

# A preliminary analysis of the draft high seas biodiversity treaty

**Klaudija Cremers, Glen Wright, Julien Rochette (IDDRI), Kristina Gjerde (IUCN), Harriet Harden-Davies (University of Wollongong)**

In 2017, following more than a decade of informal discussions, States at the United Nations decided to convene an intergovernmental conference (IGC) to negotiate an international legally binding instrument (ILBI) for the conservation and sustainable use of the biological diversity of marine areas beyond national jurisdiction (BBNJ). The negotiations for an ILBI are based on a package of issues agreed in 2011, namely: marine genetic resources (MGRs), including questions on the sharing of benefits; measures such as area-based management tools (ABMTs), including marine protected areas (MPAs); environmental impact assessments (EIA); and capacity-building and the transfer of marine technology.

United Nations General Assembly (UNGA) Resolution 72/249 provides for four meetings of the IGC. The final session is scheduled to take place from 23 March to 3 April 2020, at the United Nations (UN) Headquarters in New York. This round of negotiations will be based on the revised draft text (released 27 November 2019).

This paper provides an initial analysis of the draft text, highlighting key areas of progress and contention, as well as identifying some possible options for strengthening the text.

## KEY MESSAGES

It remains unclear whether the current draft treaty is sufficiently ambitious and developed to deliver an effective governance framework. Many of the key provisions are still in brackets and the level of ambition will depend on the choices made in the final stages of the negotiations.

The current draft gives the COP the mandate to establish arrangements that will be of crucial importance for the functioning of the future regime, including the establishment of bodies and funding mechanisms and the adoption of procedures to promote compliance. Such procedures, commonly provided for in international agreements, can slow down the operationalization of the treaty, so it is crucial that any voting rules established will allow States Parties to go beyond the consensus.

Enhancing international cooperation and encouraging the adoption of complementary measures within existing frameworks is crucial to the success of the treaty. This is reflected in the current draft treaty, though some provisions could be strengthened.

Time will tell if the 2 weeks of negotiations in March will be sufficient to finalize the treaty. The priority should be on drafting an ambitious and robust agreement, even if additional sessions are needed.



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## **GLOSSARY**

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<b>ABMTs</b>	Area-based management tools
<b>ABNJ</b>	Marine areas beyond national jurisdiction
<b>BBNJ</b>	Biological diversity in marine areas beyond national jurisdiction
<b>CBD</b>	Convention on Biological Diversity
<b>COP</b>	Conference of the Parties
<b>DOALOS</b>	Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations
<b>EBSA</b>	Ecologically or biologically significant marine area
<b>EIA</b>	Environmental impact assessment
<b>IGC</b>	Intergovernmental conference
<b>ILBI</b>	International legally binding instrument
<b>IOC-UNESCO</b>	International Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization
<b>IPBES</b>	Intergovernmental Panel on Biodiversity and Ecosystem Services
<b>IPCC</b>	Intergovernmental Panel on Climate Change
<b>MGRs</b>	Marine genetic resources
<b>MPA</b>	Marine protected area
<b>RFMO</b>	Regional fisheries management organisation
<b>UN</b>	United Nations
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea
<b>UNFSA</b>	United Nations Fish Stocks Agreement
<b>UNGA</b>	United Nations General Assembly

## 1. INTRODUCTION

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In 2017, following more than a decade of informal discussions, States at the United Nations (UN) decided to convene an intergovernmental conference (IGC) to negotiate an international legally binding instrument (ILBI) for the conservation and sustainable use of the biological diversity of marine areas beyond national jurisdiction (BBNJ).<sup>1</sup>

### BOX. THE "PACKAGE DEAL"

The negotiations for an ILBI are based on a package of issues agreed in 2011, namely:<sup>2</sup>

- Marine genetic resources (MGRs), including questions on the sharing of benefits;
- Measures such as area-based management tools (ABMTs), including marine protected areas (MPAs);
- Environmental impact assessments (EIA); and
- Capacity-building and the transfer of marine technology.

United Nations General Assembly (UNGA) Resolution 72/249 provides for four meetings of the IGC. The final session is scheduled to take place from 23 March to 3 April 2020, at the United Nations (UN) Headquarters in New York.<sup>3</sup> This round of negotiations will be based on a revised draft text, which was prepared

by the President of the IGC, Ms Rena Lee, and released on 27 November 2019.<sup>4</sup> The draft comprises 12 parts, 70 articles and 2 annexes.

This paper provides an initial analysis of the draft text, focusing on general provisions, institutional arrangements, and the substantive provisions concerning the package deal elements (Parts I–VI).<sup>5</sup> This analysis highlights key areas of progress or contention, identifying some possible options for strengthening the text.

Section 2 first reviews the general provisions and institutional arrangements, while Section 3 examines both the text options on which States are approaching consensus as well as any outstanding questions in relation to the package deal elements. Some concluding thoughts are provided in Section 4.

## 2. GENERAL PROVISIONS AND INSTITUTIONAL ARRANGEMENTS

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### Preamble

The short draft Preamble makes only limited reference to key instruments, principles and objectives. The Preamble could expand on its sole reference to UNCLOS and provide a more comprehensive and ambitious vision for the treaty. In particular, it could draw attention to the inherent value of marine

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<sup>1</sup> United Nations General Assembly Resolution 72/249, 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. For a detailed overview of the history of this process, see Wright *et al.* (2018).

<sup>2</sup> Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Document A/66/119, §I.1(a) and (b), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/397/64/PDF/N1139764.pdf>.

<sup>3</sup> The first three meetings took place in September 2018, March/April 2019 and August 2019. See <http://www.un.org/bbnj>.

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<sup>4</sup> [https://www.un.org/bbnj/sites/www.un.org/bbnj/files/revised\\_draft\\_text\\_a\\_conf\\_232.2020.11\\_advance\\_unedited\\_version.pdf](https://www.un.org/bbnj/sites/www.un.org/bbnj/files/revised_draft_text_a_conf_232.2020.11_advance_unedited_version.pdf). This draft replaces the earlier version of May 2019 (<https://undocs.org/a/conf.232/2019/6>).

<sup>5</sup> For analysis of issues beyond the package deal, see Wright *et al.* (2019). States at the United Nations are negotiating a treaty to ensure the conservation and sustainable use of this vast global commons. These negotiations provide a unique and timely opportunity to strengthen the management regime for the global ocean, building on the vision of the UN Convention on the Law of the Sea (UNCLOS).

biodiversity and ecosystem services, as well as the critical role they play in supporting evolution, adaptation, human needs and cultural values.<sup>6</sup> The Preamble could highlight the threats facing ABNJ, such as the biodiversity loss and climate impacts detailed in the recent IPBES Global Assessment Report on Biodiversity and Ecosystem Services and the IPCC Special Report on the Ocean and Cryosphere in a Changing Climate.<sup>7</sup>

The Preamble could also better reflect the importance of science-based decision-making and effective enforcement; e.g. it could highlight the “general lack of information and knowledge regarding biological diversity and of the urgent need to develop scientific, technical, and institutional capacity” (CBD preamble) and reiterate the call made in the UN Fish Stocks Agreement (UNFSA) for “more effective enforcement by flag States, port States and coastal States”.<sup>8</sup>

## General provisions (Part I)

Part I comprises six articles applicable to the treaty as a whole: use of terms; objectives; scope of application; relationship to other treaties; general principles and approaches; and international cooperation. Discussions to date have focussed on substantive provisions, so there has only been limited exchange of views on these provisions – especially on the use of terms, as reflected by the number of brackets and alternative options.

Draft Article 2 states that the **general objective** of the instrument is “[long-term] conservation and sustainable use” of BBNJ through implementation of UNCLOS and international cooperation. It is important that “long-term” is included in the objective, in line with the ecosystem approach and similar objectives in other agreements, such as the UNFSA.<sup>9</sup>

The requirement that the instrument “**should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies**”<sup>10</sup> is reflected in draft Article 4. Discussions to date have demonstrated that interpretations of what this means in practice vary considerably (Wright *et al.*, 2018), thus it would be helpful if this article included a complementary provision requiring existing agreements to be implemented in light of the treaty’s objective.

<sup>6</sup> For example, the preamble of the Convention on Biological Diversity (CBD) preamble notes “the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere”.

<sup>7</sup> Available at <https://ipbes.net/global-assessment-report-biodiversity-ecosystem-services> and <https://www.ipcc.ch/srocc/> respectively.

<sup>8</sup> Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, Preamble.

<sup>9</sup> Draft Article 2: “The objective of this Agreement is to ensure the [long-term] conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination”; Article 2, UNFSA: “The objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention”.

<sup>10</sup> UNGA Resolution 72/249.

Compared to the prior version, draft Article 5 includes a longer list of **general principles and approaches**. The article now includes the precautionary principle/approach, ecosystem approach, the use of best available science, and ecosystem resilience. Notably, the common heritage of mankind principle has been added as bracketed text, though there remains no convergence on its ultimate inclusion.<sup>11</sup> If it is to be included, it would be helpful to specify in which contexts and to which resources it applies. This provision 5 also provides an opportunity to reinforce other key overarching principles and obligations, such as transparency and cooperation and coordination. This would help ensure that these are applied consistently throughout the agreement.

Draft Article 6 is of particular importance, as **international cooperation** is a key condition for the successful management of ABNJ. To this end, this article could include a clear obligation for States Parties to cooperate through this agreement as well as through competent international and regional bodies to take measures to implement the treaty’s objectives. Draft Article 6(2) would oblige States Parties to promote international cooperation in “marine scientific research and in the development of marine technology”, which could be expanded to include cooperation on data collection and reporting. Draft Article 6 could also call specifically for cooperation on matters of enforcement (as in UNFSA, Article 21).

## Institutional arrangements (Part VI)

Effective implementation will require an appropriate institutional structure through which States Parties can take decisions, coordinate, and perform reviews and assessments of implementation (Mace, 2006; Wright *et al.*, 2018). This structure is set out in the four draft Articles that comprise Part VI.

A **Conference of the Parties (COP)** (draft Article 48) would bring together all States Parties in order to take decisions and review progress. The COP would also be able to establish subsidiary bodies as it deems necessary.<sup>12</sup> Article 48.3bis, currently in brackets, states that the COP shall generally take decisions by consensus, but leaves open the possibility of establishing alternative rules “if all efforts to reach consensus have been exhausted”. Such alternative rules could help avoid deadlock where full consensus proves unachievable.<sup>13</sup> The COP

<sup>11</sup> The status of MGRs has proven to be a divisive issue throughout the negotiations, as an ideological divide emerged early on between States that argue that MGRs are part of the common heritage of mankind, thus requiring their exploitation to be conducted in a manner beneficial to all, and those that argue that exploitation of MGRs is covered by the principle of freedom of the high seas (Wright *et al.*, 2018).

<sup>12</sup> E.g. A body to implement an access and benefit-sharing mechanism, a capacity-building and transfer of marine technology committee, or an implementation and compliance committee and a finance committee (draft Article 48(4)(d)).

<sup>13</sup> For example, many regional fisheries management organisations (RFMOs) adopt decisions by consensus, which “favours the ‘law of least ambitious program’, where policy reform will only progress to the level deemed acceptable by those least interested in reform” (Pentz and Klenk, 2017) other RFMOs provide for majority voting on conservation measures, but allow members to opt out if they do not agree (McDorman, 2005).

would also be charged with promoting cooperation and coordination with and among relevant legal instruments and bodies, which is not only necessary to meet the “not undermining” requirement, but also for addressing the fragmented nature of current framework.

A **scientific and technical body** (draft Article 49) would provide “scientific and technical advice to the COP”, especially on the four elements of the Package Deal. This body could play a crucial role in informing and implementing the agreement, with potential roles ranging from evaluating scientific reports for ABMTs and EIAs to convening panels of experts. Existing scientific and technical bodies vary widely in form and function and can provide inspiration and lessons learned that can inform the establishment of such a body for BBNJ. However, the form this body may take and its relationship with existing bodies remains unclear at this stage.

A **secretariat** (draft Article 50) would provide support to States Parties, including on administrative issues or implementation challenges. There is currently no consensus on whether a new body will be established or if an existing international organisation will be mandated to carry out this role.<sup>14</sup> In any case, it is crucial that States Parties provide the secretariat with sufficient capacity to effectively fulfil its mandate.

A **clearing-house mechanism** (draft Article 51) would aim to facilitate the exchange of information through a centralised platform.<sup>15</sup> The draft text specifies that the mechanism shall consist primarily of an open-access web-based platform, with modalities to be determined by the COP.<sup>16</sup> There is little clarity at this stage regarding its specific functions and associated financial and institutional arrangements; much of the text remains in brackets. In particular, there is currently no agreement on: whether the mechanism’s role will be passive (e.g. publication of data) or active (e.g. conducting data analysis); the hosting institution;<sup>17</sup> whether it should also include a network of experts and practitioners in relevant fields (which could be critical for ensuring that the mechanism is a dynamic forum that goes beyond a mere website); and who will be permitted to contribute and use the mechanism.<sup>18</sup>

The draft text currently includes options for specific functions relating to all of the package deal elements, with the exception of ABMTs and MPAs. This may limit the effectiveness of the mechanism, given that exchange of information on these

issues would enhance cooperation and coordination. Similarly, the draft text does not currently envisage a role for the mechanism in supporting monitoring, control and surveillance (MCS) activities, which is a missed opportunity as the cooperation required for effective MCS could be enhanced through the clearing-house mechanism (Cremers *et al.*, 2019).<sup>19</sup> More broadly, it may be relevant to assess the clearing-house mechanism established under the Convention on Biological Diversity, in order to highlight and integrate lessons learnt and key conditions for success.

### 3. PACKAGE DEAL COMPONENTS

#### Marine genetic resources and access and benefit sharing (Part II)

The use of marine genetic resources was not envisaged by the drafters of UNCLOS and there is “a lack of clarity on the applicable regime relating to bioprospecting and equitable use” of MGRs in ABNJ (Gjerde, 2008). Part II is composed of eight draft Articles (7-13) that seek to provide clarity and facilitate benefit-sharing.

Importantly, there is currently no consensus on a range of **foundational provisions**, e.g. how MGRs should be defined and whether the scope of the treaty will include derivatives and the use of fish and other biological resources as a commodity;<sup>20</sup> and whether the objectives in relation to MGRs relate to the collection of or the access and utilisation of MGRs in ABNJ.<sup>21</sup>

The common heritage principle is not currently included in this part, though there appears to be a “general agreement that recognition of MGRs as common heritage of mankind is not a prerequisite for the establishment of **benefit-sharing** obligations, nor for the possible inclusion of principles that could apply to ABNJ in general (e.g. stewardship, intergenerational equity and solidarity)” (Wright *et al.*, 2018). However, negotiators are still undecided as to whether benefit-sharing will be mandatory or voluntary and whether this includes monetary benefits (which would presumably necessitate establishment of a mechanism for distributing such benefits) as well as non-monetary benefits, such as access to samples and sharing of information.<sup>22</sup> The draft text includes various options for when benefit-sharing obligations would be triggered – i.e. when MGRs are collected, accessed or utilised.<sup>23</sup>

<sup>14</sup> E.g. The Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations (DOALOS).

<sup>15</sup> The term clearing-house “originally referred to a financial establishment where checks and bills were exchanged among member banks so that only the net balances need to be settled in cash. Today, its meaning has been extended to include any agency that brings together seekers and providers of goods, services or information, thus matching demand with supply”. See [https://bch.cbd.int/help/topics/en/What\\_is\\_a\\_Clearing\\_House\\_Mechanism.html](https://bch.cbd.int/help/topics/en/What_is_a_Clearing_House_Mechanism.html).

<sup>16</sup> Draft Article 51(2).

<sup>17</sup> E.g. the Secretariat, or an existing body such as International Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization - IOC-UNESCO.

<sup>18</sup> I.e. Whether only States Parties will be able to upload information and have access or also non-States Parties, including civil society.

<sup>19</sup> E.g. By specifying that it can serve as a platform to share good MCS practices, exchange data on MCS activities, match capacity-building needs in relation to MCS tools and methods for assessment (increase capacity for the design and implementation of MCS technologies and policies) and highlight opportunities to collaboratively monitor activities at sea.

<sup>20</sup> Draft Articles 1(8), 1(9), and 8.

<sup>21</sup> Draft Article 7.

<sup>22</sup> Draft Article 11.

<sup>23</sup> *Ibid.*

There is similar uncertainty in relation to other provisions: the draft text includes an option regarding **traditional knowledge** that would require prior and informed consent of indigenous peoples and local communities in certain circumstances;<sup>24</sup> there are divergent views on who should be responsible for **monitoring of the utilisation of MGRs**;<sup>25</sup> and it is unclear how the ILBI can ensure **implementation of benefit-sharing** provisions (not only in terms of enforcement, but also more broadly in the identification, delivery, monitoring and review of benefit-sharing provisions).<sup>26</sup>

## Area-based management tools, including marine protected areas (Part III)

The international community has made various commitments to establish a network of MPAs, including targets to cover a significant percentage of the ocean, but there is currently no global mechanism to establish MPAs in ABNJ or to coordinate the use of ABMTs currently available to existing management organisations.<sup>27</sup> Part III comprises eight draft Articles (14-21) that seek to fill this governance gap.

Draft Article 14 provides various options for the **objectives**, including enhancing cooperation and coordination in order to establish a "comprehensive system" of ABMTs/MPAs. The order of the objectives could be changed so that conservation and sustainable use is first in the list, thereby emphasising this aspect (in line with the "general objective" of draft Article 2). The draft text includes a long list of possible objectives, some of which may not provide added value here and could instead be removed or placed in the preamble or general provisions, where relevant, so as to make them applicable to the entire agreement (e.g. Draft Article 14-1b on "implementing effectively obligations under the Convention and other relevant international obligations and commitments").

Draft Article 15 on international cooperation and coordination requires States Parties **to promote coherence and complementarity in the establishment of ABMTs**, including through relevant legal instruments, frameworks and bodies. Draft Article 15-3 also requires States Parties "to make arrangements for consultation and coordination to enhance cooperation with and among relevant legal instruments, frameworks and bodies" as well as coordination among associated conservation and

management/sustainable use measures adopted thereunder. This crucial provision could contribute to tackling the challenges present by the fragmented nature of the current governance framework and by encouraging States Parties to take the action necessary to implement ABMTs/MPAs.

Draft Article 16 provides for a list of indicative criteria (draft Annex I) for the **identification of areas requiring protection through ABMTs/MPAs**, emphasising the use of the best available science, the precautionary approach/principle and the ecosystem approach. The inclusion of "feasibility" in the list of criteria appears to contradict the intent of the article, as an area's need for protection is unrelated to the feasibility of designating the necessary ABMTs/MPAs in practice. Indeed, application of the precautionary and ecosystem approaches requires particular care to be taken if an area is known to require protection but ABMTs are deemed infeasible.

According to draft Article 17, **proposals to establish ABMTs/MPAs** "shall be submitted by States Parties, individually or collectively, to the secretariat". Collaboration with industry, scientists and civil society could not only help to ensure that proposals are robust, but could also facilitate understanding of the proposal and support for eventual measures. However, a provision enabling States Parties to collaborate with stakeholders in developing proposals currently remains in brackets.<sup>28</sup> Draft Article 17-4 provides a list of **elements to be included in proposals**. The article would require proposals to specify a duration for the proposed area and measures; this may be contrary to the principles of long-term conservation and recovery/resilience of ecosystems, which will likely require that certain areas be protected for an indeterminate time period (or indefinitely). The draft article does not currently require proposals to include information on how measures could be monitored and enforced; it could, for example, require inclusion of a MCS strategy that highlights the technological tools and institutional frameworks available for ensuring compliance.

Draft Article 18 indicates that **consultations on proposals should be inclusive, transparent and open to all relevant stakeholders**.<sup>29</sup> The consultation period is time-bound,<sup>30</sup> but it is unclear who will decide what the timeframe will be. The draft text does not include any option that would allow States Parties to adopt **interim or emergency measures** while the proposal is assessed. Given that adoption of proposals may take some time, it is important that the treaty provides for such measures.

Draft Article 19 gives the COP responsibility for the **decision-making process**. It includes an option to empower the COP to recommend that States Parties promote the adoption of management measures for conservation and sustainable use through relevant legal instruments, frameworks or bodies.<sup>31</sup> Another option provides for a default mechanism whereby the

<sup>24</sup> Draft Article 10bis. This provision also stipulates that the clearing-house mechanism could act as an intermediary to facilitate access to such traditional knowledge.

<sup>25</sup> Article 13. E.g. via the clearing-house mechanism, the Scientific and Technical Body, the Secretariat, or existing institutions. The draft text also includes an option that requires States Parties to submit reports to the COP regarding their utilisation of MGRs.

<sup>26</sup> Ibid.

<sup>27</sup> Several international organisations have established ABMTs and MPAs in ABNJ, but these are only binding on Parties, or on other States or bodies on a voluntary basis and only apply to a limited number of activities (Wright *et al.*, 2018).

<sup>28</sup> Draft Article 17(2).

<sup>29</sup> Draft Article 18(1).

<sup>30</sup> Draft Article 18(5).

<sup>31</sup> Draft Article 19(Alt. 1(c)(i)).

COP itself could take decisions on the adoption of such measures where there are no relevant legal instruments, frameworks or bodies.<sup>32</sup> At present, there appears to be no provision that would explicitly empower the COP to take measures in cases where competent bodies fail to act upon its recommendations. Without such a provision, areas designated under the BBNJ agreement could remain unprotected or unmanaged if members of the relevant bodies do not agree upon appropriate measures. It is therefore important for the COP to be entitled to take decisions binding on its own States Parties (in addition and complementary to those of competent bodies and in adherence to the various provisions concerning consultation).

Draft Article 20 focuses on **implementation**. One option would require States Parties that are members of relevant existing frameworks and bodies to promote the adoption of conservation and management measures that support the goals of ABMTs/MPAs designated under the BBNJ agreement.<sup>33</sup> This is key to ensuring that the tools and processes already available under existing instruments are proactively and effectively utilised in support of conservation and sustainable use.

Experience with **reporting and monitoring** obligations in UNCLOS and other instruments suggests that obligations may not be fully implemented in the absence of clear timelines and modalities. Yet while the current draft requires States Parties to report to the COP on the implementation of ABMTs/MPAs and specifies that these reports should be made publicly available by the secretariat,<sup>34</sup> there is no indication of how frequently States Parties have to produce these reports. Importantly, the draft text includes a provision that would request or require relevant legal instruments, frameworks and bodies to report to the COP on the implementation of measures that they have established.<sup>35</sup> It is crucial for the treaty to include such a provision as this would improve transparency by making States Parties to sectoral and regional organisations accountable for the implementation of these measures (and therefore accountable to States Parties to the BBNJ treaty that are not also party to the relevant management bodies).<sup>36</sup> This would also enable the COP to act as a central platform for the discussion of the implementation of ABMTs/MPAs, thereby providing some **global oversight**.

## Environmental impact assessments (Part IV)

UNCLOS already includes certain provisions relevant to environmental impact assessments (EIAs),<sup>37</sup> but it does not include any guidance or minimum standards, nor provisions on cumulative impact assessments and strategic environmental assessments (SEAs). In its 21 draft Articles (21bis-41), Part IV aims to operationalise existing provisions (by establishing processes, thresholds and guidelines) and provide for consideration of cumulative impacts and SEAs, thereby achieving a coherent EIA framework for activities in ABNJ.<sup>38</sup>

Given the need to ensure conservation and sustainable use, the **requirement to conduct an EIA** could apply to all activities that have an impact in ABNJ (rather than limiting application to activities that actually take place in ABNJ),<sup>39</sup> though consensus has not yet been reached on this point.<sup>40</sup> The draft text provides two alternatives for **thresholds and criteria** for EIAs. An EIA would be required when States or States Parties have "reasonable grounds for believing that planned activities" either "may cause substantial pollution of or significant and harmful changes" or "are likely to have more than a minor or transitory effect on" the marine environment.<sup>41</sup> In either case, the provision as currently drafted would place responsibility for determining whether there are such "reasonable grounds" with States Parties (in contrast to most domestic EIA legislation, which generally places such determinations in the hands of a management body). In case a State Party determines that an EIA is not required, the draft text includes an option that could function as a safeguard by tasking the Scientific and Technical Body with verifying or approving that the information provided by the State Party satisfies the requirements under the treaty.<sup>42</sup> The draft text also places responsibility for conducting assessments in the hands of States Parties (as opposed to the proponent of the planned activity).<sup>43</sup>

<sup>32</sup> Draft Article 19(Alt. 1(d)).

<sup>33</sup> Draft Article 20(4).

<sup>34</sup> Draft Article 21(1).

<sup>35</sup> Draft Article 21(5).

<sup>36</sup> For example, a State with an interest in the conservation of BBNJ but no interest in fishing could be party to the BBNJ agreement but not to a relevant regional fisheries management organisation (RFMO) with a mandate to implement fisheries management measures.

<sup>37</sup> E.g. States are required to "observe, measure, evaluate and analyse, by recognised scientific methods, the risks or effects of pollution of the marine environment" and carry out assessments when they 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" (UNCLOS Articles 204-206).

<sup>38</sup> *Ibid.*

<sup>39</sup> This is also in line with customary international law regarding transboundary impacts and EIA.

<sup>40</sup> Draft Article 22(3).

<sup>41</sup> Draft Article 24. The previous version of the draft text specified that a lower threshold for EIAs could apply for activities proposed in areas that have been identified as "ecologically, biologically significant or vulnerable areas" (e.g. ecologically or biologically significant marine areas (EBSAs) identified within the framework of the Convention on Biological Diversity (CBD)). However, the current draft text simply provides that planned activities in such areas require EIA (draft Article 27(1)).

<sup>42</sup> Draft Article 30(3).

<sup>43</sup> Draft Article 32.

The draft contains an option to include an **indicative non-exhaustive list** of activities that either require or do not require an EIA, to be regularly updated by the COP.<sup>44</sup> The Scientific and Technical Body could also be empowered to develop **additional guidelines** on the conduct of EIAs.<sup>45</sup> Together, these provisions could provide some useful guidance to proponents seeking to plan activities in ABNJ.

The draft text includes possible Articles on **cumulative and transboundary impacts**,<sup>46</sup> but it does not define the latter and there is little convergence on how such impacts should be considered in the conduct of EIAs. The draft text also includes an Article on **strategic environmental assessments**, but it remains general and there is no consensus on a definition.<sup>47</sup> Further clarification of the concept, potential scope and procedural aspects is therefore needed (Warner, 2016, 2012).

There is currently little agreement on the **effect of an assessment**, i.e. whether it would be advisory only, with States ultimately deciding whether the activity may proceed, or whether the COP will be responsible for providing such authorisation.<sup>48</sup> In line with conservation and sustainable use and the precautionary approach, the treaty could include an obligation to manage such activities to avoid significant adverse impacts or not to allow the activity to proceed. If the decision whether to proceed remains with the State Party, the treaty could include provisions enabling other States Parties to appeal the decision.

In terms of **monitoring and review**, the draft text provides options for a scenario in which the results of monitoring identify unforeseen adverse impacts.<sup>49</sup> However, there is no agreement as to whether the State or the Scientific and Technical Body should in that case notify the COP/other States/the public, halt the activity, require the proponent to propose measures to mitigate and/or prevent those impacts or make an evaluation and decide whether the activity should continue.<sup>50</sup>

## Capacity-building and transfer of marine technology (Part V)

UNCLOS itself devotes a chapter on development and transfer of marine technology,<sup>51</sup> but the implementation of these provisions is limited (Wright *et al.*, 2018). Part V contains six draft Articles (42-47) that aim to catalyse capacity-building and technology transfer efforts.

States agree that the **objective** of this part is to ensure that developing States Parties have the capacity to develop, implement, monitor, manage and enforce.<sup>52</sup> Four supplementary objectives specifically relating MGRs remain in brackets.<sup>53</sup>

The revised draft text on **cooperation** in capacity-building and transfer of marine technology provides that this shall be promoted and carried out through "enhanced cooperation at all levels and in all forms, including partnerships with and involving all relevant stakeholders such as, where appropriate, [the private sector,] civil society and holders of traditional knowledge". Draft Article 46 introduces Annex II, which would provide a non-exhaustive list of **types** of capacity-building and transfer of marine technology. In order to future-proof the list, it empowers the COP to review, assess and amend the list of types to "reflect technological progress and innovation and to respond and adapt to the evolving needs of States, subregions and regions".<sup>54</sup>

There is still a lack of consensus on **modalities**, with draft Article 44 suggesting that capacity building and technology transfer could be voluntary and/or mandatory, and provided on a "bilateral, regional, subregional, and multilateral basis". An option to empower the COP to develop detailed modalities and guidelines, which could help provide further clarity in the future, currently remains in brackets. The current draft text suggests that **reporting** by States Parties on capacity-building and the transfer of marine technology is voluntary and not compulsory.<sup>55</sup>

## 4. CONCLUSION

As we enter the final stretch of the negotiations for an international legally binding instrument for the conservation and sustainable use of BBNJ, it remains difficult to judge whether the current draft treaty is sufficiently ambitious and developed to deliver an effective governance framework that can meet the urgent challenges facing these areas. The current draft proposes a coherent architecture based on relevant principles and approaches and would impose a number of conservation and sustainable use obligations on States Parties. However, many of the key provisions are still in brackets and the level of ambition of the treaty will therefore depend on future negotiations and choices.

The current draft gives the COP the mandate to establish arrangements that will be of crucial importance for the functioning of the future regime, including the establishment of the secretariat, the specific modalities of the clearing-house mechanism, the funding mechanisms, and procedures to promote compliance. Such procedures, commonly provided for

<sup>44</sup> Draft Article 27(2).

<sup>45</sup> Draft Article 29.

<sup>46</sup> Draft Articles 25 and 26.

<sup>47</sup> Draft Articles 1(13) and 28.

<sup>48</sup> Draft Article 38.

<sup>49</sup> Draft Article 41.

<sup>50</sup> *Ibid.*

<sup>51</sup> UNCLOS, Part XIV.

<sup>52</sup> Draft Article 42(f)(v)-(vi).

<sup>53</sup> Draft Article 42(f)(i)-(iv).

<sup>54</sup> Draft Article 46(3).

<sup>55</sup> Draft Article 47(5).

in international agreements, can slow down the operationalization of the treaty. In this regard, it is crucial that any voting rules established will allow States Parties to go beyond the consensus.<sup>56</sup>

The need for international cooperation and adoption of complementary measures under existing instruments, a key condition for success of the future regime, is reflected in the current draft, although some provisions could be further strengthened. More broadly, it is crucial that the requirement to “not undermine” existing institutions is combined with the necessary accountability of these institutions in the implementation of the treaty.

Time will tell if the 2 weeks of negotiations in March will be sufficient to finalize the treaty. The most important priority is to end up with an ambitious and robust agreement, even if additional sessions are needed.

<sup>56</sup> UNCLOS, Article 162-2-o(ii). Moreover, while draft Article 62 provides for provisional application of the text, it does not specify that States that consent to this provisional application can adopt rules and procedures (as was envisaged by UNCLOS in relation to the International Seabed Authority).

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# A preliminary analysis of the draft high seas biodiversity treaty

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The Institute for Sustainable Development and International Relations (IDDRI) is an independent think tank that facilitates the transition towards sustainable development. It was founded in 2001. To achieve this, IDDRI identifies the conditions and proposes the tools for integrating sustainable development into policies. It takes action at different levels, from international cooperation to that of national and sub-national governments and private companies, with each level informing the other. As a research institute and a dialogue platform, IDDRI creates the conditions for a shared analysis and expertise between stakeholders. It connects them in a transparent, collaborative manner, based on leading interdisciplinary research. IDDRI then makes its analyses and proposals available to all. Four issues are central to the institute's activities: climate, biodiversity and ecosystems, oceans, and sustainable development governance.

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