustee to oversee the fund and the restoration/mitigation activities.

(ii) Payments as a condition of access to, and utilization of, marine genetic resources, premiums paid during the approval process of environmental impact assessments, in addition to cost recovery, fees

PART VIII IMPLEMENTATION [AND COMPLIANCE]

Draft text	Comments
<p>Article 53 Implementation [and compliance]</p> <p>1. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure the implementation of this Agreement.</p> <p>[2. Each State Party shall monitor the implementation of its obligations under this Agreement and shall, at intervals and in a format to be determined by the Conference of the Parties, report to the Conference on measures that it has taken to implement this Agreement.]</p> <p>[3. The Conference of the Parties shall consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Agreement and to address cases of non-compliance.]</p>	<p>This section could include an invitation to other organizations to report on measures taken to support implementation of the agreement.</p>

[PART IX SETTLEMENT OF DISPUTES]

Draft text	Comments
<p>Article 54 Obligation to settle disputes by peaceful means</p> <p>States have the obligation to settle their disputes by negotiation,</p>	

<p>[1. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.]</p> <p>[2. Any procedure accepted by a State Party to this Agreement and the Convention pursuant to article 287 of the Convention shall apply to the settlement of disputes under this Part, unless that State Party, when signing, ratifying or acceding to this Agreement, or at any time thereafter, has accepted another procedure pursuant to article 287 for the settlement of disputes under this Part.]</p> <p>[3. A State Party to this Agreement that is not a Party to the Convention, when signing, ratifying or acceding to this Agreement, or at any time thereafter, shall be free to choose, by means of a written declaration, one or more of the means set out in article 287, paragraph 1, of the Convention for the settlement of disputes under this Part. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is a party that is not covered by a declaration in force. For the purposes of conciliation and arbitration in accordance with annexes V, VII and VIII to the Convention, such State shall be entitled to nominate conciliators, arbitrators and experts to be included in the lists referred to in annex V, article 2, annex VII, article 2, and annex VIII, article 2, for the settlement of disputes under this Part.]</p>	<p>fisheries agreements. Language addressing disputes over the relation to other instruments, etc, would be useful.</p> <p>55 also omits <u>UNFSA</u> article 30(5), which identifies the applicable law for a dispute under the agreement, and which importantly includes “generally accepted standards for the conservation and management of living marine resources”.</p> <p>A recommended addition, copying <u>UNFSA</u> art. 29:</p> <p>Where a dispute concerns a matter of a technical nature, the States concerned may refer the dispute to an ad hoc expert panel established by them. The panel shall confer with the States concerned and shall endeavour to resolve the dispute expeditiously without recourse to binding procedures for the settlement of disputes.</p>
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[PART X NON-PARTIES TO THIS AGREEMENT]

Draft text	Comments
<p>[Article 56 Non -parties to this Agreement]</p> <p>[States Parties shall encourage non-parties to this Agreement to become parties thereto and to adopt laws and regulations consistent with its provisions.]</p>	

PART XI GOOD FAITH AND ABUSE OF RIGHTS

Draft text	Comments
<p>Article 57 Good faith and abuse of rights</p> <p>States Parties shall fulfil in good faith the obligations assumed under this Agreement and exercise the rights recognized therein in a manner that would not constitute an abuse of right.</p>	

PART XII FINAL PROVISIONS

Draft text	Comments
<p>Article 58 Signature</p> <p>[This Agreement shall be open for signature by all States and the other entities referred to in article [1 (12) (b)] from [insert date] and shall remain open for signature at United Nations Headquarters until [in</p>	

<p>Article 61 Entry into force</p> <p>[1. This Agreement shall enter into force [30] days after the date of deposit of the [...] instrument of ratification, approval, acceptance or accession.]</p> <p>[2. For each State or entity that ratifies, approves or accepts the Agreement or accedes thereto after the deposit of the [...] instrument of ratification, approval, acceptance or accession, this Agreement shall enter into force on the [thirtieth] day following the deposit of its instrument of ratification, approval, acceptance or accession.]</p>	
<p>[Article 62 Provisional application]</p> <p>[1. This Agreement shall be applied provisionally by a State or entity that consents to its provisional application by so notifying the depositary in writing at the time of signature or deposit of its instrument of ratification, acceptance, approval, formal confirmation or accession. Such provisional application shall become effective from the date of receipt of the notification by the Secretary-General.]</p> <p>[2. Provisional application by a State or entity shall terminate upon the entry into force of this Agreement for that State or entity or upon notification by that State or entity to the depositary in writing of its intention to terminate its provisional application.]</p>	<p>It is important for the Agreement to include provisional application. (See <u>UNCLOS, Articles 160, 162, 308, Annex I-Resolution 1; 1994 Agreement</u>).</p>
<p>Article 63 Reservations and exceptions</p> <p>[No reservations or exceptions may be made to this Agreement.]</p>	

[Article 64 Relation to other agreements]

[1. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Agreement, applicable ,igreementi.]

[5.

(ii) For this reason, its member States shall not become States Parties, except in respect of their territories for which the international organization has no responsibility;

(iii) It accepts the rights and obligations of States under this Agreement;

(b)

[The Secretary-General of the United Nations shall be the depositary of this Agreement and any amendments or revisions thereto.]

Article 70 Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

These comments were prepared by the
International Union for Conservation of Nature
World Commission on Environmental - Ocean Specialist Group

&

Environmental Law Centre

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