

**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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## 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 obligation to share fairly and equitably the benefits arising from utilization of MGR derived from ABNJ.*

- 2) Obligations and responsibilities to cooperate on a global or regional basis, building on [UNCLOS art. 197](#) and [CBD art. 5](#).

*States shall cooperate on a global basis and, as appropriate, on a regional basis as well as sub-regional basis, directly, or through competent international organizations, in formulating and elaborating rules, standards and recommended practices and procedures consistent with the Convention (UNCLOS) and this agreement, for the conservation and sustainable use of marine biodiversity and its components and protection and preservation of the marine environment, taking into account characteristic regional features.*

- 3) Provisions on responsibility, liability and compensation. These obligations already exist in international law, as explained by the International Tribunal for the Law of the Sea in its [interpretation](#) of the 1994 Agreement and the ISA Regulations. They can include requirements for following the mitigation hierarchy -- avoid, minimize, restore/rehabilitate and offset harm -- within the framework of no net loss, as detailed in the [IUCN Biodiversity Offsets Policy](#). There could also be a mechanism in case of emergency, which could be a cooperation mechanism put in place later on.

- 4) Consideration of new technologies for monitoring and implementation.

### Connectivity and Adjacency

The concepts of “connectivity” and “adjacency” have been discussed frequently and are used in this commentary. Therefore we provide a brief explanation of their meaning:

Connectivity is used to describe the physical oceanographic, habitat, evolutionary, and ecological continuity that exists in the ocean. Examples include passive ocean connectivity, where ocean currents and wind drifts transport larvae, plankton, pollutants, and cause thermal mixing; and active ocean connectivity, such as migrations of whales, tuna, and sea turtles or life cycles of anadromous and catadromous species. The IUCN [Draft Guidance for safeguarding ecological corridors in the context of ecological networks for conservation](#) defines it:

“Ecological connectivity (sometimes referred to in shorthand as connectivity): The movement of populations, individuals, genes, gametes (mature male or female haploid germ cell that can unite with another of the opposite sex), and propagules (pollen, plant parts, and seeds) between populations, communities, and ecosystems as well as non-living material from one location to another.”

IUCN's concept paper, [The Legal Aspects of Connectivity Conservation](#), explains:

“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  |
|---|---|
| <p><i>The States Parties to this Agreement,</i></p> <p><i>Recalling</i> the relevant provisions of the United Nations Convention on the Law of the Sea, including the obligation to protect and preserve the marine environment,</p> <p><i>Stressing</i> the need to respect the balance of rights, obligations and interests set out in the Convention,</p> <p><i>Stressing</i> the need for the comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,</p> <p><i>Respecting</i> the sovereignty, territorial integrity and political independence of all States,</p> <p><i>Desiring</i> to promote sustainable development,</p> | <p>The agreement should include a visionary preamble that sets out the need for enhanced cooperation to meet the challenges of accelerating climate change related impacts, marine environmental degradation and associated risks to marine biodiversity and ecosystem services which a fragmented governance system is ill-suited to address. Inspiration can be found in the <a href="#">Draft Global Pact for the Environment</a>, <a href="#">the Regular Process</a>, <a href="#">IPCC</a> and <a href="#">IPBES</a> reports and the <a href="#">CBD Preamble</a>.</p> <p>Considering the current youth movement and the rationale behind the BBNJ negotiations, the interests of present and future generations should be mentioned in the Preamble. This would help to interpret the interests of stakeholders in the years to come, and would modernize UNCLOS, which does not have any references to present and future generations.</p> |

*Aspiring to achieve universal participation,  
Have agreed as follows:*

*Conscious of the intrinsic value of marine biological diversity and of the biological, genetic, social, economic, scientific, educational and aesthetic values of marine biological diversity and its components,*

*Conscious also of the importance of marine biological diversity for evolution and for maintaining the functionality and productivity of ecosystems,*

*Aware that the conservation of marine biodiversity is a common concern and the shared responsibility of all States and that States have the obligation to protect and preserve the marine environment in ABNJ and to assist other States to do the same;*

*Concerned that marine biological diversity of areas beyond national jurisdiction is being significantly reduced and threatened by anthropogenic activities and stressors,*

*Mindful of the need to address legal, regulatory, governance and implementation gaps in relation to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,*

*Mindful of the need to address fragmentation in relation to conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,*

*Stressing the need to strengthen and implement the framework provided in the United Nations Convention on the Law of the Sea,*

*Stressing the need for the comprehensive global regime to effectively address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,*

*Committed to the protection, preservation and restoration of marine biological diversity and the marine environment and the maintenance and restoration of ecosystem integrity and resilience in areas beyond national jurisdiction.*



## PART I GENERAL PROVISIONS

| Draft text  | Comments   |
|---|--|
| <p><b>Article 1 Use of terms</b></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 <i>in situ</i>, <i>ex situ</i> [and <i>in silico</i>] [[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 (<a href="#">Nagoya Protocol</a> arts. 2, 6):</p> <p><i>“Access” means, in relation to marine genetic resources, collecting, taking, obtaining or exploiting marine genetic resources for their utilization..</i></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> |

Parties that may cause substantial pollution of or significant and harmful changes to the marine environment.]

[8. “Marine genetic material” means any material of marine plant, animal, microbial or other origin containing functional units of heredity [collected from areas beyond national jurisdiction] [; it does not include material made from material, such as derivatives, or information describing material, such as genetic sequence data].]

[9. Alt. 1. “Marine genetic resources” means any material of marine plant, animal, microbial or other origin, [found in or] originating from areas beyond national jurisdiction and containing functional units of heredity with actual or potential value of their genetic and biochemical properties.]

[9. Alt. 2. “Marine genetic resources” means marine genetic material of actual or potential value.]

10. “Marine protected area” means a geographically defined marine area that is designated and managed to achieve specific [long-term biodiversity] conservation and sustainable use objectives [and that affords higher protection than the surrounding areas].

[11. “Marine technology” means information and data, provided in a user-friendly format, on marine sciences and related marine operations and services; manuals, guidelines, criteria, standards, reference materials; sampling and methodology equipment; observation facilities and equipment (e.g., remote sensing equipment, buoys, tide gauges, shipboard and other means of ocean observation); equipment for *in situ* and laboratory observations, analysis and experimentation; computer and computer software, including models and modelling techniques; and expertise, knowledge, skills, technical, scientific and legal know-how and analytical methods related to marine scientific research and observation.]

12. (a) “States Parties” means States that have consented to be bound by this Agreement and for which this Agreement is in force.

(b) This Agreement applies *mutatis mutandis*:

(i) To any entity referred to in article 305, paragraph 1 (c), (d) and (e), of the Convention, and

regime of the international seabed area. These rights and the regime are specifically aimed at the exploration and exploitation of resources and consequently do not impinge on the residuary freedom of all States as regards other activities on the seabed.” (T. Treves).

If a definition is provided, suggested text is:

*“Areas beyond national jurisdiction” includes the high seas, including the seabed and the water column thereof, and superjacent airspace.*

1.7. Environmental impact assessment is effectively described in Part IV below, therefore it is not necessary to define it here. The draft definitions of “EIA” mix general definition with specifics in a way that is not clear or comprehensive. Alt 1 specifies the scope of where EIAs would be required, but not the threshold of harm/damage or the entity with the obligation to ensure the EIA is undertaken. Alt 2 includes the threshold from UNCLOS art. 206 which may be higher than appropriate under international law and does not consider the options of specifying activities for which EIA is required. A simpler definition which leaves issues of scope, threshold and obligation to be addressed in more detail in the relevant provision may be more appropriate. This may be based on provisions in the [CBD](#) and the [Espoo Convention](#). It may also be useful to define the term “impact” based on the [Espoo Convention](#).

*“Environmental impact assessment” means a procedure for evaluating the likely impact of a proposed activity on the environment.*

1.8. If the definition of “marine genetic material” is different in scope from the CBD and the Nagoya Protocol, it may allow users to select the least difficult regulatory regime to work in where there is ambiguity on origin (e.g. when a resource is found both within and beyond national jurisdiction). Excluding genetic sequence data may result in a regime that does not reflect current and future scientific practices. Defining the term “derivative” in line with the [Nagoya Protocol](#) could reduce confusion:

*“Derivative” means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.*

(ii) Subject to article 67, to any entity referred to as an “international organization” in annex IX, article 1, of the Convention

that becomes a Party to this Agreement, and to that extent “States Parties” refers to those entities.

[13. “Strategic environmental assessment” means the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.]

[14. “Transfer of marine technology” means the transfer of the instruments, equipment, vessels, processes and methodologies required to produce and use knowledge to improve the study and understanding of the nature and resources of the ocean.]

[15. Alt. 1. “Utilization of marine genetic resources” means to conduct research and development on the genetic and/or biochemical composition of marine genetic resources [, as well as the exploitation thereof].]

[15. Alt. 2. “Utilization of resources” means the taking, harvesting, recovery, extraction, collection, analysis, processing or use for commercial purposes, or that results in commercial advantage, of or from resources of actual or potential value located in areas beyond national jurisdiction.]

1.9. In the definition of “marine genetic resources”, the meaning of value raises questions. It may be easier to depart from the Nagoya Protocol definition and define “marine genetic resources” alone, without reference to marine genetic material but incorporating the definition of “utilization” to distinguish between MGR and commodities. If the scope of application of the agreement to marine genetic resources is defined in Article 8 (originating in vs. accessed in ABNJ), it does not need to be repeated in the definition.

*“Marine genetic resources” means material of marine plant, animal, microbial or other origin containing functional units of heredity and utilized to conduct research and development on its genetic and/or biochemical composition, including through the application of biotechnology.*

1.10. The definition of “Marine Protected Area” should more closely track accepted definitions (such as [the IUCN definition](#)) that focus on the primary objective of the long-term conservation of nature and associated ecosystem services. Otherwise it will be difficult to distinguish between MPAs and other ABMTs, and it will increase the complexity of the tracking process.

1.11. The definition of “marine technology” is very detailed, and may work better in an appendix.

1.13 Strategic environmental assessment practice is evolving, and in this instrument could play an important role in effective ecosystem-based management. SEA can be used to facilitate cross-sectoral and cross jurisdictional consultations as part of the process at the global, regional and sub-regional scales.

Multiple definitions are in use. The definition of “Strategic environmental assessment” used here is based on [the Kiev Protocol](#) and does not match the description of SEA in draft art. 28(1).

A note by CBD Executive Secretary says SEA is “characterized by the goal of mainstreaming and up-streaming environmental considerations into strategic decision-making at the earliest stages of planning processes to ensure they are fully included and appropriately addressed.” [UNEP/CBD/COP/11/23](#) The 2001 SEA Directive of the European Union and SEA Protocol to the Convention on

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|  | <p>Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) are examples of this approach.</p> <p><i>“Strategic environmental assessment” means the evaluation of the likely environmental effects of proposed plans and programmes, including cumulative effects [, or new technologies and activities]”</i></p> <p>1.15. “Utilization of marine genetic resources” is an important definition, because it creates the distinction between marine living resources as commodities and genetic resources. It should apply to research and exploitation for any purpose, including non-commercial research which often leads to commercial applications and provides key opportunities for non-monetary benefit sharing. Commercialization can be separately addressed as a stage in the development process that triggers additional benefit-sharing requirements, but it should not be a prerequisite for application of the entire MGR regime. The definition of biotechnology in <a href="#">the Nagoya Protocol</a> contains the reference to derivatives; if utilization is not defined to include application of biotechnology, the role of derivatives should be defined explicitly.</p> <p>The Draft does not provide definitions for the following terms, which are used throughout the document:</p> <ul style="list-style-type: none"> <li>• “conservation” and “sustainable use”. These terms form the aim and purpose of the BBNJ instrument. A definition for “sustainable use” could be based on <a href="#">CBD Art. 2</a>.</li> <li>• “marine biological diversity”. This could be based on the definition of “biological diversity” in <a href="#">CBD Art. 2</a>.</li> <li>• “in-situ” and “ex-situ” (<a href="#">IUCN 2013</a>).</li> <li>• “in silico”, “genetic sequence data” or “digital sequence information” See the <a href="#">CBD discussions on DSI</a>. As these discussions are ongoing, one option is to refrain from using the terms in the instrument and to give the BBNJ decision-making body an explicit mandate to flesh out the particularities of DSI/GSD by a particular deadline.</li> </ul> |
| <p><b>Article 2 Objective</b></p> <p>The objective of this Agreement is to ensure the long-term conservation and sustainable use of marine biological diversity of</p> | <p>The objective should include the obligation to protect and preserve the marine environment and to cooperate at a global and regional basis for that purpose.</p>   |

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| <p>areas beyond national jurisdiction through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination.</p>   | <p>The International Tribunal for the Law of the Sea, in its <a href="#">Deep Seabed Advisory Opinion</a>, para 112, said:</p> <p>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 <a href="#">ILC Articles on State Responsibility</a>, Commentary to article 8, paragraph 1).</p>                                  |
| <p><b>Article 3 Application</b></p> <p>1. The provisions of this Agreement apply to areas beyond national jurisdiction.</p> <p>2. This Agreement does not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Agreement.</p>  |  |
| <p><b>Article 4 Relationship between this Agreement and the Convention and other [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies</b></p> <p>1. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.</p> <p>2. The rights and jurisdiction of coastal States over all areas under national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone, shall be respected in accordance with the Convention.</p> | <p>Under <a href="#">UNCLOS art. 78</a>, coastal States have certain rights to the continental shelf but they are not unlimited.</p> <p>Providing an example of a situation that could arise, many hydrothermal vents, rich in both mineral resources and biodiversity are located on the continental shelf. There is a potential clash of interest between rights of coastal States to exploitation of the mineral resources in these vents and the conservation of biodiversity and equitable access to MGR in the superjacent water.</p> <p>4.2 and 4.3 are superfluous given 4.1.</p> <p>4.3. The word “existing” implies that new relevant instruments would not be covered, which would not be desirable. The phrase “respects</p> |

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| <p>3. This Agreement shall be interpreted and applied in a manner that [respects the competences of and] does not undermine [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, and that promotes coherence and coordination with those instruments, frameworks and bodies, provided that they are supportive of and do not run counter to the objectives of the Convention and this Agreement.</p> <p>[4. The provisions of this Agreement are not intended to affect the legal status of non-Parties to the Convention or any other related agreements with regard to those instruments.]</p>   | <p>the competences of” raises an unnecessary issue, where the key point is the “not undermine”.</p>   |
| <p><b>Article 5 General [principles] [and] [approaches]</b></p> <p>In order to achieve the objective of this Agreement, States Parties shall:</p> <p>[(a) Apply an integrated approach [/principle];]</p> <p>(b) Apply an approach that builds ecosystem resilience to the adverse effects of climate change and ocean acidification and restores ecosystem integrity;</p> <p>(c) Act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another;</p> <p>(d) Endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should [, in principle,] bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment;</p> <p>[(e) Ensure accountability;]</p> <p>[(f) Be guided by the principle of non-regression;]</p> <p>[(g) Take into consideration flexibility, pertinence and effectiveness.]</p> | <p>5(a) An integrated approach is a good idea, but it would be appropriate to set out more fully what is expected. This could build on <a href="#">CBD art. 10</a>, <a href="#">Rio Principle 4</a>, or the <a href="#">Draft Global Pact for the Environment</a> as well as the <a href="#">Iron Rhine Arbitration</a>.</p> <p><i>Integrate considerations of conservation and sustainable use of the marine environment in national and international decision-making and development processes.</i></p> <p>5(d) The polluter pays principle is accepted in a number of international agreements, including the <a href="#">OSPAR Convention</a>, the <a href="#">Helsinki Convention</a>, and the <a href="#">UNECE Water Convention</a>. The qualifying words “endeavour”, “without distorting international trade and investment” and “in principle” are not found in those agreements, and the word “shall” rather than “should” is used. Given the stakes for marine protection, the stronger form of this principle is recommended:</p> <p><i>Apply the polluter-pays principle, by virtue of which costs of pollution prevention, control and reduction measures shall be borne by the polluter.</i></p> <p>5(e) Ensuring accountability is important, and this can be elaborated as a key element of democratic governance and a means to implement State responsibility. The principle of accountability is coupled with monitoring, performance reviews and compliance mechanisms. An international instrument could foresee a duty to report on different ABNJ activities, establish a system for monitoring and reviewing related decision-making processes, and include procedures for legal redress to remedy actions affecting biodiversity in</p> |

ABNJ, including access to justice. More information is available in the [IUCN Policy Brief on Governance Principles](#).

The precautionary principle should be applied throughout the agreement and all related processes, not just in the review of ABMT proposals, and could be based on [UNFSA](#) article 6, informed by [IUCN guidelines](#). A key implication of this principle is shifting of the burden to the proponent of an activity to show that it does not cause harm, e.g. in evaluation of EIAs:

*Apply the precautionary principle widely to conservation, management and exploitation of marine biodiversity, according to which the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.*

This is related to the adaptive management approach, under which activities are regularly assessed so that they can be modified or discontinued if harmful (e.g. [New Zealand EEZ Act art. 64](#)) (see also Article 38 below).

In the context of ABNJ, the recognition of the ecosystem approach is important in order to promote more integrated management of ABNJ ecosystems. This is necessary to overcome the artificial distinction between the water column and the seabed which is unjustified from a natural science perspective; and to take into account the cumulative impacts of different human activities taking place in ABNJ. While UNCLOS (and the legal framework for oceans governance in general) is largely based on a sectoral approach, basis for a cross-sectoral approach can be found in different parts of the Convention, such as the Preamble which states that 'the problems of ocean space are closely interrelated and need to be considered as a whole' (See [IUCN Policy Brief on Governance Principles](#)). The ecosystem approach can also be applied in a sectoral context; ecosystem-based governance takes actual ecosystems or spatial areas as the starting point for governance, regardless of the superimposed jurisdictional delineations ([De Lucia 2019](#)).

The science-based approach would affirm the duty of all States to ensure decisions affecting biodiversity in ABNJ are consistent with the best available scientific information and are designed to maintain or restore biodiversity, as well as to contribute actively to the collection

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|   | <p>and analysis of relevant scientific information, including relevant socio-economic information (<a href="#">UCN Policy Brief on Governance Principles</a>).</p> <p>Other principles and approaches that should be considered include:</p> <ul style="list-style-type: none"> <li>• Recognition and respect for traditional knowledge and the rights of indigenous peoples and local communities (see <a href="#">CBD art. 8(j)</a>);</li> <li>• Due regard for all states, other users and the need to protect biodiversity throughout its range;</li> <li>• Intergenerational equity and the principle of environmental stewardship for future generations;</li> <li>• Intragenerational equity and fairness in resource use and responsibility.</li> </ul>  |
| <p><b>Article 6 International cooperation</b></p> <p>1. States Parties shall cooperate for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation among existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies in the achievement of the objective of this Agreement.</p> <p>2. States Parties shall promote international cooperation in marine scientific research in accordance with articles 242 to 244 of the Convention, and in the development and transfer of marine technology in accordance with articles 270 to 274 of the Convention in the achievement of the objective of this Agreement.</p> <p>[3. States Parties shall cooperate to establish new global, regional and sectoral bodies, where necessary, to fill governance gaps.]</p> | <p>6.1. As above, the word “existing” could be removed to avoid excluding future legal instruments and frameworks.</p> <p>6.3. This article could be modified to stress the need to cooperate to address unregulated activities -- these are management gaps, not governance gaps.</p> <p>The duty to cooperate remains general. As in <a href="#">UNCLOS article 197</a>, <a href="#">CBD Article 5</a> and <a href="#">UNFSA</a>, the duty to cooperate should be elaborated to show that Parties are to cooperate to:</p> <ul style="list-style-type: none"> <li>• Achieve specific objectives, e.g. enhance conservation, advance ecosystem-based approaches, develop networks of MPAs, protect special and representative habitats, protect vulnerable species throughout their range, build resilience and ensure uses are ecologically sustainable taking into account cumulative impacts;</li> <li>• Take specific actions, directly and through competent organizations, e.g. adopt management measures, conduct integrated assessments, incorporate biodiversity considerations into management decisions and apply precaution, share data and information, support science and build capacity; and</li> <li>• Make decisions in an inclusive, precautionary and transparent manner.</li> </ul> <p>In addition, the agreement could include a direct obligation on competent international organizations to cooperate and take all appropriate measures, based on <a href="#">UNCLOS art. 278</a>.</p> |



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|  | <p><i>The competent international organizations referred to in this agreement shall take all appropriate measures to ensure, either directly or in close cooperation among themselves, the effective discharge of their functions and responsibilities under this agreement.</i></p> |
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## PART II MARINE GENETIC RESOURCES, INCLUDING QUESTIONS ON THE SHARING OF BENEFITS

| Draft text   | Comments  |
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| <p><b>Article 7 Objectives</b></p> <p>The objectives of this Part are to:</p> <p>[(a) Build the capacity 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, to access and utilize marine genetic resources of areas beyond national jurisdiction;]</p> <p>[(b) Promote the generation of knowledge and technological innovations, including by promoting and facilitating the development and conduct of marine scientific research in areas beyond national jurisdiction, in accordance with the Convention;]</p> <p>[(c) Promote the [fair and equitable] sharing of benefits arising from the utilization of marine genetic resources of areas beyond national jurisdiction;]</p> <p>[(d) Promote the development and transfer of marine technology [, subject to all legitimate interests, including, inter alia, the rights and duties of holders, suppliers and recipients of marine technology];]</p> <p>[(e) Contribute to the realization of a just and equitable international economic order.]</p> | <p>7(c). The words “fair and equitable” provide valuable lens on the manner in which benefits are shared and enable the focus on developing needs and on commercial activity to sit alongside each other.</p> <p>7(d) Other legitimate interests include intellectual property rights, human rights of users, and the possibilities of exceptions to intellectual property rights that can be included by states using flexibilities under TRIPS. (<a href="#">TRIPS Agreement</a> arts 7 ,8, 9, 30, 31, 31 bis.)</p> |
| <p><b>[Article 8 Application of the provisions of this [Part] [Agreement]]</b></p>   | <p>8.1. This article defines the scope of application of the Agreement to marine genetic resources, which is also addressed in Art. 1. This</p>   |

[1. The provisions of this [part] [Agreement] shall apply to marine genetic resources [of] [accessed in] [originating from] areas beyond national jurisdiction.]

[2. The provisions of this [Part] [Agreement] shall apply to:

[(a) [The use of fish [samples] and other biological resources for research into their genetic properties] [Marine genetic resources, including fish, insofar as they are collected for the purposes of being the subject of research into their genetic properties];]

(b) Marine genetic resources collected *in situ* [and [accessed] [obtained] *ex situ* [and [*in silico*] [[and] [as] [digital] [genetic] sequence data [and information]]];]

[(c) Derivatives.]]

[3. The provisions of this [Part] [Agreement] shall not apply to:

[(a) [The use of fish and other biological resources as a commodity.] [Fish and other biological resources that are collected beyond a threshold amount shall be considered as a commodity. The threshold amount shall be determined by the [Scientific and Technical [Body] [Network]].] [If a species of fish is found to have value for its genetic material, that species shall be treated as a marine genetic resource, regardless of the volume of the catch.] [If a species of fish or other biological resources are found to have value for their genetic material, that species or those resources, where utilized for their genetic material, shall be treated as a marine genetic resource;]]

[(b) Marine genetic resources [accessed] [obtained] *ex situ* [or [*in silico*] [[and] [as] [digital] [genetic] sequence data [and information]]];]

[(c) Derivatives;]

[(d) Marine scientific research.]]

[4. The provisions of this Agreement shall apply to marine genetic resources accessed *in situ*, *ex situ* [and *in silico*] [[and] [as] [digital] [genetic] sequence data [and information]] after its entry into force, including those resources accessed *in situ* before its entry into force, but [accessed] [or utilized] *ex situ* or [*in silico*] [[and] [as] [digital] [genetic] sequence data [and information]] after it.]

duplication should be avoided. Art. 8.1 is a better place to address the geographical scope (e.g. accessed in vs. originating from ABNJ), while the distinction between genetic resources and commodities can be addressed in art. 1.

8.2. Currently much genetic research uses resources not specifically accessed for their genetic properties. Researchers can purchase or arrange to take bycatch and commercial fish and other resources brought to shore by commercial fishing expeditions and sold in local shops and then extract the DNA for research purposes without venturing onto a boat, much less into ABNJ. Excluding these resources from the agreement creates a loophole. The key distinction should be the nature and purpose of utilization, rather than collection. The point of access is the point at which the resources are utilized in relation to their genetic properties. This is captured in the definition of marine genetic resources. A cleaner definition of scope could be based on [the Nagoya Protocol art. 3](#).

*8.2 The provisions of this Part shall apply to marine genetic resources within the meaning of Article 1 and to benefits arising from the utilization of such resources [and their derivatives].*

8.3(a). Defining commodity in terms of the amount of resource collected does not make sense, and could allow increase in collection as a means to avoid the requirements of the Protocol. Likewise distinction on the basis of value of the resource will be difficult to implement: a species may be valuable both as a commodity and in terms of genetic properties. The distinction between commodity and genetic resource should be on the basis of utilization, which can be captured in the definition of marine genetic resource, and would not need to be restated in this section. This text should be deleted.

8.3(c). Derivatives can be used in at least two ways: as subjects of research potentially leading to products, and as ingredients in products. As subjects of research they are more similar to genetic resources and should be treated as such. As ingredients in products, they are more similar to commodities.

8.3(d). Excluding marine scientific research could exclude a significant amount of MGR, limit opportunities for non-monetary benefit sharing and undermine traceability. The measures related to benefit-sharing

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|  | <p>and access in the agreement are in line with scientific best practice and should not be a burden on MSR.</p> <p>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 access resources prior to entry into force of the agreement.</p>   |
| <p><b>[Article 9 Activities with respect to marine genetic resources of areas beyond national jurisdiction]</b></p> <p>[1. Activities with respect to marine genetic resources of areas beyond national jurisdiction may be carried out by all States and their natural or juridical persons under the conditions laid down in this Agreement and with due regard for the rights, obligations and interests under the Convention.]</p> <p>[2. In cases where marine genetic resources of areas beyond national jurisdiction are also found in areas within national jurisdiction, activities with respect to those resources shall be conducted with due regard for the rights and legitimate interests of any coastal State under the jurisdiction of which such resources are found.]</p> <p>[3. No State shall claim or exercise sovereignty or sovereign rights over marine genetic resources of areas beyond national jurisdiction [, nor shall any State or natural or juridical person appropriate any part thereof]. No such claim or exercise of sovereignty or sovereign rights [nor such appropriation] shall be recognized.]</p> <p>[4. The utilization of marine genetic resources of areas beyond national jurisdiction shall be for the benefit of mankind as a whole, taking into consideration the interests and needs of developing States, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries.]</p> <p>[5. Activities with respect to marine genetic resources of areas beyond national jurisdiction shall be carried out exclusively for peaceful purposes.]</p> | <p>Many resources are found both within and beyond national jurisdiction. This creates problems of proof -- who proves that a resource appears both within and beyond national jurisdiction -- and forum shopping, and the need for consistency with the Nagoya Protocol. Nagoya addresses the question of transboundary resources through a provision on cooperation (<a href="#">art. 11</a>) but this has been difficult to implement in practice, and does not address ABNJ. Realistically, it is not possible to apply both the Nagoya Protocol and this agreement to the same resource, and the Nagoya Protocol does not apply to resources accessed in ABNJ, even where they are also found within national jurisdiction.</p> <p>One option is incorporating a presumption that all marine genetic resources were accessed in ABNJ except where there is evidence of access within national jurisdiction, in which case a showing of prior informed consent is required. This only works if the benefit-sharing requirements for resources accessed in ABNJ are at least as stringent as those applicable in most jurisdictions -- otherwise it could provide a means of avoiding Nagoya Protocol requirements by claiming resources originate beyond national jurisdiction (which is already the case in the absence of a BBNJ regime).</p> <p>There is an additional issue where there is an extended continental shelf and parts of the benthic ecosystem are sedentary species and others are not. In these situations, researchers may need to notify coastal states and obtain consent under the Nagoya Protocol if organisms collected may be sedentary species. Notification and permission are already a requirement under UNCLOS; UNCLOS Article 77 states "if the coastal State does not explore the continental</p> |

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|   | <p>shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.”</p> <p>A provision could be added to encourage use of resources for environmentally and socially beneficial purposes, along the lines of Nagoya Protocol <a href="#">arts. 8</a> and <a href="#">9</a>.</p>  |
| <p><b>[Article 10 Access to marine genetic resources of areas beyond national jurisdiction]</b></p> <p>[1. <i>In situ</i> access to marine genetic resources within the scope of this Part shall be subject to [Alt. 1. [prior] notification to the secretariat [, which shall include an indication of the location and date of access, the resources to be accessed, the purposes for which the resources will be utilized and the entity that will access the resources] [of access to marine genetic resources of areas beyond national jurisdiction].]</p> <p>[Alt. 2. a [permit] [licence] issued in the manner and under the terms and conditions set forth in paragraph 2.]]</p> <p>[2. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that <i>in situ</i> access to marine genetic resources within the scope of this Part shall be subject to:</p> <ul style="list-style-type: none"> <li>(a) An indication of the geographical coordinates of the location where marine genetic resources were accessed;</li> <li>(b) Capacity-building;</li> <li>(c) The transfer of marine technology;</li> <li>(d) The deposit of samples, data and related information in open source platforms, such as databases, repositories or gene banks;</li> <li>(e) Contributions to the special fund;</li> <li>(f) Environmental impact assessments;</li> <li>(g) Other relevant terms and conditions as may be determined by the Conference of the Parties, including in relation to access to marine genetic resources in ecologically and biologically significant areas,</li> </ul> | <p>10.1. The specification that the provisions of this Article apply to <i>in situ</i> access should alleviate worries regarding including all materials originating in ABNJ within the scope of the overall agreement. This allows provisions regarding cruise notification to apply only to <i>in situ</i> collection while benefit-sharing provisions apply to all resources originating in ABNJ, including those accessed <i>ex situ</i>.</p> <p>10.1. Information on the location and date of access, resources to be accessed, purpose and entity that will access the resources should be available from the cruise plan, so would create no additional burden to the scientists. It should be backed up with what actually happened during the cruise as this may differ from the planned activities. However, it should be noted that purpose may change when the MGRs are back on land and analysed under laboratory conditions. It may be appropriate to set out detailed requirements for advanced notification in an Annex, including geographical area of sampling, duration of sampling activity, description of participating research entities, and the type and quantity of MGR sought.</p> <p>10.2 These requirements are wide-ranging; some are non-specific and some are not related to access. Listing these types of requirements here can be workable as long as they do not conflict with more specific elaborations later in the text.</p> <p>“Open source” is a legal term that does not apply to all databases and genebanks, which can be the subject of copyright in terms of structure and content, and which can have different meanings.</p> <p><i>10.2.d The deposit of samples, data and related information in databases, repositories, gene banks or other platforms that allow unrestricted and fee-free access.</i></p> <p>Collection and research activities should be subject to EIA when they may be anticipated to meet the threshold detailed in Article 24.</p> |

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| <p>vulnerable marine ecosystems and other specially protected areas, in order to ensure the conservation and sustainable use of the resources therein.]</p> <p>[3. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that <i>ex situ</i> access to marine genetic resources within the scope of this Part is free and open [, subject to articles 11 and 13].]</p> <p>[4. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that access to [<i>in silico</i> information and data] [[and] [digital] [genetic] sequence data [and information]] is facilitated [, subject to articles 11 and 13].]</p> <p>[5. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that activities with respect to marine genetic resources of areas beyond national jurisdiction that may result in the utilization of marine genetic resources found in areas both within and beyond national jurisdiction are subject to the prior [consent] [,] [notification and consultation] of the coastal States [and any other relevant State] concerned, with a view to avoiding infringement of the rights and legitimate interests of [that] [those] State[s].]</p> <p>[6. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, with the aim of ensuring that traditional knowledge [associated with marine genetic resources of areas beyond national jurisdiction that is held by indigenous peoples and local communities] [of indigenous peoples and local communities that is useful for unlocking the value of marine genetic resources of areas beyond national jurisdiction] is accessed with the prior informed consent or approval and involvement of those indigenous peoples and local communities, and that mutually agreed terms have been established.]</p> <p>[7. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that marine genetic resources of areas beyond national jurisdiction utilized within their jurisdiction have been accessed in accordance with this Part.]</p> | <p>10.3. The provision on <i>ex situ</i> access should use the same language as the provision describing the deposit of samples -- that is, "unrestricted and fee-free" or equivalent.</p> <p>10.5. The question of adjacency with respect to MGR is difficult. Many specimens occur widely and could be found throughout ABNJ and in multiple national jurisdictions. A researcher in the middle of the Pacific may collect a widely occurring specimen, where "adjacent" States might be throughout the Pacific Ocean basin. In this case, the adjacency concept makes no sense. Moreover, the requirement of prior consent of coastal states for resources found in ABNJ does not align with the Nagoya Protocol, which does not require prior consent from adjacent states in cases where resources are found in two or more national jurisdictions. Given this, it is not clear what the rights and legitimate interests of adjacent States are in these resources. This should be clarified if a provision on adjacency is retained.</p> <p>In the case of accessing or utilizing MGR in the seabed and subsoil of the extended continental shelf, the rights and interests of the coastal State do become relevant: UNCLOS, article 77 applies with regard to sedentary species as defined in the Convention (requires "express consent of the coastal State").</p> <p>This also implies that notification of the coastal state may be needed when conducting research or other activities in the vicinity of the continental shelf, or where the research risks making contact with the seabed, or with resources located on or near the seabed. Note that, except where states have opposite or adjacent coasts (see UNCLOS article 83), "rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation," UNCLOS, article 77.</p> <p>10.7. If this is included, there is no need to begin every other article with "States Parties shall take the necessary legislative, administrative or policy measures, as appropriate." The requirements for access can simply be listed.</p> |
| <p><b>[Article 11 [Fair and equitable] sharing of benefits]</b></p> <p>[1. States Parties, including their nationals, that have [accessed] [utilized] marine genetic resources of areas beyond national jurisdiction</p>   | <p>11.1. This could include a reference to adjacent States, particularly adjacent coastal States with extended continental shelves, significant</p>   |

[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 into account current international practice in the field.]]

[4. Benefits shared in accordance with this Part shall be used in the manner determined by the Conference of the Parties, which may include using the benefits for the following purposes:

demonstrated ecological connectivity between their coastal waters and ABNJ, or in whose waters resources accessed are also found.

11.2. Benefits should include both monetary and non-monetary benefits, recognizing that even so-called “non-monetary benefits” represent financial investment as well.

11.3(a). The original idea of the embargo period was that researchers could pay for an extended embargo to provide more time to exclusively utilize resources (Brogiato et al. 2018). However, an embargo period raises questions related to fairness and accessibility. If an embargo is provided for, it needs to be carefully defined, and its implications considered.

Payments to a special fund may be required at the time of access, in applying for IPR, or upon commercialization.

11.3(b) Samples, data and related information should be made available as soon as they are generated, as is becoming common practice. Pre-cruise plans should be made available as part of the prior notification regime.

The “fair and equitable sharing of benefits” under art. 11 could be linked more directly to benefits related to the licensing of intellectual property rights under art. 12.

International practice related to DSI/GSD will shift over time, so specific requirements related to them should be elaborated and amendable by the decision-making body. Again, the term “open access” should be considered and clearly defined in relation to IP rights, payment, confidentiality of information and time. Open access and open source are often used loosely and can have different and overlapping meanings. The key issue is whether the resource in question is considered to be owned by someone. If so, the owner could choose to share it on a wide (possibly unrestricted) basis for no financial payment - Creative Commons is a legal means by which this can be done on a viral basis. Another approach is that the resource is not to be owned by anyone at all and so is available to all to do what they want with it. This could be a problem here and so a more prescriptive approach of what is to be done or not done may be needed.

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| <p>[(a) To contribute to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction;]</p> <p>[(b) To promote scientific research and facilitate access to marine genetic resources of areas beyond national jurisdiction;]</p> <p>[(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];]</p> <p>[(d) To create and strengthen the capacity of States Parties to conserve and use sustainably marine biological diversity of areas beyond national jurisdiction, with a focus on small island developing States;]</p> <p>[(e) To support the transfer of marine technology;]</p> <p>[(f) To assist developing States Parties in attending the meetings of the Conference of the Parties.]]</p> <p>[5. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from access to and the utilization of marine genetic resources of areas beyond national jurisdiction by natural or judicial persons under their jurisdiction are shared in accordance with this Agreement.]</p> <p>[6. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge referred to in article 10, paragraph 6, are shared in a fair and equitable way with indigenous peoples and local communities holding such knowledge.]</p> | <p>10.4(c) The specific modalities of benefit sharing can be included in an appendix.</p>   |
| <p><b>[Article 12 Intellectual property rights]</b></p> <p>[1. States Parties shall implement this Agreement in a manner consistent with the rights and obligations of States under the relevant agreements concluded under the auspices of the World Intellectual Property Organization and the World Trade Organization.]</p>   | <p>State obligations under TRIPS should not be interpreted to mean that the proposed agreement cannot engage directly with IP to achieve its goals of conservation and sustainable use. While there are ongoing processes and provisions under WIPO and WTO related to genetic resources and traditional knowledge, it is unlikely that the proposed ILBI would directly conflict with them. This is because of the different focus in the WIPO discussions (not on MGR) and the flexibilities in</p> |

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| <p>[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 jurisdiction].]</p> <p>[3. [Marine genetic resources [accessed] [utilized] in accordance with this Agreement shall not be subject to patents except where such resources are modified by human intervention resulting in a product capable of industrial application.] [Unless otherwise stated in a patent application or other official filing or recognized public registry, the origin of marine genetic resources utilized in patented applications shall be presumed to be of areas beyond national jurisdiction.]]</p> <p>[4. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that:</p> <p>(a) [Users of] [Applicants for patents on inventions that utilize or have utilized] marine genetic resources of areas beyond national jurisdiction disclose the origin of the marine genetic resources that they utilize;</p> <p>(b) When [applying for patents, entities] [applications for patents on inventions that utilize or have utilized marine resources of areas beyond national jurisdiction are made, applicants] consult the Scientific and Technical [Body] [Network] and propose benefit-sharing agreements in accordance with this Part [and comply with the decisions on benefit-sharing delivered by that [Body] [Network]];]</p> <p>(c) Intellectual property rights applications related to the utilization of marine genetic resources of areas beyond national jurisdiction that do not comply with this Part are not approved.]</p> | <p>TRIPS (e.g., TRIPS allows states to impose limits on IP rights and these likely could cover state exceptions regarding research for all purpose, activities to pursue sustainability or requiring sharing for marine technology transfer in the Area, if these specific steps were required in the ILBI).</p> <p>12.2. It is unclear whether this provision means that IP rights that run counter to the objectives of the agreement should not exist, or that IP rights should not be exercised to run counter to the Agreement. The Agreement should specifically engage with the possibility for exceptions to the existence and power conferred by IP rights (e.g. compulsory licenses, exceptions) under <a href="#">TRIPS</a>, Articles 7,8, 9, 30, 31, 31bis.</p> <p>12.3. Copyright or trade secret as well as patent rights could be relevant. The industrial application requirement applies to patents only. The presumption that MGR in patent applications is of ABNJ is a potentially workable solution to a problem of traceability, but requires corresponding provisions related to benefit-sharing to be meaningful. The presumption may fit better under 12.4 than 12.3, as it relates to disclosure of origin.</p> <p>There is a question regarding what disclosure requirements or presumptions apply to users of MGR for purposes other than those that lead to or involve patents.</p> <p>12.4(c). risks challenges under the WTO, as <a href="#">TRIPS</a>, Articles 9, 27, provides a minimum standard of protection for IP rights.</p> |
| <p><b>[Article 13 Monitoring]</b></p>  | <p>13.2. While a global data-sharing platform is an overarching need for the framework to work, basing enforcement and compliance of ABS requirements solely on that platform is not practical, as shown by the Nagoya Protocol experience. The ABS Clearing House, which was supposed to be one of the major mechanisms for monitoring and</p>   |



[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.]

[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.]]

enforcement, is not working properly, since competent national authorities are not uploading the necessary information to make the platform work. This is the case even though provider countries have incentives to have their information in the ABSCH. It is important to look into the issue of incentives for populating a global data-sharing platform for both State Parties and users of MGRs.

13.3.(a) The system of checkpoints in Nagoya has not been working properly, but it may be valuable to explore similar ideas, in which the user of the MGR needs to have their information in the clearing house to be able to access relevant milestones in their research or production process. Another possibility is exploring market-based incentives, such as certifications, that could be granted to users if they comply with data-sharing and notification obligations.

From a scientific perspective, it is not clear what the marker would be assigned to (the sample, the specimen, the gene?) A single water sample may contain millions of specimens with different genetic material and the genes of a single specimen could be used in many different things separately.

Specific considerations regarding the clearing-house mechanism that will support its effectiveness and the values of inclusiveness and equity include:

- Information which could be required to be uploaded may be the subject of copyright or be a trade secret.
- The software which operates the platform may be the subject of copyright, database or patents.
- The operators of the platform could either own the IP rights or have exclusive royalty free licence to the platform software, to avoid the risk of the owners of the platform IP later deciding to ask for high level licensing fees to enable the platform to be used.
- Contracts regarding uploading should clearly address IP and trade secrets, with the recommended approach to be that the obligation to disclose prevails over trade secrets and the Agreement's ABS regime prevails over any IP rights in the particular information. This approach would require a provision to keep information secret until such time as a patent application is made, as otherwise this would defeat the requirement of novelty.

[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  | Comments   |
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| <p><b>Article 14 Objectives</b></p> <p>1. Depending on the type of tool, specific objectives of area-based management tools, including marine protected areas, may include, as appropriate:</p> <p>[(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;]</p> <p>[(b) Implementing effectively obligations under the Convention and other existing international obligations and commitments;]</p> <p>[(c) Promoting a holistic and cross-sectoral approach to ocean management;]</p> <p>(d) Conserving and sustainably using areas requiring protection [under [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies];]</p> <p>[(e) Establishing a system of ecologically representative marine protected areas that are connected [and effectively and equitably managed];]</p> | <p>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 <a href="#">UNCLOS art. 194</a> and <a href="#">CBD art. 5</a>:</p> <p><i>in particular, obligations for the protection and preservation of the marine environment, including rare and fragile ecosystems and the habitat of depleted, threatened and endangered species and other forms of marine life and the conservation and sustainable use of marine biodiversity beyond national jurisdiction.</i></p> <p>14.1.i Values should include scientific, historic or paleontological values, or any combination of those values, or ongoing or planned scientific research (<a href="#">Madrid Protocol Annex V art. 3</a>)</p> <p>14.1 Certain key elements from the CCAMLR MPA objectives and others with more specific wording could be included (cf <a href="#">CCAMLR Conservation Measure 91-04</a>):</p> <p><i>(i) the protection of representative examples of marine ecosystems, biodiversity and habitats at an appropriate scale to maintain their viability and integrity in the long term;</i></p> |

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| <p>[(f) Rehabilitating and restoring biodiversity and ecosystems, including with a view to enhancing their productivity and health and building resilience to stressors, including those related to climate change, ocean acidification and marine pollution;]</p> <p>[(g) Supporting food security and other socioeconomic objectives, including the protection of cultural values;]</p> <p>[(h) Creating scientific reference areas for baseline research;]</p> <p>[(i) Safeguarding aesthetic, natural or wilderness values;]</p> <p>[(j) Establishing a comprehensive system of area-based management tools, including marine protected areas;]</p> <p>[(k) Promoting coherence and complementarity;]</p> <p>[(l) Promoting cooperation under the Convention.]</p> <p>2. The objectives specified in paragraph 1 shall be further elaborated by the Scientific and Technical [Body] [Network], for consideration by the Conference of the Parties.</p>                                     | <p><i>(ii) the protection of key ecosystem processes, habitats and species, including populations and life-history stages;</i></p> <p><i>(iii) the establishment of scientific reference areas for monitoring natural variability and long-term change or for monitoring the effects of harvesting and other human activities on Antarctic marine living resources and on the ecosystems of which they form part;</i></p> <p><i>(iv) the protection of areas vulnerable to impact by human activities, including unique, rare or highly biodiverse habitats and features;</i></p> <p><i>(v) the protection of features critical to the function of local ecosystems;</i></p> <p><i>(vi) the protection of areas to maintain resilience or the ability to adapt to the effects of climate change.</i></p>  |
| <p><b>Article 15 International cooperation and coordination</b></p> <p>1. To further international cooperation and coordination with respect to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, States Parties shall promote coherence and complementarity in the [establishment] [designation] of area-based management tools, including marine protected areas, through:</p> <p>[(a) [Existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, without prejudice to their respective mandates, in accordance with this Part;]</p> <p>[(b) The process in relation to area-based management tools, including marine protected areas, set out in this Part, including by:</p> <p>(i) Adopting conservation and management measures to complement measures designated under [existing] relevant legal instruments and frameworks and relevant global, regional or sectoral bodies;</p> | <p>The current draft text of Article 15 is confusing and repetitive. There is a need for an explicit obligation to adopt measures to conserve biodiversity and protect and preserve the marine environment, more explicit State obligations to cooperate to adopt measures to safeguard marine biodiversity and to ensure that use is ecologically sustainable, and a mechanism to enable and require States to cooperate in good faith to achieve these ends. A central core of consistent obligations and action would allow coherence within (and despite) varying regional and developmental conditions.</p> <p>This could include core obligations to:</p> <ul style="list-style-type: none"> <li>• Establish a system of ecologically representative and well-connected marine protected areas and adopt other area-based management measures where special measures need to be taken to conserve marine biological diversity in ABNJ;</li> <li>• Apply internationally agreed scientific criteria and guidelines for the selection of marine protected areas or areas where special measures need to be taken to conserve biological diversity;</li> </ul> |

[(ii) [Establishing] [Designating] area-based management tools, including marine protected areas, and adopting conservation and management measures where there is no relevant legal instrument or framework or relevant global, regional or sectoral body.]]

[2. Alt. to para. 1. (b) (ii) Where there is no [existing] relevant legal instrument or framework or relevant global, regional or sectoral body to [establish] [designate] area-based management tools, including marine protected areas, States Parties shall cooperate to establish such an instrument, framework or body and shall participate in its work to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.]

3. States Parties shall establish [coordination and collaboration mechanisms] [consultation processes] at the [global] [and] [regional] level[s] to enhance cooperation and coordination among [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies with regard to area-based management tools, including marine protected areas, as well as coordination among associated conservation and management measures adopted under such instruments and frameworks and by such bodies.

4. In promoting cooperation and coordination under this article, States Parties shall not undermine [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.

5. Measures adopted in accordance with this Part shall not undermine the effectiveness of measures adopted by coastal States in adjacent areas within national jurisdiction and shall have due regard for the rights, duties and legitimate interests of all States, as reflected in relevant provisions of the Convention. Consultations shall be undertaken to this end, in accordance with the provisions of this Part.

6. In cases where an area-based management tool, including a marine protected area, [established] [designated] under this Part subsequently falls under the national jurisdiction of a coastal State, either wholly or in part, that area-based management tool or marine protected area shall be amended to cover any remaining area beyond national jurisdiction or otherwise cease to be in force.

- Regulate or manage marine activities or resources important for the conservation of marine biological diversity in ABNJ whether within or outside MPAs with a view to ensuring conservation and sustainable use;
- Promote the protection of ecosystems, natural habitats and maintenance of viable populations of species in natural surroundings.
- Integrate conservation and sustainable use of marine biological diversity into decision-making
- Adopt measures to avoid or minimize adverse impacts on marine biological diversity in ABNJ (based on CBD Art 8 (In-situ conservation))

The following edits are recommended.

1. To further **implement their obligation to cooperate and coordinate to conserve and sustainably use marine biological diversity of areas beyond national jurisdiction**, States Parties shall promote ~~coherence and complementarity in~~ **the establishment of area-based management tools, including marine protected areas, including**

**(a) directly through this Agreement in accordance with the Part;**

*(b) through relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, without prejudice to their respective mandates, in accordance with this Part.*

15.2. The text is confusing and unnecessary if States can work directly through the agreement to address gaps as in the proposed new 15.1(a).

15.3. Coordination and collaboration mechanisms for global and regional coordination are important. Consultation processes are needed for adoption of measures, coordination is needed to design them. Such mechanisms could provide a basis for cooperation in regional environmental assessments and cross-sectoral planning processes to achieve the objectives of the Agreement. This supports the “not undermining” of other bodies by focusing on coordination, cooperation and compatibility.

15.4, 15.5 and 15.6 are not needed. If it is kept, the obligation in 15.5 needs to be clarified. It is not clear what coastal measures are being

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|  | <p>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 <a href="#">UNFSA art. 7(2)</a>.</p> <p><i>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.</i></p> <p>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</p> <p>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.</p> |
| <p><b>Article 16 Identification of areas requiring protection</b></p> <p>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.</p> <p>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:</p> | <p>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 provisions on how specifically these principles would be applied in the identification of areas requiring protection. For example, similar to <a href="#">UNFSA art. 6.2</a>, this section could elaborate that:</p> <p><i>16.1.bis States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to</i></p>   |

- [(a) Uniqueness;]
  - [(b) Rarity;]
  - (c) Special importance for the life history stages of species;
  - (d) Special importance of the species found therein;
  - (e) The importance for threatened, endangered or declining species or habitats;
  - (f) Vulnerability;
  - (g) Fragility;
  - (h) Sensitivity;
  - [(i) Biological productivity;]
  - (j) Biological diversity;
  - [(k) Representativeness;]
  - (l) Dependency;
  - [(m) Exceptional naturalness;]
  - [(n) Ecological connectivity and or coherence;]
  - [(o) Important ecological processes occurring therein;]
  - (p) Economic and social factors;
  - [(q) [The adverse impacts of climate change and ocean acidification] [Vulnerability to climate change];]
  - [(r) Cumulative and transboundary impacts;]
  - (s) Slow recovery;
  - (t) Adequacy and viability;
  - (u) Replication;
  - (v) Feasibility.
3. The criteria specified in paragraph 2 shall be further developed and revised by the Scientific and Technical [Body] [Network], as necessary, for consideration by the Conference of the Parties.

*take conservation and management measures through adoption and implementation of ABMTs.*

16.1. The terms “*adoption and implementation*” could be more appropriate than “establishment” or “designation”. “Take into account” is vague; “*due regard*” could be more appropriate and in keeping with approaches to traditional knowledge.

16.2. The list of criteria does not distinguish that some of these criteria are for evaluating individual sites and other criteria are for evaluating a network or portfolio of sites. Criteria (n) and (u) relate to network design, (k) can be both a network criterion and a standalone criterion. [PSSA criteria](#) include representativeness, as do some national criteria. For example, the original objective of Australia’s system of representative MPAs was to protect areas that aren’t known to be important, like muddy bottoms, that turn out to be very important ([MACBIO 2018](#)). MPA network design criteria -- representativeness, replication, viability, precautionary design, permanence, connectivity, resilience, size and shape -- should be clearly stated and distinguished from criteria for individual MPAs ([WCPA/IUCN 2007](#)).

Criteria (q) and (r) are extremely important criteria for implementation. MPAs and MPA networks can help build resilience against climate change even if they cannot by themselves keep impacts out ([Roberts et al. 2017](#); [DOSI 2019](#)).

16.4. The required use of criteria under other legal instruments, frameworks and bodies may raise questions of competence. However, the Agreement can provide that State Parties “*shall encourage*” global, regional and sectoral bodies to apply or take into account these elements to improve the protection of marine biodiversity.

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| <p>4. The criteria specified in paragraph 2, as well as any that may be further developed and revised in accordance with paragraph 3, shall be applied by the Scientific and Technical [Body] [Network] in the identification of areas requiring protection through the [establishment] [designation] of area-based management tools, including marine protected areas under this Part. Such criteria shall also be [applied] [taken into account] by States Parties in the [establishment] [designation] of area-based management tools, including marine protected areas, under [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.</p>  |  |
| <p><b>Article 17 Proposals</b></p> <p>1. Proposals in relation to [[the establishment] [the designation] of] area-based management tools, including marine protected areas, under this Part shall be submitted by States Parties, individually or collectively, to the secretariat.</p> <p>2. States Parties may collaborate with relevant stakeholders in the development of proposals.</p> <p>3. Proposals shall be based on the best available science, apply the precautionary [approach] [principle] and an ecosystem approach and take into account the relevant traditional knowledge of indigenous peoples and local communities.</p> <p>4. Proposals shall include the following elements:</p> <p>(a) A geographic or spatial description of the area that is the subject of the proposal;</p> <p>(b) Information on the standards and criteria applied in identifying the area;</p> <p>(c) Specific human activities in the area, including uses by local communities in adjacent coastal States;</p> <p>(d) Elements on the state of the marine environment and biodiversity in the identified area;</p> <p>(e) A description of the conservation and sustainable use objectives set out in paragraph 1 of article 14 that are to be applied to the area;</p> | <p>Proposals for MPAs and ABMTs will be different, and will necessitate different processes. Draft articles 17 and 18 make sense in the context of MPAs.</p> <p>There should be a separate article for the adoption of sectoral ABMTs. States Parties as part of their duty to cooperate could be called upon to promote the adoption of ABMTs in their capacity as members or contracting parties to the relevant bodies and agreements, and to apply the objectives and criteria set forth in this Part and to apply a similarly consultative, transparent and precaution guided process</p> <p>There is a question on how art. 17 relates to art. 16. One option is for the Scientific and Technical Body to apply the criteria to identify areas requiring protection, as well as a possible MPA network. This list could then form the basis of proposals developed by States Parties; alternatively the STB itself could have authority to develop proposals from the list, while States Parties may suggest other sites. In either case, the connection between the identification process and the proposal process should be clear.</p> <p>In developing an MPA network, it is important to consider the diversity of protected areas. Recognizing multiple categories of protected areas, such as IUCN's six categories, can support more resilient, connected and well-adapted seascapes. Strictly protected areas, where commercial activities are not permitted, are an essential part of such seascapes, supported by protected areas with small-scale sustainable use, which conserve ecosystems and habitats together with associated cultural values and natural resource management systems. Categories are distinguished by their different conservation</p> |

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| <p>[(f) A description of the proposed [conservation and management measures] [management plan] to be adopted to achieve the specified objectives;]</p> <p>(g) A monitoring, research and review plan, including priority elements;</p> <p>(h) Information on any consultations undertaken with adjacent coastal States and/or relevant global, regional and sectoral bodies.</p> <p>5. Further requirements regarding the contents of proposals shall be elaborated by the Scientific and Technical [Body] [Network] as necessary, for consideration by the Conference of the Parties.</p>   | <p>objectives, which determine management measures. For each category, the primary purpose is the long term conservation of nature. Permanence and the primary objective of conservation distinguish MPAs from other area-based tools (<a href="#">IUCN 2012</a>; <a href="#">IUCN 2008</a>; <a href="#">IUCN 2018</a>).</p> <p>Different zones corresponding to different categories can be designated within a single protected area. These should be identified as part of the proposal. The management categories themselves can be included in a separate article.</p> <p><i>(j) Identification of the management category of the proposed MPA corresponding to its conservation objectives;</i></p> <p><i>(k) Delineation of zones within the proposed MPA and [proposed category of][management measures to be adopted within] each of these zones.</i></p> <p>The MPA categories can also be used in developing MPA networks. These would be considered in the process of identifying sites in need of protection or a separate provision on MPA network planning.</p> |
| <p><b>Article 18 Consultation on and assessment of proposals</b></p> <p>1. Consultations on proposals submitted under article 17 shall be inclusive, transparent and open to all relevant stakeholders.</p> <p>2. Upon receipt of a proposal, the secretariat shall make that proposal publicly available and shall facilitate consultations thereon as follows:</p> <p>(a) States, in particular adjacent coastal States, shall be invited to submit views, including:</p> <p>(i) Views on the merits of the proposal;</p> <p>(ii) Any relevant additional scientific inputs;</p> <p>(iii) Information regarding any existing measures in adjacent areas within national jurisdiction;</p> <p>(iv) Views on the potential implications of the proposal on sovereign rights of coastal States in areas within their national jurisdiction,</p> | <p>Like article 18, this process makes sense for MPAs, but not necessarily for other ABMTs.</p> <p>18.2. The requirement for consultation in relation to the designation, establishment, and implementation of MPAs needs more detail, and should include the principle of non-discrimination as between different stakeholders (e.g. UNCLOS Arbitral Tribunal <a href="#">Chagos MPA Award</a>).</p> <p>The consultation process should also ensure full access by all designated stakeholders. The agreement should clarify whether civil society will be able to participate in the consultation process on their own behalf or on behalf of stakeholders such as indigenous peoples' groups or local communities.</p> <p>Consultation should as far as possible be conducted in an open and transparent manner to ensure that all expressed views by relevant stakeholders are taken into account.</p>   |



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 that body;

(v) Views regarding any relevant additional measures that fall within the competence of that instrument, framework or body;

(vi) Any other relevant information;

(c) Indigenous peoples and local communities with relevant traditional knowledge, the scientific community, civil society and other relevant stakeholders shall be invited to submit views, including:

(i) Views on the merits of the proposal;

(ii) Any relevant additional scientific inputs;

(iii) Any relevant traditional knowledge;

(iv) Any other relevant information.

1. Any contributions received pursuant to paragraph 2 shall be made publicly available by the secretariat.

2. The proponent shall consider the contributions received during the consultation period and shall either revise the proposal accordingly or continue the consultation process.

3. The consultation period shall be time-bound.

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| <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><b>Article 19 Decision-making</b></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> |

(i) Whether to recommend that States Parties to this Agreement promote the adoption of relevant measures through such instruments, frameworks and bodies, in accordance with their respective mandates;

(ii) Whether to adopt measures complementary to those adopted under such instruments, frameworks and bodies;

(d) Where there are no [existing] relevant legal instruments or frameworks or relevant global, regional or sectoral bodies, the adoption of conservation and management measures.]

[Alt. 2

(b) Matters related to identifying potential area-based management tools, including marine protected areas;

(c) Recommendations relating to the implementation of related management measures, while recognizing the primary authority for the adoption of such measures within the respective mandates of [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies;]

2. As a general rule, the decisions of the Conference of the Parties referred to in paragraph 1 shall be taken by consensus. If all efforts to reach consensus have been exhausted, the procedure established in the rules of procedure adopted by the Conference shall apply.

3. Decisions of the Conference of the Parties shall be made publicly available by the secretariat and shall be transmitted, in particular, to adjacent coastal States and [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.

#### **Article 20 Implementation**

1. States Parties shall ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted under this Part.

2. Nothing in this Agreement shall prevent a State Party from adopting stricter measures with respect to its vessels or with regard to activities under its jurisdiction or control in addition to those adopted under this Part, in conformity with international law.

[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 conservation and management measures [established] [designated] under such instruments, frameworks or bodies is not discharged from the obligation to cooperate, in accordance with the Convention and this Agreement, in the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. Such State Party shall ensure that activities under its jurisdiction or control are conducted consistently with measures related to area-based management tools,

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| <p>including marine protected areas, [established] [designated] under relevant frameworks, instruments and bodies.]</p>  |  |
| <p><b>Article 21 Monitoring and review</b></p> <p>[Alt.1</p> <p>1. States Parties, individually or collectively, shall report to the Conference of the Parties on the implementation of [area-based management tools, including marine protected areas] [relevant elements of the decisions of the Conference on area-based management tools, including marine protected areas], [established] [designated] under this Part. Such reports shall be made publicly available by the secretariat.</p> <p>2. Area-based management tools, including marine protected areas, [established] [designated] under this Part, including related conservation and management measures, shall be monitored and periodically reviewed by the Scientific and Technical [Body] [Network].</p> <p>3. The review referred to in paragraph 2 shall assess the effectiveness of measures and the progress made in achieving their objectives and to provide advice and recommendations to the Conference of the Parties.</p> <p>4. Following the review, the Conference of the Parties shall, as necessary, take decisions on the amendment or revocation of area-based management tools, including marine protected areas, including any associated conservation and management measures, on the basis of an adaptive management approach and taking into account the best available scientific information and knowledge, including traditional knowledge, the precautionary [approach] [principle] and an ecosystem approach.]</p> <p>[Alt.2</p> <p>States Parties shall monitor the implementation of measures and report to the secretariat on the relevant activities with associated data within the required time frame after the monitoring activity. The State submitting the proposals should take the lead in monitoring the measures, while other States Parties may monitor them and report thereon. The duration of marine protected areas and related</p> | <p>Monitoring effectiveness has the potential to be expensive and difficult. It should be clear who will be responsible for monitoring, and the role of ABMT proponents in monitoring and review. More specific modalities for monitoring could be developed by the COP.</p> <p>21. [Alt 1] 4. Amendment or revocation is a potentially dangerous provision that can open the door to opportunistic downgrading of marine protected areas. If amendment or revocation is included, it should be allowed only on the basis of strict criteria stipulated in the agreement itself (e.g. if the area is no longer fulfilling the purpose for which it was established). A requirement for the establishment of equivalent protection elsewhere should be considered in order to avoid overall reduction of protection. However, even this creates the potential problem of a series of short term MPAs that are not sufficient to fulfil their function. Here again it is important to distinguish between ABMTs, which are potentially time bound and geographically flexible, and MPAs which are by definition geographically fixed and long term and ideally permanent. Adaptive management is going to be important, particularly in the context of climate change, but it is necessary to create safeguards so that it cannot be used to justify revocation of ABMTs for the purpose of unsustainable exploitation.</p> <p>21. [Alt 2] Once again, MPAs should not be timebound. There is no expiry date on conservation, and there is no date by which conservation is not necessary. The idea of time bound management measures may be taken from fisheries management approaches, but it does not apply in the context of MPAs (<a href="#">IUCN 2012</a>; <a href="#">IUCN 2008</a>; <a href="#">IUCN 2018</a>).</p> |

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| <p>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.]</p> <p>[Alt.3</p> <p>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.]</p> |  |
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## PART IV ENVIRONMENTAL IMPACT ASSESSMENTS

| Draft text  | Comments   |
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| <p><b>Article 22 Obligation to conduct environmental impact assessments</b></p> <p>1. States Parties shall [as far as practicable] assess the potential effects of planned activities under their jurisdiction or control [on the marine environment] [in accordance with their obligations under articles 204 to 206 of the Convention].</p> <p>2. On the basis of articles 204 to 206 of the Convention, States Parties shall take the necessary legal, administrative or policy measures, as appropriate, to implement the provisions [of this Part] [and any further measures [on the conduct of environmental impact assessments] decided by the Conference of the Parties [, including, but not limited to, requiring any proponent of a planned activity falling under its jurisdiction or control to conduct an environmental impact assessment for an activity that meets the threshold requirement for such an assessment, as set out in this Part]].</p> | <p>22.1 - UNCLOS provides other obligations related to environmental impact assessment which should not be excluded and there is no need to specify selected articles.</p> <p>The element of time needs to be addressed. Activities should be assessed prior to their development or deployment, and this should be specified. The International Court of Justice emphasized the importance of commencing EIA before the activity is implemented: “The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project.” (<a href="#">Pulp Mills Case</a> para 205)</p> <p><i>States Parties shall assess the potential effects of planned activities under their jurisdiction or control, before irretrievable commitments of resources are made, and in accordance with their obligations under the Convention and international law.</i></p> <p>22.3 - Because the objective is to manage impacts on biodiversity in ABNJ, all reasonably foreseeable impacts should be considered in the</p> |

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| <p>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].</p> | <p>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 (<a href="#">UNCLOS art. 204-206</a>; <a href="#">1994 Agreement, Annex, Section 1</a>; <a href="#">Pulp Mills Case</a>). It is also consistent with existing rules of many States (e.g., USA, <a href="#">NEPA S 102(2)(c)</a> and <a href="#">Executive Order 12114</a>).</p> <p>Flowing from the due diligence obligation of prevention, the ICJ explained, there is an obligation to conduct environmental impact assessment (EIA) ‘where there is a risk that [a] proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource’ (<a href="#">Pulp Mills Case</a> para 204).</p> <p>There is no reference to the concept of environmental risk, which is important in evaluating planned activities.</p> <p>Environmental impact assessments should be required to follow best environmental practices. These could include the following elements:</p> <ul style="list-style-type: none"> <li>• Proper tiering of Regional, Strategic and Project level assessments.</li> <li>• Appropriate assessment streams</li> <li>• Cooperative approach to assessments involving multiple decision makers</li> <li>• Transparency</li> <li>• Accountability</li> <li>• Independent and impartial administration</li> <li>• Sustainability-based assessments</li> <li>• Evaluation of alternatives</li> <li>• A cumulative effects focus</li> <li>• Meaningful public participation</li> <li>• A learning-based approach throughout</li> <li>• A post approval process that is based on ensuring compliance, adaptive management and learning</li> </ul> |
| <p><b>Article 23 Relationship between this Agreement and environmental impact assessment processes under other</b></p>   | <p>The Agreement, to fulfill its unique conservation and sustainable use mandate, should provide a means to review all EIAs, including those prepared under the jurisdiction of other instruments, in order to confirm</p>   |

**[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 Convention.

2. The environmental impact assessment process set out in this Agreement shall not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies. [To that end, the provisions of this Agreement shall be interpreted in such a manner as to respect the obligations under other [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, and be mutually supportive, in order to achieve a coherent environmental impact assessment framework for activities in areas beyond national jurisdiction.]

[3. Alt. 1. The Scientific and Technical [Body] [Network] shall consult and/or coordinate with [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies with a mandate to regulate activities [with impacts] in areas beyond national jurisdiction or to protect the marine environment. [Procedures for consultation and/or coordination shall include the establishment of an ad hoc interagency working group or the participation of representatives of the scientific and technical bodies of those organizations in meetings of the Scientific and Technical [Body] [Network].]

[3. Alt. 2. States shall cooperate in promoting the use of environmental impact assessments in relevant legal instruments and frameworks and relevant global, regional and sectoral bodies for planned activities that meet or exceed the threshold contained in this Agreement.]

[4. Alt. 1. [Global minimum standards] [and] [guidelines] for the conduct of environmental impact assessments [under [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies] shall be developed [by the Scientific and Technical [Body] [Network]] [through consultation or collaboration with [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies]]. [These [global minimum standards] [and] [guidelines]

that all relevant activities are being reviewed according to the minimum standards set by this Agreement.

It is usual, where there are multiple EIA mandates, to:

- Prepare a joint EIA that satisfies all the requirements of both;
- Allow the more stringent requirements to set the standards for both; or
- Use relevant EIA or SEA sections for other EIAs by including the information in full or incorporating it by reference to specific sections of the other EIA or SEA.

These approaches limit the problems of duplicative effort, gaps, and inconsistency.

23.4 - Global minimum standards for EIA in marine ABNJ should be set in the Agreement.

Alt. 1 authorizes a body created under this Agreement to establish the standards in an Annex. The advantage of this approach is that more detail can be provided than would be appropriate in the main text of the Agreement (see, e.g., the appendices of the [Espoo Convention](#) and Annex I to the [Madrid Protocol to the Antarctic Treaty](#)).

The disadvantage is that agreeing an annex could be time consuming. This disadvantage can be mitigated by ensuring that sufficient specific elements of EIA are included in the main text, including:

Process

- Steps in the EIA, including screening, scoping, etc.
- Modalities for notification and consultation with States, public, existing bodies, affected local communities
- Incorporation of comments/revision
- Monitoring and review
- Scientific review

Content

- Minimum requirements, including management measures
- Cumulative effects, including climate change
- Transboundary effects



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

[4. Alt. 2. The provisions of this Part constitute global minimum standards for environmental impact assessments for areas beyond national jurisdiction.]

[5. Alt. 1. [Existing relevant] [Relevant] legal instruments and frameworks and relevant global, regional and sectoral bodies with a mandate in relation to marine biological diversity of areas beyond national jurisdiction shall conform to the strict environmental impact assessment standards set forth in this Part.]

[5. Alt. 2. No environmental impact assessment is required under this Agreement for any activity conducted in accordance with the rules and guidelines appropriately established under [existing] relevant legal instruments and frameworks and by relevant global, regional and sectoral bodies, regardless of whether or not an environmental impact assessment is required under those rules or guidelines.]

[5. Alt. 3. No environmental impact assessment is required under this Agreement where relevant legal instruments and frameworks and relevant global, sectoral or regional bodies with mandates for environmental impact assessments for planned activities [with impacts] in areas beyond national jurisdiction already exist, regardless of whether or not an environmental impact assessment is required for the planned activity.]

[5. Alt. 4. Where a planned activity [with impacts] in areas beyond national jurisdiction is already covered by existing environmental impact assessment obligations and agreements, it is not necessary to conduct another environmental impact assessment of that activity under this Agreement [, provided that the [State with jurisdiction or control over the planned activity] [body set forth in Part [...]] [, following consultation with [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies,] determines that:

[(a) The outcome of environmental impact assessment under those obligations or agreements is effectively implemented;]

Alt. 2 offers an alternative, which could be effective if the words “*and any annexes thereto*” are added to allow the flexibility of future modifications.

23.5 Alt. 2 and Alt 3. This would, where no EIA is required, violate the customary international law obligation regarding EIA (see comment on Article 22) and therefore should not be included in the text. Alt. 4 is consistent with existing obligations and the purpose of this Agreement, with the addition of a requirement that EIA documents prepared under those other arrangements are also submitted to the repository created under this Agreement in a timely manner and the public participation process provides adequate notice to and takes into account comments from other states, scientists, commercial entities, and civil society organizations and individuals:

*23.5. Where a planned activity with impacts in areas beyond national jurisdiction is already covered by existing environmental impact assessment obligations and agreements, it is not necessary to conduct another environmental impact assessment of that activity under this Agreement, provided that the State or States with jurisdiction or control over the planned activity, and the designated review body under this Agreement, determine that:*

*(a) The outcome of environmental impact assessment under those obligations or agreements is effectively implemented;*

*(b) The environmental impact assessment already undertaken is substantively and procedurally equivalent to the one required under this Part, and is comparably comprehensive, including with regard to such elements as the assessment of cumulative impacts; and*

*(c) The threshold for the conduct of environmental impact assessments meets or exceeds the threshold set out in this Part.*

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| <p>[(b) The environmental impact assessment already undertaken is [[functionally] [substantively] equivalent to the one required under this Part] [comparably comprehensive, including with regard to such elements as the assessment of cumulative impacts];]</p> <p>[(c) The threshold for the conduct of environmental impact assessments meets or exceeds the threshold set out in this Part.]]</p>   |  |
| <p><b>Article 24 Thresholds and criteria for environmental impact assessments</b></p> <p>[Alt.1</p> <p>When States have reasonable grounds for believing that planned activities under their jurisdiction or control [may cause substantial pollution of or significant and harmful changes to] [are likely to have more than a minor or transitory effect on] the marine environment [in areas beyond national jurisdiction], they shall, [individually or collectively,] as far as practicable, [assess the potential effects of such activities on the marine environment] [ensure that the potential effects of such activities on the marine environment are assessed].]</p> <p>[Alt.2</p> <p>1. When States Parties have reasonable grounds for believing that planned activities under their jurisdiction or control are likely to have more than a minor or transitory effect on the marine environment, they shall conduct a[n] [initial] [simplified] environmental impact assessment on the potential effects of such activities on the marine environment in the manner provided in this Part.</p> <p>2. When States Parties have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall [conduct] [ensure that] a [full] [comprehensive] environmental impact assessment [is conducted] on the potential effects of such activities on the marine environment [and ecosystems] and shall [communicate] [submit] the results of such assessments [for technical review] in the manner provided in this Part.]</p> <p>[Alt.3</p> | <p>The “minor or transitory effect” threshold, used in the Madrid Protocol to the Antarctic Treaty, is preferable in light of scientific studies reporting the sensitivity of the marine environment. A threshold for EIAs of “significant and harmful” will miss repetitive ongoing changes such as noise pollution that can negatively impact ecosystems but taken individually may be less than “significant”. Moreover, it is difficult to assess whether a change is significant and harmful given limited knowledge about much of the deep sea environment. Thresholds and criteria for EIAs should be in accordance with the precautionary principle.</p> <p><i>When the effects of the proposed activity are unknown or poorly understood, an environmental impact assessment will always be required.</i></p> |

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| <p>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]]].</p>  |  |
| <p><b>Article 25 Cumulative impacts</b></p> <p>[1. Cumulative impacts shall [as far as possible] be [taken into account] [considered] in the conduct of environmental impact assessments.]</p> <p>[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.]</p> <p>[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.]</p> | <p>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.</p> <p>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> <p>Cumulative impacts analysis includes all impacts originating in AWNJ and ABNJ, regardless of whether any state exercises jurisdiction and control of the sources of the cumulative impacts, as this is a fact-based inquiry intended to understand the condition of the ocean environment in the present and, to the extent reasonably possible, the future.</p> <p>Assessments often fall short in considering future human activities in their cumulative effects analysis, resulting in an under-appreciation of the overall threat of human activities on the health and resilience of ecosystems. Best practice is to create reasonable development scenarios that consider a range of possible and likely futures for affected areas. This can be done at the project level, but is ideally done through regional or strategic assessments prior to any project proposals (see article 28).</p> |
| <p><b>Article 26 Transboundary impacts</b></p> <p>[1. Possible transboundary impacts shall be taken into account in environmental impact assessments.]</p> <p>[2 Where relevant, the environmental impact assessment process shall also take into account possible impacts in [adjacent [areas] [coastal States] [areas within national jurisdiction, including the continental shelf beyond 200 nautical miles].]</p>   | <p>States have a customary international law obligation “to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control”. (<a href="#">Nuclear Weapons Case</a>; <a href="#">Trail Smelter Case</a>; <a href="#">Construction of a Road</a>; <a href="#">Gabčíkovo-Nagymaros</a>).</p> <p>This obligation includes impacts of: activities conducted on the extended continental shelf which affect the superjacent waters; activities conducted in ABNJ that affect adjacent coastal states; and</p>  |

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|   | activities conducted in areas within national jurisdiction that affect areas beyond national jurisdiction.   |
| <p><b>Article 27 Areas identified as ecologically or biologically significant or vulnerable</b></p> <p>[1. A lower threshold, as set out in article [...], shall apply to the conduct of environmental impact assessments for activities undertaken in areas identified as ecologically or biologically significant or vulnerable.]</p> <p>[2. Alt. 1. Environmental impact assessments for planned activities to be undertaken in areas identified as ecologically or biologically significant or vulnerable shall be conducted in accordance with the following provisions: [...].]</p> <p>[2. Alt. 2. Guidelines on the conduct of environmental impact assessments in [or adjacent to] areas identified as ecologically or biologically significant or vulnerable shall be elaborated by the Conference of the Parties.</p> <p>[2. Alt. 3. Environmental impact assessments shall be conducted in existing marine protected areas or areas that may require protection in accordance with the relevant international agreements applicable to those areas.]</p> |  |
| <p><b>Article 28 Strategic environmental assessments</b></p> <p>[1. States Parties, individually or in cooperation with other States Parties, shall ensure that a strategic environmental assessment is carried out for plans and programmes relating to activities [under their jurisdiction or control,] [conducted] [with impacts] in areas beyond national jurisdiction, which meet the threshold/criteria established in article 24.]</p> <p>[2. As one type of environmental assessment, strategic environmental assessments shall follow mutatis mutandis the process set out in this Part.]</p>   | <p>SEA is a key element for achieving effective ecosystem-based governance. It offers the potential for cooperation and coordination regarding ABNJ and areas within national jurisdiction, and with other relevant legal instruments and frameworks and relevant global, regional and sectoral bodies. SEA has the following characteristics:</p> <ul style="list-style-type: none"> <li>• Geographic scope can be regional or ecosystem</li> <li>• Consultation can be across sectors, levels of governance, and public</li> <li>• Potential for establishing long-term advisory committees and other consultative bodies</li> <li>• Can provide a platform for integrating outcomes of monitoring into management</li> <li>• Can provide a forum to establish agreements between governance instruments.</li> </ul> |

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|  | <p>28.3. <i>Specific procedures for and content of strategic environmental assessments shall be determined by the Conference of the Parties.</i></p> <p>Alternatively, the process for SEA could be left to be developed by the scientific advisory body.</p>  |
| <p><b>Article 29 List of activities that [require] [or] [do not require] an environmental impact assessment</b></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>   |  |
| <p><b>Article 30 Screening</b></p> <p>[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].]</p> <p>[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.]</p> <p>[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 Scientific and Technical [Body] [Network] must be obtained] [it must provide information to support that conclusion]. [The Scientific and Technical [Body] [Network] shall verify that the information provided by the [State Party] [proponent of the planned activity] satisfies the requirements in this Part.]</p> | <p>Screening is a critical step in EIA that helps to identify, early in the process, whether EIA is needed by providing an indicator of which alternatives are likely to have an impact sufficient to trigger the need for a full EIA.</p> <p>Public participation, including notice and comment and deposit of the screening documents with the repository, should occur at the screening step.</p> |

### Article 31 Scoping

[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].]

[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].]

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).

*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.*

### Article 32 Impact assessment and evaluation

[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].]

[2. Nothing in this Part precludes States Parties, in particular small island developing States, from conducting joint environmental impact assessments.]

[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.]

[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].]

[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.]

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.’ [Deep Seabed Mining Advisory Opinion](#), ITLOS Reports 2011, para.115 (citing Pulp Mills case); [Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission](#) ITLOS Reports 2015, para 131.

*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.*

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

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|   | <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><b>Article 33 Mitigation, prevention and management of potential adverse effects</b></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.’ (<a href="#">Iron Rhine Arbitration</a>)</p>  |
| <p><b>Article 34 Public notification and consultation</b></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> |

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| <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].]</p> <p>[3. Public notification and consultation shall be transparent and inclusive [, and targeted and proactive when involving adjacent small island developing States].]</p> <p>[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.]</p> <p>[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].]</p> <p>[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].]</p> <p>[7. Procedures may be developed by the Conference of the Parties to facilitate consultation at the international level.]</p> | <p>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.</p> <p>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:</p> <p><i>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.</i></p> <p>See: <a href="#">EIA repository</a> for the <a href="#">Madrid Protocol to the Antarctic Treaty</a>, See also, <a href="#">UNCLOS</a> art. 205; <a href="#">Antarctic Treaty</a>, art. 7(5); <a href="#">Espoo Convention</a>, art. 1-6. See also <a href="#">International Association for Public Participation</a></p> <p>A provision which avoids the publication of information which is the subject of a patent application is appropriate. This is different from a provision which would support keeping secret information complementary to a patent which a patent owner has chosen not publish to extend the power of a patent. “Other interests” is very vague.</p> |
| <p><b>Article 35 Preparation and content of environmental impact assessment reports</b></p> <p>1. States Parties shall be responsible for the preparation of an environmental impact assessment report for any such assessment undertaken pursuant to this Part.</p> <p>2. Where an environmental impact assessment is required in accordance with this Part, the environmental impact assessment report [shall] [may] include [as a minimum, the following information]:</p>   | <p>This is an appropriate list of the contents for an EIA, with the following addition:</p> <p><i>A report of a reasoned decision, explaining the basis for the decision, including reference to available science and responses to public comments.</i></p>  |



- (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-up actions, including any monitoring and management programmes, any plans for post-project analysis where scientifically justified, and plans for remediation;
- (i) Uncertainties and gaps in knowledge;
- (j) [A non-technical summary] [and/or a technical summary];
- [(k) The identification of the sources of the information contained in the report;]
- [(l) An explicit indication of predictive methods and underlying assumptions, as well as the relevant environmental data used;]
- [(m) The methodology used to identify environmental impacts;]

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| <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><b>Article 36 Publication of [assessment] reports</b></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><b>[Article 37 Consideration and review of [assessment] reports]</b></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"> <li>• Provides initial review of all projects and activities at screening stage</li> <li>• Tagging to identify activities taking place in sensitive areas</li> <li>• Refers to standing scientific body where needed for several reasons (sensitivity of impacted resources; large scale of activity; novelty of activity)</li> </ul> |

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|  | <p>Standing scientific body:</p> <ul style="list-style-type: none"> <li>• Accepts EIAs further review where needed</li> <li>• Advises on EIA process (intersecting with capacity building and tech transfer),</li> <li>• Provides comment at</li> <li>• Elevates concerns to the COP, to a regional/sectoral body, or to a specialized expert scientific body</li> </ul> <p>Specialized Scientific agencies, organizations, universities</p> <ul style="list-style-type: none"> <li>• 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</li> </ul>  |
| <p><b>Article 38 Decision-making</b></p> <p>[1. Alt. 1. Where a planned activity is under the jurisdiction or control of a State Party, that State shall be responsible for determining whether the planned activity may proceed.]</p> <p>[1. Alt. 2. The Conference of the Parties shall be responsible for determining whether a planned activity may proceed, in accordance with the following procedural requirements:</p> <p>(a) The environmental impact assessment report shall be submitted to the Scientific and Technical [Body] [Network] for review, which shall, having regard to the inputs received during public consultation, review the report and make a recommendation to the Conference of the Parties on whether the planned activity should proceed[:]</p> <p>[(b) A revised environmental impact assessment report may be submitted to the panel of experts, appointed by the Scientific and Technical [Body] [Network], for reconsideration where the Scientific and Technical [Body] [Network] has recommended that the planned activity should not proceed.]]</p> <p>[1. Alt. 3. The Conference of the Parties may delegate its decision-making function to a relevant regional body in accordance with conditions and requirements to be established by the Conference.]</p> | <p>Decision making should be based first and foremost on the precautionary principle and in line with a precautionary approach (<a href="#">IUCN 2007</a>) .</p> <p>Adaptive management may be part of a precautionary approach under certain conditions (<a href="#">IUCN 2007</a>):</p> <p>“Unless strict prohibitions are required, an adaptive management approach should be considered, including the following core elements:</p> <p>(a) monitoring of impacts of management or decisions based on agreed indicators;</p> <p>(b) promoting research to reduce uncertainties;</p> <p>(c) ensuring periodic evaluation of the outcomes of implementation, drawing of lessons and review and adjustment, as necessary, of the measures or decisions adopted;</p> <p>(d) establishing an efficient and effective compliance system.”</p> <p>Applying the Precautionary Principle may sometimes require strict prohibition of activities. This is particularly pertinent in situations where urgent measures are required to avert imminent potential threats, where the potential damage is likely to be immediately irreversible (such as the spread of an invasive species), where particularly vulnerable species or ecosystems are concerned, and where other</p> |

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| <p>[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.]</p> <p>[3. Decision-making-related documents shall be made public, including through the clearing-house mechanism.]</p>  | <p>measures are likely to be ineffective. This situation is often the result of a failure to apply more moderate measures at an earlier stage.</p> <p>Approval or acceptance of an EIA under this section does not mean that the activity itself is in compliance with other international or national law.</p> <p>See, <a href="#">New Zealand EEZ Act art. 64</a>; and <a href="#">Sustain our Sounds [2014] NZSC 40 para 129</a> case:</p> <p>[129] The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors:</p> <ul style="list-style-type: none"> <li>(a) the extent of the environmental risk (including the gravity of the consequences if the risk is realised);</li> <li>(b) the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);</li> <li>(c) the degree of uncertainty; and</li> <li>(d) the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.</li> </ul> <p>The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach.</p> |
| <p><b>Article 39 Monitoring</b></p> <p>[In accordance with articles 204 to 206 of the Convention,] States Parties shall [[continuously] monitor the effects of authorized activities] [ensure that the environmental impacts of the authorized activity are [continuously] monitored [and supervised] [by the proponent of the planned activity]] [, in accordance with the conditions set out in the approval of the activity].]</p> | <p>The meaning of “authorized activities” is not clear. The obligation for monitoring should apply to all activities under a State’s jurisdiction or control.</p> <p>“... once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.” (<a href="#">Pulp Mills Case</a>, para 205).</p> <p>The text should reflect that the State Party is ultimately responsible, under international law, although it may delegate the execution to the proponent.</p>   |

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| <p><b>Article 40 Reporting</b></p> <p>[1. Alt. 1. States Parties shall report on the effects of authorized activities in accordance with articles 204 to 206 of the Convention.]</p> <p>[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.]</p> <p>[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 activity] [the results of the monitoring and review required under articles 39 and 41].]</p> <p>[2. Reports shall be submitted to [the clearing-house mechanism] [the Scientific and Technical [Body] [Network]] [ [existing] relevant legal instruments or frameworks or relevant global, regional and sectoral bodies and other States].]</p> <p>[(a) The Scientific and Technical [Body] [Network] may request independent consultants or an expert panel to undertake a further review of the reports submitted to it;]</p> <p>[(b) [Existing relevant] [Relevant] legal instruments and frameworks and relevant global, regional and sectoral bodies and other States may [analyse the reports and highlight cases of non-compliance, the lack of information or other shortcomings] [provide recommendations regarding] [comment on] the environmental assessment and review.]</p> | <p>Reporting on the results of the activity supports the goal of the EIA process: to improve environmental outcomes and to prevent environmental harm. Results of reporting are important inputs for ecosystem-based sustainable use and conservation of marine biodiversity, and can be used to develop cumulative impacts analyses for future EIAs. .</p> <p>As with all aspects of EIA, reporting should be transparent and accessible.</p> |
| <p><b>Article 41 Review</b></p> <p>[1. Alt. 1. [The Scientific and Technical [Body] [Network] shall] [States Parties shall] [States Parties shall require the proponent to] review the [environmental impacts of the authorized activity] [results of the monitoring required under article 39] [conditions set out in the authorization of the activity].]</p> <p>[1. Alt. 2. States Parties shall ensure that the environmental impacts of the authorized activity are reviewed.]</p>   | <p>The agreement should include a mechanism for suspension of activities, as well as a timeframe.</p> <p>When an activity that has been the subject of an EIA changes in any of several ways, for example, in scale, frequency, or nature, a supplemental EIA is required. This additional text would address that need:</p>   |

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| <p>[(a) Should the results of the monitoring required under article 39 identify adverse impacts not foreseen in the environmental impact assessment, the [State with jurisdiction or control over the activity] [Scientific and Technical [Body] [Network]] shall:</p> <ul style="list-style-type: none"> <li>[(i) Notify the [Conference of the Parties] [other States] [the public];]</li> <li>[(ii) Halt the activity;]</li> <li>[(iii) Require the proponent to propose measures to mitigate and/or prevent those impacts;]</li> <li>[(iv) Evaluate measures proposed under article [...] and decide whether the activity should continue];]</li> </ul> <p>[(b) The Conference of the Parties shall develop guidelines on the nature and severity of the impacts that would require a supplemental environmental impact assessment.]</p> <p>[2. A non-adversarial consultation process shall be established to resolve [controversies] [differences] [disagreements] in respect of monitoring, [without recourse to judicial or non-judicial bodies].]</p> | <p>1. (b) <i>The Conference of the Parties shall develop guidelines on the nature and severity of the impacts that would require a supplemental environmental impact assessment.</i></p> |
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## PART V CAPACITY-BUILDING AND TRANSFER OF MARINE TECHNOLOGY

| Draft text  | Comments  |
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| <p><b>Article 42 Objectives</b></p> <p>Capacity-building and the transfer of marine technology shall be aimed at:</p> <ul style="list-style-type: none"> <li>(a) Assisting States Parties, in particular developing States Parties, in implementing the provisions of this Agreement, in order to achieve its objectives;</li> <li>(b) Enabling inclusive and effective participation in the activities undertaken under this Agreement;</li> </ul> | <p>42(f). The reference to ensuring access should be clarified -- should this refer to fee-free and open access, or access under the same conditions (which could imply a fee) as other States? Should access imply the capacity to use the resource?</p> |

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| <p>[(c) [Promoting and encouraging] [Ensuring] [Providing or facilitating] access to technology by and transfer of marine technology for peaceful purposes to developing States Parties for the attainment of the objectives of this Agreement;]</p> <p>(d) Increasing, disseminating and sharing knowledge on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction;</p> <p>(e) Developing the marine scientific and technological capacity of States Parties with regard to the conservation and sustainable use of marine biological resources of areas beyond national jurisdiction;</p> <p>(f) Ensure that developing States Parties have:</p> <p>[(i) Access to, and benefit from, the scientific information resulting from access to resources in areas beyond national jurisdiction, in particular marine genetic resources;]</p> <p>[(ii) Access to, and that their special requirements receive consideration in, the sharing of benefits from, marine genetic resources and in marine scientific research;]</p> <p>[(iii) Access to marine genetic resources <i>in situ</i>, <i>ex situ</i> [and <i>in silico</i>] [[and] [as] [digital] [genetic] sequence data [and information]]];]</p> <p>[(iv) [Endogenous] [Local] research capabilities relating to marine genetic resources and products, processes and other tools;]</p> <p>(v) The capacity to develop, implement, monitor and manage, including to enforce, any area-based management tools, including marine protected areas;</p> <p>(vi) The capacity to conduct and evaluate environmental impact assessments [and strategic environmental assessments].</p> |   |
| <p><b>Article 43 Cooperation in capacity-building and transfer of marine technology</b></p>  | <p>43.2. In this provision, as noted previously, the word “existing” implies exclusion of future instruments, frameworks and bodies, which is not</p> |

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| <p>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.</p> <p>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.</p> <p>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.</p> | <p>appropriate. Cooperation is an international obligation and should be ensured.</p> <p>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.</p> |
| <p><b>Article 44 Modalities for capacity-building and the transfer of marine technology</b></p> <p>1. Capacity-building and the transfer of marine technology [shall] [may] be provided on a [voluntary] [bilateral, regional and multilateral] basis.</p> <p>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 process that is participatory, cross-cutting and gender-responsive.</p> <p>3. Capacity-building and the transfer of marine technology shall be based on and be responsive to the needs and priorities of developing</p>   | <p>44.2. The obligation to not duplicate existing programmes is important to avoid a situation where previously allocated resources are “rebadged” to meet this obligation.</p>   |



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| <p>States Parties [carried out through] [as determined by] [informed by] a needs assessment [on an individual case-by-case or regional basis]. Such needs and priorities may be self-assessed or facilitated through a mechanism, which may be established by the Conference of the Parties.</p> <p>[4. Detailed modalities, procedures and guidelines for capacity-building and the transfer of marine technology [may] [shall] be developed and adopted by the Conference of the Parties.]</p>  |   |
| <p><b>Article 45 Additional modalities for the transfer of marine technology</b></p> <p>[1. States Parties, recognizing that marine technology includes biotechnology and that both access to and the transfer of marine technology among States Parties are essential elements for the attainment of the objectives of this Agreement, [undertake to provide or facilitate] [shall promote] [shall ensure] access for and transfer to developing States Parties of appropriate, reliable, affordable, modern and environmentally sound marine technology that is relevant to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.]</p> <p>2. The development and transfer of marine technology shall be [carried out] [promoted]:</p> <p>(a) On a [voluntary] [voluntary and mandatory] basis;</p> <p>(b) [On the basis of fair and reasonable terms and conditions] [On fair and most favourable terms, including on concessional and preferential terms] [According to mutually agreed terms and conditions].</p> <p>[3. Alt. 1. The transfer of marine technology shall [take into account the need to protect intellectual property rights] [be carried out with due regard for all legitimate interests, including the rights and duties of holders, suppliers and recipients of marine technology].]</p> <p>[3. Alt. 2. States Parties shall [protect] [respect the protection of] intellectual property rights.]</p> <p>[3. Alt. 3. Intellectual property rights [related to resources of areas beyond national jurisdiction] shall [not preclude the transfer of</p> | <p>45.3. Marine technology can be subject to IP rights or trade secret, and private rights holders may refuse to share. A clause on IP and trade secrets could protect IP rights and rights of users but could also consider possible exceptions as permitted under TRIPS. The agreement could require States to incorporate such exceptions in their domestic IP law. This runs a risk that some countries may be party to trade agreements which require no exceptions, but not engaging with this issue would limit the possible transfer of contemporary technology. This should not be limited to IP rights related to MGR, but should also include the technology and information relevant to accessing MGR and conserving marine biological diversity, such as software and equipment.</p> |

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| <p>technology] [be subject to specific limitations in furtherance of technology transfer related to marine technology] under this Agreement.]</p> <p>4. States Parties shall [promote] [ensure] the transfer of marine technology in an accessible form 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 [, and shall ensure that such transfer is not conditional on onerous reporting requirements].</p>  |  |
| <p><b>Article 46 Types of capacity-building and transfer of marine technology</b></p> <p>[Alt.1</p> <p>1. In support of the objectives set out in article 42, the types of capacity-building and transfer of marine technology may include, and are not limited to:</p> <ul style="list-style-type: none"> <li>(a) The sharing of relevant data, information, knowledge and research;</li> <li>(b) Information dissemination and awareness-raising, including with respect to traditional knowledge;</li> <li>(c) The development and strengthening of relevant infrastructure, including equipment;</li> <li>(d) The development and strengthening of institutional capacity and national regulatory frameworks or mechanisms;</li> <li>(e) The development and strengthening of human resources and technical expertise through exchanges, research collaboration, technical support, education and training and the transfer of technology;</li> <li>(f) The development and sharing of manuals, guidelines and standards;</li> <li>(g) The development of technical, scientific and research and development programmes, including biotechnological research activities.] <p>[Alt.2</p> </li></ul> |  |

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| <p>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.]</p> <p>[Alt.3</p> <p>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.]</p> <p>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.</p>   |  |
| <p><b>Article 47 Monitoring and review</b></p> <p>1. Capacity-building and the transfer of marine technology activities undertaken in accordance with this Agreement shall be monitored and reviewed periodically.</p> <p>2. The monitoring and review referred to in paragraph 1 shall be aimed at:</p> <p>(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;</p> <p>(b) Measuring performance on the basis of objective indicators and reviewing results-based analyses, including the output, progress and effectiveness of capacity-building and transfer of marine technology activities, successes and challenges;</p> <p>(c) Making recommendations for proposed ways forward and follow-up activities, including on how capacity-building and the transfer of marine technology could be further enhanced to allow 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,</p> |  |

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| <p>to fully meet their obligations and exercise their rights under this Agreement.</p> <p>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.</p> <p>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.</p> <p>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.</p> |  |
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## PART VI INSTITUTIONAL ARRANGEMENTS

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| <p><b>Article 48 Conference of the Parties</b></p> <p>1. A Conference of the Parties is hereby established.</p> <p>2. The first meeting of the Conference of the Parties shall be convened no later than one year after the entry into force of this Agreement. Thereafter, ordinary meetings of the Conference shall be held at regular intervals to be determined by the Conference at its first meeting.</p> | <p>A section could be included on provisional application that includes a Preparatory Commission to undertake many of the tasks allocated to the COP and science-advisory body, as there was for the ISA. UNCLOS, Articles 160, 162, 308, Annex I-Resolution 1; 1994 Agreement.</p> <p>Subsidiary bodies under 48.4(d) should also be able to start work on a provisional basis.</p> |

3. The Conference of the Parties shall agree upon and adopt rules of procedure for itself and for any subsidiary body that it may establish.

4. The Conference of the Parties shall monitor and keep under review the implementation of this Agreement and, for this purpose, shall:

(a) Make, within its mandate, decisions and recommendations related to the implementation of this Agreement;

(b) Exchange information relevant to the implementation of this Agreement;

(c) Promote cooperation and coordination with and among [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, with a view to promoting coherence among efforts towards, and the harmonization of relevant policies and measures for, the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction [, including by establishing processes for cooperation and coordination among relevant global, regional and sectoral bodies] [, including by inviting other global, regional and sectoral bodies to establish processes for cooperation];

(d) Establish such subsidiary bodies as deemed necessary for the implementation of this Agreement [, which may include:

[(i) An access and benefit-sharing mechanism;]

[(ii) A capacity-building and transfer of marine technology committee;]

[(iii) An implementation and compliance committee;]

[(iv) A finance committee];]

(e) Adopt, at each ordinary meeting, a budget for the financial period until the following ordinary meeting;

(f) Undertake other functions identified in this Agreement or as may be required for its implementation.

[5. The Conference of the Parties [shall] [may], at intervals to be determined by it, assess and review the adequacy and effectiveness of the provisions of this Agreement and, if necessary, propose means of strengthening the substance and methods of implementation of those

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| <p>provisions in order to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.]</p>   |   |
| <p><b>Article 49 Scientific and Technical [Body] [Network]</b></p> <p>1. A Scientific and Technical [Body] [Network] is hereby established.</p> <p>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.</p> <p>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.</p> <p>[4 Alt. 1. Under the authority and guidance of the Conference of the Parties, [and upon its request,] the [Body] [Network] shall:</p> <p>(a) Provide scientific and technical advice to the Conference of the Parties;</p> <p>[(b) Have advisory competence with regard to marine genetic resources, including questions on the sharing of benefits;]</p> <p>[(c) Elaborate a benefit-sharing mechanism;]</p> <p>[(d) Monitor the utilization of marine genetic resources of areas beyond national jurisdiction;]</p> <p>[(e) Possess recommendatory functions with respect to measures such as area-based management tools, including marine protected areas, including regarding:</p> <p>(i) Standard-setting and review;</p> <p>(ii) The assessment of proposals;</p> <p>(iii) The monitoring and review of measures;]</p> <p>[(f) Elaborate guidelines with respect to environmental impact assessments;]</p> | <p>Most modern agreements have their own scientific bodies to inform the Parties, and also rely on networks of experts both as standing committees and ad hoc groups. The subsidiary body plays a key role that cannot be undertaken solely by a network.</p> |

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| <p>[(g) Make recommendations to the Conference of the Parties with respect to environmental impact assessments;]</p> <p>[(h) Review environmental impact assessment standards to ensure consistency with the requirements under this Agreement;]</p> <p>[(i) Identify innovative, efficient and state-of-the-art technology and know-how relating to the conservation and sustainable use of marine biological diversity;]</p> <p>[(j) Advise on ways and means to promote the development and transfer of marine technology;]</p> <p>[(k) Assess the effectiveness of the implementation of measures and programmes for capacity-building and the transfer of marine technology, including by assessing whether capacity gaps are decreasing;]</p> <p>[(l) Collaborate with regional committees on capacity-building and the transfer of marine technology or regional needs assessment mechanisms;]</p> <p>[(m) Elaborate programmes for capacity-building and the transfer of marine technology;]</p> <p>[(n) Establish subsidiary bodies as required;]</p> <p>(o) Perform such other functions as may be determined by the Conference of the Parties or assigned to it under this Agreement.</p> <p>[4 Alt. 2. The functions of the [Body] [Network] shall be elaborated by the Conference of the Parties.]</p> |  |
| <p><b>Article 50 Secretariat</b></p> <p>[1. Alt. 1. A secretariat is hereby established.]</p> <p>[1. Alt. 2. The Conference of the Parties shall [, at its first ordinary meeting,] designate the secretariat from among those existing competent international organizations that have signified their willingness to carry out the secretariat functions under this Agreement.]</p>   | <p>50.1. A dedicated secretariat would be capable of undertaking several of the activities needed to implement the Agreement. Other options have certain limitations. DOALOS has a more administrative role that would require expansion to allow it to perform all of the requisite functions. The ISA's mandate and staffing are focused on extraction rather than conservation.</p> <p>The functions of secretariat will require adequate financing for the mandate of the agreement to be fulfilled.</p> |

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| <p>[1. Alt. 3. The secretariat functions for this Agreement shall be performed by the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations.]</p> <p>[1. Alt. 4. The secretariat functions under this Agreement shall be performed by the secretariat of the International Seabed Authority.]</p> <p>2. The secretariat shall:</p> <p>(a) Provide administrative and logistical support;</p> <p>(b) Convene and service the meetings of the Conference of the Parties and of any other bodies as may be established by the Conference;</p> <p>(c) Circulate information relating to the implementation of this Agreement;</p> <p>[(d) [Ensure] [Facilitate] [the necessary] [appropriate] coordination with the secretariats of other relevant international bodies;]</p> <p>[(e) Provide assistance with the implementation of this Agreement, as mandated by the Conference of the Parties;]</p> <p>[(f) Prepare reports on the execution of its functions under this Agreement and submit them to the Conference of the Parties;]</p> <p>(g) Perform such other functions as may be determined by the Conference of the Parties or assigned to it under this Agreement.</p> |   |
| <p><b>Article 51 Clearing-house mechanism</b></p> <p>1. A clearing-house mechanism is hereby established.</p> <p>2. The clearing-house mechanism shall consist primarily of an open-access web-based platform. It shall also include a network of experts and practitioners in relevant fields. The specific modalities for the operation of the clearing-house mechanism shall be determined by the Conference of the Parties.</p> <p>[3. Alt. 1. The clearing-house mechanism shall serve as a centralized platform to enable States Parties to have access to, [collect,] evaluate, [publish] [make public] and disseminate information with respect to:</p>   | <p>A clearing-house mechanism may be used to manage information related to all four elements of the agreement. Some sub-paragraphs apply only to MGR.</p> <p>51.2 The term “open access” is ambiguous and carries legal implications. Terms like “fee-free” and “unrestricted access” can be more clear.</p> <p>51.3 Alt. 1 The platform also serves as a centralized platform for public participation, including by non-State Parties, and non-State actors.</p> <p>51.3 Alt. 1 (a). A clearing house will struggle to perform all of these functions. It may be more feasible to include only notices of</p> |



[(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 resources, their biochemical components, genetic sequence data [and information] [and the utilization of marine genetic resources];]

[(b) Data and scientific information on, as well as [, in line with the principle of prior informed consent,] traditional knowledge associated with, marine genetic resources of areas beyond national jurisdiction, including through lists of databases, repositories or gene banks where marine genetic resources of areas beyond national jurisdiction are currently held, a registry of such resources, and a track-and-trace mechanism for marine genetic resources of areas beyond national jurisdiction and their utilization;]

[(c) The sharing of benefits, including through reports on the status of monetary benefits shared and on their use through the publication of the proceedings of the meetings of the Conference of the Parties;]

[(d) Environmental impact assessments [, including:

(i) Environmental impact assessment reports;

(ii) Statements of the reasons underlying decisions related to environmental impact assessments and how environmental concerns have been taken into account;

(iii) The policies, guidelines and technical methods of States Parties for environmental impact assessments;

(iv) Guidelines and technical methods on environmental impact assessments;

(v) Best practices on environmental impact assessments;

(vi) Indications of areas in which proposed planned activities will take place;]]

[(e) Opportunities for capacity-building and the transfer of marine technology, such as activities, programmes and projects being conducted in areas beyond national jurisdiction, including those relevant

forthcoming collection cruises, actual samples collected and the repository where such samples can be accessed.

51.3 Alt. 1 (b). A full track and trace system will be near-impossible to implement. Track and trace can function up to a point where it is essential for scientific purposes. Beyond this point it should be a system of due diligence by the user to ensure that they have the unique identifier to enable patenting/publication/data deposition.

51.3 Alt. 1 (d) A clearing house mechanism platform would also include notices of activities at the screening and scoping stages. This provides passive notice to potentially affected states and others. See articles 30 and 36.

51.3 Alt. 1 (e) and (f) If done correctly, the clearing house can serve as a form of match-making service, linking capacity-building and technology transfer opportunities and requests. However, this type of mechanism only works if countries know what to ask for, which requires a more active process and active personnel. There is also the question of how to get universities, research institutes and other relevant agencies to supply information on research collaboration and training opportunities.

51.3. Alt.1. (h)) The clearing house could also provide draft licensing or sharing agreements in relation to technology transfer. Information on sources of technological information and data should emphasize open standards and licensing regimes.

51.7. Confidentiality should be limited and subject to review by an appropriate third party. This issue is discussed in relation to specific articles above.

For example, providing due regard to confidentiality could be a problem if a scientist, institution or business chooses to keep information secret and not disclose it at all rather than seeking IP rights. This might be fair but a blanket reliance on self certification should not be included. If it is, exceptions should be introduced such that commercially sensitive information regarding sales should not be shared, but there can be exceptions, e.g. for research to pursue sustainability, mirroring those suggested as possibilities in respect of IP rights.

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;]

[(g) Research collaboration and training opportunities, including in relation to information on universities and other organizations that offer study grants and facilities in the field of marine science, marine research institutes that offer laboratory facilities, equipment and opportunities for research and training, and offers of cruise studies at the global, regional and subregional levels;]

[(h) Information on sources and availability of technological information and data for the transfer of marine technology and opportunities for facilitated access to marine technology.]

[3. Alt. 2. The functions of the clearing-house mechanism shall be elaborated by the Conference of the Parties.]

[4. The clearing-house mechanism [shall] [should]:

[(a) Match capacity-building needs with the support available and with providers for the transfer of marine technology, including governmental, non-governmental or private entities interested in participating as donors in the transfer of marine technology, and [provide] [facilitate] access to related know-how and expertise;

[(b) Promote linkages to existing relevant global, regional, subregional, national and sectoral clearing-house mechanisms and other databases, repositories and gene banks [, including experts in traditional knowledge];]

[(c) Link to private and non-governmental platforms for the exchange of information;]

[(d) Build on existing regional and subregional clearing-house institutions, if applicable, when establishing regional and subregional mechanisms under the global mechanism;]

(e) Facilitate enhanced transparency, including by providing baseline data and information;

There is a need to consider how and by whom the Clearing House Mechanism will be populated in the way necessary for it to work properly, and what incentives and resources are necessary for this purpose. Setting up the Clearing House is not enough for State Parties and users to actually take the time to upload all the information they have.

See discussion of safeguards for Clearing House Mechanism and other information platforms at Article 13 above.

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| <p>(f) Facilitate international cooperation and collaboration, including scientific and technical cooperation and collaboration.</p> <p>[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.]</p> <p>[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].]</p> <p>[7. Due regard shall be given to the confidentiality of information provided under this Agreement.]</p> |  |
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## [PART VII FINANCIAL RESOURCES [AND MECHANISM]]

| Draft text  | Comments   |
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| <p><b>[Article 52 Funding]</b></p> <p>[1. Funding in support of the implementation of this Agreement, in particular capacity-building and the transfer of marine technology under this Agreement, [shall] [may] [aims to strive to] be adequate, accessible, transparent [, sustainable and predictable] and [both voluntary and mandatory] [voluntary].]</p> <p>2. Funding may be provided through public and private sources, both national and international, including but not limited to contributions from States, international financial institutions, existing funding mechanisms under global and regional instruments, donor agencies,</p> | <p>Prompt and comprehensive implementation of the measures proposed under this agreement needs to be facilitated through the provision of adequate financial resources and appropriate financial mechanisms. Specific measures are required to ensure in particular the full participation of Developing States in delivering all aspects of the Agreement. Furthermore the financing mechanisms set up within this agreement should be able to make best use of other existing and future funding processes so as to ensure enhanced cooperation and effective delivery of the goal to fully protect and sustainably use biodiversity beyond national jurisdiction.</p> |

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 and penalties, and other avenues for mandatory payments;]

(c) Endowments by States Parties;

(d) Existing financial mechanisms, such as the Global Environment Facility and the Green Climate Fund;

[(e) Private entities wishing to engage in the exploration and exploitation of marine biological diversity of areas beyond national jurisdiction.]]

[Alt.2

5. States Parties shall cooperate to establish appropriate funding mechanisms to assist developing States Parties with achieving the objectives of capacity-building and the transfer of marine technology under this Agreement.]

6. The funding mechanisms established under this Agreement shall be aimed at ensuring efficient access to funding through simplified approval procedures and enhanced readiness of support 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.

7. Access to funding under this Agreement shall be open to developing States Parties [and other stakeholders] [on the basis of need] [[, taking into account the needs for assistance of] [giving priority to] States with special requirements, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries].

## PART VIII IMPLEMENTATION [AND COMPLIANCE]

| Draft text   | Comments   |
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| <p><b>Article 53 Implementation [and compliance]</b></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   |
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| <p><b>Article 54 Obligation to settle disputes by peaceful means</b></p> <p>States have the obligation to settle their disputes by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.</p> | <p>This section should grant explicit authority to ITLOS to issue advisory opinions. The Convention is sometimes referred to as a framework convention, to be developed through implementing agreements such as this one. Legal questions will inevitably arise. The Tribunal is an authoritative interpretive body capable, should the States Parties so desire, of providing legal advice to guide implementation. For a discussion of the requirement that another treaty confer advisory opinion jurisdiction on the Tribunal, see Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission ITLOS Reports 2015, paras 37-69.</p> |
| <p><b>[Article 55 Procedures for the settlement of disputes]</b></p>  | <p>55 tracks <a href="#">UNFSA</a> article 30, with the exception of UNFSA art 30.2, which addresses disputes over the interpretation or application of other</p>  |

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| <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 <a href="#">UNFSA</a> 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 <a href="#">UNFSA</a> art. 29:</p> <p><i>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.</i></p> |
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## [PART X NON-PARTIES TO THIS AGREEMENT]

| Draft text   | Comments |
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| <p><b>[Article 56 Non-parties to this Agreement]</b></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 |
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| <p><b>Article 57 Good faith and abuse of rights</b></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  |
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| <p><b>Article 58 Signature</b></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 [insert date].]</p>  | <p>Article 1.12.b refers to specific forms of self-governing associated States and territories that have competence over the matters governed by this agreement, and to international organizations as defined in the Convention.</p> |
| <p><b>Article 59 Ratification, approval, acceptance and formal confirmation</b></p> <p>[This Agreement is subject to ratification, approval or acceptance by States and to formal confirmation by the other entities referred to in article [1 (12) (b)]. The instruments of ratification, approval, acceptance and formal confirmation shall be deposited with the Secretary-General of the United Nations.]</p> | <p>See article 58.</p>  |
| <p><b>Article 60 Accession</b></p> <p>[This Agreement is open for accession by States and the other entities referred to in article [1 (12) (b)] from the day following the date on which it is closed for signature. The instruments of accession shall be deposited with the Secretary-General of the United Nations.]</p>  |   |



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| <p><b>Article 61 Entry into force</b></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><b>[Article 62 Provisional application]</b></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 <a href="#">UNCLOS, Articles 160, 162, 308</a>, Annex I-Resolution 1; <a href="#">1994 Agreement</a>).</p> |
| <p><b>Article 63 Reservations and exceptions</b></p> <p>[No reservations or exceptions may be made to this Agreement.]</p>  |  |
| <p><b>[Article 64 Relation to other agreements]</b></p> <p>[1. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Agreement, applicable solely to the relations between them, provided that such agreements do not relate to a provision the derogation from which is incompatible with the effective execution of the object and purpose of this Agreement, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such</p>  |  |

agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Agreement.]

[2. States Parties intending to conclude an agreement referred to in paragraph 1 shall notify the other States Parties through the secretariat referred to in article 50 of their intention to conclude the agreement and of the modification or suspension that it provides.]

#### **Article 65 Amendment**

[1. A State Party may, by written communication addressed to the secretariat referred to in article 50, propose amendments to this Agreement. The secretariat shall circulate such communication to all States Parties. If, within [six] months from the date of the circulation of the communication, not less than [one half] of the States Parties reply favourably to the request, the proposed amendment shall be considered at the following meeting of the Conference of the Parties.]

[2. The Conference of the Parties shall make every effort to reach agreement on the adoption of any proposed amendment by way of consensus. If all efforts to reach consensus have been exhausted, the procedures established in the rules of procedure adopted by the Conference shall apply.]

[3. An amendment adopted in accordance with paragraph 2 of this article shall be communicated by the depositary to all States Parties for ratification, approval or acceptance.]

[4. Amendments to this Agreement shall enter into force for the States Parties ratifying, approving or accepting them on the [thirtieth] day following the deposit of instruments of ratification, approval or acceptance by [two-thirds] of the number of States Parties [at the time of adoption of the amendment] [at the time of ratification, approval or acceptance of the amendment]. Thereafter, for each State Party depositing its instrument of ratification, approval or acceptance of an amendment after the deposit of the required number of such instruments, the amendment shall enter into force on the [thirtieth] day following the deposit of its instrument of ratification, approval or acceptance.]

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| <p>[5. An amendment may provide that a smaller or a larger number of ratifications or accessions shall be required for its entry into force than required under this article.]</p>   |  |
| <p><b>Article 66 Denunciation</b></p> <p>[1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, denounce this Agreement and may indicate its reasons. Failure to indicate reasons shall not affect the validity of the denunciation. The denunciation shall take effect [one year] after the date of receipt of the notification, unless the notification specifies a later date.]</p> <p>[2. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Agreement to which it would be subject under international law independently of this Agreement.]</p>  |  |
| <p><b>Article 67 Participation by international organizations</b></p> <p>[1. In cases where an international organization referred to in annex IX, article 1, of the Convention does not have competence over all the matters governed by this Agreement, annex IX to the Convention shall apply mutatis mutandis to participation by such international organization in this Agreement, except that the following provisions of that annex shall not apply:</p> <ul style="list-style-type: none"> <li>(a) Article 2, first sentence;</li> <li>(b) Article 3, paragraph 1.]</li> </ul> <p>[2. In cases where an international organization referred to in annex IX, article 1, of the Convention has competence over all the matters governed by this Agreement, the following provisions shall apply to participation by such international organization in this Agreement:</p> <ul style="list-style-type: none"> <li>(a) At the time of signature, formal confirmation or accession, such international organization shall make a declaration stating that: <ul style="list-style-type: none"> <li>(i) It has competence over all matters governed by this Agreement;</li> </ul> </li> </ul> | <p>This refers to “an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters.” UNCLOS, Annex IX, Article 1.</p> |

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| <p>(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;</p> <p>(iii) It accepts the rights and obligations of States under this Agreement;</p> <p>(b) Participation of such an international organization shall in no case confer any rights under this Agreement on member States of the international organization;</p> <p>(c) In the event of a conflict between the obligations of an international organization under this Agreement and its obligations under the agreement establishing the international organization or any acts relating to it, the obligations under this Agreement shall prevail.]</p>  |  |
| <p><b>[Article 68 Annex[es]]</b></p> <p>[1. The annex[es] form[s] an integral part of this Agreement and, unless expressly provided otherwise, a reference to this Agreement or to one of its Parts includes a reference to the annex[es] relating thereto.]</p> <p>[2. The annex[es] may be revised from time to time by States Parties. Notwithstanding the provisions of article 65, if a revision to an annex is adopted by consensus at a meeting of the Conference of the Parties, it shall be incorporated in this Agreement and shall take effect from the date of its adoption or from such other date as may be specified in the revision. Once adopted, the revised annex shall be submitted to the depositary for its circulation to all States. If a revision to an annex is not adopted by consensus at such a meeting, the amendment procedures set out in article 65 shall apply.]</p> | <p>The following sections refer to possible use of an annex:</p> <p>Article 10.1 Access to marine genetic resources of areas beyond national jurisdiction – Listing requirements for advanced notification of <i>in situ</i> collection of MGR</p> <p>Article 23.4 Alt. 1 Relationship between this Agreement and environmental impact assessment processes under other ... - Listing global minimum standards for EIA in marine</p> <p>Article 34.2-.3 Public notification and consultation – Listing criteria and procedures for affirmative notification of specially affected entities</p> <p>Article 35.3 Preparation and content of environmental impact assessment reports – Listing additional specifics</p> <p>Article 46.1 Alt. 2 and 46.2 Alt 3 Types of capacity-building and transfer of marine technology - Listing the types</p> <p>The proposed text is largely based on <a href="#">UNFSA</a>, Article 48. Changes include omission of the phrase “Such revisions shall be based on scientific and technical considerations”; while an important criterion for some annexes, it is not equally relevant to each of the proposed uses of an annex in this agreement.</p> |
| <p><b>Article 69 Depositary</b></p>  |  |

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| <p>[The Secretary-General of the United Nations shall be the depositary of this Agreement and any amendments or revisions thereto.]</p>               |  |
| <p><b>Article 70 Authentic texts</b><br/>The Arabic, Chinese, English, French, Russian and Spanish texts of this Agreement are equally authentic.</p> |  |

*These comments were prepared by the  
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*&*

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