



28/02/17

**Chair's non-paper on elements of a draft text of an international legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction**

Explanatory note:

As indicated at the second session of the Preparatory Committee established by resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, this Chair's non-paper aims to provide a structured presentation of the issues and ideas reflected in the proposals for elements of a draft text of an international legally-binding instrument invited by the Chair to be submitted by 5 December 2016, as well as in the possible areas of convergence from the Chair's understandings<sup>1</sup> and those issues and ideas which were extensively discussed during the second session of the Preparatory Committee which are also contained in the submissions made to the Chair. The complete text of all the submissions is available on the website of DOALOS as a web-based rolling compilation.<sup>2</sup> The present non-paper provides a reference document to assist delegations in their consideration of the issues to be discussed by the Preparatory Committee.

This non-paper does not aim to reproduce the submissions received verbatim but rather provides an attempt by the Chair at clustering the proposed elements and ideas in a suggested structure. Accordingly, some ideas and elements put forward in the submissions under specific headings may be found under different headings in this document based on the Chair's assessment of their best placement for the purpose of the document.

Where specific wording proposals were received, they are indicated in italics for ease of reference. The inclusion of specific wording proposals does not imply that the Chair commends those proposals for delegations' consideration.

The content of this document is without prejudice to the position of any delegation on any of the matters referred to therein. Further, the elements listed are not necessarily exhaustive and do not preclude consideration of matters not included in this document.

The Chair wishes to express his appreciation to the delegations that made available to him their suggestions, proposals and position papers.

The Chair notes that some areas would benefit from elaboration and others from a streamlining of proposals. To that end, the Chair encourages delegations to make concrete submissions and to engage in consultations.

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<sup>1</sup> Included in the Chair's overview of the second session of the Preparatory Committee, at <http://www.un.org/depts/los/biodiversity/prepcom.htm>

<sup>2</sup> Available at <http://www.un.org/depts/los/biodiversity/prepcom.htm>.

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## I. PREAMBULAR ELEMENTS

- *“Desiring by this new instrument to develop an effective regime of conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through a fair and equitable regime of access to and sharing of benefits of marine genetic resources. The principle of common heritage of humankind will contribute to the realization of the said objective as, through the application of this principle, the interests and needs of humankind as a whole, especially those of developing countries will be fairly addressed and taken care of.”*<sup>3</sup>
- Broader contextual issues, e.g. sustainable development, the need for a comprehensive global regime or the link between climate change and oceans.<sup>4</sup>
- Recognition of the importance of the ocean towards coping with the ill effects of climate change.<sup>5</sup>
- Description of the problem and reasons for action; reference to relevant international instruments and bodies such as the UN Fish Stocks Agreement (UNFSA), Regional Fisheries Management Organizations (RFMOs), the International Maritime Organization (IMO), and the International Seabed Authority (ISA); and recognition of key concerns and issues such as the importance of marine biodiversity for ocean health, productivity, and resilience, food security, and ecosystem services.<sup>6</sup>
- Reaffirmation that the conservation of marine biodiversity in marine areas beyond national jurisdiction is a common concern of humankind.<sup>7</sup>
- Some approaches and principles could also be set out in the preamble of the agreement.<sup>8</sup>

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<sup>3</sup> G77&China

<sup>4</sup> EU

<sup>5</sup> Federated States of Micronesia

<sup>6</sup> USA

<sup>7</sup> IUCN

<sup>8</sup> New Zealand

## II. GENERAL ELEMENTS

### A. USE OF TERMS<sup>9 10</sup>

- Definitions should be consistent with those contained in the United Nations Convention on the Law of the Sea (UNCLOS).<sup>11</sup>
  - Definitions, where possible, should be consistent with UNCLOS, UNFSA, and the Convention on Biological Diversity (CBD) (including its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the CBD), and other relevant international instruments, adjusted for the marine biodiversity of areas beyond national jurisdiction (BBNJ) context.<sup>12</sup>
  - *"For the purpose of this Treaty, the following terms shall have the meanings hereunder assigned to them. These definitions are not intended to cover trade in commodities: [...]"*<sup>13</sup>
- 1) Areas beyond national jurisdiction
    - Areas beyond national jurisdiction: The high seas are all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State, according to UNCLOS (article 86). The Area is the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (UNCLOS, article 1).<sup>14</sup>
    - "Areas beyond national jurisdiction" means the high seas and the Area, as defined in UNCLOS.<sup>15</sup>
  - 2) Biological diversity
    - "Biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.<sup>16</sup>
  - 3) Ecosystem
    - "Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.<sup>17</sup>

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<sup>9</sup> EU suggested that definitions may be included under the respective parts of an international instrument, unless these terms were to be used in more than one part of the instrument

<sup>10</sup> The USA indicated that a section on definitions and scope could include definitions of certain key terms used in the instrument, such as area-based management tools, marine protected areas, and marine genetic resources. It could also describe entities and areas to which the instrument applies.

<sup>11</sup> Chair's understanding on cross-cutting issues

<sup>12</sup> Australia

<sup>13</sup> Japan

<sup>14</sup> CARICOM

<sup>15</sup> EU

<sup>16</sup> CARICOM

<sup>17</sup> CARICOM

#### 4) Biological resources

- "Biological resources" includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.<sup>18</sup>

#### 5) (Marine) genetic resources

- "Genetic resources" means genetic material of actual or potential value.<sup>19</sup>
- Marine genetic resources means any marine genetic material of plant, animal, or microbial origin of actual or potential value collected from the Area.<sup>20</sup>
- "Marine genetic resources" means any marine genetic material of plant, animal, microbial or other origin, containing functional units of heredity, being of actual or potential value.<sup>21</sup>

#### 6) Genetic material

- "Genetic material" means any material of plant, animal, microbial or other origin containing functional units of heredity (based on CBD, article 2).<sup>22</sup>
- "Genetic material" means any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity (based on International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), article 2).<sup>23</sup>
- "Genetic material: any material of plant, animal, or microbial origin containing functional units of heredity collected from the Area; it does not include materials made from material, such as derivatives, or information describing material, such as genetic sequence data".<sup>24</sup>

#### 7) Derivatives

- "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 (based on Nagoya Protocol, article 2).<sup>25</sup>

#### 8) Utilization of (marine) genetic resources

- Utilization of genetic resources means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in article 2 of the CBD.<sup>26</sup>
- "Utilization of marine genetic resources" means to conduct commercial research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology.<sup>27</sup>

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<sup>18</sup> CARICOM

<sup>19</sup> CARICOM, Norway

<sup>20</sup> Japan, USA

<sup>21</sup> IUCN

<sup>22</sup> CARICOM, Norway

<sup>23</sup> CARICOM, Norway

<sup>24</sup> Japan, USA

<sup>25</sup> CARICOM

<sup>26</sup> Japan

<sup>27</sup> Norway

- “Utilization of marine genetic resources” means to conduct research and development on the genetic and/or biochemical composition of marine genetic resources, including through the application of biotechnology.<sup>28</sup>

9) Sustainable use

- Sustainable use means the use of components of marine biodiversity in a way and at a rate that does not lead to the long term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.<sup>29</sup>

10) Bioprospecting<sup>30 31</sup>

11) Marine scientific research<sup>32 33</sup>

12) In situ collection

- “In situ collection” means the collection of marine genetic material in ecosystems and natural habitats in areas beyond national jurisdiction.<sup>34</sup>

13) Area-based management tools

- Area-based management tools (ABMTs) are tools designed and applicable in a specified area located beyond national jurisdiction with a view to achieving a defined objective (environmental conservation or/and resource management).<sup>35</sup>
- A spatial management tool for a geographically defined area through which one or several sectors/activities are managed with the aim of achieving particular objectives and affording higher protection than the surrounding areas.<sup>36</sup>
- ABMTs are regulations of human activity in a specified area, to achieve biodiversity conservation and/or resource management objectives.<sup>37</sup>
- Sectoral ABMTs include measures adopted by a competent international organization to achieve biodiversity conservation objectives for a specific area.<sup>38</sup>
- Cross-sectoral ABMTs, including marine protected areas (MPAs) and marine spatial planning, are those tools that require cooperation and coordination across multiple organizations and bodies, may achieve broader objectives and respond to cumulative impacts.<sup>39</sup>
- *“ABMTs include both sectoral and cross-sectoral measures that contribute to conservation and sustainable use of marine biodiversity. Examples of cross-sectoral ABMTs include marine*

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<sup>28</sup> IUCN. IUCN indicates that it believes that for benefit sharing to be meaningful, “genetic and/or biochemical composition” in this definition includes all the data/information described in the chart included in its submission (see section 5.6) as Category I as well as Category II with a periodic review for broadening the category of data/information to be part of benefit sharing.

<sup>29</sup> CARICOM

<sup>30</sup> CARICOM

<sup>31</sup> Japan suggested that bioprospecting should not be defined in an international instrument.

<sup>32</sup> CARICOM

<sup>33</sup> Japan suggested that marine scientific research should not be defined in an international instrument.

<sup>34</sup> Norway

<sup>35</sup> G77&China

<sup>36</sup> EU

<sup>37</sup> Monaco

<sup>38</sup> Monaco

<sup>39</sup> Monaco

*spatial planning and marine protected areas. Examples of sectoral ABMTs include fisheries closures designated by Regional Fisheries Management Organisations (RFMOs), Particularly Sensitive Sea Areas (PSSAs) designated by the International Maritime Organization (IMO), or Areas of Particular Environmental Interest (APEIs/reference zones) designated by the International Seabed Authority (ISA).<sup>40</sup>*

- Definitions of AMBTs might differ between existing instruments governing existing oceans management mechanisms, such as IMO, RFMO/As, regional seas conventions and ISA. However, there are also commonalities. Important to focus on the functions of ABMTs when deciding whether and how to define them. Need to be clear on what we want to achieve by defining these concepts and what will be the practical usage and implications of the definitions.<sup>41</sup>

#### 14) Marine Protected Areas

- Definition of marine protected areas could distinguish them as a subcategory of ABMTs which have a primary stated objective of achieving long-term conservation of marine biodiversity and ecosystems.<sup>42</sup>
- *"A geographically defined area which is designated, regulated and managed to achieve specific conservation objectives"* (CBD).<sup>43</sup>
- The definition of MPAs in the implementing agreement should include at least a geographical notion, a function and a conservation objective. The definition of "protected area" provided in article 2 of the CBD can be a starting point which would need to be adapted, as appropriate, in order to specifically focus on marine areas beyond national jurisdiction.<sup>44</sup>
- The CBD defines a protected area as: "A geographically defined area which is designated, regulated and managed to achieve specific conservation objectives." This definition can be a good starting point for drafting the concept of area based measures to protect and manage biodiversity in the high seas. Any definition of an MPA in the future instrument must be wide or flexible enough to encompass the high seas protected areas already created by RFMOs, so that they are fully recognised as MPAs under the instrument.<sup>45</sup>
- On the basis of the definition in Article 2 of the CBD, an MPA is a geographically defined marine area which is designated and regulated and managed to achieve specific conservation objectives.<sup>46</sup>
- The Food and Agriculture Organization of the United Nations (FAO) considers an MPA "any marine geographical area that is afforded greater protection than the surrounding waters for biodiversity conservation or fisheries management purposes." Thus, MPAs should not be limited to "marine reserved areas" or "no take zones." The definition of MPAs in the new implementing agreement should clearly reflect these points.<sup>47</sup>

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<sup>40</sup> WWF

<sup>41</sup> Norway

<sup>42</sup> New Zealand

<sup>43</sup> G77&China

<sup>44</sup> Monaco

<sup>45</sup> Iceland

<sup>46</sup> EU

<sup>47</sup> Japan



- The definition of MPAs could be based on the IUCN definition and should be broad enough to include different types of protected areas including no-take marine reserves. *“A designated geographically defined marine area [in areas beyond national jurisdiction] where human activities are regulated, managed or prohibited in order to achieve specific conservation objectives including the long-term conservation and resilience of nature.”*<sup>48</sup>
- Marine protected area: *“A geographically defined area, in which human activities are regulated, managed or prohibited in order to achieve specific conservation objectives, including the long-term conservation of nature.”*<sup>49</sup>
- Marine protected area means: *“A defined area of the marine environment, including its associated flora, fauna, historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine biodiversity enjoys a higher level of protection than its surroundings”*. Besides the definition, the IUCN categorization of different types of (marine) protected areas should be recognized to guide the designation process and the development of appropriate management plans. As guidance may change over time in light of new scientific information, it is suggested that such guidance be included in an Annex to the implementing agreement that enables eventual amendments to be incorporated by decisions of a Conference of the Parties (COP).<sup>50</sup>

#### 15) Marine reserves<sup>51</sup>

- As long as the definition of MPAs under the new agreement clearly includes the option of areas where extractive and damaging human activities are prohibited (i.e. marine reserves), there is no specific need to have a separate legal definition of marine reserves.<sup>52</sup>

#### 16) Marine spatial planning

- Marine spatial planning is a cross-sectoral area-based management tool that provides a framework for the orderly and sustainable use of the oceans as envisioned by UNCLOS with a view to balance demands for development with the need to protect the marine environment. Sectoral area-based management tools (e.g. fisheries closures, Particularly Sensitive Sea Area (PSSAs), Particularly Sensitive Sea Area (PSEIs)), other cross-sectoral ABMTs (e.g. MPAs), strategic environmental assessments (SEAs) and environmental impact assessments (EIAs) are an integral part of this overarching planning approach. Marine spatial planning approaches should be ecosystem-based, adaptive and include all relevant stakeholders in the area under consideration.<sup>53</sup>

#### 17) Ecosystem-based management

- *“Ecosystem-based management”* means an integrated approach to management that considers the entire ecosystem, including all stakeholders and their activities, and resulting stressors and pressures with direct or indirect effects on the ecosystem under consideration.

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<sup>48</sup> Greenpeace

<sup>49</sup> High Seas Alliance

<sup>50</sup> WWF

<sup>51</sup> Greenpeace

<sup>52</sup> Greenpeace

<sup>53</sup> WWF

The goal of ecosystem-based management is to maintain or rebuild an ecosystem to a healthy, productive and resilient condition, through, inter alia, the development and implementation of cross-sectoral ecosystem-level management plans”.<sup>54</sup>

#### 18) Environmental impact assessments

- A process to evaluate the environmental impacts of activity to be carried out in areas beyond national jurisdiction, with an effect on areas within or beyond national jurisdiction, taking into account interrelated socioeconomic, cultural and human health impacts, both beneficial and adverse.<sup>55</sup>

#### 19) Transboundary environmental assessment<sup>56 57</sup>

#### 20) Technology

- Technology should not just refer to hard technology but also to all of its associated aspects - article 5(8), Annex III to UNCLOS refers technology to also mean “specialized equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis” - therefore encompassing the entire technological system as a whole. The United Nations Conference on Trade and Development draft International Code on the Transfer of Technology also supports this view by defining technology transfer more holistically. Article 22, paragraph 5(g), of the Nagoya Protocol additionally calls for infrastructure and enhancing technical capacity to make such transfer sustainable.<sup>58</sup>

#### 21) Biotechnology

- “Biotechnology” means any technological application that uses marine biological systems, living organisms or derivatives thereof, to make or modify products or processes for specific use.<sup>59</sup>

#### 22) Transfer of marine technology

- The transfer of marine technology refers to the transfer of 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 oceans.<sup>60</sup>

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<sup>54</sup> WWF

<sup>55</sup> G77&China

<sup>56</sup> CARICOM.

<sup>57</sup> New Zealand indicated that it was not convinced at this stage that it is necessary to specifically define a transboundary EIA.

<sup>58</sup> AOSIS

<sup>59</sup> Norway

<sup>60</sup> AOSIS

## **B. SCOPE / APPLICATION<sup>61</sup>**

### **1) Geographical scope**

- The High Seas as well as the Area, respecting the provisions of UNCLOS.<sup>62</sup>
- High seas, i.e. the water column beyond national jurisdictions, as well as the Area, i.e. the seabed and subsoil beyond the limits of national jurisdiction.<sup>63</sup>
- Does not apply to national zones or continental shelves, including shelves beyond 200 nm.<sup>64</sup> In some areas an international water column will overlay the national continental shelf of a coastal State beyond 200 nautical miles. In these areas the implementing agreement will apply only to the water column and not to activities taking place on the continental shelf in the same area.<sup>65</sup>
- Conservation, sustainable use and responsible management of all marine living organisms of areas beyond national jurisdiction, whether in the water column, the deep seabed and the subsoil thereof, or anywhere in between.<sup>66</sup>
- Areas not adequately addressed by existing international conventions.<sup>67</sup>
- Marine biodiversity of areas beyond national jurisdiction.<sup>68</sup>

### **2) Material scope**

- All elements of the package specified in General Assembly resolution 69/292.<sup>69</sup>
- 2011 package. All activities that take place in areas beyond national jurisdiction and/or may have an impact on the marine biological biodiversity and resources of areas beyond national jurisdiction.<sup>70</sup>
- Conservation, sustainable use and responsible management of all marine living organisms of areas beyond national jurisdiction.<sup>71</sup>
- All activities taking place in or otherwise having impact in areas beyond national jurisdiction. However, where such activities are already managed or governed by an existing Agreement, then the instrument will apply relevant provisions of the existing Agreement *mutatis mutandis*.<sup>72</sup>
- All existing and new activities and sectors impacting on marine biodiversity beyond national jurisdiction with respect to the elements identified in the “package”, while not undermining existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.<sup>73</sup>

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<sup>61</sup> The USA indicated that a section on definitions and scope could include definitions of certain key terms used in the instrument, such as area-based management tools, marine protected areas, and marine genetic resources. It could also describe entities and areas to which the instrument applies.

<sup>62</sup> Monaco

<sup>63</sup> New Zealand

<sup>64</sup> Norway

<sup>65</sup> Norway

<sup>66</sup> Federated States of Micronesia

<sup>67</sup> Federated States of Micronesia

<sup>68</sup> WWF

<sup>69</sup> CARICOM

<sup>70</sup> Monaco

<sup>71</sup> Federated States of Micronesia

<sup>72</sup> CARICOM

<sup>73</sup> New Zealand

- Activities not adequately addressed by existing international conventions, e.g., UNCLOS and CBD.<sup>74</sup>
- Activities carried out under the jurisdiction or control of a contracting party in areas beyond national jurisdiction.<sup>75</sup>
- Activities with the potential to have significant effects on or to cause damage to marine biodiversity or ecosystems in areas beyond national jurisdiction regardless of where these activities occur.<sup>76</sup>
- The implementing agreement could address activity indirectly by obliging the States parties to pursue the objectives of the agreement in all relevant bodies where they are party – for instance in the IMO, the ISA and RFMO/As. Possible elements for text could be:
  - *“In implementing the Agreement, States Parties shall work together to actively engage competent international organisations and arrangements to take actions within their competence to contribute to the achievement of the objectives of this Agreement. Where a State Party considers that action is desirable in relation to a question falling within the competence of relevant international organisations or arrangements, it shall draw that question to the attention of the organisations or arrangement competent for that question. The Parties who are members of the organisation or arrangement in question shall cooperate within that organisation or arrangement in order to achieve an appropriate response.”<sup>77</sup>*
- Fisheries management in areas beyond national jurisdiction should not form part of the BBNJ negotiations.<sup>78</sup>

### **3) Personal scope**

- Participation in the instrument should extend to all States and other entities in like manner as the participation in the UNFSA.<sup>79</sup>
- Agreement being open for signature, ratification and accession by all States and other entities on the same basis as provided for in UNFSA (UNFSA articles 37-39).<sup>80</sup>

## **C. OBJECTIVE(S)**

- Conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.<sup>81</sup>
- Conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction.<sup>82</sup>
- Conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction through the effective implementation of the relevant provisions of UNCLOS.<sup>83</sup>

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<sup>74</sup> Federated States of Micronesia

<sup>75</sup> WWF

<sup>76</sup> WWF

<sup>77</sup> Norway

<sup>78</sup> Iceland

<sup>79</sup> CARICOM

<sup>80</sup> New Zealand

<sup>81</sup> EU

<sup>82</sup> USA

<sup>83</sup> Chair’s understanding on cross cutting issues

- A focused objective, along the lines of the article 2 objective of UNFSA, which is simple and concise, recognising the need to ensure the long-term conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction through effective implementation of the relevant provisions of the Convention. Incorporation of other concepts could be addressed in the context of a preamble, which accords with principles of treaty interpretation.<sup>84</sup>
- The purpose of the implementing agreement should be "the conservation and sustainable use of BBNJ." The purpose of the implementing agreement should be considered in reference to the following provision:
  - Article 2 of 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>85</sup>
- Drawing on UNFSA article 2, the overall objective of the agreement could be phrased as follows:
  - *"The objective of this Agreement is to ensure the long-term conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction through effective implementation of the relevant provisions of the Convention".*<sup>86</sup>
- A possible overall objective could be:
  - *"To ensure the long term conservation and sustainable use of marine biodiversity beyond national jurisdiction through effective implementation of the relevant provisions of the Convention."*<sup>87</sup>
- *"The objective of this Agreement to be pursued in accordance with its provisions is to ensure the long-term conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction through the effective operationalization of ecosystem-based integrated oceans management and through the effective implementation of the relevant provisions of the Convention and other relevant instruments."*<sup>88</sup>
- Ensure the long-term conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.<sup>89</sup>
- Conservation and sustainable use of biological diversity of areas beyond national jurisdiction to ensure its long-term sustainability for the benefit of the humankind.<sup>90</sup>
- Ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction in compliance with the purpose and objectives of UNCLOS.<sup>91</sup>
- Restatement of the objective of UNCLOS to protect and preserve the marine environment.<sup>92</sup>
- Furthering of regional cooperation and regional cooperative mechanisms, since this will be the main vehicle for ensuring long-term conservation and sustainable use of marine biodiversity.<sup>93</sup>

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<sup>84</sup> Australia

<sup>85</sup> Japan

<sup>86</sup> Norway

<sup>87</sup> New Zealand. New Zealand indicated that it also supports supplementary objectives for each of the four main aspects of the implementing agreement (i.e. marine genetic resources and the sharing of benefits; area-based management including marine protected areas; environmental impact assessments; and capacity building and transfer of marine technology).

<sup>88</sup> WWF

<sup>89</sup> Monaco

<sup>90</sup> Fiji

<sup>91</sup> CARICOM

<sup>92</sup> CARICOM

<sup>93</sup> Norway

- With respect to utilisation of biological diversity in areas beyond national jurisdiction, States should take measures to prevent or eliminate excess capacity and should ensure that levels of effort by entities involved are commensurate with the sustainable use of biological diversity as a means of ensuring the effectiveness of conservation and sustainable management measures.<sup>94</sup>

#### **D. RELATIONSHIP TO UNCLOS AND OTHER INSTRUMENTS**

- The instrument should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.<sup>95</sup>
- Guidance can be drawn from existing instruments, in particular UNFSA, when addressing the relationship of the instrument with UNCLOS.<sup>96</sup>
- Provision analogous to that of article 4 of UNFSA providing that nothing in the agreement shall affect the rights, obligations or jurisdiction of States under the Convention. The agreement shall be interpreted and applied in a manner consistent with the Convention.<sup>97</sup>
- The relationship between UNCLOS and the implementing agreement should be considered in reference to the relevant provision of UNFSA.
  - Article 4 of UNFSA: “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.”<sup>98</sup>
- With respect to the relationship of the new implementing agreement with UNCLOS, include a provision similar to article 4 of UNFSA.<sup>99</sup>
- Articulation of the relationship between the implementing agreement and UNCLOS, which establishes, similar to article 4 of UNFSA, that nothing in the implementing agreement will prejudice the rights, jurisdiction and duties of States under UNCLOS, and that the implementing agreement should be interpreted and applied consistent with UNCLOS, UNFSA and the Part XI Agreement.<sup>100</sup>
- Nothing in the new instrument shall prejudice the rights, jurisdiction and duties of States under UNCLOS. The new instrument shall be interpreted and applied in the context of and in a manner consistent with UNCLOS.<sup>101</sup>
- Provide that nothing in the instrument prejudices the rights, jurisdiction and duties of States under UNCLOS, and that the instrument is to be interpreted and applied in the context of and in a manner consistent with the Convention.<sup>102</sup>
- *“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.”*<sup>103</sup>

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<sup>94</sup> Fiji

<sup>95</sup> Chair’s understanding on cross-cutting issues

<sup>96</sup> Chair’s understanding on cross-cutting issues

<sup>97</sup> EU

<sup>98</sup> Japan

<sup>99</sup> New Zealand

<sup>100</sup> Australia

<sup>101</sup> G77&China

<sup>102</sup> USA

<sup>103</sup> Monaco, Norway

- The agreement must be interpreted and applied in a manner that does not undermine, is consistent with, or is in magnification of, the 1982 UNCLOS and its related instruments.<sup>104</sup>
- Affirmation that the provisions of the instrument do not apply to sovereign immune vessels (in line with article 236 of UNCLOS).<sup>105</sup>
- Affirmation that matters not regulated by UNCLOS or this instrument continue to be governed by the rules and principles of general international law.<sup>106</sup>
- In resolution 69/292, the UN General Assembly stated that the BBNJ process “should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”. Accordingly, a without-prejudice-clause would assist in achieving this purpose.<sup>107</sup>
- There is value in global standard-setting, via the implementing agreement, that catalyses Parties to act at a regional level without undermining existing regional and sectoral efforts, and in keeping with resolution 69/292.<sup>108</sup>
- The implementing agreement and its provisions should not undermine existing relevant instruments, frameworks, processes, and relevant international, regional and sectoral bodies nor duplicate and dictate measures to such existing bodies.<sup>109</sup>
- The meaning of paragraph 3 of resolution 69/292 is that the process should not undermine, or reduce, the effectiveness of existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.<sup>110</sup>
- Consider including a provision in the implementing agreement stating explicitly that the implementing agreement should not affect the competence of mechanisms managing activities such as shipping and fisheries:
  - *The Agreement shall not affect the competence of relevant international organisations and arrangements within their areas of competence.*<sup>111</sup>
- Consider including in the implementing agreement provisions stating explicitly what role or function the implementing agreement should not have in relation to activities in areas beyond national jurisdiction. The role of the implementing agreement would rather be to contribute to a holistic, ecosystem based and cross sectoral approach to oceans management through common guidelines and strengthened coordination and cooperation. The OSPAR Convention provides an example of such an approach. Annex V to the OSPAR Convention spells out OSPAR’s general biodiversity responsibility, while article 4 explicitly states that OSPAR will not deal with direct management of fisheries and not manage shipping.<sup>112</sup>

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<sup>104</sup> Fiji

<sup>105</sup> USA

<sup>106</sup> USA

<sup>107</sup> EU

<sup>108</sup> Australia

<sup>109</sup> Monaco

<sup>110</sup> High Seas Alliance

<sup>111</sup> Norway

<sup>112</sup> Norway

### III. CONSERVATION AND SUSTAINABLE USE OF MARINE BIODIVERSITY OF AREAS BEYOND NATIONAL JURISDICTION

#### A. GENERAL PRINCIPLES AND APPROACHES<sup>113</sup>

- A distinction should be drawn between principles and approaches.<sup>114</sup>
- Draw on article 5 of the UNFSA as a starting point.<sup>115</sup>
- Some of the principles and approaches relate to governance and process issues, e.g. accountability and transparency, and others relate to the manner in which marine biodiversity should be conserved and sustainably used under the new agreement, reflecting international best practice, e.g. precautionary approach, ecosystem approach, decisions based on best available scientific information. In relation to the latter category of principles and approaches, include a specific article in the new implementing agreement that sets out general approaches and principles to be applied when giving effect to the agreement, similar to article 5 of UNFSA. Some approaches and principles may benefit from further elaboration in an article of their own, similar to article 6 of UNFSA (Application of the Precautionary Approach).<sup>116</sup>
- The implementing agreement should provide a common direction to the management in relevant international mechanisms by outlining general principles that the States parties should be obliged to pursue as members of relevant bodies. Articles 5 and 6 of UNFSA contain elements of how such an approach could be formulated in an agreement.<sup>117</sup>
- Any definitions and/or interpretation of guiding approaches and principles should be consistent with those already agreed under UNCLOS, UNFSA, CBD and other relevant international instruments.<sup>118</sup>
- See the document entitled “Governance Principles Relevant to Marine Biodiversity in Areas Beyond National Jurisdiction” available on the DOALOS website:  
[http://www.un.org/depts/los/biodiversity/prepcom\\_files/greenpeace.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/greenpeace.pdf).<sup>119</sup>
- The following were raised:
  - Recognition of need for a comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction<sup>120</sup>
  - Respect for the balance of rights, obligations and interests enshrined in UNCLOS<sup>121</sup>

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<sup>113</sup> Different ways of referring to approaches and principles were suggested by delegations: 1) explicit reference to these approaches and principles in the instrument [EU, New Zealand, Norway] (in the preamble of the instrument, in a stand-alone article, or some approaches and principles may benefit from further elaboration in an article of their own, similar to Article 6 of UNFSA); 2) reflecting these approaches and principles in the content of individual provisions of the instrument by making them operational [EU].

<sup>114</sup> Chair’s understanding on cross-cutting issues

<sup>115</sup> Australia, New Zealand, Norway

<sup>116</sup> New Zealand

<sup>117</sup> Norway

<sup>118</sup> New Zealand

<sup>119</sup> High Seas Alliance

<sup>120</sup> New Zealand

<sup>121</sup> Chair’s understanding on cross-cutting issues



- Respect for the freedoms, rights, duties and obligations of States as enshrined in UNCLOS<sup>122</sup>
- Incorporation of, and non-derogation from, the relevant principles enshrined in UNCLOS<sup>123</sup>
- Common heritage of mankind<sup>124</sup>
- Respect for the law of the sea<sup>125</sup>
- No undermining of existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies<sup>126</sup>
- Recognition of existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies (in particular UNCLOS, UNFSA, RFMO/As, IMO, ISA, and regional seas conventions)<sup>127</sup>
- Due regard for the rights of others<sup>128</sup>
- Respect for the rights of coastal States over all areas under their national jurisdiction, including their continental shelves beyond 200 nautical miles where applicable<sup>129</sup>
- Respect for the sovereignty and territorial integrity of coastal States<sup>130</sup>
- Adjacency<sup>131</sup>
- Recognition of the role of adjacent coastal States as well as other States<sup>132</sup>
- International cooperation and coordination<sup>133</sup>
- Duty to cooperate<sup>134</sup>
- Enhanced cooperation and coordination between and among States and organizations to conserve and sustainably use marine biodiversity in areas beyond national jurisdiction<sup>135</sup>
- Protection and preservation of the marine environment and its biodiversity, including for the benefit of future generations<sup>136</sup>
- Duty not to transform one type of pollution into another<sup>137</sup>
- Use of biodiversity of areas beyond national jurisdiction for peaceful purposes only<sup>138</sup>
- Integrated approach<sup>139</sup>
- Ecosystem approach<sup>140</sup>

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<sup>122</sup> EU

<sup>123</sup> Chair's understanding on cross-cutting issues

<sup>124</sup> G77&China, AOSIS, CARICOM

<sup>125</sup> Chair's understanding on cross-cutting issues

<sup>126</sup> Chair's understanding on cross-cutting issues

<sup>127</sup> New Zealand

<sup>128</sup> Chair's understanding on cross-cutting issues

<sup>129</sup> Chair's understanding on cross-cutting issues

<sup>130</sup> Chair's understanding on cross-cutting issues

<sup>131</sup> PSIDS

<sup>132</sup> New Zealand

<sup>133</sup> Chair's understanding on cross-cutting issues, EU, WWF

<sup>134</sup> Chair's understanding on cross-cutting issues

<sup>135</sup> New Zealand

<sup>136</sup> Chair's understanding on cross-cutting issues, EU

<sup>137</sup> Chair's understanding on cross-cutting issues

<sup>138</sup> Chair's understanding on cross-cutting issues

<sup>139</sup> CARICOM

<sup>140</sup> Chair's understanding on cross-cutting issues, CARICOM, EU, Australia, Canada, New Zealand, Norway, WWF. WWF indicated that it recommends that an Annex to the implementing agreement (forming an integral part of the agreement) be adopted guiding the implementation of ecosystem-based management in the same fashion as Annex II to UNFSA guides the operationalization of the precautionary approach to fisheries.

- Science-based approach<sup>141</sup>
- Use of the best available scientific information<sup>142</sup>
- Public availability of information<sup>143</sup>
- Public participation<sup>144</sup>
- Stakeholder involvement<sup>145</sup>
- Good governance<sup>146</sup>
- Transparency<sup>147</sup>
- Transparent and open decision-making processes<sup>148</sup>
- Decision-making utilising traditional knowledge<sup>149</sup>
- Accountability<sup>150</sup>
- Equity<sup>151</sup>
- Intra- and inter-generational equity<sup>152</sup>
- Capacity-building and technology transfer<sup>153</sup>
- Environmentally sound techniques and methods of operation in order to prevent or limit damage to biological diversity<sup>154</sup>
- Sustainable use of marine biodiversity<sup>155</sup>
- Precautionary principle/approach<sup>156</sup>
- Risk-based approach<sup>157</sup>
- Polluter-pays principle<sup>158</sup>
- Special circumstances/case of small islands developing States (SIDS), including the avoidance of any disproportionate burden to SIDS and least developed countries<sup>159</sup>
- Avoidance of disproportionate burden<sup>160</sup>
- Adaptive management<sup>161</sup>
- Ability to address cumulative impacts<sup>162</sup>
- Traceability<sup>163</sup>
- Flexibility<sup>164</sup>

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<sup>141</sup> Chair's understanding on cross-cutting issues, CARICOM, EU

<sup>142</sup> Chair's understanding on cross-cutting issues, PSIDS, Australia, Canada, New Zealand

<sup>143</sup> Chair's understanding on cross-cutting issues, EU

<sup>144</sup> Chair's understanding on cross-cutting issues

<sup>145</sup> New Zealand

<sup>146</sup> Chair's understanding on cross-cutting issues

<sup>147</sup> Chair's understanding on cross-cutting issues, CARICOM, PSIDS, Australia, New Zealand, WWF

<sup>148</sup> EU, WWF

<sup>149</sup> Australia

<sup>150</sup> Chair's understanding on cross-cutting issues, CARICOM

<sup>151</sup> CARICOM, PSIDS

<sup>152</sup> Chair's understanding on cross-cutting issues

<sup>153</sup> Chair's understanding on cross-cutting issues

<sup>154</sup> Norway

<sup>155</sup> EU

<sup>156</sup> EU, Norway, High Seas Alliance, WWF / CARICOM, PSIDS, Australia, Canada, New Zealand. WWF suggested the following wording: "Where there are threats of significant adverse impacts or damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent or mitigate such a threat or environmental degradation".

<sup>157</sup> Canada

<sup>158</sup> CARICOM, EU, PSIDS, WWF

<sup>159</sup> AOSIS, CARICOM, PSIDS

<sup>160</sup> PSIDS

<sup>161</sup> CARICOM, PSIDS, New Zealand

<sup>162</sup> New Zealand

<sup>163</sup> PSIDS

- Conservation of biodiversity as a common concern of humankind<sup>165</sup>
- Measures, whether at sub-regional, regional, or global levels, should be based on the best science available and be designed to ensure the long-term sustainability of biological diversity and biological resources at levels which promote the objective of their conservation and sustainable use and maintain, without compromise by short term considerations, their availability for present and future generations.<sup>166</sup>

## **B. INTERNATIONAL COOPERATION<sup>167</sup>**

- Assist with coordinating efforts, provide guidance, and facilitate cooperation and communication between the relevant organizations and bodies.<sup>168</sup>
- States have a duty to cooperate directly or through appropriate sub regional, regional or global mechanisms, taking into account the specific characteristics of the sub region or region (see UNFSA article 8.1).<sup>169</sup>
- States and all those engaged in management of biological diversity should, for areas under the agreement, adopt harmonised measures for the long-term conservation and sustainable use of biological diversity.<sup>170</sup>
- Take into account and complement existing instruments, frameworks, processes and bodies, as well as strengthen and enhance coherence, international coordination, cooperation and consultation.<sup>171</sup>
- The agreement (and any subsidiary documents developed under it) would provide guidance and recommendations to States, including through existing global, sectoral or regional organizations involved in the conservation and sustainable use of marine biodiversity beyond national jurisdiction in the form of goals, procedures, criteria, standards and guidelines.<sup>172</sup>
- For the purpose of attaining the objectives of the implementing agreement through better cooperation and coordination with relevant international organizations and in order to bolster coherence and complementarity of action among them, the implementing agreement should envisage a possibility for participation of and/or cooperation with these organizations, within their respective mandates, in practical arrangements under the implementing agreement.<sup>173</sup>
- Implementation to be the responsibility of States themselves, particularly through regional and sectoral organizations, where these exist, on the basis of clearly set global objectives, timeframes for their implementation and reporting requirements. In this respect the implementing agreement could draw inspiration from Part III of UNFSA.<sup>174</sup>

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<sup>164</sup> PSIDS

<sup>165</sup> WWF

<sup>166</sup> Fiji

<sup>167</sup> See also section on institutional arrangements.

<sup>168</sup> Canada

<sup>169</sup> Norway

<sup>170</sup> Fiji

<sup>171</sup> Monaco

<sup>172</sup> New Zealand

<sup>173</sup> EU

<sup>174</sup> New Zealand

- Promote further cooperation and coordination between States and regional and sectoral bodies. This will promote coherence and consistency between existing bodies and bring about a greater understanding of/ability to address cumulative impacts.<sup>175</sup>
- Need to establish new formal or informal regional cooperation mechanisms to enable more effective cooperation and coordination between existing bodies in the delivery of the objectives of the new agreement.<sup>176</sup>
- Strengthen and develop regional cooperative mechanisms, particularly regional seas conventions building on UNFSA Part III.<sup>177</sup>
- The model from the North-East Atlantic with regard to the collective arrangement between OSPAR, the regional environmental organization and the North East Atlantic Fisheries Commission, RFMOs, could represent an example, where institutions co-operate, coordinate their work and share information regarding their activities before taking decisions that affect their subject matter.<sup>178</sup>
- The implementing agreement could address activities indirectly by obliging the States parties to pursue the objectives of the implementing agreement in all relevant bodies where they are party – for instance in the IMO, the ISA and the RFMO/As. Possible elements for text could be:
  - *“In implementing the Agreement, States Parties shall work together to actively engage competent international organisations and arrangements to take actions within their competence to contribute to the achievement of the objectives of this Agreement. Where a State Party considers that action is desirable in relation to a question falling within the competence of relevant international organisations or arrangements, it shall draw that question to the attention of the organisations or arrangement competent for that question. The Parties who are members of the organisation or arrangement in question shall cooperate within that organisation or arrangement in order to achieve an appropriate response.”*<sup>179</sup>
- Encourage and strengthen cooperation and coordination between competent mechanisms. Article 8.6 of UNFSA is a relevant example to consider in this regard:
  - *Any State proposing that action be taken by an intergovernmental organization having competence with respect to marine biodiversity shall, where such action could have a significant effect on conservation and management measures already established by a competent sectoral or regional organisation or arrangement, consult through that organisation or arrangement with its members or participants. To the extent practicable, such consultation should take place prior to the submission of the proposal to the intergovernmental organisation.*<sup>180</sup>
- Create an incentive for existing organizations to improve their performance, and where necessary, expand their mandates, through their implementation of the global standards and guidelines reflected in the implementing agreement (article 13 UNFSA refers).<sup>181</sup>
- Where there is no body with a mandate for the conservation or sustainable use of marine biodiversity in a particular sector or geographic area of areas beyond national jurisdiction, or in

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<sup>175</sup> New Zealand

<sup>176</sup> New Zealand

<sup>177</sup> Norway

<sup>178</sup> Iceland

<sup>179</sup> Norway

<sup>180</sup> Norway

<sup>181</sup> New Zealand

cases where there are a number of bodies but no effective coordination mechanism, encourage the establishment of a relevant body or effective coordination mechanism within a specific timeframe (article 8(5) UNFSA refers).<sup>182</sup>

- States, in possessing the freedoms entailed under the Convention, should collaborate with a view to establishing regional organizations, or a council of organizations, with a mandate to administer and coordinate the various activities to ensure conservation and sustainable use.<sup>183</sup>
- Where any interest or activity exists, States Parties, particularly adjacent States, should cooperate to ensure effective conservation and sustainable use of biological diversity. This should be achieved, where appropriate, through the establishment of a subregional or regional organization or arrangement.<sup>184</sup>
- A subregional or regional organization or arrangement should include representatives of States in whose jurisdictions the biological resources in areas under the agreement are adjacent to.<sup>185</sup>
- Where a subregional or regional organization or arrangement exists and has the competence to establish conservation and sustainable use measures, States Parties to the agreement, should be required to become a member of such organization in order to effectively cooperate in such organization or arrangement, and actively participate in its work.<sup>186</sup>
- A State Party which is not a member of a subregional or regional organization or arrangement or is not a participant in a subregional or regional organization or arrangement should nevertheless cooperate, in accordance with relevant international agreements and international law, in the conservation and management of the relevant fisheries resources by giving effect to any conservation and management measures adopted by such organization or arrangement.<sup>187</sup>
- The new agreement should help enhance collaboration and, in some ways, also accountability of regional and sectoral bodies, in line with modern principles of good governance. The new agreement cannot impose measures on other bodies or non-Parties. Ultimately however, regional and global bodies are made of Member States, some of which will be Parties to the new agreement and bound by it, and others will be non-Parties. The latter are obliged under international law to cooperate in good faith for the protection and preservation of the marine environment, and therefore to ensure that their activities do not undermine the effectiveness of the new agreement's conservation measures.<sup>188</sup>

### **C. MARINE GENETIC RESOURCES, INCLUDING QUESTIONS ON THE SHARING OF BENEFITS**

#### **1. Scope**

- Establish effective regulation on the conservation, sustainable use and responsible management of all marine living organisms of areas beyond national jurisdiction, whether in the water column, the deep seabed and the subsoil thereof, or anywhere in between.<sup>189</sup>

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<sup>182</sup> New Zealand

<sup>183</sup> Fiji

<sup>184</sup> Fiji

<sup>185</sup> Fiji

<sup>186</sup> Fiji

<sup>187</sup> Fiji

<sup>188</sup> Greenpeace

<sup>189</sup> Federated States of Micronesia

- “Marine genetic resources of the area beyond the outer limits of the continental shelf beyond 200nm or of the area beyond national jurisdiction including waters superjacent to the seabed and of the ocean floor and of the subsoil thereof”<sup>190</sup>
- Only applies to marine genetic resources in the Area and collected *in situ*.<sup>191</sup>
- For purposes of benefits, the geographical scope of marine genetic resources in an implementing agreement would be for marine genetic resources obtained or derived from and existing in both the Area and the high seas.<sup>192</sup>
- Implementing agreement should not regulate the management of fish stocks and fisheries. On the other hand, the future instrument should cover fish and other biological resources used for the research on their genetic properties.<sup>193</sup>
- A distinction should be made between the use of fish for their genetic properties, and the use of fish as a commodity. The former could be addressed in the same manner as other marine genetic resources under any new BBNJ agreement, while the latter is already effectively managed under existing regimes, such as RFMOs, and should not be considered marine genetic resources for the purposes of this new agreement.<sup>194</sup>
- Apply only to marine genetic resources used for their genetic properties, and not to organisms when used as a commodity.<sup>195</sup>
- A distinction should be made between fish used as a commodity and fish valued for their genetic properties.<sup>196</sup>
- Fish as part of marine biodiversity is relevant to an international legally binding instrument to the extent necessary to extract genetic resources; however, due care must be exercised to ensure that an international legally binding instrument does not undermine existing fishery regulations, such as measures implemented by RFMOs.<sup>197</sup>
- Decisions will need to be made whether it is practicable and/or desirable to draw distinctions between benthic formations and organisms in the Area and fishes swimming in the high seas.<sup>198</sup>
- The BBNJ instrument should cover both *in situ* marine genetic resources and *ex situ* samples of marine genetic resources.<sup>199</sup>
- Marine genetic resources could include both those that are *in situ* and *ex situ*. Including *ex situ* samples could be included in addition to *in situ* samples. An implementing agreement could include a requirement for a set of procedures to be established for collection, transportation and storage (or a minimum metadata i.e. collection location, depth, temperature, etc.) which will promote a global standardization of procedures that would benefit all for a better global coordination, cooperation and collaboration.<sup>200</sup>
- Fruitless given the sphere of the unknown that the new instrument employ the approach of listing particular marine genetic resources that would be covered by its provisions. A listing approach in the new instrument could overly restrict the marine genetic resources subject to

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<sup>190</sup> Bangladesh

<sup>191</sup> USA

<sup>192</sup> IUCN

<sup>193</sup> EU

<sup>194</sup> Canada

<sup>195</sup> USA

<sup>196</sup> IUCN

<sup>197</sup> Federated States of Micronesia

<sup>198</sup> Jamaica

<sup>199</sup> CARICOM

<sup>200</sup> IUCN

access and benefit sharing, and is not appropriate in light of the fact that the discovery of marine genetic resources is still expanding.<sup>201</sup>

- Be as comprehensive as possible to include derivatives. Derivatives being the result of the utilization of a genetic resource through human activity, such as research and development, regulatory framework on derivatives must be such as would foster rather than slow down research and development without losing sight of the main principle behind equitable sharing of benefits.<sup>202</sup>

## **2. Guiding principles and approaches**

- Guiding principles and approaches constitute a cross-cutting issue.<sup>203</sup>
- The rights of coastal States over their continental shelf should be respected.<sup>204</sup>
- The principle of common heritage of mankind must underpin the new regime governing marine genetic resources of areas beyond national jurisdiction. Given its crosscutting nature, the principle should be at the core of the new instrument. The principle of the common heritage of mankind provides the legal foundation for a fair and equitable regime of conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including the access and sharing of benefit of marine genetic resources. Among the elements of the principle of common heritage of mankind that are critical to a fair and equitable regime for the conservation and sustainable use of marine biological diversity, of which marine genetic resources are part, include the following:
  - since the objective of the new instrument is to conserve and sustainably use marine biological diversity, this implies the need to carry out activities pertaining to that objective for the benefit of mankind as a whole, irrespective of their geographical location, and taking into particular consideration the interests and needs of the developing countries (regardless of sub-categorization of countries under ‘developing countries’);
  - no claim or exercise of sovereignty or sovereign rights of the areas beyond national jurisdiction nor any appropriation shall be recognized;
  - use of areas beyond national jurisdiction and their resources by all States shall be exclusively for peaceful purposes;
  - the benefits shall be equitably shared;
  - in addition, this implies that the activities regarding the exploration, exploitation of the resources in the said areas should be governed by an international regime.<sup>205</sup>
- Marine genetic resources whether in the Area or in the water column beyond the exclusive economic zone are subject to certain core principles that form the basis of the common heritage of mankind concept as reflected in customary international law, requiring:
  - peaceful use;
  - non-appropriation;

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<sup>201</sup> Jamaica

<sup>202</sup> Federated States of Micronesia

<sup>203</sup> Chair’s understanding on marine genetic resources, including questions on the sharing of benefits

<sup>204</sup> Chair’s understanding on marine genetic resources, including questions on the sharing of benefits

<sup>205</sup> G77&China

- an international regime to govern the management and conservation of resources for future generations and an equitable sharing of benefits.<sup>206</sup>
- The common heritage of mankind principle of article 136 of UNCLOS, applies to mineral resources, at or beneath the sea-bed, as defined in article 133, and is not applicable to renewable, biological resources on the seabed or in the water column beyond national jurisdictions. The principle of the freedom of the high seas which is enshrined in article 87 of UNCLOS seems more suitable in regard to marine genetic resources. Given that neither of the aforementioned principles seem to be directly applicable, a practical, possibly hybrid, definition and solution needs to be found.<sup>207</sup>
- The principle of freedom of the high seas should be applied to marine genetic resources in areas beyond national jurisdiction. An implementing agreement must include a clear provision to this effect, to the extent that the views are expressed that the principle of common heritage of mankind should apply to marine genetic resources in areas beyond national jurisdiction in the new implementing agreement. No inclusion of provisions in the new implementing agreement which could be interpreted as meaning that marine genetic resources in areas beyond national jurisdiction are recognized as common heritage of mankind.<sup>208</sup>
- Principle of adjacency in the sense that high sea pockets created by adjacent exclusive economic zones deserve special attention. Coastal States have greater opportunity, and should be allowed greater role, in conserving, managing, and regulating access to the resources of those high sea pocket areas.<sup>209</sup>
- A new regime should ensure:
  - legal certainty, clarity and transparency;
  - free access and encouragement of research, innovation and commercial development;
  - sustainable collection of genetic material;
  - environmentally sound techniques and methods of operation;
  - a general duty of care;
  - fair and non-arbitrary rules and procedures for benefit sharing;
  - simple, expedient and cost-effective procedures and mechanisms.<sup>210</sup>
- Common concern of humankind is a principle that could be applied to access and benefit sharing of marine genetic resources in areas beyond national jurisdiction since the focus of an implementing agreement is on the sustainable use of the marine genetic resources and utilization of the shared benefits for conservation of marine biodiversity in areas beyond national jurisdiction.<sup>211</sup>

### **3. Access and benefit-sharing**

- A workable regime should cover access to marine genetic resources and establish benefit sharing rules.<sup>212</sup>

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<sup>206</sup> CARICOM, Jamaica

<sup>207</sup> Iceland

<sup>208</sup> Japan

<sup>209</sup> Federated States of Micronesia

<sup>210</sup> Norway

<sup>211</sup> IUCN

<sup>212</sup> Australia



- There are four existing access and benefit-sharing models that may be considered in developing an access and benefit-sharing regime for marine genetic resources in areas beyond national jurisdiction – for example:
  - The provisions in UNCLOS relating to marine scientific research;
  - The CBD and Nagoya Protocol;
  - The ITPGRFA; and
  - The Antarctic Treaty System.

Although none of these instruments can be transplanted, on their own, to access and benefit-sharing in the areas beyond national jurisdiction, they provide useful guidance on elements to be addressed in an access and benefit sharing regime for marine genetic resources in areas beyond national jurisdiction.<sup>213</sup>

- For an access and benefit-sharing regime to work, it must be supported by a firm commitment of States Parties towards sharing of access benefits in a manner that gives tangible consideration to the needs and interests of developing States. Exploitation of marine genetic resources poses environmental threats and many of these threats are not fully understood with present technology. The interests of fairness and equity lean heavily towards sharing of the benefits from access to marine genetic resources in light of mutual risks from the environmental and ecological hazards arising from the exploitation of these resources.<sup>214</sup>
- A regime for access and benefit-sharing could include the following elements:
  - ensure free access to genetic material from areas beyond national jurisdiction;
  - obligations for flag States to carry out the collection of marine genetic resources in a way that does not harm the ecosystem and to use environmentally sound techniques and methods of operation;
  - in marine protected areas environmental protection measures may be stricter if needed;
  - establish an access and benefit-sharing clearing house modelled on the Nagoya Protocol article 14;
  - include an obligation for the flag State to report on accessed marine genetic resources from areas beyond national jurisdiction to the clearing house after the material has been deposited. A sample could also be provided to a public collection;
  - establish research programmes on marine research that can support the conservation and management of areas beyond national jurisdiction with the participation of developing countries inspired by article 16 of the ITPGRFA. The programme could be linked to existing national research institutions.<sup>215</sup>
- Consider developing a *sui generis* regime that is practical, workable, and will address the views and concerns expressed by all sides.<sup>216</sup>

### *3.1 Access to and collection of marine genetic resources of areas beyond national jurisdiction*

- Importance of the access to marine genetic resources. Discuss about the different forms of access to marine genetic resources which would make their sharing of benefit most effective and

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<sup>213</sup> CARICOM, Jamaica

<sup>214</sup> Federated States of Micronesia

<sup>215</sup> Norway

<sup>216</sup> Canada

responsive to the protection and preservation of marine environment, and the needs and interests regarding marine scientific research as well as the development opportunities of the developing countries, including future generations. Bearing in mind that any access within the scope of the new instrument will not hamper marine scientific research, there is interest to include a provision on access to marine genetic resources.<sup>217</sup>

- *In situ* access to marine genetic resources in areas beyond national jurisdiction should be based on, in particular, the following principles:
  - access to marine genetic resources should remain free, in line with UNCLOS provisions concerning marine scientific research in areas beyond national jurisdiction;
  - the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, in line with applicable UNCLOS provisions;
  - rights and obligations of coastal States over the resources in the maritime zones within their jurisdiction, as provided for in UNCLOS, should be respected.<sup>218</sup>
- The relationship between Part XIII of UNCLOS, which covers the freedom of marine scientific research, and a scheme governing the extraction of marine genetic resources will need to be considered and addressed by the Prep Com. Ensure the UNCLOS regime for marine scientific research is respected and upheld for the extraction of marine genetic resources, whilst a fair and equitable regime is established for the sharing of benefits from the use of marine genetic resources sourced from areas beyond national jurisdiction.<sup>219</sup>
- This section could set out guidance for utilization of marine genetic resources from areas beyond national jurisdiction. It would reaffirm that the instrument would not hinder access to marine genetic resources or research and development.<sup>220</sup>
- Draw from the principles contained in the Nagoya Protocol with respect to knowledge associated with genetic resources and "prior consent" involving indigenous and local communities.<sup>221</sup>
- The issue of whether a version of prior informed consent and mutually agreed terms will appear in the new instrument is to be considered in the context of how these elements form the basis of access under the Nagoya Protocol.<sup>222</sup>
- Ensure free access to genetic material from areas beyond national jurisdiction. Favour a "light" access regime. This could for instance be done by establishing a clearing house for marine genetic resources which could be integrated in DOALOS. Such a regime could include an obligation on the flag State to register information on accessed genetic material with the clearing house which in turn would make the information publicly available. A fully-fledged access-regime with applications, permits and contracts by "a marine genetic resources steward of the areas beyond national jurisdiction" on the one hand and the flag State on the other, similar to the regime for mineral resources in the Area, will be costly and cumbersome. It would potentially hinder research and development and thereby also conservation. As opposed to harvest of commodities, utilisation of genetic material does, as a rule, depend on only small amounts of biological material. This is mostly unproblematic in terms of *in situ* conservation of

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<sup>217</sup> G77&China

<sup>218</sup> EU

<sup>219</sup> Australia

<sup>220</sup> USA

<sup>221</sup> Federated States of Micronesia

<sup>222</sup> Jamaica

biological material as long as the collection is made with due care to the environment and with the use of environmentally sound techniques and methods of operation. Thus, one does not need a strict regime for access to marine genetic resources subject to prior informed consent in order to prevent environmental degradation of ecosystems. Overview and control and tracking of the utilisation of the marine genetic resources in order to share the benefits of the utilisation should be pursued by other mechanisms than a permit system.<sup>223</sup>

- Specific obligations on capacity building and transfer of marine technology can be built into the conditions for access. This example is drawn from the ISA model whereby provisions on capacity building are included as conditions for the issuance of exploration licenses.<sup>224</sup>
- To promote the involvement of users from developing countries, access to marine genetic resources from areas beyond national jurisdiction could come with the condition of making the material and/or genetic information publicly available in open source databases, biorepositories and/or biobanks, thus contributing to the already existing common pools of genetic resources.<sup>225</sup>

### 3.2 Sharing of benefits from the utilization of marine genetic resources

- This section could describe a benefit-sharing regime, if one is needed. It could include the following:
  - circumstances under which benefit-sharing would be encouraged;
  - types of benefit-sharing that would be encouraged (e.g., benefits focused on capacity building and conservation).<sup>226</sup>

#### 3.2.1 Objectives

- Benefit-sharing should/should also/could contribute to conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.<sup>227</sup>
- A pragmatic, *sui generis* regime for the sharing of benefits from marine genetic resources could support the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.<sup>228</sup>
- Benefit sharing should contribute to the broad objectives of the implementing agreement, such as through activities and projects that assist in conservation and sustainable use of marine biodiversity.<sup>229</sup>
- Benefit-sharing should be beneficial to current and future generations, build capacity to access marine genetic resources of areas beyond national jurisdiction, and not be detrimental to research and development.<sup>230</sup>
- Facilitate and encourage the equitable sharing of benefits from the collection of marine genetic resources while encouraging and not creating disincentives for marine scientific research, including research into and development of marine genetic resources.<sup>231</sup>

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<sup>223</sup> Norway

<sup>224</sup> Fiji

<sup>225</sup> IUCN

<sup>226</sup> USA

<sup>227</sup> Chair's understanding on marine genetic resources, including questions on the sharing of benefits

<sup>228</sup> New Zealand

<sup>229</sup> Australia

<sup>230</sup> Chair's understanding on marine genetic resources, including questions on the sharing of benefits

<sup>231</sup> New Zealand

### 3.2.2 Principles guiding benefit-sharing

- An appropriate regime would need to balance the interests of participating States and other entities engaged in the access and use of marine genetic resources.<sup>232</sup>
- Benefit-sharing of marine genetic resources should be fair and equitable on the basis of the principle of common heritage of mankind.<sup>233</sup>
- Benefit-sharing should be conducive to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, marine scientific research conducted in accordance with UNCLOS, as well as to the promotion of knowledge generation and innovation.<sup>234</sup>
- Any benefit-sharing regime that may arise from the use of marine genetic resources in areas beyond national jurisdiction should not negatively impact States' rights to conduct marine scientific research consistent with the regime under UNCLOS.<sup>235</sup>
- Some examples of principles governing a sharing of benefit regime are as follows:
  - due consideration accorded to SIDS;
  - impact upon marine ecology and neighboring zones including those under national jurisdiction;
  - differentiated severity of impact upon adjacent States Parties;
  - cost of remediation and anti-pollution measures;
  - increase scientific knowledge on conservation of biodiversity;
  - benefits from humane use of derivatives; and
  - not promote or allow the use of derivatives towards destruction or impairment of human life or towards non-peaceful purpose.<sup>236</sup>

### 3.2.3 Benefits

- Benefits should be both monetary and non-monetary.<sup>237</sup>
- Address the issue of monetary benefits.<sup>238</sup>
- Marine genetic resources can bring about monetary benefits and, consequently, discuss the different modalities of monetary benefits which may include, but would not be limited to those mentioned in the Annex of the Nagoya Protocol as well as the conditions triggering the monetary benefits.<sup>239</sup>
- Monetary benefits may include:
  - payments (i.e. up-front, milestone or royalties);
  - fees (access, license or special);
  - research funding;
  - joint intellectual property rights ownership; and

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<sup>232</sup> Australia

<sup>233</sup> G77&China

<sup>234</sup> EU

<sup>235</sup> Canada

<sup>236</sup> Federated States of Micronesia

<sup>237</sup> G77&China

<sup>238</sup> Jamaica

<sup>239</sup> G77&China

- patents.<sup>240</sup>
- Benefit-sharing for non-monetary benefits.<sup>241</sup>
- The common heritage of mankind principle does not apply to marine genetic resources. Non-monetary benefits therefore seem more appropriate in this regard.<sup>242</sup>
- Primarily concentrate on non-monetary benefits. The point of departure with regard to types of non-monetary benefit sharing are provisions contained in Part XIII ('Marine Scientific Research') and Part XIV UNCLOS ('Development and Transfer of Marine Technology'). Also draw on the indicative list of non-monetary benefits provided for in the Nagoya Protocol.<sup>243</sup>
- UNCLOS provisions related to marine scientific research already foresee different forms of non-monetary benefit-sharing, such as:
  - promoting international cooperation in marine scientific research (article 242 UNCLOS);
  - making knowledge resulting from marine scientific research available by publication and dissemination (article 244 para. 1 UNCLOS);
  - promoting data and information flow and the transfer of knowledge (article 244 para. 2 UNCLOS).

In this regard the new UNCLOS implementing agreement could provide for a framework to specify, coordinate, promote and monitor the implementation, with respect to marine genetic resources from areas beyond national jurisdiction, of the above mentioned benefit-sharing provisions to make the best use of the available diverse non-monetary benefit-sharing activities. Such an approach could be further strengthened and integrated with capacity-building activities that could be based on Part XIV UNCLOS, as well as with activities to enhance, facilitate and stimulate the sharing of material, information and knowledge. In particular, it could be useful to draw upon such provisions of Part XIV UNCLOS as articles 266 ('promotion of the development and transfer of marine technology') and 269 (establishment of, inter alia, programmes of technical cooperation, seminars, conferences, promote the exchange of scientists).<sup>244</sup>

- The annex to the Nagoya Protocol provides useful advice on potential non-monetary benefits.<sup>245</sup>
- The non-monetary benefit should comprise of access to all forms of resources, data and related knowledge, transfer of technology and capacity building as well as facilitation of marine scientific research on marine genetic resources of areas beyond national jurisdiction.<sup>246</sup>
- Some of the non-monetary benefits that are of particular importance are:
  - the transfer of technology and dissemination of scientific knowledge and research and development results relating to marine genetic resources;
  - strengthening the research capabilities of developing countries through education and training; and
  - collaboration in research and development programs where possible.<sup>247</sup>
- Non-monetary benefits may include:
  - access to samples, data and knowledge, including the publication and sharing of scientific knowledge;

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<sup>240</sup> IUCN

<sup>241</sup> Chair's understanding on marine genetic resources, including questions on the sharing of benefits

<sup>242</sup> Iceland

<sup>243</sup> EU

<sup>244</sup> EU

<sup>245</sup> Australia, Norway

<sup>246</sup> G77&China

<sup>247</sup> Jamaica

- collaboration and international cooperation in scientific research;
  - capacity building and technology transfer including scientific training and access to resources, research infrastructure and technology; and
  - other socio-economic benefits (e.g. research directed to priority needs such as health and security).<sup>248</sup>
- Any benefit-sharing regime should emphasize capacity-building opportunities, such as access to scientific research vessels destined for the high seas, educational opportunities and training programs, to increase accessibility to marine genetic resources in areas beyond national jurisdiction.<sup>249</sup>
  - In considering the kinds of benefits that might be shared, it would be useful to bear in mind the value of data and knowledge sharing, including existing mechanisms for data sharing, such as data banks, sample collections, and open access gene pools, and the need to create incentives for the development of such mechanisms on a more comprehensive basis. The value of collection and sharing of data and knowledge on the associated marine environment, biodiversity and ecosystems could also be recognised and such practices encouraged.<sup>250</sup>
  - Consider the particular types of benefits that can be shared at particular points in the process. For example, an access and benefit sharing regime under the implementing agreement may require marine genetic resources research to be published within a specified reasonable timeframe, ensuring that findings are shared with the international community. This could provide value, even in instances where commercialisation is delayed, or does not eventuate.<sup>251</sup>
  - Establish a hybrid mechanism to bring the best elements of all existing instruments into a functional whole. It could integrate capacity building measures in the benefit-sharing mechanism, by implementing part XIV of UNCLOS and in particular its article 266, on the promotion of the development and transfer of marine technology. One possibility to consider could be to establish international programmes on marine research to support the conservation and management of the marine environment in areas beyond national jurisdiction. Inspired by the ITPGRFA, Part V Supporting components, the research programmes should include provisions on the participation of developing countries. The programmes could be linked to existing national research institutions and have research activities on genetic material from areas beyond national jurisdiction which may in turn generate monetary benefits for the participants. Another possibility would be to include in the IA provisions obliging developed parties to include developing partners in their research and exploration activities on marine genetic resources.<sup>252</sup>

### *3.2.4 Benefit-sharing modalities*

- Any mechanism for benefit-sharing must be functional, economical and designed to encourage rather than impede investment in research in marine genetic resources.<sup>253</sup>
- Consideration of a mechanism should take into account existing mechanisms, such as the ISA.<sup>254</sup>

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<sup>248</sup> IUCN

<sup>249</sup> Canada

<sup>250</sup> New Zealand

<sup>251</sup> Australia

<sup>252</sup> Norway

<sup>253</sup> Iceland

<sup>254</sup> G77&China

- A trust fund within the possible clearinghouse mechanism on access and benefit-sharing could be established with a view to ensuring a fair and concrete sharing of benefit.<sup>255</sup>
- In the context of the access and benefit sharing mechanism that would be established under the agreement on marine genetic resources, a fund could be established with specific allocation for SIDS.<sup>256</sup>
- Clear commitment to building an access and benefit-sharing fund. The general purpose of the fund can be outlined in an international legally binding instrument, whereas detailed mechanics of uses can be provided by protocol.<sup>257</sup>
- Benefits, including monetary benefits, could be allocated to a fund for capacity building, including training, and technology transfer. The specific allocation could ensure that the benefits are used for conservation and sustainable use of the ocean and marine biodiversity beyond national jurisdiction.<sup>258</sup>
- Based on the example of the ITPGRFA, in which recipients in developing countries and countries with economies in transition are exempt from certain payments, consideration should be given to whether similar special exemptions should be extended to developing and least developed countries where there are obligations to pay into a benefit-sharing fund.<sup>259</sup>
- Establish a system similar to the annual partnership contribution under World Health Organization Pandemic Influenza Preparedness (PIP) Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits.<sup>260</sup>
- To distribute benefits fairly and equitably, include, or combine: a project-based approach similar to the ITPGR Benefit-sharing Fund: following the announcement of a call for project proposals, these are received by the Secretariat and screened by a panel of experts according to specific eligibility and selection criteria which were adopted by the ITPGRFA Governing Body. The new implementing agreement could assign priority to projects that support the conservation and sustainable use of biodiversity. To ensure that the competitive nature of the project-based approach takes sufficient account of the unequal capacities of countries and actors, promotes projects that serve collective interests beyond the specific area or actors involved in the project, and serves to strengthen coordination and cooperation between stakeholders, activities and countries to address global concerns, the implementing agreement could task the Secretariat with the organization of workshops and the provision of a helpdesk function to assist applicants to prepare proposals, similarly to what is being done under the ITPGRFA. In addition or as an alternative, the new implementing agreement could establish international criteria and guidelines for regional offices to identify and prioritize beneficiaries (States, but also indigenous peoples and local communities). The implementing agreement secretariat could receive advice from, and the benefit-sharing system could be reviewed by, an international advisory group of experts. This could draw inspiration from the WHO PIP Framework.<sup>261</sup>

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<sup>255</sup> G77&China

<sup>256</sup> AOSIS

<sup>257</sup> Federated States of Micronesia

<sup>258</sup> IUCN

<sup>259</sup> Jamaica

<sup>260</sup> WWF

<sup>261</sup> WWF

### *3.3 Intellectual property rights*

- Intellectual property rights, including disclosure-of-origin requirements in patent applications, should not be within the scope of the UNCLOS implementing agreement, as this issue has to be dealt with within the existing institutional frameworks competent in this subject-area (World Intellectual Property Organization (WIPO) and World Trade Organization).<sup>262</sup>
- Any marine genetic resources regime should work within existing intellectual property frameworks. WIPO must remain the proper forum for any intellectual property issues related to marine genetic resources in areas beyond national jurisdiction.<sup>263</sup>
- Rules on intellectual property rights, such as patents, may have implications for the effectiveness of the implementing agreement. How and to what extent intellectual property rights may affect the possibilities for fair and equitable benefit-sharing is uncertain, and widely debated. Whether a patent can be obtained on an invention directly based on marine genetic resources will depend on whether the ordinary criteria for patentability, inter alia novelty and inventive step, are fulfilled. Under WIPO, in the Intergovernmental Committee for Genetic Resources, Traditional Knowledge and Folklore, the drafting of an international instrument for requiring disclosure of origin of genetic resources in patent applications is being discussed. Such disclosure requirement may facilitate possible access and benefit-sharing arrangements.<sup>264</sup>
- The new instrument must reflect the status of marine genetic resources as the common heritage of mankind. Accordingly, it must embrace the principle of non-appropriation to ensure that no State will claim or exercise sovereignty or sovereign rights over marine genetic resources in areas beyond national jurisdiction. The instrument should prohibit private appropriation and the exercise of intellectual property rights where this would limit access to marine genetic resources for further research and other aims. If intellectual property rights are claimed in respect of products developed from marine genetic resources, the approach taken in the ITPGRFA provides a possible framework which could be considered.<sup>265</sup>

### ***4. Monitoring of the utilization of marine genetic resources of areas beyond national jurisdiction***

- A protocol or code of conduct or guidelines could be developed within the mechanism in order to ensure environmental protection compliance and ensure transparency in the use of marine genetic resources of areas beyond national jurisdiction.<sup>266</sup>
- A depository of information on marine genetic resources extraction could also serve as a mechanism to trace the provenance of marine genetic resources obtained in areas beyond national jurisdiction.<sup>267</sup>

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<sup>262</sup> EU

<sup>263</sup> Australia

<sup>264</sup> Norway

<sup>265</sup> Jamaica

<sup>266</sup> G77&China

<sup>267</sup> Australia



## **5. Clearing house and information sharing<sup>268</sup>**

- The clearing house set up to handle access and benefit sharing under the Nagoya Protocol to the CBD provides a mechanism for collecting and publishing research relating to genetic resources within national jurisdictions. There may be some ability to use this as a model or expand the Nagoya Access and Benefit-Sharing Clearing House to hold records and data from BBNJ. This would be consistent with UNCLOS article 244 which encourages the dissemination of information and knowledge from marine scientific research.<sup>269</sup>
- Establish an access and benefit-sharing clearing house modelled on the Nagoya Protocol article 14.<sup>270</sup>
- Include an obligation for the flag State to report on accessed marine genetic resources from areas beyond national jurisdiction to the clearing house after the material has been deposited. A sample could also be provided to a public collection.<sup>271</sup>
- Create a platform where various data/information exchange initiatives can be organized and tracked in a way that will be easy to navigate. An implementing agreement can create a platform for various organizations to cooperate and collaborate for better sharing of data/information that will lead to scientific innovation around the world.<sup>272</sup>

## **6. Special requirements of SIDS<sup>273</sup>**

- Proponents of marine genetic resources-related activities could be required to provide capacity building specifically to SIDS. Elements of capacity building could include as an initial matter: provision of education/training in science and technologies, policy and governance, including through joint research efforts supported through the establishment of a global scholarship fund, and enhanced through collaboration in research and development on marine genetic resources.<sup>274</sup>
- In the context of the access and benefit sharing mechanism that would be established under the agreement on marine genetic resources, a fund could be established with specific allocation for SIDS.<sup>275</sup>

## **D. MEASURES SUCH AS AREA-BASED MANAGEMENT TOOLS, INCLUDING MARINE PROTECTED AREAS**

- The objective of the implementing agreement provisions on ABMTs should be to:
  - set out general requirements for the designation, development and establishment of ABMTs, for instance that all steps must be based on best available science;
  - recognize ABMTs in existing regional and sectoral instruments and mechanisms as important tools for conservation and sustainable use of marine biodiversity;

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<sup>268</sup> See also sub-section 3.2 in this section.

<sup>269</sup> Australia

<sup>270</sup> Norway

<sup>271</sup> Norway

<sup>272</sup> IUCN

<sup>273</sup> See also sub-section 3.2 in this section.

<sup>274</sup> AOSIS

<sup>275</sup> AOSIS

- reinforce States Parties' duty to cooperate in their use of ABMTs in different regional and sectorial management mechanisms;
- spur States engagement, responsibility and involvement in all relevant mechanisms where they are participating;
- activate, utilize, strengthen and challenge existing mechanisms to actively adopt measures within their competence;
- provide for closer contact, coordination and cooperation between relevant existing mechanisms as regards the use of ABMTs;
- provide for accountability, transparency, review and stakeholder participation.<sup>276</sup>
- The new agreement should enable cooperation and coordination between regional and sectoral bodies that are responsible for implementation of ABMTs. It should facilitate consultation, and effective coordination and communication between relevant stakeholders - including interested States, regional, sectoral, intergovernmental and global bodies - for the purposes of transparency and reporting.<sup>277</sup>
- Promote cross-sectoral coordination and cooperation between competent global, regional and sectoral organizations.<sup>278</sup>
- Promote greater global coherence by establishing a more specific framework, objectives and relevant guidance aimed at achieving more effective implementation of ABMT and MPA initiatives at the regional and sectoral level. This could include:
  - recognising that MPAs represent an important mechanism for States to meet their obligations to protect and preserve the marine environment and, in this regard, requiring States and other entities to cooperate in the identification, designation and implementation of a comprehensive and representative network of marine protected areas, including through relevant regional and sectoral bodies;
  - providing an avenue for States to seek guidance on areas identified as needing additional levels of protection and requiring reporting within a set time frame on actions taken to implement this guidance (UNFSA 8(6) also relevant in this context);
  - providing standards and policy guidance on the design and process for ABMT/MPA initiatives that would guide Parties in pursuing initiatives through relevant bodies;
  - promoting regular and meaningful engagement within and between these bodies, and where appropriate, encouraging the establishment of regional coordinating mechanisms in cases where a number of bodies are active players in a specific ABMT/MPA regional context; and
  - mandating regular reporting by States, including through such bodies, in accordance with requirements established under the implementing agreement, to the COP.<sup>279</sup>
- The new agreement, guided by the precautionary principle, should identify and adopt through the COP protected areas and specific measures to meet their conservation objectives, based on the based available science, information on cumulative impacts provided by the proponents, and the consultation process with Parties, non-Parties, scientific committee, regional/sectoral bodies, and all relevant stakeholders.<sup>280</sup>

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<sup>276</sup> Norway

<sup>277</sup> Canada

<sup>278</sup> EU

<sup>279</sup> New Zealand

<sup>280</sup> Greenpeace

- Set up a framework for effective cooperation and coordination among Parties, non-Parties and competent sectoral and regional organizations, in the establishment, management and enforcement of a network of ecologically representative, well connected and effectively managed MPAs, including marine reserves in areas beyond national jurisdiction.<sup>281</sup>
- The new agreement will fill regulatory gaps, complement and strengthen existing frameworks and global, regional and sectoral bodies. It will act as an umbrella and promote coherence, cooperation and coordination among regional and sectoral structures (including technical bodies and systems for exchanging data) and may also provide incentives for the establishment of regional structures where these are absent.<sup>282</sup>
- In relation to the identification, designation, management and enforcement of marine protected areas and marine reserves, the new agreement would enhance coordination and cooperation among sectors and ensure that conservation efforts are not undermined by conflicting activities. New agreement, through the consultation process set up therein, would provide the best scientific information and enable them to adopt sound measures under their remit.<sup>283</sup>
- Noting that the implementing agreement must be fully integrated within the UNCLOS legal architecture, including its two implementing agreements, look to existing models in the UNCLOS legal architecture, such as those elaborated under article 8 of the UNFSA. Value in global standard-setting, via the implementing agreement, that would catalyse implementing agreement Parties to act at a regional level. In the BBNJ context, this would see standards and principles for identifying values being set out in a global instrument, which would then catalyse Parties to take action at the regional level to manage/protect such values where Parties identify them. This model could encourage Parties, at the regional level, to work closely with existing institutions, to establish coordination mechanisms, to consider the adjustment or modification of the mandates of existing institutions, or to consider new approaches or new institutions.<sup>284</sup>
- To achieve its objectives effectively, the new agreement must provide a combination of vertical and horizontal governance approaches. However, it is critical that the new instrument has the authority to mandate and enable States to establish and manage multi-sectoral MPAs, including marine reserves in areas beyond national jurisdiction, in line with their obligations under the Convention and other global conservation commitments, e.g. Aichi Target 11 or Sustainable Development Goal 14.5.<sup>285</sup>
- Provide explicit authority and a mandate to establish multi-sectoral, high seas MPAs, including marine reserves, by a set date.<sup>286</sup>

### **1. Objectives of ABMTs, including MPAs**

- Set out objectives that ABMTs and MPAs developed and implemented at the regional level should meet.<sup>287</sup>
- Conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.<sup>288</sup>

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<sup>281</sup> Greenpeace

<sup>282</sup> Greenpeace

<sup>283</sup> Greenpeace

<sup>284</sup> Australia

<sup>285</sup> Greenpeace

<sup>286</sup> High Seas Alliance

<sup>287</sup> New Zealand

- "Conservation and sustainable use" of biodiversity and living resources of areas beyond national jurisdiction.<sup>289</sup>
- Dual objective of conservation and sustainable use of marine resources, and MPAs in particular are regulated and managed to achieve a primary objective of long-term conservation of nature with associated ecosystem services.<sup>290</sup>
- Long-term conservation and sustainable use of marine biodiversity for the benefit of present and future generations.<sup>291</sup>
- Protect and preserve the marine environment.<sup>292</sup>
- Contribute to maintaining and restoring (rather than rehabilitating) ocean ecosystem health, consistent with the Rio+20 commitments.<sup>293</sup>
- Values to be protected and managed could include biodiversity and key ecosystem processes, habitats and species, including marine areas essential for the survival, function, or recovery of particular stocks or rare or endangered marine species (such as breeding or spawning grounds), or for the support of large ecosystems.<sup>294</sup>
- Protection of areas which are vulnerable to impact(s) from human activities, including unique, fragile/sensitive, rare or highly biodiverse habitats and features as well as, as appropriate, representative marine ecosystems and habitats.<sup>295</sup>
- Reduction of direct anthropogenic stressors to increase ecosystem resilience. Climate change can function as a physiological stressor that increases vulnerability to physical disturbance and reduces resilience.<sup>296</sup>

## 2. Guiding principles and approaches

- ABMTs, including MPAs, should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.<sup>297</sup>
- The global overarching framework established by the implementing agreement that sets out criteria for the identification and designation of ABMTs as well as processes for their creation, implementation, monitoring and review should not undermine relevant existing frameworks and bodies.<sup>298</sup>
- Building on the duty of cooperation (including that required in articles 197 and 279 of the Convention and the *in situ* conservation requirements of article 8 of the CBD), contracting Parties should be obligated to apply the principles and approaches, objectives and guidelines of the new international Instrument in regulating or managing marine activities or resources important for the conservation of marine biodiversity in areas beyond national jurisdiction , including through the use of ABMTs.<sup>299</sup>

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<sup>288</sup> Chair's understanding on measures such as ABMTs, including MPAs

<sup>289</sup> Fiji

<sup>290</sup> Monaco

<sup>291</sup> Monaco

<sup>292</sup> Chair's understanding on measures such as ABMTs, including MPAs, Monaco

<sup>293</sup> Greenpeace

<sup>294</sup> Australia

<sup>295</sup> Australia

<sup>296</sup> IUCN

<sup>297</sup> Chair's understanding on cross-cutting issues

<sup>298</sup> Monaco

<sup>299</sup> High Seas Alliance

- A number of principles and approaches to be taken in the establishment of ABMTs, including MPAs, such as:
  - Transparency<sup>300</sup>
  - Ecosystem approach<sup>301</sup>
  - Ecosystem-based approach<sup>302</sup>
  - Precautionary principle/approach<sup>303</sup>
  - Science-based approach<sup>304</sup>
  - Use of the best available science<sup>305</sup>
  - Adaptive management<sup>306</sup>
  - Protection and preservation of the marine environment<sup>307</sup>
  - Sustainable use<sup>308</sup>
  - Equitable use<sup>309</sup>
  - Accountability<sup>310</sup>
  - Liability<sup>311</sup>
  - Polluter-pays principle<sup>312</sup>
  - Duty to cooperate<sup>313</sup>
  - International coordination<sup>314</sup>
  - Consultation<sup>315</sup>
  - Public participation<sup>316</sup>
  - Stewardship of the global marine environment for present and future generation<sup>317</sup>
  - Protection and restoration of the health, productivity and resilience of oceans and marine ecosystems, and maintenance and restoration of their biodiversity, in areas beyond national jurisdiction<sup>318</sup>
  - Respect for the law of the sea / conditional freedom for the seas<sup>319</sup>
- Threats-based approach under particular circumstances (e.g. if a species, habitat or ecosystem has been identified as being vulnerable to a particular activity).<sup>320</sup>
- Multi-use approach to area-based management to protect values while allowing for sustainable exploitation of the ocean's economic resources.<sup>321</sup>

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<sup>300</sup> Chair's understanding on measures such as ABMTs, including MPAs, Monaco, High Seas Alliance

<sup>301</sup> Chair's understanding on measures such as ABMTs, including MPAs, Monaco, High Seas Alliance

<sup>302</sup> Canada, High Seas Alliance

<sup>303</sup> EU, High Seas Alliance / G77&China, Canada, Monaco

<sup>304</sup> Chair's understanding on measures such as ABMTs, including MPAs, Australia, Monaco

<sup>305</sup> G77&China, Canada, CARICOM, EU, High Seas Alliance

<sup>306</sup> Canada

<sup>307</sup> G77&China, Monaco

<sup>308</sup> G77&China, Monaco

<sup>309</sup> G77&China, Monaco

<sup>310</sup> G77&China

<sup>311</sup> G77&China

<sup>312</sup> High Seas Alliance

<sup>313</sup> Monaco, High Seas Alliance

<sup>314</sup> Monaco

<sup>315</sup> Monaco

<sup>316</sup> High Seas Alliance

<sup>317</sup> High Seas Alliance

<sup>318</sup> High Seas Alliance

<sup>319</sup> High Seas Alliance

<sup>320</sup> Australia

<sup>321</sup> Australia

- Respect for existing (regional and sectoral) mechanisms that regulate the exploitation of living resources in areas beyond national jurisdiction.<sup>322</sup>
- Clarification and development of States' responsibility to protect and preserve the marine environment under Part XII of UNCLOS.<sup>323</sup>
- Representative networks of MPAs are necessary to ensure that biological connections are maintained between interdependent MPAs and that a full array of marine habitats is protected.<sup>324</sup>
- Representative approach to develop MPAs.<sup>325</sup>
- Create a comprehensive, coherent, ecologically representative, globally recognized network of well-connected and well-managed MPAs, for example along critical migration routes or to connect those routes to spawning areas, etc. The establishment of this network would be enhanced through cross-sectoral ABMTs at a regional or global scale.<sup>326</sup>
- Shall not create or cause disproportionate burden upon coastal States' ABMTs with respect to the management of their respective exclusive economic zone. SIDS that are adjacent to the high seas do have measures in place and have adopted management tools designed to preserve and conserve resources under national jurisdiction. With respect to ABMTs for BBNJ, such should not overburden, or cause any disproportionate burden upon, coastal States.<sup>327</sup>
- Do not encroach upon continental shelves under national sovereign rights or which fall within the scope of article 76 of UNCLOS. Continental shelves are presently covered by UNCLOS. An international legally binding instrument gives consistency to, rather than conflict, the rules governing continental shelves.<sup>328</sup>

### **3. Process for the establishment of ABMTs, including MPAs**

- Create a procedure/process to enable the establishment and management of an ecologically coherent global network of representative and effectively managed MPAs in areas beyond national jurisdiction with the aim of contributing to the achievement of conservation and sustainable use of marine biological diversity.<sup>329</sup>
- Establish a clear procedure for the establishment of MPAs, setting out:
  - what each stage is designed for (and also what it should include);
  - who participates in each stage; and
  - how the intended purpose is to be achieved (that is, the institutional setting that enables the desired outcome of each stage).<sup>330</sup>
- Create a global overarching framework enabling the identification, designation, management and enforcement of ABMTs in areas beyond national jurisdiction, including MPAs, based on agreed scientific criteria and the best available scientific information, after public consultations with all relevant stakeholders, including States and existing relevant international, regional and

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<sup>322</sup> Australia

<sup>323</sup> Australia

<sup>324</sup> High Seas Alliance

<sup>325</sup> Australia

<sup>326</sup> Monaco

<sup>327</sup> Federated States of Micronesia

<sup>328</sup> Federated States of Micronesia

<sup>329</sup> EU

<sup>330</sup> EU

sectoral organizations, in order to establish a network of ecologically representative, well-connected and effectively managed ABMTs with different levels of protection, including marine protected areas and marine reserves where and when appropriate, with the objectives of long-term conservation and sustainable use of marine biodiversity and all marine resources.<sup>331</sup>

- Clear mandate and procedures for the creation of MPAs, including how States make the proposals, the modalities for scientific evaluation and the decision making process, is imperative.<sup>332</sup>
- Set out the process for designating the boundaries of areas for protection and the process for considering potential management measures for such areas.<sup>333</sup>
- Set up an inclusive and transparent process for the designation, management and enforcement of ABMTs and MPAs, including marine reserves, in consultation with all relevant stakeholders, including civil society, underpinned by, and in accordance with, modern principles of ocean governance. Stakeholders should play a central role in the MPA decision-making process, and should be involved, in the identification, designation and management of MPAs as well as in the monitoring and review of their progress. Relevant stakeholders may include: competent regional and sectoral bodies, civil society, scientific community, indigenous and local communities with historic links to areas in areas beyond national jurisdiction. Future generations should also be considered as stakeholders whose interests should be fully taken into account in decisions affecting areas beyond national jurisdiction.<sup>334</sup>
- Establish procedures to ensure that scientific assessment and advice informs the policy/decision-making process on whether and to what extent an MPA should be updated, amended or de-designated. The amendment of any MPA should follow a similar process to its original designation.<sup>335</sup>
- A suggested process for the establishment of MPAs under the agreement could entail the following steps:
  - adoption of a systematic approach to the development of an ecologically representative network of effectively managed MPAs (Viz. CCAMLR Conservation Measure 91-04). This could be elaborated during the negotiations of the implementing agreement and adopted as an integral component of the agreement as another technical annex; or this could be one of the first tasks to be addressed by a subsidiary body on scientific and technical advice (SBSTA) and decided by the COP;
  - development by SBSTA and adoption by the COP of a global bioregional/biogeographic classification (that can be refined regionally) to be used as the basis for designating planning domains within which networks of interconnected representative MPAs can be proposed and developed. Alternatively, this could also be developed in parallel to the negotiations of the agreement and adopted as another technical annex to the agreement, which could be revised over time on the basis of SBSTA advice in light of new scientific information;
  - States Parties (individually or collectively), competent organizations, or observer organizations may submit an MPA proposal (including proposed priority elements of a

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<sup>331</sup> Monaco

<sup>332</sup> Iceland

<sup>333</sup> USA

<sup>334</sup> Greenpeace

<sup>335</sup> EU

- management plan) to the COP. The proposal may (ideally) refer to a network of interconnected representative MPAs for a bioregion or biogeographic planning domain, or a single MPA. Priority should be given to development of such networks;
- the COP requests advice from the SBSTA, especially with respect to the MPA(s) location, delineation and design (in light of biological or ecological features, and in the context of establishing an ecological representative network), proposed conservation objectives and corresponding management measures (in light of existing or potential pressures/stressors on BBNJ in the area under consideration and biodiversity trends);
  - in parallel to the SBSTA assessment, an online consultation phase would be opened by the secretariat, where stakeholders and relevant organizations (especially those with relevant data and information about the area and its marine biodiversity) are invited to comment upon the MPA proposal and to provide relevant additional information;
  - the consultation period would close well before SBSTA's deadline for advice, so that relevant scientific and technical input can be taken into consideration by SBSTA;
  - SBSTA would then provide advice to the COP on the MPA proposal, including its location, design, conservation objectives and on the priority elements of a management plan;
  - If accepted, the COP would designate the MPA and adopt the priority elements of the management plan. The new MPA(s) would be added to an annex to the agreement, which would be binding upon all parties, and transmitted to competent organizations, States and any regional committees to finalise the management plan (within a specific timeframe) including adoption of respective conservation and management measures in accordance with their respective competencies and mandates. The COP decision establishing the MPA would specifically set out reporting and review arrangements and which 'existing sectoral bodies' were expected to adopt and implement particular measures, with deadlines for both adoption and implementation of measures;
  - Parties and competent organizations would then report on their measures and other arrangements to effectively implement the MPA(s) to the COP in accordance with the reporting timeframes established. In the case of non-compliance, respective non-compliance procedures under the agreement would be triggered and corresponding sanctions applied.<sup>336</sup>
- The duty of international organizations to coordinate and cooperate could be further operationalised as follows:
    - joint meetings where appropriate;
    - consultation on matters related to areas beyond national jurisdiction with a view to coordinate respective activities;
    - cooperation in the collection of data and information relating to areas beyond national jurisdiction;
    - sharing of information and data regarding activities and the impact of activities under their mandate with the scientific body under the agreement;
    - cooperation in the identification and implementation of the most effective conservation measures to protect areas in areas beyond national jurisdiction, within a specific time frame;
    - cooperation in the management of the areas beyond national jurisdiction MPAs;

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<sup>336</sup> WWF



- conduct marine scientific research and join assessments of the effectiveness of existing MPAs and their conservation measures;
- regularly reports to the COP on progress made;
- participation in meetings of the respective governing bodies as observers.<sup>337</sup>

### 3.1 Identification of areas

- General criteria and/or guidelines to identify priority areas should be developed on the basis of the existing internationally recognized criteria for area-based conservation measures as follows (1) the uniqueness and rarity of the areas; (2) vulnerability; (3) fragility, sensitivity of the area; (4) biological or ecological productivity and diversity.<sup>338</sup>
- Bearing in mind the objective and principles that should apply to the BBNJ instrument, the criteria for the identification of areas that may require ABMTs, including MPAs, can be done having regard for existing scientific criteria for instance as relevant to the designation of EBSAs, PSSAs, vulnerable marine ecosystems (VMEs); and/or criteria set out under regional agreements, or any new criteria agreed to by States. There might also be some value in establishing scientific or technical advisory committee(s), as done under the Specially Protected Areas and Wildlife Protocol, that could also have a monitoring and reviewing role.<sup>339</sup>
- Provide for a set of general criteria for the identification of areas requiring protection through the establishment of MPAs, based on scientific and technical input. Such input would include those from existing processes, such as the process for describing EBSAs under the CBD; input from existing relevant global, regional or sectoral bodies; other relevant information and research from States Parties, including any information gathered through environmental impact assessments. Such general criteria should reflect ecological criteria, such as uniqueness or rarity; representativeness; fragility; dependency; diversity; productivity; naturalness. On the basis of these general criteria, more detailed criteria could subsequently be developed (and updated, as necessary).<sup>340</sup>
- In support of the concept of “use of best available science”, the work done by the CBD to describe EBSAs may be helpful in identifying priority biodiversity areas.<sup>341</sup>
- Scientific criteria (e.g. incorporated in an annex or as appropriate) for the identification of areas that may require ABMTs, including MPAs, and their designation. Those criteria can build on existing internationally recognized criteria, such as CBD's EBSAs, IMO's PSSAs, FAO's VMEs, ISA's APEIs, etc. The regional level can also be taken into consideration, e.g. the Special Protected Areas of Mediterranean Importance in the context of the Barcelona Convention.<sup>342</sup>
- The identification of potential protected areas should be based on agreed scientific criteria, such as those developed for the identification of EBSAs and VMEs with a view to avoiding duplication. In identifying protected areas, their contribution to a global representative network should be duly considered.<sup>343</sup>

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<sup>337</sup> Greenpeace

<sup>338</sup> G77&China

<sup>339</sup> CARICOM

<sup>340</sup> EU

<sup>341</sup> Canada

<sup>342</sup> Monaco

<sup>343</sup> Greenpeace

- The criteria should be general in nature in order to apply to every situation, but they should also provide clear guidance in order to ensure, inter alia, that ABMTs, including MPAs, established under the auspices of the implementing agreement are ambitious, have clear long-term conservation objectives that will ensure the sustainable use of marine resources, and enable the creation of a global well-connected network.<sup>344</sup>
- If necessary, some criteria could be further developed by the decision making body, once the implementing agreement is into force, on the basis of the best available scientific information and recommendations from a competent scientific advisory body.<sup>345</sup>
- A scientific committee under the agreement could be mandated by States to undertake a global review and identify candidates for an ecologically representative global network of MPAs and reserves.<sup>346</sup>

### 3.2 Designation decision

#### 3.2.1 Proposal

- Any proposal can be submitted by States Parties to the new instrument.<sup>347</sup>
- The proposal for the designation of an MPA will be made by State Parties to the new implementing agreement.<sup>348</sup>
- States Parties, individually or collectively, prepare an initial proposal for the designation and establishment of a new MPA.<sup>349</sup>
- The procedure for designation of MPAs should be triggered by States Parties, through the submission of a proposal.
  - proposals should come from States Parties, individually or collectively.
  - the implementing agreement should build on the work of existing organizations and frameworks, while not undermining their mandates and without duplicating their activities. A separate procedure for the recognition of MPAs agreed by regional organizations that meet the agreed general criteria set out in the implementing agreement is proposed.
  - civil society should also be able to play a role in the procedure, including by contributing to proposals for the designation of potential MPAs.<sup>350</sup>
- The process of designation can be initiated by a proposal from a State, a scientific or technical advisory committee under the new instrument, or other intergovernmental organization(s) within their respective mandates.<sup>351</sup>
- Provide a mechanism through which Parties and those States and entities that are entitled to become Parties may propose areas to be considered for protection.<sup>352</sup>

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<sup>344</sup> Monaco

<sup>345</sup> Monaco

<sup>346</sup> Greenpeace

<sup>347</sup> G77&China

<sup>348</sup> Japan

<sup>349</sup> Monaco

<sup>350</sup> EU

<sup>351</sup> CARICOM

<sup>352</sup> USA

- The instrument should specify who can submit proposals, which may include States Parties, competent international organizations, a subsidiary technical body or accredited scientific experts or non-governmental organizations (NGOs).<sup>353</sup>
- Parties, individually or collectively through relevant organizations, but also the scientific committee under the agreement as well as stakeholders, including civil society, should be able to submit MPA proposals. Proponents should be encouraged to seek views and inputs from relevant stakeholders in the process of developing their MPA proposals.<sup>354</sup>
- Stakeholders, including civil society and scientific bodies, could put forward individual proposals.<sup>355</sup>
- The proposal to establish an ABMT should take into account the best available science and be based on the precautionary approach/principle.<sup>356</sup>
- The proposal should comprise of:
  - the objective of the measure;
  - the delimitation of the area;
  - the conservation or management measures needed to reach the specified objective on the basis of best available scientific evidence.<sup>357</sup>
- A proposal should meet specific criteria established in the implementing agreement, and should be based on the principles and approaches set out in the implementing agreement including the best available scientific information, follow an ecosystem approach and the precautionary principle. The proposal should at a minimum include the following elements:
  - spatial boundaries (where is the area to be established);
  - description of the characteristics and biodiversity values of the area and the sensitivity of the species/habitats concerned (what we want to protect and to what extent it meets the criteria set in the implementing agreement);
  - information on neighbouring areas including any under national jurisdiction (including areas covered by submissions under article 76 of UNCLOS);
  - description, if relevant, of how the proposed site would contribute to ecologically representative MPA networks, including possible relationship to existing MPAs or other ABMTs (and site protection status under other networks);
  - description of impacts, including cumulative impacts, identification of threats and possible activities with adverse impact (what are we protecting the areas from);
  - description of the conservation objectives (what is to be achieved with the designation);
  - information relating to possible interference with other legitimate uses of the sea and, when appropriate, related possible socio-economic costs;
  - information on international organizations and bodies whose action might be relevant in order to achieve the conservation objectives;
  - priority elements for management to achieve the conservation objectives, including possibly socio-economic mitigation measures;
  - priority elements for a research and monitoring plan.<sup>358</sup>

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<sup>353</sup> High Seas Alliance

<sup>354</sup> Greenpeace

<sup>355</sup> Greenpeace

<sup>356</sup> G77&China

<sup>357</sup> G77&China

<sup>358</sup> EU

- The proposal should at a minimum include the following elements:
  - spatial boundaries of the area to be designated as an MPA;
  - current condition of biodiversity of the area to be designated (including scientific data concerning the condition as well as the information on the contact person(s) of the proposing State responsible for the data);
  - description of conservation objectives;
  - factors possibly affecting the biodiversity of the designated area;
  - conservation and management measures (including (i) information on relevant existing frameworks, (ii) whether prior consultations with those frameworks have been held (see article 8. 6 of UNFSA) and (iii) time period of conservation and management measures);
  - monitoring and review.<sup>359</sup>
- The proposal should include at least:
  - the spatial boundaries of the proposed MPA;
  - an evaluation of the current state of the marine ecosystem and a description of ongoing human activities in that area;
  - the conservation objectives to be achieved;
  - the elements of the management plan and of the plan for monitoring and review of the MPA once established.<sup>360</sup>
- MPA proposals should include specific objectives that contribute to one or more general objectives or criteria for which it is agreed that MPAs are an appropriate tool. These could draw on existing commitments under UNCLOS and other internationally agreed objectives and criteria for MPAs, including:
  - the UNCLOS commitment to "protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life";
  - CBD scientific criteria for EBSAs;
  - FAO criteria for VMEs as defined in the 2009 FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas;
  - IMO criteria for PSSAs and Special Areas under MARPOL;
  - general objectives described in CCAMLR Conservation Measure 91-04; and
  - primary objectives described in the 2008 IUCN Guidelines for Applying Protected Area Management Categories.

These issues would all need to be addressed in the specific regional context in which an MPA was located.<sup>361</sup>

- Include the following:
  - a requirement that proposals take into account the ecosystem and precautionary approaches and be based on the best available scientific information;
  - scientific criteria that should be used to identify proposed areas;
  - a requirement that proposals include: (i) clear and specific objectives for the area; (ii) defined, science-based boundaries; (iii) a description of the biodiversity and ecosystem functions within the area; (iv) a description of activities that could

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<sup>359</sup> Japan

<sup>360</sup> Monaco

<sup>361</sup> New Zealand

potentially harm or cause adverse impacts, including cumulative impacts, to the area.<sup>362</sup>

- An MPA proposal should contain at least the following elements:
  - the spatial boundary of the MPA;
  - a description of the characteristics and biodiversity values of the area, including an evaluation of the current state of the marine ecosystem;
  - a description of ongoing and potential human activities in that area, including their known or potential impacts, including cumulative impacts;
  - a statement of the conservation objectives to be achieved by establishing the MPA; and
  - (priority elements for) management measures through which those objectives will be achieved and of the plan for monitoring, enforcement and review of the MPA once established.<sup>363</sup>
- The design and planning of ABMTs, including MPAs, could incorporate existing climate change (including warming, deoxygenation, acidification) syntheses and projections into evaluation of vulnerability, need for protections, and resilience. The design of ABMTs, including MPAs, could recognize that climate change-related impacts can alter habitat suitability and representativeness, redistribute species and modify biodiversity and thus designs and management should ensure replication, adaptive protection of migratory corridors, and incorporate predicted habitat shifts.<sup>364</sup>
- Any overlap between the proposed ABMT and an existing ABMT should be identified and measures for coordination proposed.<sup>365</sup>
- The proposal should not indicate any duration of the protected site.<sup>366</sup>

### *3.2.2 Consultation on and evaluation of the proposal*

- The proposal could be reviewed by a scientific and technical body, without prejudice to the sovereignty and territorial integrity of coastal States.<sup>367</sup>
- A proposal for the designation of an MPA, containing all the elements required by the Implementing Agreement, should be submitted by the proponent States and circulated to all States (not only States Parties), relevant organizations and stakeholders including civil society representatives thereby launching an initial consultation process. The duration of the consultation process should be established in the Implementing Agreement. This will allow all States - both the Parties to the agreement and non-Parties, as well as relevant organizations and stakeholders, to submit views on the MPA proposal.
  - Participation: The consultation should be inclusive, transparent and open to all relevant actors, namely:
    - All States, irrespective of whether they are parties to the implementing agreement

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<sup>362</sup> USA

<sup>363</sup> High Seas Alliance

<sup>364</sup> IUCN

<sup>365</sup> CARICOM

<sup>366</sup> Greenpeace

<sup>367</sup> G77&China

- Relevant global, regional or sectoral organizations
- Civil society, including sectoral stakeholders
- Content:
  - States should be invited to, *inter alia*:
    - i. submit views on the merits and other aspects of the proposal;
    - ii. provide any further scientific inputs considered to be relevant;
    - iii. identify circumstances that need to be considered by the decision-making body, including the existence of conservation measures in place in areas under national jurisdiction adjacent to or adjoining the proposed MPA, noting the advantages of complementarity and compatibility across jurisdictions;
    - iv. submit views on whether their rights established under UNCLOS, including the sovereign rights over their continental shelf, could be affected by the proposal.
  - Competent global, regional or sectoral organizations should be invited to, *inter alia*:
    - i. submit views on the merits and other aspects of the proposal;
    - ii. provide any further scientific inputs considered to be relevant;
    - iii. identify circumstances that need to be considered by the decision-making body, including the existence of measures adopted by the organization for the area in question or for an area adjacent to/adjoining it and the advantages of complementarity and compatibility between existing and future measures;
    - iv. identify measures, within their competence and remit to achieve the conservation objectives complementary to those which may be adopted by individual States Parties.
  - Civil society representatives should be invited to, *inter alia*:
    - i. submit views on the merits and other aspects of the proposal;
    - ii. provide any further scientific inputs considered to be relevant;
    - iii. identify circumstances that need to be considered by the decision-making body.
  - Upon conclusion of the consultation process, the proponent State(s) shall take into consideration the inputs received during the consultation, before submitting a final proposal for an initial consideration of State Parties to the implementing agreement. It might be necessary to repeat the consultation process before the proposal can be finalized, in the event that significant issues emerge during the consultations. The contributions made during the consultation process should be made public by the secretariat.<sup>368</sup>
  - Consultations between, *inter alia*, the proponent(s) of a new ABMT, other States Parties and such existing bodies should be held prior to the designation of new ABMTs, including MPAs, their long-term conservation objectives and management measures.<sup>369</sup>

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<sup>368</sup> EU

<sup>369</sup> Monaco

- A proposal for the designation of the MPA prepared by a State Party will be shared with the existing frameworks and all States Parties through the secretariat, and the existing frameworks and all State Parties, including coastal States, may submit comments on the proposal during a certain period of time. Also, consultations with the proposing State through the contact person(s) specified will be allowed.<sup>370</sup>
- The secretariat in charge of administrative duties, upon request by the proponent, makes the proposal publically available to States, relevant international, regional and sectoral bodies with mandates and competencies related to the objectives of the proposed MPA, as well as all other stakeholders. Such States, bodies and stakeholders have a time-bound period within which they can submit feedbacks and comments regarding the proposal. The secretariat collects, compiles and forwards all comments back to the proponent.<sup>371</sup>
- Based on the result of the consultation, the proposing State will revise the proposal as necessary and send the amended proposal through the secretariat to the existing frameworks and all States Parties including coastal States. Subsequently, the proposing State will send the proposal to the scientific committee.<sup>372</sup>
- The proponent can modify its proposal at all stages of the process, as appropriate, before submitting it to a competent scientific advisory body, which should advise on the proposal's compatibility with the implementing agreement's scientific criteria, as well as make other recommendations.<sup>373</sup>
- The proponent further consults with all relevant stakeholders and can modify its proposal, as appropriate, before submitting the final proposal to the decision making body for its consideration.<sup>374</sup>
- Consultation with competent bodies and all relevant stakeholders should be designed to ensure proposals are based on best available science and that views of stakeholders are taken into consideration.<sup>375</sup>
- Provide a mechanism for considering proposals for areas for protection. It could include the following:
  - a mechanism for scientific consideration and advice, which could advise on the extent to which a proposed area for protection meets the instrument's scientific criteria. This mechanism should draw input from existing processes, including coordinating with scientists in regional and sectoral bodies that have jurisdiction over potential activities in the proposed area and consulting with scientists from relevant industries that operate in the proposed area;
  - a mechanism for review of proposals and submission of comments within a time-bound period by Parties and those States and entities that are entitled to become Parties;
  - a mechanism for review of proposals and submission of comments within an appropriate and realistic time-bound period by relevant global, regional, and

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<sup>370</sup> Japan

<sup>371</sup> Monaco

<sup>372</sup> Japan

<sup>373</sup> Monaco

<sup>374</sup> Monaco

<sup>375</sup> Greenpeace

- sectoral bodies with mandates and competences related to the objectives of the proposal, where such bodies exist, and by other interested stakeholders;
- a mechanism for the proponents of proposals to consider and address to the extent possible comments received during the time-bound open and public consultation and to revise their proposals based on such input, as appropriate.<sup>376</sup>
  - Establish procedures to ensure that a scientific assessment of a draft proposal is undertaken and scientific advice informs the policy/decision-making process for the designation of areas to be protected and for the measures to be adopted. To this end, the creation of a (or the use of an existing) scientific subsidiary body, which could perform a technical evaluation of the MPA proposal, merits consideration.<sup>377</sup>
  - Designated evaluating body requests best available science on the proposed area.<sup>378</sup>
  - Establish a permanent scientific committee that assists in the review of ABMTs proposal and oversee their implementation. Key to this process is the reliability and consistency in implementing ABMTs. Establish a scientific committee under an international legally binding instrument to inform States Parties of the character, scope and appropriate placements of ABMTs using best available technology. The role of this scientific committee is to produce guidelines and recommendations on the appropriate ABMTs using best available technology. Key aspect of the role of this scientific committee is to give due consideration to the influence of climate change impacts on the suitable choice of ABMTs.<sup>379</sup>
  - A scientific committee will be established under the implementing agreement to discuss MPA proposals from a scientific viewpoint.
    - Could have a new committee under the implementing agreement, or utilize a scientific committee of the existing frameworks;
    - Could have one scientific committee covering all sea areas or multiple scientific committees with each one covering a sea area;
    - Scientists from the existing frameworks and coastal States will be able to participate in discussions at the scientific committee;
    - Decision-making at the scientific committee should be by consensus in principle;
    - Proposals on which the scientific committee reached an agreement should be sent to the COP. Proposals submitted by the scientific committee will be discussed at the COP to consider whether or not they are appropriate.<sup>380</sup>
  - A scientific committee should provide the necessary scientific inputs to inform sound decision-making under the new instrument. The scientific committee could be mandated by States to undertake a global review and identify candidates for an ecologically representative global network of MPAs and reserves in areas beyond national jurisdiction and could submit individual proposals. In this it could draw upon the work of existing bodies e.g., CBD work for describing EBSAs, IMO's work on PSSAs, FAO's work on VMEs or ISA's on APEIs. The scientific committee would review proposals and provide its views and recommendations, including on specific management measures for the proposed site.<sup>381</sup>

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<sup>376</sup> USA

<sup>377</sup> EU

<sup>378</sup> CARICOM

<sup>379</sup> Federated States of Micronesia

<sup>380</sup> Japan

<sup>381</sup> Greenpeace



- Upon submission of a proposal, a scientific committee created by the agreement, relevant regional/sectoral bodies, and stakeholders, including civil society, should be invited to submit views and recommendations on the proposal, including suggestions on specific management measures for the proposed site, within a time-bound period. The consultation process should inform the management plan, including the identification of the most effective conservation and management measures for the proposed site as well as a monitoring/research plan.<sup>382</sup>
- Should the proposal be found to have merit, then the area proposed for management and the measures to be used to conserve the area could be presented to State Parties and recognised international bodies and international governmental organization under the instrument for approval.<sup>383</sup>

### 3.2.3 Designation

- The process of designation or establishment of ABMTs shall be consistent with the purposes and principles of the UN Charter.<sup>384</sup>
- The decision on the establishment of an MPA will be taken by States Parties to the implementing agreement. In taking the decision, all efforts should be made to reach consensus.<sup>385</sup>
- Designate a competent body with the mandate to review and adopt, modify or reject proposals, resulting in formal international recognition of adopted sites.<sup>386</sup>
- Based on the information gathered during the consultation process, the decision-making body under the new agreement (e.g., COP) would adopt the proposed protected area including its boundaries, conservation objectives, and detailed management and monitoring plan, by consensus if possible and by majority voting if not.<sup>387</sup>
- Decision(s) on ABMTs should partly rest on RFMOs in order to be consistent with regional approach to conservation: RFMOs are mandated to carry out ABMTs, in particular, MPAs.<sup>388</sup>
- Provide a mechanism through which Parties and those States and entities that are entitled to become Parties could decide on the designation of a proposed area for protection.<sup>389</sup>
- On the basis of the consultation and scientific advice, a draft proposal for the designation of an MPA would be finalized for submission to the decision making body and should include the following minimum elements:
  - spatial boundaries (where is the area to be established);
  - description of the characteristics and biodiversity values of the area and the sensitivity of the species/habitats concerned (what we want to protect and to what extent it meets the criteria set in the implementing agreement);
  - description of impacts including identification of pressures and possible activities with adverse impact (what are we protecting the areas from);
  - description of (general and specific) conservation objectives (what is to be achieved with the designation);

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<sup>382</sup> Greenpeace

<sup>383</sup> CARICOM

<sup>384</sup> G77&China

<sup>385</sup> EU

<sup>386</sup> High Seas Alliance

<sup>387</sup> Greenpeace

<sup>388</sup> Fiji

<sup>389</sup> USA

- description of potential socio-economic impacts;
- a draft management plan including possibly socio-economic mitigation measures;
- a research and monitoring plan.
- The draft management plan aims to provide further details about the features of the designated MPA, as well as the potential management measures and administrative arrangements for achieving the conservation objectives. In this sense, the draft management plan should include the following elements where relevant:
  - identification of those activities and their impacts that could prevent the MPA from reaching its conservation objectives;
  - measures identified during the consultation process by competent international organizations for their consideration to tackle identified impacts of activities under their competence in order to contribute to the delivery of the conservation objectives;
  - measures addressed to States Parties, including in situations where competent international organizations do not exist, to tackle identified impacts of activities under their competence in order to contribute to the delivery of the conservation objectives;
  - the details of the communication strategy, particularly towards relevant stakeholders, to be put in place with the purpose of raising awareness about the features and objectives of the designated MPA.
- The research and monitoring plan's purpose is to support and review the implementation of the specific conservation objectives and the review process of the designated MPA. Therefore, it should include, inter alia:
  - the identification of the research and monitoring procedures to evaluate to which degree the conservation objectives are being achieved (this includes determining the nature and regularity of scientific data needed for this purpose);
  - the identification of the research and monitoring procedures to evaluate the potential adverse and cumulative impacts of specific activities and whether the managements measures are being effective;
  - the support/assistance/contribution of regional and sectoral bodies to the research and monitoring procedures, when appropriate;
  - provisions on data usage, storage and accessibility in the context of the research and monitoring plan.<sup>390</sup>
- Using the establishment of MPAs by regional seas conventions as an example, a possible process for designation, development and establishment of MPAs could be as follows:
  - A MPA proposal is presented to the appropriate regional seas convention;
  - The regional seas convention conducts a public hearing by
    - posting the proposal on its website, with a link on the DOALOS website, for anyone to react to the proposal, including States, NGOs etc;

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<sup>390</sup> EU

- sending the proposal for review specifically to other relevant bodies, such as IMO, RFMOs, other regional seas conventions, ISA and consulting relevant coastal States;
- The regional seas convention considers the proposal in relation to the requirements of the implementing agreement and relevant input from the public hearing
  - the scientific justification of the proposal is considered according to the requirements of the implementing agreement by the regional seas conventions procedures as they might be;
- The regional seas convention adopts the MPA, including any measures that fall within its competence;
- The regional seas convention announces its decision on its website with a link on the DOALOS website, including its consideration of the quality status of the marine environment, the identified ecological values, conservation goals, identification of problems, threats, pressure, etc.;
- The decision made by the regional seas convention, in accordance with the requirements of the implementing agreement, is binding on all States Parties to the implementing agreement;
- The regional seas convention, or one of its Parties, forwards the MPA decision specifically to other relevant bodies, such as IMO, RFMOs, other regional seas conventions, ISA etc. to actively engage those bodies to take complementary actions within their respective competence to strengthen the management objectives of the MPA. According to the implementing agreement, the State Parties will be under an obligation to pursue the objectives of the implementing agreement in all relevant mechanisms where they are participating;
- Other relevant bodies consider whether the activity they are managing are relevant to the conservation goals and if measures within their competence are required
  - any complimentary measures should be announced on the web site of the relevant body with a link on the DOALOS website;
- The MPA shall be on the agenda for the next State Parties meeting, providing for accountability, transparency, review and stakeholder participation
  - DOALOS prepares and presents a factual report on the designation, development and adoption of the MPA
  - the regional seas convention and other relevant bodies report on their considerations and decisions
  - States Parties, relevant bodies, NGOs etc. are given the opportunity to evaluate and scrutinize the considerations and decision of the regional seas convention and other relevant mechanisms, which will be reflected in the outcome of the State Parties meeting.
  - the issue might be followed up by later State Parties meetings
- Such a process will contribute to the establishment of multipurpose ABMTs. All relevant management mechanisms will be required to cooperate and assess whether measures are necessary within their respective mandate, and it will facilitate accountability, transparency, review and stakeholder participation. It would be based on UNCLOS, fit

well within the existing law of the sea architecture and will not undermine the competence of existing instruments and bodies.<sup>391</sup>

- If the proposed conservation and management measures are under the authority of existing frameworks dealing with such areas as (i) navigation, (ii) mining development in the Area, (iii) fishery (in the waters where RFMOs exist), (iv) regional marine area management bodies (such as OSPAR and Antarctic Treaty), those measures will not be carried out by the implementing agreement; instead, the relevant existing frameworks (IMO, ISA, RFMOs, OSPAR, etc.) will be provided with the information on the conservation and management measures recognized as appropriate by the COP and will be requested to consider whether to take such measures by themselves:
  - Article 4 of Annex V of OSPAR Convention: “1. In accordance with the penultimate recital of the Convention, no programme or measure concerning a question relating to the management of fisheries shall be adopted under this Annex. However where the Commission considers that action is desirable in relation to such a question, it shall draw that question to the attention of the authority or international body competent for that question. Where action within the competence of the Commission is desirable to complement or support action by those authorities or bodies, the Commission shall endeavor to cooperate with them. 2. Where the Commission considers that action under this Annex is desirable in relation to a question concerning maritime transport, it shall draw that question to the attention of the International Maritime Organization. The Contracting Parties who are members of the International Maritime Organization shall endeavor to cooperate within that Organization in order to achieve an appropriate response, including in relevant cases that Organization’s agreement to regional or local action, taking account of any guidelines developed by that Organization on the designation of special areas, the identification of particularly sensitive areas or other matters.”<sup>392</sup>
- When the COP recognizes the proposed measures as appropriate and the proposed measures are under the authority of an existing framework, the COP will provide information to the relevant existing framework, and will also request it to consider whether or not to take such measures. The framework in question will be requested to be present at the next meeting of the COP to report on the results of its consideration. If the framework in question decides to take different or no measures, the COP will ask the framework for consultations. The COP will duly respect the views of the existing frameworks, examine further as necessary, and endeavor to achieve the conservation and sustainable use of BBNJ through dialogue and cooperation with the relevant frameworks.<sup>393</sup>
- Provide a mechanism for consideration of potential management measures in designated areas for protection. It could include the following:
  - a process by which information about a designated area for protection and information about activities that could potentially harm or cause adverse impacts to that area are referred to relevant bodies with purview over such activities for consideration and possible management measures or other action by those bodies, including adaptive

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<sup>391</sup> Norway

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- management and, as appropriate, periodic review of any management measures implemented;
- when a designated area has multiple relevant bodies with purview over activities that could potentially harm or cause adverse impacts to that area, a process by which those bodies could coordinate and cooperate, including during the consideration of and, as appropriate, implementation of possible management measures;
  - a process by which proposed management measures for designated areas for protection that are not under the purview of another body could be developed and considered by Parties and those States and entities that are entitled to become Parties, including adaptive management and periodic review of any management measures implemented;
  - a requirement that any management measures and any enforcement of management measures are consistent with UNCLOS, including but not limited to sovereign immunity (in line with article 236) and the obligations in article 237.<sup>394</sup>
- In the absence of any existing framework that deals with the proposed conservation and management measures, it may be necessary to set up a new regional management organization with necessary expertise. In this case, the COP, will encourage the countries and organizations concerned to establish a new organization or framework and to participate in its activities.
    - Article 8. 5 of UNFSA: “Where there is no subregional or regional fisheries management organization or arrangement to establish conservation and management measures for a particular straddling fish stock or highly migratory fish stock, relevant coastal States and States fishing on the high seas for such stock in the subregion or region shall cooperate to establish such an organization or enter into other appropriate arrangements to ensure conservation and management of such stock and shall participate in the work of the organization or arrangement.”<sup>395</sup>
  - Where there is no competent body to recommend measures to address the impact of a specific activity in the proposed area, the COP, guided by the precautionary principle, should identify specific measures to meet the conservation objectives of the area, based on information regarding cumulative impacts provided by the proponents, and the consultation process.<sup>396</sup>
  - Those outside the framework of the implementing agreement such as the existing frameworks and non-contracting Parties will be allowed to join discussions at the COP as observers.<sup>397</sup>
  - The decision-making at the COP will be by consensus of the State Parties in principle; however, further examination will be conducted as to whether or not decision making by a special majority of the Parties can be accepted if necessary and whether or not expressing objection should be accepted.<sup>398</sup>
  - Decision of the relevant existing framework or the new organization will not be binding on those States that are Parties to the implementing agreement but are not members of the existing framework or the new organization.<sup>399</sup>

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<sup>394</sup> USA

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<sup>396</sup> Greenpeace

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- Decisions on ABMT should recognize ecologically significant/sensitive areas, and/or areas of interest in relation to conservation and sustainable use of biological diversity in areas beyond national jurisdiction (Areas of interest).<sup>400</sup>
- The MPA designation could include a comprehensive approach that includes consideration of climate change impacts on all vertical realms (seabed, seabed and near-bottom waters, seabed and midwater, seabed and entire water column, surface waters).<sup>401</sup>
- Decisions on ABMTs should be based on scientific data with ABMTs being universal and binding in nature (but limited to areas under the ABMTs). There may be a need for regular sessions out of this implementing agreement given the changing nature of the oceans and its uses and users.<sup>402</sup>
- Depending on the conservation objectives of individual MPAs, as well as the "vulnerability" of their features/ecosystems and the pressures on them, different levels of protection may be necessary.<sup>403</sup>
- There should be a different threshold for ABMTs (partial closure/stock specific/activity specific/full closure).<sup>404</sup>
- The designation should be for an indefinite period to ensure the long-term conservation and resilience of marine biodiversity and ecosystem services and functions, and serve as reference areas for science.<sup>405</sup>
- The designation of an MPA, its conservation objectives and the management measures cannot be considered as time-bound or temporary.<sup>406</sup>
- The designation of an MPA should be for an indefinite period (neither the establishment of an MPA nor the implementation of conservation measures should be time-bound or temporary). However, a regular review based on the research and monitoring plan should be established to allow for its updating, amendment or de-designation, in accordance with the principles and approaches set out in the implementing agreement for the establishment of an MPA. If, at a later stage, an MPA falls entirely within a maritime area under the sovereignty or jurisdiction of a coastal State, it shall cease to be in force. The coastal State may decide to adopt similar measures under its national law. In case of partial overlap its spatial boundaries will be amended accordingly.<sup>407</sup>
- MPAs are indefinite in duration and appropriately regulated to best ensure the long-term conservation of marine biodiversity and ecosystem services. A particular MPA's conservation and management plan and any specific measures applied to it may be adjusted to reflect the status of the area based on a review process.<sup>408</sup>

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<sup>400</sup> Fiji

<sup>401</sup> IUCN

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<sup>404</sup> Fiji

<sup>405</sup> Greenpeace

<sup>406</sup> Monaco

<sup>407</sup> EU

<sup>408</sup> High Seas Alliance

#### **4. Follow-up to the designation decision / implementation**

- Consider the use of either of the terms: conservation and sustainable measures (CSMs); conservation and sustainable use measures (CSUMs); or conservation and sustainable management measures (CSMMs). CSMs, CSUMs, or CSMMs, should provide agreed targets for achieving broad objectives of ABMTs including MPAs.<sup>409</sup>
- The secretariat notifies States Parties and those who are not Parties, relevant international, regional and sectoral bodies, as well as all other stakeholders including the general public of the establishment of a new MPA, as well as its objectives, its management measures and the monitoring and review plan.<sup>410</sup>
- Upon designation, the secretariat of the new agreement should inform relevant regional/sectoral bodies of the new MPA, its boundaries, objectives, management and monitoring plan and call on their members to take the necessary action with regards to activities under their competence within a set period of time. Parties should commit to use their best efforts to ensure the adoption of necessary measures by competent regional or global bodies in which they are members.<sup>411</sup>
- The Parties to the implementing agreement and the relevant existing frameworks will cooperate as much as possible within the relevant framework(s) in order to facilitate these existing frameworks duly respecting the agreement of the Conference of the Parties and taking appropriate conservation and management measures.<sup>412</sup>
- In line with the principles of international law, it will be the responsibility of States Parties to the implementing agreement to implement the management measures established in the adopted management plan with respect to activities and processes under their jurisdiction which impact on the conservation objectives of an MPA. Where a State Party is a Party to a relevant competent organization with a competence to manage such activities, the State Party should also promote, support and agree to necessary measures within that organization.<sup>413</sup>
- States Parties have primary responsibility for implementing the MPA management measures with respect to activities under their jurisdiction or control (i.e. as a flag State).<sup>414</sup>
- Parties would have the primary responsibility to implement the agreed conservation and management measures for nationals, vessels, and activities under their jurisdiction and control.<sup>415</sup>
- Nothing in the implementing agreement should prevent State Parties from adopting additional and stricter measures from those adopted by the competent international organizations with respect to their vessels or with regard to activities and processes under their control and jurisdiction.<sup>416</sup>
- The measures to be taken by the existing framework or the new management organization in response to the agreement reached at the COP will also be binding upon all State Parties which

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<sup>409</sup> Fiji

<sup>410</sup> Monaco

<sup>411</sup> Greenpeace

<sup>412</sup> Japan

<sup>413</sup> EU

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<sup>415</sup> Greenpeace

<sup>416</sup> EU

agreed to these measures at the COP of the implementing agreement, including non-members of the existing framework or the new management organization – e.g. article 8.3 UNFSA.

- “Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement [...]”<sup>417</sup>
- While the management plan will not be applicable to non-Parties of the implementing agreement, they should be notified of the designation and invited to consider implementing appropriate management measures for activities and processes under their jurisdiction having an impact on the conservation objectives of the MPA (also taking into account general obligations under article 197 of the UNCLOS and under customary international law). States that are not parties to the agreement should be invited to consider adopting measures in line with those included in the management plan, where applicable, to support the objectives of the MPA.<sup>418</sup>
- States that are not Parties and existing bodies would be requested to implement all appropriate complementary measures within their respective jurisdictions and competencies to further advance the achievement of the objectives of the MPA. To that end, States Parties can work within the relevant organizations of which they are members to pursue, develop and implement such complementary measures.<sup>419</sup>
- Parties should, individually or collectively, request non-Contracting Parties whose activities, vessels or nationals operate in the protected areas to become Parties to the agreement or to cooperate fully in the implementation of conservation and management measures adopted by the agreement. Nothing should prevent Parties or competent bodies from implementing more stringent conservation measures in relation to their nationals, vessels, and activities under their jurisdiction and control.<sup>420</sup>
- Competent international organizations should be invited to adopt specific measures necessary to achieve the conservation objectives of the new instrument. They could also be requested to develop and implement “biodiversity strategies and action plans” (akin to what is already called for at the national level under CBD article 6) as a tool to integrate biodiversity considerations into management and decision-making.<sup>421</sup>
- Where there are no bodies with a mandate for the conservation or sustainable use of marine biodiversity in a particular sector or geographic area, the implementing agreement should encourage the establishment of relevant bodies within a specific timeframe in the same way that UNFSA led to the establishment of new RFMO/As.<sup>422</sup>

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<sup>417</sup> Japan

<sup>418</sup> EU

<sup>419</sup> Monaco

<sup>420</sup> Greenpeace

<sup>421</sup> High Seas Alliance

<sup>422</sup> Norway



**5. Relationship to ABMTs, including MPAs, established prior to the instrument, under relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, or by adjacent coastal States**

- Establish a procedure that would provide for complementary measures for ABMTs which already exist in an area, or the recognition of existing MPAs that occur in areas beyond national jurisdiction provided that they comply with the criteria adopted in the implementing agreement. This recognition should build upon the work that has been done by these global, regional/or sectoral bodies while not undermining the decisions made by those bodies.<sup>423</sup>
- MPAs identified by regional bodies with a mandate to establish MPAs in areas beyond national jurisdiction should be included in the network of MPAs created under the implementing agreement, provided that they meet the criteria adopted in the implementing agreement.<sup>424</sup>
- ABMTs must acknowledge and respect efforts by regional and subregional institutions managing certain areas beyond national jurisdiction as sanctioned by UNCLOS. Allow for regional and subregional institutions to operate towards implementing conservation and management measures of BBNJ.<sup>425</sup>
- ABMTs are not designed to compete and undermine, but rather complement existing regulations. ABMTs must not undermine existing regulations that are implemented by RFMOs and SRFMOs.<sup>426</sup>
- Nothing in the new implementing agreement should prevent RFMOs from establishing their own ABMTs, including MPAs.<sup>427</sup>
- Parties individually or collectively through relevant organizations should be able to propose existing protected areas that have been designated under regional or global agreements, as long as they comply with the relevant criteria and the proposal should include all the above elements.<sup>428</sup>
- A process for the recognition under the implementing agreement of existing MPAs in areas beyond national jurisdiction established by other organizations (e.g. by regional seas organizations) should be included in the agreement. Considering that best available scientific advice has been incorporated in these existing high seas MPA processes at regional levels (e.g. OSPAR, CCAMLR and Barcelona Convention), the COP could have the option to adopt them directly without reference to SBSTA, unless there is a need for further scientific input. The secretariat would then facilitate consultation with the implementing agreement Parties and stakeholders prior to the official adoption of any such MPAs by COP.<sup>429</sup>
- Other types of sectoral ABMTs (e.g. RFMO VME closures, IMO PSSAs, or ISA APEIs) would not require a formal global recognition process, but should be informed to the COP and included in the clearing-house mechanism and information-sharing mechanism. These should also be integrated in ecosystem-based integrated oceans management plans or marine spatial plans, and analysis of potential pressures, stressors or impacts on these areas should be fully

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<sup>423</sup> EU

<sup>424</sup> EU

<sup>425</sup> Federated States of Micronesia

<sup>426</sup> Federated States of Micronesia

<sup>427</sup> Fiji

<sup>428</sup> Greenpeace

<sup>429</sup> WWF

integrated into SEAs and EIAs. Where appropriate, they could be introduced into the MPA process if deemed likely to contribute to establishing representative networks.<sup>430</sup>

- It will be important to ensure that area based management measures are made in a manner that takes account of action related to conservation and sustainable use of marine biodiversity taken by States within their national jurisdiction, and the interests of those coastal States adjacent to areas beyond national jurisdiction in effective and coherent oceans governance.<sup>431</sup>

## **6. Capacity-building and transfer of marine technology**

- Include necessary support to implement SIDS' rights and obligations under the new instrument, including technical, scientific and funding support in the development of proposals, review of proposals, development of management measures, and monitoring of ABMTs.<sup>432</sup>
- Provisions to avoid the transfer of disproportionate conservation burden on these countries are also critical – article 7 of the UNFSA on compatible conservation measures provides a useful example.<sup>433</sup>
- Establish clear obligations on developed parties to assist in the establishment of necessary management mechanisms in cases where the lack of mechanisms is due to lack of funding or capacity. One could imagine State-to-State cooperation between oceans management administrations in developed and developing countries as well as cooperation between regional seas conventions.<sup>434</sup>

## **7. Monitoring and review**

- Without prejudice to the consideration whether an ABMT should be time-framed or not, the ABMT should be kept under review and be monitored on the basis of best available science and within the objective to conserve and sustainably use marine biological diversity.<sup>435</sup>
- ABMTs should be monitored and reviewed against the objectives identified. The new instrument should establish reporting obligations and timeframes for review. On the latter, it should accommodate for exogenous factors such as climate change.<sup>436</sup>
- A regular review process should be established through the implementing agreement to assess the effectiveness of MPAs and associated measures pursuant to the management plan, established under the implementing agreement and the progress made in reaching its conservation objectives in order to inform any adaptation required to the management plan. This process should take into consideration the scientific data and information gathered/provided by States, regional and sectoral bodies in the context of their research and monitoring responsibilities as laid out in the monitoring plan, as well as by relevant global and regional processes and frameworks (e.g. the World Ocean Assessment) and civil society.<sup>437</sup>

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<sup>430</sup> WWF

<sup>431</sup> Australia

<sup>432</sup> AOSIS

<sup>433</sup> AOSIS

<sup>434</sup> Norway

<sup>435</sup> G77&China

<sup>436</sup> CARICOM

<sup>437</sup> EU

- Management of ABMTs and MPAs should be adaptive, including regarding their conservation and management measures, that should be reviewed at set intervals and that could be updated, as appropriate.<sup>438</sup>
- The management measures and the progress towards the achievement of the MPA's objectives shall be reviewed at set intervals, on the basis, inter alia, of reports from States Parties.<sup>439</sup>
- States Parties and competent global, regional or sectoral organizations should be required to report regularly on the implementation of the measures for activities under their purview pursuant to the management plan. To this end, the implementing agreement should provide for standardized reporting, with an associated time frame for reporting. Such reports should be made publicly available.<sup>440</sup>
- Mandate regular reporting by States, including through relevant regional and sectoral bodies, in accordance with requirements established under the implementing agreement, to the COP.<sup>441</sup>
- After the designation of ABMTs, including MPAs, reporting and review should encompass the progress made within existing bodies towards the achievement of their objectives.<sup>442</sup>
- Competent international organizations should be invited to regularly report on their progress.<sup>443</sup>
- The Progress made within other relevant organizations should also be considered.<sup>444</sup>
- Provide a mechanism for issuing notifications of proposed and designated areas for protection, soliciting comments, compiling and disseminating comments submitted during review, and referring information about activities that could potentially harm or cause adverse impacts to a designated area to relevant bodies.<sup>445</sup>
- Reports can be addressed to the secretariat that will make them available to a competent scientific advisory body for its consideration and recommendations as appropriate, to all States Parties for consideration and decision if necessary, as well as to the general public, for information.<sup>446</sup>
- Relevant information about the progress being made on MPA initiatives as well as the implementation of MPAs at the regional level would be submitted to the COP to demonstrate how the objectives of the Implementing Agreement were being implemented.<sup>447</sup>
- There might be some value in establishing scientific or technical advisory committee(s), as done under the Specially Protected Areas and Wildlife Protocol, that could have a monitoring and reviewing role.<sup>448</sup>
- A scientific committee would be involved in the scientific monitoring of the areas, also by delegating this function to regional bodies where possible and appropriate, and in the regular review of the effectiveness of the sites, their management measures and progress in meeting their conservation objectives.<sup>449</sup>

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<sup>438</sup> Monaco

<sup>439</sup> Monaco

<sup>440</sup> EU

<sup>441</sup> New Zealand

<sup>442</sup> Monaco

<sup>443</sup> High Seas Alliance

<sup>444</sup> Monaco

<sup>445</sup> USA

<sup>446</sup> Monaco

<sup>447</sup> New Zealand

<sup>448</sup> CARICOM

<sup>449</sup> Greenpeace

- Set up a framework for the effective monitoring and follow up of decisions, including a regular reporting and review mechanism and a strong compliance system.
  - there should be a mechanism under the new agreement for a global monitoring, control and surveillance (MCS) system for areas beyond national jurisdiction to ensure that protected areas are meeting their objectives and to identify violations by vessels as well as cases of regular non-compliance. This mechanism should facilitate information sharing and joint operations between existing MCS systems;
  - The implementation of the scientific monitoring could be delegated to appropriate regional bodies when possible as long as they meet the standards set by the new agreement;
  - In addition, the new agreement should set up a regular reporting and review process whereby:
    - parties and relevant regional or global bodies should report back regularly on the implementation of conservation and management measures. These reports should be publicly available.
    - a regular review process should incorporate input from the scientific committee established under the new agreement, all relevant regional or global bodies, and stakeholders, including civil society, as well as information gathered through the global MCS system regarding the effectiveness of the protected areas, their conservation and management plans and progress toward their objectives.
    - the review process should publish a progress report and identify any shortcomings by Parties, non-Parties, and regional or global bodies, affecting the effectiveness of the measures adopted by the agreement.<sup>450</sup>
  - The agreement should establish a compliance mechanism. Following the outcome of the review process, Parties, stakeholders, including civil society, as well as the compliance committee itself, may submit a report of non-compliance. When a Party or a non-Party is identified to have failed to discharge its obligations under the new agreement or, in the case of non-Parties, under international law, to co-operate on the protection and preservation of the marine environment, by not taking measures or exercising effective control to ensure that its vessels or nationals do not engage in any activity that undermines the effectiveness of the agreement's conservation measures, the compliance committee should make recommendations on ways to rectify their acts or omissions. The non-complying Party and non-Party should be notified and offered a reasonable time to respond to the alleged non-compliance and rectify its actions or omissions. When necessary, the new agreement should adopt measures to facilitate compliance (e.g. technical assistance and capacity building) based on recommendations from the compliance committee. If the Party or non-Party in question continues to undermine the effectiveness of the protected area, and/or if the ecosystem or any of its components under protection is under serious threat, the Parties to the agreement

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<sup>450</sup> Greenpeace

should adopt appropriate responsive measures. The responsive measures should be designed to ensure that the conservation objectives of the area are met.<sup>451</sup>

- The review process should publish a progress report and identify any shortcomings by Parties, non-Parties, and also by regional or global bodies, affecting the effectiveness of the measures adopted by the new agreement.<sup>452</sup>
- Stakeholders should also have a role in the regular review process and send their views on the effectiveness of the sites, their conservation and management measures and progress in meeting their objectives. They should also be able to submit reports of non-compliance when a Party (or non-Party) fails to act consistently with the new agreement.<sup>453</sup>
- The conservation objectives and/or the management measures can be updated, if and when necessary, based on best available scientific information and recommendations from a competent scientific advisory body.<sup>454</sup>
- The conservation and management plan and measures may be adjusted to reflect the status of the area based on the review process and the findings of the monitoring and research plan.<sup>455</sup>

### **E. ENVIRONMENTAL IMPACT ASSESSMENTS**

- EIAs should contribute to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.<sup>456</sup>
- Establish principles governing EIAs, thresholds for triggering EIAs, standards for impact statements, and provisions for reviewing, monitoring and reporting. These parameters could equally apply to SEAs. The structure of the Espoo Convention could be referenced in developing the provisions for the new BBNJ instrument.<sup>457</sup>
- Include criteria for the undertaking by State Parties of an EIA or SEA in general. In particular, include thresholds or criteria for the screening of activities to determine if they should be assessed, and the type and amount of information to be included in the assessment reports for activities that may cause significant and harmful changes to the marine environment in areas beyond national jurisdiction.<sup>458</sup>
- Establish best practice global standards for how to conduct EIAs, to avoid and mitigate harmful impacts on identified marine ecosystems and values. Requirements for minimum content of assessment reports, for quality control and public availability, including on: activity description; baseline information and duration of proposed activities; severity of impacts; methods used and uncertainties; proposed mitigation measures; and monitoring plans. Stakeholders should have an opportunity to provide inputs before decisions are made, and final decisions and responsibilities should be left with flag States. To aid decision making, standard conditions can be usefully developed. Different levels of depth and complexity for EIAs might be warranted

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<sup>451</sup> Greenpeace

<sup>452</sup> Greenpeace

<sup>453</sup> Greenpeace

<sup>454</sup> Monaco

<sup>455</sup> Greenpeace

<sup>456</sup> Chair's understanding on environmental impact assessments

<sup>457</sup> CARICOM

<sup>458</sup> EU

depending on the scale of the project or impact- and standards/guidance could be developed for this.<sup>459</sup>

- Internationally agreed upon standards, such as those found in the Espoo Convention, should provide the starting point for discussions on this topic, particularly in considering relevant definitions and information provided in the EIA reports.<sup>460</sup>
- Elaborate the provisions of article 206 in detail and develop general guidelines for EIAs as a subordinate document of the implementing agreement. State Parties to the implementing agreement should conduct EIAs in accordance with the guidelines in good faith.<sup>461</sup>
- A new global framework for EIAs in areas beyond national jurisdiction should:
  - provide for a central repository of publicly available data and information on EIAs, SEAs, and baseline data on areas beyond national jurisdiction;
  - provide guidance on the use of SEAs;
  - provide for coordination of information between countries, regions, sectoral, global and regional organizations, and relevant scientific bodies to facilitate the preparation, decision-making, monitoring and review of EIAs. This would help with transparency, accountability, effectiveness, and complement, not duplicate, the roles of existing international, regional or sectoral organizations; and
  - provide guidance to Parties on effectively implementing existing UNCLOS obligations relating to EIAs and improve coordination and implementation of EIAs.<sup>462</sup>
- This section could set out the process for conducting EIAs consistent with article 206 of UNCLOS. Key issues that will have to be addressed during development of this section include:
  - Should a new BBNJ instrument attempt to clarify what is meant by "substantial pollution of or significant and harmful changes to the marine environment?"
  - How should transboundary effects be taken into account?<sup>463</sup>
- The recommendations of the CBD's Revised Voluntary Guidelines for the Consideration of Biodiversity in Environmental Impact Assessments and Strategic Environmental Assessments in Marine and Coastal Areas (UNEP/CBD/COP/11/23) could be incorporated by reference, as well as other generally accepted minimum standards and EIA criteria. The criteria and guidance provided by the FAO International Guidelines on Deep-Sea Fisheries in the High Seas should also be incorporated, and the SBSTA could be tasked in developing further specific guidance to ensure coherence and to fill any gaps.<sup>464</sup>

### **1. *Obligation to conduct EIAs***

- Include the obligation, as provided in article 206 of UNCLOS, that when 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, as far as practicable, assess the potential effects of such activities on the marine environment, with public involvement in the assessment process.<sup>465</sup>

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<sup>459</sup> Australia

<sup>460</sup> Canada

<sup>461</sup> Japan

<sup>462</sup> New Zealand

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<sup>465</sup> USA

- Include an obligation to conduct EIAs. According to UNCLOS articles 204-206 the duty to conduct EIAs rests with the State under whose jurisdiction or control the activity in question takes place. The purpose of including provisions on EIAs in the implementing agreement must be to operationalize this duty.<sup>466</sup>
- A State Party to the implementing agreement should be responsible for deciding, based on the thresholds or criteria included in the agreement that an environmental assessment is required. Accordingly, a State Party should:
  - be required to ensure that EIAs are carried out, according to the agreed criteria, prior to engaging in or authorizing activities that may cause substantial pollution of or other significant and harmful changes ("harmful effects") to the marine environment in areas beyond national jurisdiction;
  - ensure that any such harmful effects are identified and taken into account in any decision making process and such activities are consistent with States' obligations under the UNCLOS to protect and preserve the marine environment, including through the adoption of suitable measures to prevent or mitigate any such harmful effects;
  - following the principle of due diligence linked to the requirement of article 204 of the UNCLOS, monitor the effects of activities (including policies, plans and programs) carried out after an environmental assessment and the compliance with any conditions (such as prevention, mitigation or compensation measures) related to their authorization;
  - make reports publically available on environmental assessments and on subsequent measures and monitoring results.<sup>467</sup>
- States are responsible for meeting their obligations under UNCLOS, and as Parties to an implementing agreement, would be responsible for ensuring that EIAs are conducted by them in accordance with agreed criteria and processes.<sup>468</sup>
- States should retain final decision-making authority with regard to the authorization of activities requiring EIAs, taking place in areas beyond national jurisdiction and which fall under their jurisdiction. States should be responsible for ensuring that EIAs are undertaken when required. Cooperation among States should be encouraged to mitigate the possible issue of 'flags of convenience' for those wishing to undertake activities with a high risk of significant adverse environmental impacts.<sup>469</sup>
- Responsibility for conducting EIAs to rest primarily with flag States. Under this approach, the EIA is being conducted by the operator under the flag States' oversight and review.<sup>470</sup>
- In areas beyond national jurisdiction the responsibility to conduct EIAs would primarily rest with the flag State, but responsibility could also fall on another State being responsible for the planned activity. In addition, relevant international organizations with mandates on the high seas, including ISA and RFMOs, may have competence as regards EIAs in areas beyond national jurisdiction within specific sectors and/or areas. Thus, under the implementing agreement States should be obliged to conduct EIAs either directly or through relevant global, regional or sectoral bodies.<sup>471</sup>

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<sup>466</sup> Norway

<sup>467</sup> EU

<sup>468</sup> New Zealand

<sup>469</sup> Canada

<sup>470</sup> Australia

<sup>471</sup> Norway

- Under a number of international and national regulations EIAs are conducted by the entity that intends to undertake the activity in question. The best result is often achieved when there is a close link between the EIA and the activity. However, it is still for the responsible State to make sure that the assessment is being made and to decide on whether or not the activity should be allowed and on what conditions.<sup>472</sup>
- States Parties should be required to ensure that an EIA is conducted, in accordance with the terms of the Instrument, prior to permitting any activity under their jurisdiction or control that may have a significant adverse impact on the marine environment in areas beyond national jurisdiction or is listed in an annex of activities presumed to have such impacts. Although the EIA may be carried out by the project proponent or its designee, it would be the responsibility of the State (or States) with jurisdiction over the proponent – by reason of flag, nationality, or beneficial ownership - to ensure that the EIA is conducted pursuant to the terms of the implementing agreement.<sup>473</sup>

## 2. Guiding principles and approaches

- The following guiding principles and approaches were suggested:
  - Precautionary principle / approach<sup>474</sup>
  - Ecosystem approach<sup>475</sup>
  - Ecosystem based approach<sup>476</sup>
  - Science-based approach<sup>477</sup>
  - Transparency in decision-making<sup>478</sup>
  - Inter- and intra-generational equity<sup>479</sup>
  - Responsibility to protect and preserve marine environment<sup>480</sup>
  - Stewardship<sup>481</sup>
  - No-net-loss principle<sup>482</sup>
- EIA must reflect upon existing international law principles, including transboundary environmental impact assessment.<sup>483</sup>
- *“In order to maintain the health and resilience of marine biodiversity in ABNJ, activities in ABNJ shall be planned and conducted so as to avoid significant adverse impacts on marine biological diversity and on the marine environment, taking into account the principles of precaution, transparency, stewardship, and integrated, cross-sectoral ecosystem based management, and applying best available science.”*<sup>484</sup>

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<sup>472</sup> Norway

<sup>473</sup> High Seas Alliance

<sup>474</sup> EU, High Seas Alliance / G77&China, Canada,

<sup>475</sup> G77&China, High Seas Alliance

<sup>476</sup> Canada

<sup>477</sup> G77&China, Canada, High Seas Alliance

<sup>478</sup> Chair’s understanding on environmental impact assessments, G77&China, High Seas Alliance

<sup>479</sup> G77&China

<sup>480</sup> G77&China

<sup>481</sup> High Seas Alliance

<sup>482</sup> EU

<sup>483</sup> Federated States of Micronesia

<sup>484</sup> High Seas Alliance



### 3. *Activities for which an EIA is required*

- The obligation relates to planned activities under the jurisdiction or control of States.<sup>485</sup>
- States shall assess potential effects of planned activities and publish reports of the results of such assessments.<sup>486</sup>
- Articulate when proposed activities in areas beyond national jurisdiction trigger the need for an EIA. These could be based on one or more of the following options:
  - activities in areas beyond national jurisdiction not already covered by existing obligations and agreements;
  - specified activities listed in the new implementing agreement; and/ or
  - all activities reaching and/or exceeding an agreed threshold of effects.<sup>487</sup>
- Identify the scope of "planned activities" for which EIAs would be conducted. It could include a provision stating that planned activities under a State's jurisdiction or control are those where the State exercises effective control over a particular activity or the State exercises jurisdiction in the form of licensing or funding a particular activity, and not simply activities conducted by a vessel flying a State's flag.<sup>488</sup>
- EIA must be mandatory for all proposed BBNJ activities. No minimum threshold of impact will be required.<sup>489</sup>
- According to some instruments, for instance the Espoo Convention, some activities always require EIAs, whereas EIAs for other activities depend on the possible impact based on size of activity, location and effects, cf. for instance Espoo Appendix III. It should be explored whether under the implementing agreement some activities should always require EIAs.<sup>490</sup>
- Unnecessary to conduct another EIA under the implementing agreement in relation to activities for which an EIA is conducted appropriately under the existing frameworks. Ways and means should be considered to avoid overlaps, such as establishing a clear provision to this effect.<sup>491</sup>
- No activity should be seen as by definition exempt. Initial assessment will be required to determine whether significant impacts are likely and formal EIA assessment and reporting are required as a result. SEAs are also a way to ensure cumulative impacts do not exceed significant impacts.<sup>492</sup>
- An EIA regime under the implementing agreement should set a defined threshold(s) for environmental impacts that would trigger a requirement to undertake an EIA. The implementing agreement should set thresholds at a level that captures impacts that are significant or greater. Following existing treaty formulations, the implementing agreement may characterize 'significant impacts' as activity that is likely to have significant adverse effects on biological diversity, or may cause substantial pollution of, or significant harmful changes to, the marine environment. Thresholds based on UNCLOS article 206, complemented by an illustrative list of activities.<sup>493</sup>

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<sup>485</sup> Norway

<sup>486</sup> Norway

<sup>487</sup> New Zealand

<sup>488</sup> USA

<sup>489</sup> Federated States of Micronesia

<sup>490</sup> Norway

<sup>491</sup> Japan

<sup>492</sup> Australia

<sup>493</sup> Australia

- In order to trigger a conduct of EIAs, qualitative threshold such as “reasonable grounds to believe that a proposed activity may cause significant and harmful changes to the environment” could be used. Explore a list of activities which require an EIA or/and can be exempt from an EIA requirement in order to determine the necessity of having such a list of activities to complement the qualitative threshold. If there is a necessity to have such list, it must be possible to review or to update it.<sup>494</sup>
- The implementing agreement should help operationalise generic formulae such as “reasonable grounds for believing that planned activities [...] may cause [...] significant and harmful changes” (article 206 UNCLOS), including through setting thresholds or criteria.<sup>495</sup>
- Article 206 of UNCLOS sets the threshold of an EIA; it provides that an EIA will be conducted “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 the marine environment.”<sup>496</sup>
- The applicable threshold, that is the starting point for the implementing agreement, is activities that: “*may cause substantial pollution of or significant and harmful changes to the marine environment*”.<sup>497</sup>
- The CBD COP 8 Decision VIII/28 “Voluntary guidelines on biodiversity-inclusive impact assessment” may provide useful options for this part of the BBNJ instrument. However, it would be preferable to have EIAs for activities with ‘more than a minor or transitory effect’ as per the Environment Protocol of the Antarctic Treaty System.<sup>498</sup>
- Triggering conditions and thresholds for carrying out EIAs and SEAs could include activities with the potential for significant adverse impacts, recognizing the increasingly vulnerable state of marine ecosystems and resources from climate induced changes, including from ocean acidification.<sup>499</sup>
- Include a threshold where an activity has the potential for “significant adverse effects, or alternatively, as utilized in the Madrid Protocol, a preliminary threshold of a “minor or transitory impact” that leads to a multi-layered approach to assessment with increasing requirements based on the level of potential harm. It is also important that screening and scoping criteria take into account possible cumulative effects, including those resulting from climate change, ocean acidification, and deoxygenation that may increase the significance of the effect of proposed projects.<sup>500</sup>
- All activities are to be assessed against a threshold-based approach that would be contained in an annex to the agreement. This would be based on the likelihood of significant adverse impacts (individually or combined) to occur on marine ecosystems, marine biodiversity and ecosystem services. The geographical area (and ecological relevance, considering presence of e.g. EBSAs, VMEs, PSSAs, IBAs, IMMA, ecological corridors) where the effects of the proposed activity are likely to occur should also play a role in determining the threshold.<sup>501</sup>

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<sup>494</sup> G77&China

<sup>495</sup> EU

<sup>496</sup> Japan

<sup>497</sup> Norway

<sup>498</sup> CARICOM

<sup>499</sup> IUCN

<sup>500</sup> High Seas Alliance

<sup>501</sup> WWF

- In order to trigger a conduct of EIAs, qualitative threshold such as “reasonable grounds to believe that a proposed activity may cause significant and harmful changes to the environment” could be used. Explore a list of activities which require an EIA or/and can be exempt from an EIA requirement in order to determine the necessity of having such a list of activities to complement the qualitative threshold. If there is a necessity to have such list, it must be possible to review or to update it.<sup>502</sup>
- There could be an indicative list of activities that present significant adverse effects and therefore would require EIAs.<sup>503</sup>
- Another complementary approach is to provide a list of activities in an Annex that would always require an EIA, such as found in the Espoo Convention. When applying a list approach, it is important that the list be adaptable over time to reflect new and emerging uses. A combination of the tiered threshold approach and a list approach could be adopted.<sup>504</sup>
- The instrument should also apply to activities organized in or proceeding from the territory of States Parties, as is the case with the Antarctic Treaty in article VII.5. Such a requirement would be consistent with UNCLOS article 194.2 and would assist States to implement their obligations under international law including CBD article 14 with respect to processes and activities under their jurisdiction or control.<sup>505</sup>

#### **4. EIA process<sup>506</sup>**

- The implementing agreement should:
  - establish general rules and procedures for:
    - the undertaking by States Parties of environmental assessments of planned projects, policies, plans and programs, as appropriate, under their jurisdiction or control;
    - the reporting on the outcomes of those assessments;
  - include a process for conducting environmental assessments in areas beyond national jurisdiction. There is an emerging consensus on the usefulness of such a process consisting of screening, scoping, impact analysis, mitigation and impact management, and reporting;
  - at various stages in the process, there should be access to information (including environmental information), public notification and consultation at the global level, including the identification and participation of stakeholders and consultation with relevant States.<sup>507</sup>
- Inclusive public consultation as part of the EIA process.<sup>508</sup>
- EIA must be conducted in a fair, transparent, consultative, and standardized manner. EIA must be governed by globally accepted standards in conducting it, in reviewing its outcome, and in making decisions to approve it.<sup>509</sup>

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<sup>502</sup> G77&China

<sup>503</sup> CARICOM

<sup>504</sup> High Seas Alliance

<sup>505</sup> High Seas Alliance

<sup>506</sup> See also section IV on institutional arrangements

<sup>507</sup> EU

<sup>508</sup> Canada

<sup>509</sup> Federated States of Micronesia

- A mechanism must govern the conduct of EIA through uniform guidelines prescribed by an international body that will be responsible in maintaining fairness and transparency in the EIA process.<sup>510</sup>
- Procedural steps for a conduct of EIA:
  - Screening – in order to trigger a conduct of EIAs, qualitative threshold such as “reasonable grounds to believe that a proposed activity may cause significant and harmful changes to the environment” could be used. Explore a list of activities which require an EIA or/and can be exempt from an EIA requirement in order to determine the necessity of having such a list of activities to complement the qualitative threshold. If there is a necessity to have such list, it must be possible to review or to update it;
  - Scoping – there is a need to identify which potential impacts are relevant to assess. To this end, some standard components of an EIA, such as the description of the proposed activity; the potential environmental impact of that activity, including specific information necessary for identifying and assessing the environmental effects of the proposed activity; and a description of the proposed measures to mitigate the predicted adverse impact should be included;
  - Assessment and evaluation of impacts - an assessment of the potential impacts of the proposed activities in every dimension should be taken into account. The related evaluation and analysis of the risks and potential impacts or effects of the proposed activities to marine environment should be done on the basis of recognized scientific methods;
  - Reporting of the environmental impact statement – consistent with article 205-206 UNCLOS, the reports of the results of the assessments shall be published and communicated;
  - Review / Monitoring – consistent with article 204 UNCLOS States shall keep under surveillance the effects of any activities being undertaken following the positive outcome of any EIA.<sup>511</sup>
- Provide an obligation for the proponent of a proposed activity in areas beyond national jurisdiction to notify the State under whose jurisdiction the proponent falls. The activity is then screened to determine whether it meets the threshold triggering an EIA. Any State that could be affected by the proposed activity should so be notified. If the threshold is met, then an EIA is conducted in accordance, at the minimum, with international standards and made publicly available through the mandated channel under the BBNJ instrument. To ensure environmental integrity, the EIA should be subject to a technical expert review, with recommendations on whether or not the activity should proceed. For purposes of transparency, it would be appropriate if the independent assessment is made public as part of any consultative process. If there is any objection to the assessment, this could be the subject of appeal.<sup>512</sup>
- Process of an EIA should be as follows:
  - formulation of a draft activity by a proponent;
  - decision on the necessity of an EIA by each State Party;
  - formulation of a draft EIA (including items to be assessed and methods to be adopted);
  - publication of a draft EIA;

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<sup>510</sup> Federated States of Micronesia

<sup>511</sup> G77&China

<sup>512</sup> CARICOM

- implementation of an EIA;
- preparation and publication of an EIA report;
- implementation of an activity reflecting outcomes of an EIA;
- monitoring and publication of outcomes.<sup>513</sup>
- A possible procedure could include the following elements:
  - development of a draft EIA;
  - draft EIAs is submitted to a central repository/DOALOS for publication and invite relevant stakeholders to comment on the draft within a set deadline;
  - the EIA is finalized, based on the draft EIA and comments received;
  - the final EIA is approved and a decision is made as to whether the activity may be carried out and on what conditions;
  - final EIA and decision to be sent to the central repository/DOALOS;
  - the implementing agreement should include an obligation to monitor the activity and its impact on the marine environment;
  - any completed EIA should be included in a report to the State Parties Meeting. States Parties, relevant bodies, NGOs etc. are given the opportunity to evaluate and scrutinize the assessments, considerations and decisions;
  - The procedure outlined above will require secretariat support from DOALOS to take on the role as the “repository” and to ensure the flow of information in the EIA process;
  - The obligation to conduct and decide on an EIA will rest with the responsible State, directly or through relevant mechanisms where they are participating. Transparency, accountability and stake holder scrutiny could be ensured through the States Parties Meeting under the implementing agreement.<sup>514</sup>
- This section could set out the process for evaluating planned activities and conducting EIAs. It could include the following:
  - a provision that each State determine if a planned activity under its jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment;
  - affirming that if, in the State's judgment, the planned activity will not have such an effect, no EIA need be conducted; and affirming that such a decision is not subject to review by any outside entity or process;
  - criteria for an EIA that follow international best practices, including the identification of reasonable alternatives to the planned activity (including a "no action" alternative); consideration of mitigation and monitoring; and consideration of direct, indirect, and cumulative impacts;
  - a provision affirming that the obligation to conduct an EIA is an obligation to consider the potential effects of the proposed activity, alternatives, and mitigation measures, not an obligation to choose any particular alternative or mitigation measure;
  - a provision affirming that neither the EIA itself nor the State's decision based on the EIA would be subject to review by any outside entity or process;
  - a provision stating that the EIA could be carried out by a third party, such as a research institution or a private company, under the direction and control of the State;

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<sup>513</sup> Japan

<sup>514</sup> Norway

- a provision that EIAs should be shared with competent international organizations and otherwise made available to interested States;
- public engagement process: this section could outline the public engagement process. It could include a provision that the public, States, and international organizations be given an opportunity for comment on documents provided to the public during the EIA process.<sup>515</sup>
- The SEA/EIA process suggested includes the following steps:
  - SEA is prepared by the SEA/EIA administrative oversight committee and/or regional committee in collaboration with SBSTA and the competent organizations identifying trends/scenarios in uses and activities in a given (bio)region. The SEA in this case would serve as a regional environmental assessment where cumulative effects of different activities and thresholds for individual activities effects as well as cross-sectoral conflicts could be identified. SEA information and outcomes would need to be subject to regular review;
  - Individual EIAs in the region under consideration would be guided by the outcome and information resulting from SEAs/regional environmental assessments. Proponents of projects or activities likely to affect BBNJ in the region under consideration would have to submit an environmental impact statement, based on guidelines provided by the respective SEAs/regional environmental assessments, to relevant responsible States which need to have national capacities in place to assess the likelihood of significant adverse impacts on BBNJ. States parties would then be responsible for submitting a project proposal for a screening phase conducted by the relevant body in cooperation with SBSTA;
  - If concluded that an EIA is required, the commonly known steps of an EIA procedure would then need to be conducted, with the level of assessment proportionate to the likely scale of impacts based on application of relevant guidelines, namely:
    - scoping by the relevant body (assisted by SBSTA, SEA/EIA administrative oversight committee with the involvement of the regional committees and/or competent organizations as appropriate) with public participation (e.g. online consultations);
    - impact analysis;
    - mitigation and impact management proposals;
    - EIA report submission to SBSTA, SEA/EIA administrative oversight committee (with the involvement of the regional committees and/or competent organizations as appropriate) for review;
    - review with public participation (e.g. online consultation) and recommendation to COP;
    - COP decision approving or not approving the activity/project (and associated packages of conditions, including required measures);
    - implementation, monitoring and reporting to the appropriate body and ultimately COP.<sup>516</sup>

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<sup>515</sup> USA

<sup>516</sup> WWF

- Consultation will be an important and necessary part of the SEA and EIA processes and who and how consultation should take place with, will need to be decided. This should however, include consultation with relevant coastal and adjacent States, and interested stakeholders, including people with existing interests in an area.<sup>517</sup>
- Provision for public participation and consultation should exist at each stage of the EIA process, beginning with the scoping phase. The relevant State(s) should circulate a draft assessment that includes public comment and input and the information required by the Instrument to the members of the scientific committee for review, and to any affected State, or stakeholder and to all States Parties for information. The draft assessment, along with any subsequent comments and recommendations of the scientific committee, should be made publicly available on a website or equivalent.<sup>518</sup>
- Since the process of EIA should be as inclusive as possible, civil society, industry and competent international organizations are examples of possible stakeholders.<sup>519</sup>
- Provide for a pool of experts capable of conducting EIAs for activities in areas beyond national jurisdiction, perhaps under the auspices of the instrument’s scientific body. These experts would be charged with reviewing EIAs submitted by States to determine whether such EIAs meet the standards contained in the Instrument. These experts could also be commissioned to conduct and evaluate EIAs for States with capacity limitations.<sup>520</sup>
- A scientific body should be established under the new international instrument to, among other things, review the adequacy of EIAs, make recommendations based on the EIA, and provide a body of experts who can undertake EIAs where necessary (i.e., if required by the instrument or where States have capacity limitations).<sup>521</sup>
- Ensure that the outcome of the environmental assessment is duly taken into account in decisions on the authorization of activities and on any accompanying mitigation or compensation (redress) measures. It should provide for the mitigation hierarchy to be taken into account in such decisions.<sup>522</sup>
- The proposed activity should be permitted only where the assessment concludes that the activity would not have significant adverse impacts, or can be managed to avoid such impacts. Each decision to permit an activity should include an environmental management plan. The decision shall be made on the basis of comments and recommendations of the scientific committee, which may include proposed provisions of an environmental management plan, including monitoring, review and compliance provisions.<sup>523</sup>
- Decision making processes related to EIAs and SEAs could ensure the protection of ecosystem services of deep-sea/high seas that may be altered by climate changes, including from ocean acidification.<sup>524</sup>
- With regard to “Whether the costs for conducting the EIA should be borne by the proponent of an activity,” addressing this issue falls within the national competence of the State Party.<sup>525</sup>

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<sup>517</sup> New Zealand

<sup>518</sup> High Seas Alliance

<sup>519</sup> EU

<sup>520</sup> High Seas Alliance

<sup>521</sup> High Seas Alliance

<sup>522</sup> EU

<sup>523</sup> High Seas Alliance

<sup>524</sup> IUCN

<sup>525</sup> EU

## 5. Content of EIAs

- Some standard components of an EIA, such as the description of the proposed activity; the potential environmental impact of that activity, including specific information necessary for identifying and assessing the environmental effects of the proposed activity; and a description of the proposed measures to mitigate the predicted adverse impact should be included.<sup>526</sup>
- An assessment of the potential impacts of the proposed activities in every dimension should be taken into account. The related evaluation and analysis of the risks and potential impacts or effects of the proposed activities to marine environment should be done on the basis of recognized scientific methods.<sup>527</sup>
- Environmental assessment reports made pursuant to the implementing agreement should, inter alia, include:
  - a description of the assessed activities and the likelihood that they will cause substantial pollution of, or other significant and harmful changes to, the marine environment in areas beyond national jurisdiction and its biodiversity;
  - a description of the measures for avoiding, preventing, mitigating and, where necessary and possible, redressing any substantial pollution of, or other significant and harmful changes to, the marine environment.<sup>528</sup>
- EIAs could:
  - describe potentially affected environments, including potentially sensitive or vulnerable areas;
  - identify potential environmental impacts, including direct, indirect, short-term and long-term, positive and negative effects;
  - identify measures available to mitigate any potential significant adverse impacts; and,
  - include follow up actions to verify the accuracy of the environmental assessment and the effectiveness of mitigation measures.<sup>529</sup>
- Provide standard information on what an EIA needs to contain, a generic EIA template and guidance on its use, and guidance on decision-making processes for EIAs in areas beyond national jurisdiction. This would enable proposers of an activity to know what the EIA should cover and reviewing agencies what to expect. The template should not be too prescriptive as content may differ between activities and areas.<sup>530</sup>
- The implementing agreement could specify the basic content and requirements of EIAs, for instance that EIAs should be based on the best available scientific information. Five elements are normally included in an EIA:
  - a description of the activity;
  - a description of the environment in which the activity will take place and other areas that may be affected;

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<sup>526</sup> G77&China

<sup>527</sup> G77&China

<sup>528</sup> EU

<sup>529</sup> Canada

<sup>530</sup> New Zealand



- the effects of the activity on the environment based on best available science/knowledge, including addressing cumulative environmental effects and identification of knowledge gaps;
- measures to reduce or eliminate possible negative impacts on the environment;
- monitoring of the activity and its impact on the marine environment.<sup>531</sup>
- One model for consideration is the Espoo Convention, which provides the following:
  - a description of the proposed activity and its purpose;
  - a description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;
  - a description of the environment likely to be significantly affected by the proposed activity and its alternatives;
  - a description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;
  - a description of mitigation measures to keep adverse environmental impact to a minimum;
  - an explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
  - an identification of gaps in knowledge and uncertainties encountered in compiling the required information;
  - where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and
  - a non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).<sup>532</sup>
- An EIA should at a minimum identify the full range of environmental effects including cumulative impacts and an activity's indirect or secondary effects. Some activities may have impacts on areas beyond the immediate activity area – for example trenching or mining may cause plumes of sediment which could travel some distance from the site of the original activity. The effects on these “environmental impact areas” should be considered, along with any dependent or associated ecosystems.<sup>533</sup>
- The scope of EIAs could:
  - include assessment of vulnerability to climate stressors;
  - include assessment of ecosystem services provided by the area of interest; and
  - include potential impacts to ecosystem services;
  - recognize that ecosystem services derive from multiple life stages, migrations, water or chemical movements, and other transboundary processes, and reflect the potential for cumulative impacts to these services by activities in widely separated areas.<sup>534</sup>
- Require that any assessments account for cumulative impacts of activities and climate change.<sup>535</sup>
- Individual and cumulative impacts on biodiversity and ecosystem services should be assessed (building upon any SEA that might have already been completed).<sup>536</sup>

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<sup>531</sup> Norway

<sup>532</sup> High Seas Alliance

<sup>533</sup> New Zealand

<sup>534</sup> IUCN

<sup>535</sup> High Seas Alliance

<sup>536</sup> WWF

- EIAs and SEAs could recognize that climate change may:
  - vary biodiversity independent of other stressors;
  - be a source of cumulative impacts; and
  - compound anthropogenic disturbance-induced change (e.g. plumes generated from seabed mining may exacerbate climate-induced effects, including from ocean acidification).<sup>537</sup>

## **6. EIAs for transboundary impacts**

- Any proposed activity on the areas beyond national jurisdiction that has potential impact upon the resources within national zone is required to have a transboundary EIA.<sup>538</sup>
- Where an EIA identifies potential cross-boundary harm, consultation with the coastal State should occur.<sup>539</sup>
- EIA entails the cooperation and involvement of coastal States, especially those States with exclusive economic zones adjacent to the location on the high seas where a proposed activity is under review. The EIA process needs broadest possible consultation by providing coastal States with notification of the proposed activity on the BBNJ, consulting their views upon such proposed activity, and informing them of the outcome of the consultation. Full information must be provided not only to the States but also the communities in the coastal States, which have traditional connection to the resources on the high seas.<sup>540</sup>
- As regards situations where activities beyond national jurisdiction may have impacts inside national jurisdiction, the possible procedures for EIAs set out in the implementing agreement should apply.<sup>541</sup>
- With regard to activities within national jurisdiction having impacts beyond national jurisdiction, the obligation to conduct EIAs according to UNCLOS rests with the coastal State, who will also be responsible for making decisions concerning the activities in question in accordance with UNCLOS and its national legislation. Since the activities in question are taking place within national jurisdiction, it is not obvious that possible provisions on EIAs in the implementing agreement could apply, since the implementing agreement will apply to areas beyond national jurisdiction only. However, as a minimum, harmonization for instance related to the duty to publish reports could be discussed. It would be essential, however, that the authority to conduct EIAs and decide on relevant activities must remain with the coastal State and any role for a global body in such situations would run counter to UNCLOS.<sup>542</sup>
- Transboundary impacts do not require separate assessment processes but are rather included as part of a properly conducted EIA generally.<sup>543</sup>
- All human activities with the potential for significant adverse impacts in areas beyond national jurisdiction need to be assessed, regardless of where they actually take place. Transboundary EIAs should be required for activities conducted within national jurisdiction that may significantly affect marine biodiversity or the environment in areas beyond national jurisdiction,

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<sup>537</sup> IUCN

<sup>538</sup> Federated States of Micronesia

<sup>539</sup> Australia

<sup>540</sup> Federated States of Micronesia

<sup>541</sup> Norway

<sup>542</sup> Norway

<sup>543</sup> Canada

as well as for activities conducted in areas beyond national jurisdiction that may affect biodiversity or other interests of coastal States within national jurisdiction.<sup>544</sup>

### **7. Strategic environmental assessments<sup>545</sup>**

- Establish clear, transparent and effective requirements and procedures for SEAs.<sup>546</sup>
- Conducting SEAs in areas beyond national jurisdiction might in many cases require cooperation between States at regional level, either ad hoc or in the context of existing regional or global institutions (for an example of such cooperation at strategic level, cf. ISA Environmental Management Plan Clarion Clipperton Zone for deep sea mining). The implementing agreement should help improve such cooperation.<sup>547</sup>
- SEAs should be developed at a regional level and prior to activities requiring EIAs commencing. Regional and international organizations would be encouraged to prepare SEAs where they have existing mandates. In addition the new agreement could encourage States to co-operate and develop regional SEAs in furtherance of their obligations to protect and preserve the marine environment.<sup>548</sup>
- A possible role for regional seas conventions in relation to SEAs should be discussed.<sup>549</sup>
- SEAs should be collectively funded (e.g. funded from collective industry funds established under the implementing agreement) and describe the strategic context within which specific activities can take place, while EIAs are operator- funded/contributed exercises confined to a particular user and circumstance.<sup>550</sup>

### **8. Compatibility of EIA measures**

- Compatibility with coastal State measures should be built into EIAs conducted in relation to areas beyond national jurisdiction adjacent to areas under the coastal State's national jurisdiction. This agreement should respect coastal States' jurisdiction regarding EIAs for activities that are within their national jurisdictions.<sup>551</sup>

### **9. Relationship to EIAs undertaken under relevant legal instruments and frameworks and relevant global, regional and sectoral bodies**

- Existing relevant legal instruments and frameworks, in particular UNCLOS, as well as relevant global, regional and sectoral bodies should not be undermined, as stipulated in resolution 69/292.<sup>552</sup>
- Existing processes and guidance developed to assess the impacts of human activities on biodiversity features applicable in areas beyond national jurisdiction, including those under

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<sup>544</sup> High Seas Alliance

<sup>545</sup> See also sub-sections 4 and 12.

<sup>546</sup> High Seas Alliance

<sup>547</sup> EU

<sup>548</sup> New Zealand

<sup>549</sup> Norway

<sup>550</sup> WWF

<sup>551</sup> Canada

<sup>552</sup> Chair's understanding on environmental impact assessments

regional and sectoral regimes, should be respected, and duplication of processes and outcomes in this regard should be avoided. Existing activities managed under regional and sectoral organizations should be allowed to continue where these organizations are mandated to consider the environmental impacts in the regulation of their respective activities (e.g. RFMOs and IMO). Any new agreement could play a useful role in assisting to coordinate these efforts, and facilitating cooperation and information sharing between these bodies.<sup>553</sup>

- The implementing agreement will apply generally and set out goals, principles, standards and requirements relating to EIAs which States Parties will be obliged to pursue directly and/or in all relevant mechanisms where they are participating. Within the framework provided by the implementing agreement, the EIAs should be conducted by the responsible State directly or according to the system of relevant sectorial or regional mechanisms, as appropriate. The implementing agreement could add value by ensuring necessary contact and exchange of information among relevant sectorial and regional mechanisms, while the States Parties Meeting under the implementing agreement could assure transparency, accountability and stake holder scrutiny of assessments and decisions being made.<sup>554</sup>

#### **10. Information dissemination / Clearing-house mechanism**

- Consistent with article 205-206 UNCLOS, the reports of the results of the assessments shall be published and communicated.<sup>555</sup>
- Address the publication of assessment reports, e.g. through a dedicated website or a registry.<sup>556</sup>
- Various means could be used to ensure transparency of a decision authorizing the activity in areas beyond national jurisdiction. This could include the requirement for a public statement of the reasons underlying a particular decision and of how environmental concerns have been taken into account.<sup>557</sup>
- Place EIAs on a registry or information-sharing mechanism, providing transparency and helping to manage some capacity constraints as external parties could provide an additional layer of oversight.<sup>558</sup>
- Make the results of EIAs publicly available, e.g. through the establishment of a global information sharing mechanism.<sup>559</sup>
- The reports of environmental assessments should be made publicly available.<sup>560</sup>
- Ensure that information gathered in connection with an EIA process in areas beyond national jurisdiction be publicly available, including to all interested stakeholders.<sup>561</sup>
- The application of the implementing agreement could help overcome challenges for conducting environmental assessments in areas beyond national jurisdiction by facilitating the gradual build-up of, and access to, a globally shared body of best practices.<sup>562</sup>

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<sup>553</sup> Canada

<sup>554</sup> Norway

<sup>555</sup> G77&China

<sup>556</sup> EU

<sup>557</sup> EU

<sup>558</sup> Australia

<sup>559</sup> Canada

<sup>560</sup> Chair's understanding on environmental impact assessments

<sup>561</sup> Norway

<sup>562</sup> EU

## **11. Capacity-building and transfer of marine technology**

- It is essential that EIAs process under the new instrument should take into account the special needs of developing countries, including necessary technical and financial assistance as well as development of institutional capacity and transfer of marine technology.<sup>563</sup>
- The implementing agreement should facilitate the building of capacity for, and learning of lessons from the application of its environmental assessment provisions, so as to improve over time the quality of assessments carried out in the challenging areas beyond national jurisdiction context. This can be achieved through e.g. voluntary peer review mechanisms or “twinning” amongst State Parties.<sup>564</sup>
- Provisions for financial and technical support in the development as well as review of EIAs could be included, so as to accommodate the resource constraints of SIDS.<sup>565</sup>
- To accommodate constraint resources, SIDS could be provided with an opportunity to submit joint EIAs where appropriate.<sup>566</sup>
- Additional capacity building may be targeted towards developing and supporting the EIA process in capacity-constrained countries.<sup>567</sup>

## **12. Monitoring and review**

- Consistent with article 204 UNCLOS States shall keep under surveillance the effects of any activities being undertaken following the positive outcome of any EIA.<sup>568</sup>
- The assessment should be followed by the monitoring of the effects of any permitted activities (cf. article 204 of the UNCLOS).<sup>569</sup>
- Provide for monitoring and review mechanisms to be developed and included in SEA and EIA processes.<sup>570</sup>
- Provide for a follow-up procedure in order to review compliance with the agreed rules and procedures for completed EIAs and SEAs.<sup>571</sup>
- On an annual basis, States Parties should be required to prepare and submit to a review committee a report detailing their implementation of the EIA-related provisions of the implementing agreement. States may also report on any failures to implement the EIA-related provisions by other parties. The reports shall be made publicly available without delay.<sup>572</sup>
- Members of the review committee shall be elected from among the States Parties and shall be term-limited. With the assistance of the secretariat and the scientific body, the committee will prepare an annual synthesis document that evaluates States’ compliance with their EIA-related obligations, identifying any specific instances of non-compliance and publish such report.<sup>573</sup>

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<sup>563</sup> G77&China

<sup>564</sup> EU

<sup>565</sup> AOSIS

<sup>566</sup> AOSIS

<sup>567</sup> Australia

<sup>568</sup> G77&China

<sup>569</sup> EU

<sup>570</sup> New Zealand

<sup>571</sup> EU

<sup>572</sup> High Seas Alliance

<sup>573</sup> High Seas Alliance

## **F. CAPACITY-BUILDING AND TRANSFER OF MARINE TECHNOLOGY**

- Recognition that capacity-building and transfer of technology are cross-cutting and vitally important to enable developing States to conserve and sustainably use marine biological diversity of areas beyond national jurisdiction.<sup>574</sup>
- As the issue of capacity building and the transfer of marine technology is cross cutting in nature, it should be applied across all aspects of the agreement and the special circumstances of Small Island Developing States must be captured in the whole package.<sup>575</sup>
- Define the general obligations in promoting cooperation to develop capacity and transfer of marine technology while recognizing the relevance of marine scientific research for developing countries.<sup>576</sup>
- Capacity-building and technology transfer provisions under the Implementing Agreement should be coherent with and contribute to making more operational the existing and sometimes detailed provisions on capacity-building and technology transfer included in UNCLOS and other international agreements.<sup>577</sup>
- UNCLOS calls for capacity building and transfer of technology. An international legally binding instrument must maintain consistency with these UNCLOS provisions. Moreover, clear and binding mechanism must be in place to secure capacity building and transfer of technology. Voluntary pledges are deemed to be ineffective to address this need fully.<sup>578</sup>
- There will need to be both mandatory and non-mandatory provisions on capacity building and technology transfer built into this new agreement, similar to other existing instruments and frameworks. Measures for capacity-building and transfer of technology, which should also include:
  - identifying a set of tangible measures, such as operational guidelines, that are known to or are considered to build human, social, institutional, and economic capacity for States Parties;
  - placing these measures within a broader systems framework; and
  - exploring stakeholder feedback on specific measures to inform framework implementation.<sup>579</sup>
- Establish a framework for capacity building and transfer of marine technology to developing parties. This framework should be based on i.a.:
  - clear obligations on developed parties to conduct capacity building and transfer of marine technology;
  - clearly targeted to the implementation of the objective of the implementing agreement - to ensure the long-term conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction;
  - Provide for synergies with the benefit sharing from the utilization of genetic resources;

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<sup>574</sup> Chair's understanding on capacity-building and transfer of marine technology

<sup>575</sup> AOSIS

<sup>576</sup> G77&China

<sup>577</sup> EU

<sup>578</sup> Federated States of Micronesia

<sup>579</sup> Fiji

- Provide for active participation from administrators and scientists from developing countries in relevant activities in developed countries, including related to scientific research, bioprospecting, conduct of EIAs, establishment of MPAs etc.;
- Clear obligations to assist in the strengthening and development of adequate national and regional mechanisms in developing countries, such as regional seas conventions.<sup>580</sup>
- Include provisions regarding capacity building and the transfer of marine technology as related to the conservation and sustainable use of biodiversity in areas beyond national jurisdiction, and in accordance with the existing provisions in UNCLOS on capacity building and marine technology. Key issues that will have to be addressed include:
  - how capacity building/transfer of technology provisions will relate to the other sections of the instrument, namely area-based management tools, EIAs, and marine genetic resources;
  - how capacity building/transfer of technology provisions can ensure coordination with already existing efforts and mechanisms, including the work of the Intergovernmental Oceanographic Commission of UNESCO (IOC), the Group on Earth Observations, and RFMOs;
  - how provisions will ensure the protection of intellectual property rights.<sup>581</sup>
- Incorporate an obligation on States Parties to fully recognise the special requirements of developing States, including the least developed among them and SIDS. The precedent is set out in Part VII of UNFSA and has been accommodated in other treaties and instruments. Include a formula for the special recognition of developing States similar to the UNFSA.<sup>582</sup>
- Need for a fair framework that recognises States Parties development aspirations, addresses disproportionate burden, for where it is demonstrated to exist, of whatever is agreed to for implementation, and reduces the impacts from any activity in the areas beyond national jurisdiction that is known or perceived to have either slight, or vast, proportionate significance on development goals for developing countries, including SIDS.<sup>583</sup>
- Inclusion in the implementing agreement of provisions drafted with reference to these provisions:
  - Article 11 of Stockholm Convention on Persistent Organic Pollutants (POPs): “1. The Parties shall, within their capabilities, at the national and international levels, encourage and/or undertake appropriate research, development, monitoring and cooperation pertaining to persistent organic pollutants and, where relevant, to their alternatives and to candidate persistent organic pollutants, including on their: [...]”
  - Article 12.1 and 12.2 of POPs: “1. The Parties recognize that rendering of timely and appropriate technical assistance in response to requests from developing country Parties and Parties with economies in transition is essential to the successful implementation of this Convention. 2. The Parties shall cooperate to provide timely and appropriate technical assistance to developing country Parties and Parties with economies in transition, to assist them, taking into account their particular needs, to develop and strengthen their capacity to implement their obligations under this Convention.”

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<sup>580</sup> Norway

<sup>581</sup> USA

<sup>582</sup> Fiji

<sup>583</sup> Fiji

- Article 14.1 of Minamata Convention on Mercury: “1. Parties shall cooperate to provide, within their respective capabilities, timely and appropriate capacity building and technical assistance to developing country Parties, in particular Parties that are least developed countries or small island developing States, and Parties with economies in transition, to assist them in implementing their obligations under this Convention.”
- Article 18.1 of CBD: “1. The Contracting Parties shall promote international technical and scientific cooperation in the field of conservation and sustainable use of biological diversity, where necessary, through the appropriate international and national institutions.”<sup>584</sup>

### **1. Objectives of capacity-building and transfer of marine technology**

- Enhance and develop the capacity and ability of developing countries, taking into account the special needs for assistance of land-locked and geographically disadvantaged developing States, SIDS, least developed countries, coastal African States as well as the specific development challenge of developing middle-income States, with a view to enabling them to assume their responsibility and obligations under the new instrument as well as to conserve and sustainably use the marine biological diversity.<sup>585</sup>
- Enhance the capacity and ability of developing country Parties to effectively implement the agreement, in particular countries for which the oceans is of strategic importance, and constitutes a valuable development resource, such as SIDS.<sup>586</sup>
- Contribute to assisting States, in particular developing States, to:
  - support the implementation of any marine genetic resources regime, which may be established by the new instrument, while ensuring that sustainability and conservation are achieved;
  - carry out or participate in environmental assessments of activities, including projects, plans and programmes that may have an impact on the marine biodiversity of areas beyond national jurisdiction; in that context, apply and/or participate in preventive and precautionary approaches, including the reduction of the risk of marine biodiversity degradation, unfavourable conservation status of marine species and/or long-term or irreversible adverse effects on marine biodiversity;
  - undertake and participate in measures to conserve and sustainably use marine biodiversity in areas beyond national jurisdiction, inter alia, through the establishment and the management of area based management tools, in particular marine protected areas.<sup>587</sup>
- States shall cooperate in promoting transfer of technology and scientific knowledge on BBNJ so that all States, especially SIDS, will benefit from the BBNJ resources. To achieve this objective, meaningful opportunities must be accorded to personnel from SIDS for adequate training in marine science and technology.<sup>588</sup>

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<sup>584</sup> Japan

<sup>585</sup> G77&China

<sup>586</sup> AOSIS

<sup>587</sup> EU

<sup>588</sup> Federated States of Micronesia



- Enhance the implementation of UNCLOS obligations to promote the development of marine scientific research capacity in developing States and to promote the transfer of marine science and technology. It could facilitate the sharing of knowledge and expertise relating to conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction and to marine genetic resources and related technologies.<sup>589</sup>
- Enable States now unable to do so to eventually become parties to and effectively participate in the implementation of the implementing agreement.<sup>590</sup>

## **2. Scope of capacity-building and technology transfer**

### *2.1 Capacity-building*

- The scope of the needs and priorities for capacity building can include scientific, educational, technical assistance as well as individual capacity building through short-term, medium-term and long-term training and scholarships, exchange of experts, and research cooperation programmes, awareness raising and knowledge sharing. The possible areas are, inter alia, marine science (including in the context of access to and use of marine genetic resources), ABMTs, the conduct of EIAs under the new instrument; establishment or strengthening the capacity of relevant organizations/ institutions in developing countries to deal with conservation of marine biological diversity in areas beyond national jurisdiction; access and acquisition of necessary knowledge and materials, information, data in order to inform decision making of the developing countries; development of necessary technology in marine science; development of necessary infrastructure and acquisition of necessary equipment to sustain and further develop R&D capabilities in the country.<sup>591</sup>
- Capacity building may include, but is not limited to, human resource and institutional capacity.<sup>592</sup>
- Capacity building in pursuance of the general and specific objectives of the new instrument namely:
  - capacity building in respect of the new access and benefit-sharing regime;
  - capacity building for development, implementation and monitoring of ABMTs including MPAs;
  - capacity building for conduct and evaluation of EIAs.<sup>593</sup>
- Importance of institutional building at the regional, sub-regional and national levels not only for capacity building and transfer of marine technology, but also for the management data.<sup>594</sup>
- Capacity building should address needs related to all relevant natural and social sciences, both basic and applied, including oceanography, chemistry, marine biology, marine geospatial analysis, ocean economics, international relations, public administration and law. For example, a mechanism could be created to assist developing States in drafting legislation and associated regulatory, scientific and technical requirements on a national or regional level and to design

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<sup>589</sup> New Zealand

<sup>590</sup> WWF

<sup>591</sup> G77&China

<sup>592</sup> AOSIS

<sup>593</sup> CARICOM

<sup>594</sup> Fiji

institutions to enable them to effectively implement various components of an implementing agreement. This could include, but not be limited to, how to effectively conduct an EIA or participate in an SEA.<sup>595</sup>

- Institutional capacity building across sectors and organizations is also important to allow for a truly integrated implementation of the agreement by all countries and competent bodies, to fulfil the ambition of biodiversity conservation and sustainable use.<sup>596</sup>

## 2.2 Technology transfer

- Technology should not just refer to hard technology but also to all of its associated aspects.<sup>597</sup>
- Technologies must be appropriate, reliable, affordable, modern and environmentally sound.<sup>598</sup>
- Includes specialized equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis.<sup>599</sup>
- Cover data and specialised knowledge inclusive of but not limited to, equipment, criteria, protocols, samples, processes, software, methodologies and infrastructure. The 2003 IOC Guidelines on the Transfer of Marine Technology are an important reference in this regard.<sup>600</sup>
- Include details on what is considered technology for the purposes of technology transfer, be consistent with the IOC Criteria and Guidelines for the Transfer of Marine Technology, and include both physical (infrastructure) as well as numerical (data, knowledge) technology elements, such as:
  - information and data on marine sciences;
  - manuals, guidelines, criteria, standards, reference materials;
  - sampling and methodology equipment;
  - observation facilities and equipment;
  - equipment for *in situ* and laboratory observations, analysis and experimentation;
  - computer and computer software, models and modeling techniques;
  - expertise, knowledge, skills, know-how and analytical methods.<sup>601</sup>
- Some of the technologies and mechanisms that could give support to advancing science and innovation in developing countries may be:
  - IT infrastructure, that would allow advanced data analysis and storage of data;
  - access to autonomous underwater vehicles and remotely operated underwater vehicles (deep submergence vehicles) fitted with high resolution cameras, which could be used to map extensive seafloor habitats and define megafaunal species distributions;
  - acoustic and sampling devices (e.g. multi-beam echo sounding, acoustic underwater positioning systems for deep-water mapping);
  - high-resolution, large-scale and long-term data collection as well as sharing mechanisms;

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<sup>595</sup> IUCN, High Seas Alliance

<sup>596</sup> WWF

<sup>597</sup> AOSIS

<sup>598</sup> AOSIS

<sup>599</sup> AOSIS

<sup>600</sup> CARICOM

<sup>601</sup> USA

- molecular tools for high-resolution observation of microbes to larger invertebrates that would allow sequencing of DNA at sea and back on shore; and
- innovative financial mechanisms for marine technologies.<sup>602</sup>
- The new instrument should be related to the areas which require increased scientific knowledge, the development of research capacity, promoting, inter alia, an effective implementation of the existing relevant provisions on transfer of marine technology, including those provided by the IOC. It concerns, for instance, Criteria and Guidelines on the Transfer of Marine Technology, with the possibility to revise and update them (among others, the definition of marine technology therein) so as to include all aspects of needs in the context of conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.<sup>603</sup>
- Importance of institutional building at the regional, sub-regional and national levels not only for capacity building and transfer of marine technology, but also for the management data.<sup>604</sup>

### **3. Principles guiding capacity-building and technology transfer**

- The following principles found in UNCLOS should be incorporated namely:
  - duty to cooperate and collaborate;
  - duty to promote the development of marine scientific and technological capacity of States;
  - duty to provide scientific and technical assistance to developing countries;
  - duty to provide preferential treatment for developing countries<sup>605</sup>
- The capacity-building and/or transfer of marine technology under the existing instruments and mechanisms (such as UNCLOS, ISA, IOC-UNESCO capacity development) should be enhanced. The new instrument shall not undermine or duplicate the existing programmes/mechanisms and shall address the specific aspects relating to the new instrument, while building upon the lessons learned from different international instruments that are of technical nature such the UNCLOS, the CBD, and the United Nations Framework Convention on Climate Change (UNFCCC) including the Paris Agreement. The instrument should also build upon the existing capacity building frameworks/mechanisms and focus on coordinating efforts and make them responsive to the objective of conservation and sustainable use of marine biological diversity, such as the IOC Medium-Term Strategy 2014-2021.<sup>606</sup>
- Building up the capacity building and technology transfer mechanism for the new instrument utilizing existing mechanisms such is a practical approach, which could be explored further.<sup>607</sup>
- Capacity-building and technology transfer measures should be clear, result oriented and guided by lessons learned, including from other instruments. They should focus on demonstrable results and outcomes and be sustainable over time.<sup>608</sup>
- Capacity-building should be promoted and carried out on fair and reasonable terms and conditions as well as through favorable terms and conditions.<sup>609</sup>

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<sup>602</sup> IUCN

<sup>603</sup> G77&China

<sup>604</sup> Fiji

<sup>605</sup> CARICOM

<sup>606</sup> G77&China

<sup>607</sup> AOSIS

<sup>608</sup> EU

- Provide for the facilitation of voluntary technology transfer on mutually agreed terms and conditions that respects intellectual property rights and fosters science, innovation, research, and development.<sup>610</sup>
- The development and transfer of marine science and marine technology should be “on fair and reasonable terms and conditions in order to gain access to appropriate, reliable, affordable, modern and environmentally sound technologies”.<sup>611</sup>
- Transfer of marine technology should be promoted and carried out on fair and reasonable terms and conditions as well as through favorable terms and conditions.<sup>612</sup>
- Technology transfer measures should be carried out on a voluntary basis taking into account the IOC Guidelines.<sup>613</sup>
- Technology needs must be nationally determined, based on national circumstances and priorities.<sup>614</sup>
- Transfer of technology should enable all countries concerned, to benefit from developments in marine science related activities on an equitable basis, by promoting and encouraging/facilitating access to technology by, and transfer of technology to, developing countries, in particular the least developed countries and SIDS. Any non-state actors and organizations in a position to do so may also assist in facilitating the transfer of such technologies.<sup>615</sup>
- Recognition that capacity-building, including institutional capacity-building, and transfer of marine technology should be responsive to national and regional needs, priorities and requests, with flexibility to adapt as needs and priorities change.<sup>616</sup>
- Assistance should be "needs driven" and respond to the specific needs of the developing States relating to the objectives and scope of the agreement. It should be compatible and responsive to national and regional realities and priorities and should complement and not duplicate other efforts and resources. It should also optimize the use of available financial, human and technical resources and promote sustainable development. In order to ensure the best possible outcomes, the identification of needs should be based on a holistic evaluation of existing capacities, including institutional and human resource capacities and abilities to utilize profitably the transferred technologies.<sup>617</sup>
- Needs – which might change or evolve over time and therefore require adaptation – should be identified by the developing States, preferably in the context of an approach involving a periodical assessment, carried out at national and regional level through a joint collaborative exercise involving all relevant States and stakeholders, including international, regional and civil society organizations.<sup>618</sup>
- Capacity-building should be needs-based and country driven (based on the needs identified by developing countries in particular SIDS and LDCs).<sup>619</sup>

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<sup>609</sup> G77&China

<sup>610</sup> USA

<sup>611</sup> AOSIS

<sup>612</sup> G77&China

<sup>613</sup> EU

<sup>614</sup> AOSIS

<sup>615</sup> AOSIS

<sup>616</sup> Chair’s understanding on capacity-building and transfer of marine technology

<sup>617</sup> EU

<sup>618</sup> EU

<sup>619</sup> CARICOM

- Need for BBNJ capacity building and technology transfer that responds to the needs of developing States.<sup>620</sup>
- Mechanism for CB/TMT in the implementing agreement should be based on the needs and priorities of developing States.<sup>621</sup>
- Need for meaningful capacity-building that is responsive to the needs of developing States, as identified by those States and consistent with the objective of the implementing agreement. The implementing agreement can play an important role in ensuring the implementation of the Sustainable Development Goals, in particular Sustainable Development Goal 14.<sup>622</sup>
- Include provisions for capacity building that are compatible with, and responsive to, local, national and regional realities and needs, related to the conservation and sustainable use of biodiversity in areas beyond national jurisdiction.<sup>623</sup>
- Capacity-building should also be ongoing to take into account developments in scientific knowledge and address new impacts.<sup>624</sup>
- Meaningful capacity building and technology transfer should be long term and meet the needs and goals of the recipient country for the conservation and sustainable use of marine areas and biodiversity beyond national jurisdiction.<sup>625</sup>
- Recognition of the importance of the involvement of relevant stakeholders in capacity-building and transfer of marine technology<sup>626</sup>
- Broad and timely participation of relevant stakeholders – including regional fisheries management organizations and regional seas conventions or action plans, civil society, non-governmental organizations and other groups including the private sector, the scientific community, United Nations bodies, as appropriate – in the design, implementation and evaluation of these measures should be foreseen. In that context, the role and participation of women should be promoted.<sup>627</sup>

#### **4. Types of and modalities for capacity-building and technology transfer**

- Provide for States, either directly or through appropriate international, regional organizations and bodies or any other relevant organization, to provide assistance in the form of capacity-building and technology transfer to developing States.<sup>628</sup>
- Enhancing cooperation in the development of capacity and transfer of marine technology should be encouraged at all levels, including North-South / South-South cooperation and partnerships with relevant stakeholders with specific expertise as this will prove beneficial to strengthening human and institutional capacities and ultimately achieving the objectives of the new instrument.<sup>629</sup>

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<sup>620</sup> Australia

<sup>621</sup> Japan

<sup>622</sup> New Zealand

<sup>623</sup> USA

<sup>624</sup> CARICOM

<sup>625</sup> IUCN, High Seas Alliance

<sup>626</sup> Chair's understanding on capacity-building and transfer of marine technology

<sup>627</sup> EU

<sup>628</sup> EU

<sup>629</sup> G77&China

- The procedures and modalities of the mechanism must be simple, targeted and operate as expeditiously as possible.<sup>630</sup>
- Include a mechanism to identify the capacity building and technology transfer needs of developing countries. An implementing agreement could build on the IOC Criteria and or use it as a model to assess the capacity needs of developing countries. The data from the Sustainable Development Goals indicators could also be used to assess the needs at the local, national and regional levels for capacity building and marine technology transfer.<sup>631</sup>
- In designing a benefit-sharing regime, consider where benefit sharing may be utilised to build the capacity of developing countries, and facilitate technology transfer.<sup>632</sup>
- Concrete measures may include:
  - development of regional centers for skill development;
  - knowledge sharing through sharing results of R&D;
  - scholarships or other grants for SIDS representatives in workshops, programmes or other relevant training programmes in order to develop their specific capacities;
  - development of joint scientific research projects in cooperation with institutions in developing countries;
  - establishment of national and regional scientific centres, including as data repositories.<sup>633</sup>
- Among the activities that could contribute to achieving the objectives of the implementing agreement, include the following:
  - raising awareness on the importance of conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction and means to achieve these objectives;
  - integrating protection, conservation, restoration and sustainable use of marine biodiversity in areas beyond national jurisdiction into relevant national and regional policies, in support of sustainable development and in line with obligations under UNCLOS;
  - assisting States to comply with the obligations of the implementing agreement, to implement its various provisions and to monitor the progress made in its implementation, including by assisting them in developing, implementing and enforcing domestic legislative, administrative or policy measures;
  - increasing, disseminating and sharing knowledge for effective conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction;
  - promoting the development of human resources as well as technical and research capabilities related to the objectives and material scope of the implementing agreement, including by disseminating and creating training opportunities at national, regional and global levels;
  - developing, upgrading or strengthening systems and institutional structures capable of assessing marine biodiversity as well as of implementing and monitoring the objectives and activities related to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction;

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<sup>630</sup> AOSIS

<sup>631</sup> IUCN

<sup>632</sup> Australia

<sup>633</sup> AOSIS

- assisting States, in particular developing States, to access, collect, analyse and use data, samples and information.<sup>634</sup>
- Establish a mechanism for enhancing the following, keeping in mind the importance of participation by scientists from developing countries:
  - access to samples, data and knowledge, including the publication and sharing of scientific knowledge;
  - collaboration and international cooperation in scientific research projects and programs, including south-south and triangular cooperation;
  - scientific and training and access to resources, research infrastructure and technology;
  - socio-economic benefits (e.g. research directed to priority needs such as health and security); and
  - facilitating the involvement of public and private sectors and multi-stakeholder partnerships.<sup>635</sup>
- To avoid what is termed the “brain drain” of trained personnel from developing countries, a strong global professional alumni network could serve as an excellent pool of human resources, networking, mutual learning, and a foundation of international cooperation.<sup>636</sup>
- Capacity building will have synergies and therefore be closely linked to benefit sharing. Some benefit sharing may also build capacity towards the conservation and sustainable use of biodiversity of areas beyond national jurisdiction.<sup>637</sup>
- Capacity-building and technical assistance may be delivered through international, regional and bilateral arrangements, including existing or new regional centres, as appropriate, through other multilateral and bilateral means, and through partnerships involving the private sector.<sup>638</sup>
- Due to the vast geographical scale and multitude of stakeholders involved, it is crucial to have participation and commitments from various stakeholders; not only from governments, but also from intergovernmental organizations, non-governmental organizations, academia, the business sector and philanthropic organizations. Coordination and cooperation among these organizations, bringing in their competences, resources, and networks, will be essential for effective capacity development for the conservation and sustainable management of BBNJ.<sup>639</sup>
- The IOC Guidelines are an important reference point for developing the capacity-building provisions of the BBNJ instrument.<sup>640</sup>
- Include a provision to support coordination and collaboration of existing and new initiatives, including but not be limited to the initiatives by IOC and other stakeholders. IOC could be given additional financial support or resources to play an important role in providing a structure for fostering coordination and collaboration and taking it steps further.<sup>641</sup>
- Recognition that the IOC Criteria and Guidelines on the Transfer of Marine Technology are useful as a guiding tool for further work on the transfer of marine technology in an international instrument.<sup>642</sup>

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<sup>634</sup> EU

<sup>635</sup> IUCN, High Seas Alliance

<sup>636</sup> IUCN

<sup>637</sup> Australia

<sup>638</sup> EU

<sup>639</sup> IUCN

<sup>640</sup> CARICOM

<sup>641</sup> IUCN

<sup>642</sup> Chair’s understanding on capacity-building and transfer of marine technology

- Article 16 of CBD and IOC Guidelines can form a basis of our engagement in developing guidelines for transfer of marine technology.<sup>643</sup>
- Take into account as appropriate, the IOC Criteria and Guidelines on the Transfer of Marine Technology.<sup>644</sup>
- Draw from existing guidelines and frameworks that are already agreed upon, such as the IOC Criteria and Guidelines on the Transfer of Marine Technology.<sup>645</sup>
- Best practices and lessons learned from existing mechanisms must be utilized wherever relevant and applicable.<sup>646</sup>
- Promoting cooperation on technology transfer with a view to identifying or developing the appropriate technologies for the achievement of the objectives of the implementing agreement and to assist States, in particular developing States, to access the relevant, appropriate, adequate and up-to-date marine technology, on a voluntary basis, according to mutually agreed terms respecting intellectual property rights, in line with the IOC Guidelines.<sup>647</sup>
- The mechanisms under the ISA and IOC are some examples, but it will be useful to explore all relevant mechanisms and frameworks, including those under existing regional organizations, to identify the best way forward. However, the new mechanism should be inclusive and effectively cater to the needs of all parties to the instrument regardless of their respective region.<sup>648</sup>
- Relationship between the new implementing agreement and IOC must be clarified, otherwise establishment of a mechanism of capacity building/ transfer of marine technology under the implementing agreement will not be possible.<sup>649</sup>

#### **5. Repository/Clearing-house mechanism**

- The new agreement could play a role in coordination of, and sharing of information about, capacity building and transfer of marine technology activities. This could be in the form of a clearing-house mechanism for example.<sup>650</sup>
- A potential clearing-house mechanism, could provide centralized information access and sharing for all on activities, programmes and projects occurring in areas beyond national jurisdiction. Consideration in the design of the mechanism should also address the special needs and priorities needs of SIDS.<sup>651</sup>
- A clearing-house mechanism could:
  - promote international coordination and collaboration on capacity-building and technology transfer in relation to the objectives and scope of the implementing agreement;
  - help to ensure quick/one-stop access to information on capacity-building and technologies in relation to the objectives and scope of the implementing agreement;
  - promote and facilitate access to the corresponding expertise and know-how.

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<sup>643</sup> AOSIS

<sup>644</sup> New Zealand

<sup>645</sup> Canada

<sup>646</sup> AOSIS

<sup>647</sup> EU

<sup>648</sup> AOSIS

<sup>649</sup> Japan

<sup>650</sup> New Zealand

<sup>651</sup> AOSIS



This could, for instance, entail making capacity-building opportunities transparent, matching requests to providers for technology transfer and giving developing countries access to the related know-how and expertise, facilitating multi-stakeholder partnerships, promoting regional cooperation, enhancing developing countries' participation in scientific research and training, facilitating open access to samples and knowledge, etc.<sup>652</sup>

- Provide greater visibility through a platform that would allow States to articulate needs and be aware of existing opportunities and projects. For example, a 'clearing house' could be created that would collect and disseminate details of implementing agreement Parties' capacity building and technology transfer projects and opportunities for developing State participation. Consider how this instrument could be made effective and fit for purpose and how it would relate to other organizations with competency in the field of marine science and technology transfer. Consider whether a virtual clearing house is also an appropriate tool.<sup>653</sup>
- One or more clearing-house mechanisms, which could provide prioritized lists of required capacity-building efforts and marine technology and which may have a "match-making" function to facilitate the transfer of technology and capacity building assistance, could be an effective means of achieving this.<sup>654</sup>
- Establish a clearing-house mechanism that facilitates information sharing in connection to activities on the BBNJ, particularly (but not limited to) scientific data, research results (especially for marine genetic resources), and best practices. Capacity building requires public access to information relevant to the conservation and sustainable use of living resources of the areas beyond national jurisdiction. Access of information can be carried out through a clearing-house of data. Such access can follow the principles contained in the Aarhus Convention.<sup>655</sup>
- Include provisions for a possible repository or clearinghouse for data, information, capacity building, and/or technology transfer that is not unduly burdensome, and that would coordinate with, build upon, and improve the efficiency and effectiveness of existing international mechanisms already in place.<sup>656</sup>
- Provide an effective platform for enhancing collaboration and coordination for capacity building and technology transfer. At a minimum, provide a platform where initiatives can be tracked and coordinated so that various options for effective support can be easily navigated by developing countries and the needs easily identified by donors for planning purposes.<sup>657</sup>
- Establish a clearing-house that, similarly to the approach envisioned for the ITPGRFA Global Information System has the mandate to:
  - provide a web-based entry point to information and knowledge that is specifically geared towards strengthening the capacity for the conservation and sustainable utilization of BBNJ;
  - promote and facilitate interoperability among existing information systems (through the development of principles and technical standards);
  - create a mechanism to assess progress and monitor effectiveness in information sharing through online databases (feedback and periodic consultations);

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<sup>652</sup> EU

<sup>653</sup> Australia

<sup>654</sup> Canada

<sup>655</sup> Federated States of Micronesia

<sup>656</sup> USA

<sup>657</sup> IUCN

- enhance opportunities for collaboration (including focus on high-priority material); and
- provide capacity development and technology transfer.<sup>658</sup>
- The idea of a clearing-house mechanism and a capacity-building network could be developed, using, inter alia, web-based tools. Those tools can be a platform to access, evaluate, publish and disseminate information, as well as to provide a case-by-case option upon request. The experience of the CBD and the UNFCCC (Climate Technology Centre and Network as well as the Technology Needs Assessment), for example, could be instrumental in this regard.<sup>659</sup>
- Include a provision to improve the interoperability and linkages between existing mechanisms, including in terms of data and sample collection and sharing.<sup>660</sup>
- The further consideration of IOC as a possible clearing-house mechanism for the future implementing agreement would require an assessment of the current activities of this organization with reference to the objectives of the future implementing agreement, as well as of the possible requirements and implications of strengthening and improving its existing structures to better address – beyond the technology transfer dimension – the capacity-building dimension and the focus on areas beyond national jurisdiction, in a context of sustainable development.<sup>661</sup>
- The IOC could be charged with utilizing the Ocean Biogeographic Information System to develop an international meta-database or clearing-house mechanism to facilitate an effective mechanism for accessing and exchanging information relevant to capacity building and technology transfer for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. Such meta-database or a clearing-house mechanism can also be used to monitor needs, fulfillment of such needs to facilitate planning for future initiatives as well as foster projects and programs that are tailored to the needs at the local, national, and regional level.<sup>662</sup>

## **6. Funding**

- Ensure adequate, predictable and sustainable funding for capacity building and transfer of relevant marine technology. In addition to the voluntary trust fund, any funding mechanism under the new instrument should be complemented by the contribution resulting from the sharing of benefit aspect in order to promote meaningful projects on capacity building.<sup>663</sup>
- Establish a sustainable fund to:
  - specifically finance the participations of SIDS in major meetings under BBNJ;
  - assist developing countries, in particular SIDS, in meeting their commitments under the agreement;
  - fund capacity-building activities;
  - fund technology transfer related activities and programmes, including training.<sup>664</sup>
- Establishment of a special fund for capacity building. This special fund will be used for scientific training workshops, scholarships, participation in formal meetings under an international legally

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<sup>658</sup> WWF

<sup>659</sup> G77&China

<sup>660</sup> EU

<sup>661</sup> EU

<sup>662</sup> IUCN, High Seas Alliance

<sup>663</sup> G77&China

<sup>664</sup> AOSIS

binding instrument, and other opportunities for nationals of developing countries to learn about BBNJ activities and participate fully in the operationalization of an international legally binding instrument. It is possible to build this special fund from the financial contributions by sponsoring States or private entities proposing to explore and exploit BBNJ resources, and the rates of contribution could depend on considerations such as the size of area involved, type of activities, and risks associated with the proposed activities.<sup>665</sup>

- In addition to traditional donor models such as multilateral institutions and funds, innovative financing will be needed to support international cooperation, development of technologies and collaborative research and thus should be key priority areas under the new agreement.<sup>666</sup>
- New ocean sustainability finance tools could be an important part of the technology transfer framework. Delivering innovation, scalability and standardization through a “blue finance hub” as a knowledge, skills and project preparation center, for instance in the format of an “Ocean Sustainability Bank” could be an important tool to significantly increase marine technology impact. New initiatives such as the recently launched Coalition for Private Investment in Conservation could be taken into consideration when developing further participation in the effort. Additional funding can be found by structuring blended financial instruments that allow both public and private participation.<sup>667</sup>
- Include a process to establish a multilateral fund to support regional scientific and technological centers with pooled global resources in order to enhance technology transfer efforts. Further voluntary payments could be made by ocean users, for instance taking into account their carbon footprints, as a means to support ocean conservation efforts.<sup>668</sup>
- Funding and Institutional arrangements could be based on both voluntary and monetary proceeds - See Nagoya Protocol and ISA capacity building funding arrangements.<sup>669</sup>

## **7. Monitoring, review and follow-up**

- The needs identified and priorities for capacity building can be reviewed by an advisory or decision-making body under the new instrument.<sup>670</sup>
- The new mechanism must also have sufficient flexibility to review on a periodic basis the capacity constraints faced by SIDS according to their respective national circumstances.<sup>671</sup>
- Establishment of a monitoring mechanism and reporting requirements to facilitate periodic reviews.<sup>672</sup>
- Include a provision addressing the need for measuring the success of capacity-building and technology transfer efforts. The evaluation of capacity-building and technology transfer efforts could be based on an outcome-focused approach that utilises both quantitative and qualitative data, carried out in a joint collaborative effort undertaken at national, regional and international level.<sup>673</sup>

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<sup>665</sup> Federated States of Micronesia

<sup>666</sup> IUCN

<sup>667</sup> IUCN

<sup>668</sup> IUCN

<sup>669</sup> CARICOM

<sup>670</sup> G77&China

<sup>671</sup> AOSIS

<sup>672</sup> CARICOM

<sup>673</sup> EU

- A meeting of the States Parties could be convened on a regular basis to assess the needs and to fill in the gaps.<sup>674</sup>
- Consider incorporating a monitoring or follow-up element whereby States Parties are made aware of the progress with respect to the implementation of this provision.<sup>675</sup>
- To maintain a stable and sustainable level of funds to effectively finance an implementing agreement, there could be a mechanism to monitor the impacts of the capacity building and technology transfer programmes with a periodic review to assess funding needs, and funding sources so that the recipient countries and regions' needs can be adequately met on a stable and long-term basis.<sup>676</sup>

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<sup>674</sup> IUCN

<sup>675</sup> Fiji

<sup>676</sup> IUCN

## IV. INSTITUTIONAL ARRANGEMENTS<sup>677</sup>

- The institutional arrangements established by an instrument would have to be “fit-to-purpose”, cost-effective and efficient.<sup>678</sup>
- The implementation of the implementing agreement should be reviewed by a mechanism under the implementing agreement. A global mechanism under the implementing agreement could provide a platform where States and regional and sectorial bodies could share information about relevant activities, knowledge and decisions, as well as facilitate feed-back by other States, intergovernmental organizations and non-governmental organizations.<sup>679</sup>
- To ensure transparency, the actions, decisions and decision-making processes under the new Implementing Agreement will need to be open to an appropriate level of scrutiny by Parties, civil society and, where appropriate, outside institutions.<sup>680</sup>
- Participation in meetings should be open to non-Contracting Parties, relevant non-governmental organizations and inter-governmental organizations, and other stakeholders, in an observer capacity.<sup>681</sup>
- States and subregional or regional biological diversity management organizations and arrangements should ensure transparency in the mechanisms for management and in an agreed decision-making process.<sup>682</sup>
- Representatives from relevant organizations, both governmental and non-governmental, concerned with biological diversity beyond areas of national jurisdiction should be afforded the opportunity to take part in meetings of subregional and regional organizations and arrangements as observers or otherwise, as appropriate, in accordance with the procedures of the organization or arrangement concerned. Such representatives may be given timely access to the records and reports of such meetings, subject to the procedural rules on access to them.<sup>683</sup>
- Governance arrangements that promote transparency and accountability. This can be achieved through opening meetings to observers where appropriate, and making information about meetings and decisions publicly available.<sup>684</sup>
- Some of the functions to be covered by institutional arrangements under an international instrument include: decision-making, enhancement of cooperation and coordination, information-sharing, scientific advice, and capacity-building and transfer of marine technology.<sup>685</sup>
- The institutional arrangement for the future implementing agreement should provide for an overarching framework with decision-making at the global level. A comprehensive global regime could help ensure that variances in regional-level implementation do not contribute to a disproportionate burden of conservation activities falling on SIDS. Some decision-making as well

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<sup>677</sup> This section is to be read in conjunction with the previous sections.

<sup>678</sup> Chair’s understanding on cross-cutting issues

<sup>679</sup> Norway

<sup>680</sup> New Zealand

<sup>681</sup> New Zealand

<sup>682</sup> Fiji

<sup>683</sup> Fiji

<sup>684</sup> Australia

<sup>685</sup> Chair’s understanding on cross-cutting issues

as implementation should be conducted at the regional level, so as to adequately reflect regional and sub-regional specificities.<sup>686</sup>

- Drawing from existing examples of regional organizations, consider how a regional organization, or even a collaboration of organizations, can serve as an implementing or administrative arm of the new implementing agreement.<sup>687</sup>
- The institutional arrangement at the global level could include:
  - a decision-making forum;
  - a scientific forum;
  - a clearing-house;
  - a secretariat.<sup>688</sup>
- Institutional bodies could include:
  - a secretariat;
  - a decision-making body such as a COP;
  - a scientific and technical body with an advisory competence which can play a role in the establishment of ABMTs, including MPAs;
  - a clearing-house mechanism to promote and facilitate technical and scientific cooperation, knowledge and data sharing;
  - a mechanism in charge of access and benefit sharing of marine genetic resources.<sup>689</sup>
- To be able to meet its objectives, the new agreement needs to be equipped with a robust, but cost-effective institutional structure. This would include:
  - a secretariat, whose functions could be taken over by DOALOS;
  - a COP meeting on regular basis to supervise the implementation of the new Instrument and take relevant decisions, such as the designation of MPAs, including marine reserves. COP meetings could replace the BBNJ meetings without adding additional budgetary constraints for delegations;
  - a scientific committee to make sure that decisions are based on best available science;
  - a clearing-house mechanism to facilitate implementation through, e.g., information and knowledge sharing and scientific and technical cooperation;
  - a compliance committee to facilitate/ensure effective implementation and rectify violations dispute resolution mechanisms.<sup>690</sup>
- Envisage a decision-making body, such as a Meeting/Conference of Parties to the implementing agreement.<sup>691</sup>
- The agreement is likely to require a decision making body, such as a COP, that will most likely need to meet regularly, e.g. annually, to review progress, develop guidance, make recommendations and take decisions.<sup>692</sup>
- The possibility of use of the mechanisms already in place should always be duly examined in the first place. Concerning scientific input, taking into account existing processes, due consideration

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<sup>686</sup> PSIDS<sup>687</sup> Fiji

<sup>687</sup> Fiji

<sup>688</sup> Chair's understanding on cross-cutting issues

<sup>689</sup> G77&China

<sup>690</sup> Greenpeace

<sup>691</sup> EU

<sup>692</sup> New Zealand

should be given, among others, to the question of what kind of input could be received from the Regular Process, as well as other relevant processes (such as the EBSA Process).<sup>693</sup>

- Expansion of the mandate of the ISA to oversee the implementation of the BBNJ instrument.<sup>694</sup>
- Enhanced cooperation for the development and implementation of generally agreed rules and standards could be operationalized at the regional level through regional committees.<sup>695</sup>

## **A. INTERGOVERNMENTAL DECISION-MAKING BODY/FORUM**

### **1. Global level**

- The broad mandate of the international decision-making body should be to:
  - set criteria and guidelines, based on best available scientific information, including traditional knowledge;
  - follow up on implementation of provisions and progress in meeting global objectives;
  - adopt decisions on implementation of provisions of the instrument among parties;
  - adopt decisions on how to undertake implementation in the absence of a competent regional body or where such a body fails to take action;
  - consider and adopt amendments to the agreement;
  - promote harmonization of appropriate policies and measures for the conservation and sustainable use of BBNJ;

Adopt programmes of work and budgets relating to the work of the BBNJ agreement. The meetings of this intergovernmental body should be held at a venue at which most delegations, and in particular SIDS, maintain a permanent presence, in order to take fully into account their particular capacity constraints.<sup>696</sup>

- Global decision-making process with two organs: an Assembly and a Council.
  - The assembly: the political forum where all States Parties participate. Regular meetings, on an annual basis for instance, could also be open to States non-Parties, relevant intergovernmental organizations and international bodies, and other relevant stakeholders, including non-governmental organizations or research institutes which could be granted observers status. The work of this body is to be broad and global. Its mandate would include:
    - setting policies;
    - electing members of the council and subsidiary bodies;
    - making decisions on the global rules and procedures related to BBNJ;
    - reviewing reports of the council and those of the subsidiary bodies;
    - undertaking at regular and set intervals, a general and systematic review of the manner in which the implementing agreement has operated in practice;
    - taking measures to improve the implementation of the agreement.

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<sup>693</sup> EU

<sup>694</sup> CARICOM

<sup>695</sup> WWF

<sup>696</sup> PSIDS

- The council: the executive body with limited membership. Its members would be elected by the assembly based on a defined formula to enable balanced and equitable representation. In line with the importance of addressing the special case of SIDS, the council could include SIDS-specific seats. Meetings of the council could be open to non-members. However, only members would have decision-making power. The mandate of the council would be to:
  - establish subsidiary committees;
  - approve plans of work;
  - prepare the annual budget;
  - make recommendations to the assembly on policies or measures to be adopted;
  - approve ABMTs, including MPAs;
  - approve EIAs;
  - conduct cooperation programmes with existing organizations;
  - report to the assembly;
  - institute proceedings on behalf of the assembly in cases of non-compliance.<sup>697</sup>
- A States Parties Meeting could be a functional and cost-effective forum for reviewing the implementation, exchange of information and discussion of relevant issues. Possible text for establishing the States Parties Meeting could be:
  - *“The Parties shall meet no later than one year after the entry into force of this Agreement, as convened by the depository, and from then on as decided by the Parties. At these meetings the Parties shall:*
    - a) Review issues related to the implementation of this Agreement.*
    - b) Assess the effectiveness of this Agreement in securing the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, and if necessary, propose means of strengthening the implementation of this Agreement in order to better address any continuing problems in the conservation and sustainable use of marine biodiversity.*
    - c) Review information received from States Parties and relevant sectorial and regional mechanisms on actions taken with regard to the implementation of this Agreement.*
    - d) Consider any other issues as decided by the Parties.”<sup>698</sup>*
- The State Parties Meeting should be open to global, regional and sectorial bodies in order to share information on relevant activity and measures taken within their competence.<sup>699</sup>
- Establish a COP with predetermined functions and mandate, which should meet regularly with the purpose of, inter alia:
  - overseeing/supervising the implementation of the implementing agreement, including the operationalisation of ecosystem-based integrated oceans management in areas beyond national jurisdiction, and compliance mechanisms;

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<sup>697</sup> PSIDS

<sup>698</sup> Norway

<sup>699</sup> Norway



- facilitating cooperation and coordination among different stakeholders, States and competent organizations, including through the possible establishment of regional committees as subsidiary bodies;
- developing new substantive obligations and requirements for parties related to the implementation of and compliance with the implementing agreement;
- considering any additional action or function that may be required for the achievement of the objective of the implement agreement, including residual powers to regulate, manage and guide unregulated activities (i.e. in cases where a competent regulatory body does not exist (e.g. cable laying) as well as emerging activities);
- establishing additional subsidiary bodies and providing guidance to these bodies, as considered necessary.<sup>700</sup>

## **2. Regional level**

- Regional/sub-regional forum, that would meet at regular intervals, optimally prior to the meeting of the assembly, to:
  - take decisions on measures to implement based on global criteria, standards and measures;
  - organize broad and inclusive consultations with relevant stakeholders on relevant projects;
  - report to the international body;
  - make recommendations or submissions for improving the implementation of the implementing agreement to the international body.

This regional/sub-regional forum to be composed of the following two chambers:

- adjacent coastal States;
- all parties to the agreement.

In addition, meetings of this forum would be open to representatives of existing regional organizations, existing sectoral organizations, international organizations, and other stakeholders. Depending on outputs, work at the regional level could feed into the global mechanism at different points. For instance, the enforcement committee at the regional level would feed into the compliance committee, while the regional area-based management committee and the regional experts committees could feed work into the international experts committee at the international level.<sup>701</sup>

## **B. SUBSIDIARY BODY/BODIES**

### **1. Global level**

- The decision making-body may establish subsidiary organs, such as a scientific committee.<sup>702</sup>
- International subsidiary bodies could be elected by the assembly. Taking into account the special case of SIDS, each of the subsidiary bodies should allocate dedicated seats to SIDS. The bodies

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<sup>700</sup> WWF

<sup>701</sup> PSIDS

<sup>702</sup> EU

would meet at set intervals, with the meetings of the assembly and council, and with the possibility of additional meetings if needed.

- SBSTA / international experts committee: the SBSTA or committee would be composed of multidisciplinary subject-matter experts nominated by governments on issues covered by the implementing agreement. It could be supplemented by a list of international experts specializing in various elements of the agreement. For instance, in the context of an EIA, the conduct and/or the review of EIAs or other assessments could be conducted by experts from a dedicated list to support those States Parties who request it. This committee would also facilitate cooperation with other scientific bodies so as to harmonize global criteria, as well as advance the achievement of the implementing agreement's objectives. Its mandate, under the guidance of the global decision-making body of the BBNJ agreement and drawing upon existing competent international bodies, would be to:
  - elaborate and recommend to the decision-making body global criteria for the establishment of ABMTs, including MPAs (to be adopted by the decision making body);
  - elaborate and recommend to the decision-making body criteria and thresholds for activities in areas beyond national jurisdiction, in the context of EIAs, (to be adopted by the decision making body);
  - review and provide recommendations to the decision making body regarding designation of ABMTs, and submissions on EIAs (the submissions could also be produced by regional expert committees);
  - elaborate and recommend to the decision-making body guidelines for the access and benefit-sharing regime;
  - identify innovative, efficient and state-of-the-art technologies and know-how relating to the conservation and sustainable use of BBNJ and advise on the ways and means to promote the development and/or transfer of such technologies;
  - identify new and emerging issues relating to the conservation and sustainable use of BBNJ;
  - provide advice on scientific programmes and international cooperation in research and development related to conservation and sustainable use of BBNJ;
  - respond to scientific, technical, technological and methodological questions that the intergovernmental body and its subsidiary bodies may submit;
  - provide regular assessments of the state of scientific knowledge of BBNJ. Among its members, the committee should include experts in traditional knowledge or seek the input of relevant traditional knowledge holders in regards to any given project, issue, programme or activity.
- Compliance committee: this committee would review general issues of compliance and implementation of the BBNJ implementing agreement, in particular it would:
  - review progress on implementation and report to the intergovernmental decision-making body;
  - make recommendations on how to improve coordination among all relevant stakeholders;
  - make recommendations for strategic actions to enhance implementation;
  - make recommendations to strengthen means of implementation;

- make recommendations on how to improve the effectiveness of processes and activities under the agreement.
  - The committee could be composed of the following two branches:
    - The facilitative branch would provide advice and assistance to Parties in order to promote compliance;
    - The enforcement branch would have the responsibility to determine consequences for Parties not meeting their commitments.
  - Finance and administration committee: the mandate of the finance and administration committee would be to:
    - draft financial rules, regulations and procedures;
    - assess contributions of Parties;
    - draft rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from MGRs and the decisions to be made thereon;
    - review and plan budget;
    - monitor the funds established in the agreement;
    - report to the decision-making body.<sup>703</sup>
- COP subsidiary bodies and respective functions to be as follows:
  - SBSTA
    - the proposed SBSTA would be comprised of delegations of qualified experts from parties and observers, to provide advice and guide COP in its deliberations.
    - this body could also establish ad hoc working groups and work with independent scientists and experts to deliver their mandate. The SBSTA would also collate and build upon relevant existing scientific information from relevant organizations (e.g. CBD, FAO, United Nations Environment Programme, UNESCO, ISA, IMO) in exercising its functions and mandate, including providing scientific and technical advice on establishing ecologically representative MPA networks, biogeographical classification schemes or assessing cumulative impacts of human activities in areas beyond national jurisdiction.
    - the SBSTA would also support the regional committees, as needed, with technical and scientific input as required. It is also recommended that this SBSTA be given a broad mandate to also initiate its own work plans in pursuit of its own objectives and purposes, especially in developing operational standards, criteria and guidance/guidelines to give effect to general principles, purposes, aims and objectives set out in the implementing agreement for adoption by the COP, as well as providing scientific and technical assistance in operationalising ecosystem-based integrated oceans management at appropriate biogeographic scales.
  - SEA/EIA administrative oversight committee
    - this body would be responsible for ensuring that the particular parts of EIA and SEA (including bioregional SEA) processes are properly conducted by the appropriate entities (which may be decided pursuant to standing arrangements

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<sup>703</sup> PSIDS

or on a case by case basis, generally with EIAs being done by capable individual operators, and SEAs being done by those bodies with the appropriate level of collective responsibility, either sectorally or cross-sectorally, depending on the scope or location of the particular SEA).

- this body would establish guidelines for and ensure appropriate assessment of EIAs, especially in establishing professional technical teams to guide and assess EIAs and guide/conduct SEAs. This body would work in close cooperation with the SBSTA and any regional committees and competent organizations and provide advice to COP on EIAs and SEAs. Its oversight will be particularly important in regions that have not yet established a regional committee.
- Subsidiary body on finance, capacity building and technology transfer
  - this body would be responsible for facilitating resource mobilisation to facilitate implementation of the implementing agreement and for providing assistance to Parties, especially developing countries, and among those, particularly least developed countries and SIDS, in implementing the implementing agreement.
- Subsidiary body on compliance and implementation
  - Parties should be required to report on the implementation of the implementing agreement and any COP decisions, based upon pre-determined reporting criteria. The proposed subsidiary body on compliance and implementation would examine such reports prior to meetings of the COP and recommend to the COP steps that should be taken to enhance such implementation (including incentives as well as possible sanctions in accordance with the respective non-compliance provisions and mechanisms established by the implementing agreement). Such body could also be tasked to undertake non-compliance procedures. Non-compliance complaints by non-State actors could also be received by this body for further analysis and brought to the attention of the COP for appropriate follow up.<sup>704</sup>
- Establishment of a body, such as a compliance committee, that could address cases of non-compliance, including duties of enhanced cooperation. This body could investigate allegations of breach, find facts as necessary and, where appropriate, recommend to the State(s) in question the action to be taken to fulfill the obligation. Technical assistance could be offered to address capacity issues.<sup>705</sup>

## **2. Regional level**

- The following architecture could be envisioned:
  - Regional experts panel or committee. This committee or panel would:
    - make recommendations based on best scientific information on conservation measures to adopt in areas beyond national jurisdiction, as well as specific protection and management measures for set areas based on established criteria;

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<sup>704</sup> WWF

<sup>705</sup> High Seas Alliance

- review EIAs and SEAs and make recommendations based on the conclusions/findings of these assessments;
- review and report to the regional body on progress made in achievement of objectives of existing implemented measures, as well as regional progress in meeting the objectives of the new instrument.

This regional experts' panel or regional experts committee would also include holders of or experts in traditional knowledge.

- Area-based management committee. This committee would coordinate, in a transparent manner, with the experts committee and existing organizations to develop regional ABMTs, including MPAs and marine spatial planning.
- Capacity building and transfer of marine technology committee. The committee would coordinate capacity-building and transfer of marine technology activities, and report to the international level. Consider a regional center as an option if it does not provide another layer of mechanism. Explore merging or associating this committee with existing regional or sub-regional capacity-building and transfer of marine technology mechanisms, where relevant and appropriate, so as to build on what is already working to avoid unnecessary duplications. This body could also facilitate the development of centers of excellence in the Pacific and facilitate their coordination.
- Enforcement committee. This committee would:
  - monitor or coordinate monitoring efforts;
  - raise any issues to the Commission and make recommendations on measures to take;
  - prepare reports to the global compliance committee and decision-making body.
- Finance and administration committee. This committee would:
  - set the budget for the regional commission/implementation and provide strategy to meet the budget needs;
  - manage the regional trust fund or liability fund, when relevant: there may be merit in supporting adding a regional trust fund, which would be funded in part from the international trust fund, based on a formula to account for regional needs. This might add another layer of difficulty and burden for the PSIDS. Merging this BBNJ regional fund with other related existing funds may need to be explored so as to limit the administrative burden associated with this;
  - prepare reports to the international level.<sup>706</sup>
- Regional committees:
  - provide for Parties with an interest in the conservation and sustainable use of biodiversity in a particular region to voluntarily establish regional arrangements they deem appropriate for that region to best facilitate implementation of relevant obligations and commitments, including regional committees. Membership would be open to all Parties to the implementing agreement and non-Parties to the implementing agreement would be welcome as observers. Establishment of such committees would be by COP acceptance of a proposal by

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<sup>706</sup> PSIDS

a group of proponent member States with the relevant interest. As committees of the implementing agreement, they would be empowered to establish subsidiary arrangements as they see fit to fulfill their respective mandates.

- the principal mandate delegated to any such regional committees by the COP, in accordance with the implementing agreement, would be to facilitate the implementing agreement implementation by overseeing and facilitating enhanced cooperation between States (in respect of all their relevant sovereign competencies) and existing bodies and arrangements, including sectoral bodies with competency for controlling activities in areas beyond national jurisdiction (i.e. ISA, IMO and relevant RFMOs) in a manner and to an extent that does not undermine them, but ensures a concerted and comprehensive legal regime, consistent with UN General Assembly resolution 69/292. Additionally, regional committees could be delegated to exercise residual powers to fill any identified governance and regulatory gaps as deemed necessary by the COP to meet the implementing agreement objectives.
- These proposed committees would work closely with other subsidiary bodies under the implementing agreement in exercising oversight of the implementation of the implementing agreement, including of decisions taken by the COP and other identified relevant bodies. In areas where such regional committees or other appropriate arrangements have not been established, the COP would continue to exercise its oversight responsibilities in the same way, without undermining relevant bodies and arrangements as per UN General Assembly resolution 69/292.<sup>707</sup>

### **C. SECRETARIAT**

- The role of the secretariat could be modeled after provisions in article 319 (2) of UNCLOS and article 15 of UN General Assembly resolution 49/28. Procedures established by the secretariat should take into account the special circumstances of SIDS. Inter alia, the secretariat could:
  - provide administrative and logistical support;
  - report on issues or developments related to the conservation and sustainable use of BBNJ as they arise;
  - formulate recommendations for the consideration of States Parties;
  - notify decision-making organs of ratifications and formal confirmations of and accessions to the agreement;
  - notify States Parties of conventions or international agreements related to the future BBNJ agreement;
  - convene necessary meetings of States Parties in accordance with the implementing agreement, and invite observers to participate as observers at meetings of States Parties;

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<sup>707</sup> WWF

- establish appropriate and necessary facilities, as required by the agreement, for the deposit of BBNJ-relevant data/information and establish a system for the publicity of such data/information;
- facilitate capacity building and transfer of marine technology activities, as well as develop and host a clearing-house mechanism which should be created with due regard to the information and communication technologies limitations in SIDS with an emphasis on the accessibility, availability and application of capacity building and transfer of marine technology provisions to SIDS. It could also be tasked with managing an endowment fund.<sup>708</sup>
- The secretariat, in addition to providing administrative support, would be mandated to ensure that relevant stakeholders are included in consultations and, where appropriate, decision-making processes.<sup>709</sup>
- A question to whom to entrust the performance of secretarial functions needs also to be addressed.<sup>710</sup>
- Whether a permanent secretariat is required or whether secretariat services could be provided by an existing international body, such as the UN Secretariat's DOALOS, secretariat services should be provided in a cost effective manner.<sup>711</sup>
- Appropriate for the secretariat function to be served not by a newly established secretariat, but by DOALOS.<sup>712</sup>
- DOALOS might serve as secretariat for the implementing agreement, and be allocated necessary human, technical and financial resources.<sup>713</sup>
- A secretariat, whose functions could be taken over by DOALOS.<sup>714</sup>

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<sup>708</sup> PSIDS

<sup>709</sup> PSIDS

<sup>710</sup> EU

<sup>711</sup> New Zealand

<sup>712</sup> Japan

<sup>713</sup> Norway

<sup>714</sup> Greenpeace

## V. EXCHANGE OF INFORMATION / CLEARING-HOUSE MECHANISM

- Exchange of information and data should be promoted between States as well as relevant regional, sectoral and international organizations (similar to article 17 of CBD).<sup>715</sup>
- Clear information principles should be established that allow meeting papers, meeting reports, decisions, annual reports and results of any performance monitoring of the organization to be made available in a timely manner to Parties, civil society and outside institutions.<sup>716</sup>
- States and subregional or regional biological diversity management organizations and arrangements should give due publicity to conservation and sustainable management measures and ensure that laws, regulations and other legal rules governing their implementation are effectively disseminated. The bases and purposes of such measures should be explained to users of biological diversity and its resources in order to facilitate their application and thus gain increased support in the implementation of such measures.<sup>717</sup>
- Sharing of information and scientific knowledge will be fundamental to achieve a more holistic approach to ocean management. A repository where States and regional and sectorial bodies could post relevant information should be established.<sup>718</sup>
- A clearing-house mechanism to promote and facilitate technical and scientific cooperation, knowledge and data sharing.<sup>719</sup>
- A clearing-house mechanism to facilitate implementation through, e.g., information and knowledge sharing and scientific and technical cooperation.<sup>720</sup>
- A clearing-house mechanism, hosted by the secretariat, would provide centralized access and sharing of information for all, contributing to enhanced transparency and equity. An evolutionary approach could be employed where these information sharing functions would be carried out by the secretariat until such a time when the extraction of marine genetic resources becomes a reality, at which point a specific body would be established. The clearing-house mechanism could provide, inter alia:
  - global information services such as a website for the agreement, a network of experts and practitioners among Parties and partners, mechanisms for Parties and partners to exchange information;
  - network for clearing-house mechanisms at the regional and or national levels. This clearing-house mechanism could also include specific activities to enhance and promote information sharing and dissemination in and with SIDS, as well as provide for specific programmes for SIDS to contribute to the expansion of these mechanisms. It would be managed by the secretariat.<sup>721</sup>
- For the purpose of information sharing and dissemination, a clearing-house mechanism or online repository should be maintained with such information (biological/ecological/oceanographic), as

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<sup>715</sup> New Zealand

<sup>716</sup> New Zealand

<sup>717</sup> Fiji

<sup>718</sup> Norway

<sup>719</sup> G77&China

<sup>720</sup> Greenpeace

<sup>721</sup> PSIDS



well as pressures, stressors, activities and uses of the marine space, which would be essential for the assessment of cumulative impacts and the development of SEAs, EIAs and MPA network planning integrated into ecosystem-based integrated ocean management plans.<sup>722</sup>

- The regional clearing-house mechanism would be part of the global network of clearing-house mechanisms established under the agreement. The regional clearing-house mechanism could build on existing ones in order to limit duplication and improve communication and diffusion of information to the relevant actors. There could either be discussion for a centralized regional clearing-house mechanism, or to identify one single entry point that would be the link with all existing mechanisms.<sup>723</sup>

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<sup>722</sup> WWF  
<sup>723</sup> PSIDS

## VI. FINANCIAL RESOURCES AND MECHANISM

### A. FUNDING MECHANISM

- Funding to support the implementation of the agreement could be provided by the following sources (non exclusive):
  - mandatory sources:
    - States Parties: provision based on a tiered approach with different categories of countries paying different fees;
    - royalties and milestone payments from exploitation of marine genetic resources.
  - voluntary trust fund:
    - States Parties;
    - States non-Parties;
    - international financial institutions, donor agencies, intergovernmental organizations, non-governmental organizations; and
    - natural and juridical persons.<sup>724</sup>
- A global BBNJ trust fund, or trust funds, could:
  - fund preparation and participation of developing States Parties, in particular SIDS, to the agreement's process;
  - assist developing countries, in particular SIDS, in meeting their commitments under the agreement, including through conduct of EIAs;
  - fund capacity building activities;
  - fund technology transfer related activities and programmes, including training;
  - support conservation and sustainable use programmes by holders of traditional knowledge in local communities, including within national jurisdiction, so as to support coherence in ocean management;
  - support public consultations at the national and regional levels.<sup>725</sup>
- An additional funding mechanism to support the development of activities on capacity building and transfer of marine technology for developing countries, in particular SIDS, is the establishment of an endowment fund. It would promote and encourage the conduct of collaborative marine scientific research in areas beyond national jurisdiction including research activities related to marine genetic resources in these areas, through two main activities:
  - by supporting the participation of qualified scientists and technical personnel from developing countries, in particular SIDS, in marine scientific research programmes and activities;
  - by providing opportunities to these scientists to participate in relevant initiatives.This endowment fund would be managed by the secretariat.<sup>726</sup>
- Establishing funding mechanism(s) is important to ensure that all can equitably participate in the implementation of the agreement, in particular SIDS whose limited resources can be a major impediment. While the availability of funding is important, accessibility is equally important. For

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<sup>724</sup> PSIDS

<sup>725</sup> PSIDS

<sup>726</sup> PSIDS

SIDS, this means procedures for access and reporting that are not burdensome. Some options to ensure that SIDS' special case is taken into account include:

- SIDS specific allocation in the fund(s);
- access procedures that are not burdensome: consider a special SIDS procedure with pre-application process, which would then trigger support mechanism to prepare the required application;
- consideration could also be given to making use of existing funding mechanisms, in an attempt to improve coherence and coordination.<sup>727</sup>

### ***B. REHABILITATION / CONTINGENCY FUND***

- In line with the polluters-pay principle, a rehabilitation fund should be established. Private entities wishing to engage in the exploration and exploitation of BBNJ would be required to contribute to the fund, in accordance with a scale tied to the degree of potential environmental harm stemming from the BBNJ activities of those entities. The fund would be used to finance the rehabilitation of BBNJ, including their natural environments, in the event of pollution or other damaging impacts on BBNJ and/or the areas beyond national jurisdiction in which they reside.<sup>728</sup>
- Mechanism for a financial arrangement that will adequately address contingencies of marine pollution and disaster. Establish a fund to finance environmental disasters such as pollution and other catastrophic disasters caused by human activities on the living resources of the areas beyond national jurisdiction. This fund will complement the access and benefit-sharing mechanism established for marine genetic resources.<sup>729</sup>

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<sup>727</sup> PSIDS

<sup>728</sup> PSIDS

<sup>729</sup> Federated States of Micronesia

## VII. MONITORING, REVIEW, COMPLIANCE AND ENFORCEMENT

- Bearing in mind that also various non-State actors will carry out activities regulated by the implementing agreement, the implementing agreement should contain provisions requiring States to enact legislation and regulations and/or adopt measures necessary to ensure compliance with the standards and procedures set up in the implementing agreement.<sup>730</sup>
- States should establish, within their respective competences and capacities, effective mechanisms for monitoring, surveillance, control and enforcement of their entities operating in areas beyond national jurisdiction to ensure compliance with their conservation and sustainable management measures, as well as those adopted by subregional or regional organizations or arrangements.<sup>731</sup>
- There should be a mechanism under the new agreement for a global MCS system for areas beyond national jurisdiction to ensure that protected areas are meeting their objectives and to identify violations by vessels as well as cases of regular non-compliance. This mechanism should facilitate information sharing and joint operations between existing MCS systems. The global monitoring system should be supported by a scientific, technical, financial and capacity building mechanism to ensure equal monitoring standards for all protected areas across regions and facilitate their implementation by Parties, in particular developing States. The implementation of the scientific monitoring could be delegated to appropriate regional bodies when possible as long as they meet the standards set by the new agreement.<sup>732</sup>
- Set up a regular reporting and review process whereby:
  - Parties and relevant regional or global bodies should report back regularly on the implementation of conservation and management measures. These reports should be publicly available.
  - a regular review process should incorporate input from the scientific committee established under the new agreement, all relevant regional or global bodies, and stakeholders, including civil society, as well as information gathered through the global MCS system regarding the effectiveness of the protected areas, their conservation and management plans and progress toward their objectives.
  - The review process should publish a progress report and identify any shortcomings by Parties, non-Parties, and regional or global bodies, affecting the effectiveness of the measures adopted by the agreement.<sup>733</sup>
- Establish a compliance mechanism. Following the outcome of the review process, Parties, stakeholders, including civil society, as well as the compliance committee itself may submit a report of non-compliance. When a Party or a non-Party is identified to have failed to discharge its obligations under the new agreement or, in the case of non-Parties, under international law, to co-operate on the protection and preservation of the marine environment, by not taking measures or exercising effective control to ensure that its vessels or nationals do not engage in any activity that undermines the effectiveness of the agreement's conservation measures, the

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<sup>730</sup> EU

<sup>731</sup> Fiji

<sup>732</sup> Greenpeace

<sup>733</sup> Greenpeace

compliance committee should make recommendations on ways to rectify their acts or omissions. The non-complying Party and non-Party should be notified and offered a reasonable time to respond to the alleged non-compliance and rectify its actions or omissions. When necessary, the new agreement should adopt measures to facilitate compliance (e.g. technical assistance and capacity building) based on recommendations from the compliance committee. If the Party or non-Party in question continues to undermine the effectiveness of the protected area, and/or if the ecosystem or any of its components under protection is under serious threat, the Parties to the agreement should adopt appropriate responsive measures. The responsive measures should be designed to ensure that the conservation objectives of the area are met.<sup>734</sup>

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<sup>734</sup> Greenpeace

## VIII. SETTLEMENT OF DISPUTES

- There could be a dispute prevention mechanism to preempt any dispute from arising. Such issues could be examined either by a specific committee or by selected experts. If this process fails to resolve any issues, then the involved parties could seek peaceful settlement of disputes through mechanisms provided for in Part XV.<sup>735</sup>
- Include a provision concerning the obligation of the Parties to resolve their disputes relating to the interpretation and application of the implementing agreement by peaceful means. Due to their nature, most of possible disputes relating to matters under the implementing agreement would qualify, at the same time, also as disputes under UNCLOS.<sup>736</sup>
- The provisions of UNCLOS relating to the peaceful settlement of disputes reflect a good starting point for consideration of dispute resolution under the instrument.<sup>737</sup>
- Use of the UNCLOS Part XV dispute resolution framework.<sup>738</sup>
- Article 30 of UNFSA provides procedures for which a rendition suited to the new implementing agreement could be made.<sup>739</sup>
- A dispute resolution mechanism could be an expansion of the mandate of the International Tribunal for the Law of the Sea (ITLOS) or a new body using ITLOS as model.<sup>740</sup>
- Dispute settlement procedures in UNCLOS and UNFSA for compulsory settlement of disputes could be drawn on when developing dispute resolution procedures for the new implementing agreement.<sup>741</sup>
- The option to seek an advisory opinion from ITLOS should also be considered as a useful means for resolving differences in interpretation of the new agreement.<sup>742</sup>
- It is paramount for the new agreement to include a streamlined, rapid, accessible, transparent and cost-effective dispute settlement mechanism to resolve disputes arising from its implementation, enhancing and complementing existing mechanisms under UNCLOS. Such mechanism needs to be based on modern principles of good governance and ensure transparency, public participation and accountability and follow contemporary approaches as in the Espoo Convention with its implementation committee or the Aarhus Convention with its compliance committee.<sup>743</sup>
- Existing mechanisms under UNCLOS (e.g. ITLOS) are a good starting point but are not sufficient. The dispute settlement mechanism should incorporate a progressive approach and be accessible, efficient, support good governance, transparency and accountability. Specific clauses to be considered include qualified opt-out mechanisms. One example of how to integrate good governance and dispute resolution is the South Pacific RFMO Convention, where a Party can implement an opt-out mechanism, which allows the measure to go forward and at the same

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<sup>735</sup> PSIDS

<sup>736</sup> EU

<sup>737</sup> Chair's understanding on cross-cutting issues

<sup>738</sup> Australia

<sup>739</sup> Fiji

<sup>740</sup> Federated States of Micronesia

<sup>741</sup> New Zealand

<sup>742</sup> New Zealand

<sup>743</sup> Greenpeace

time offers an opportunity for the State concerned to go to arbitration in The Hague over the matter.<sup>744</sup>

## IX. NON-PARTIES

- Establish that States that are not Parties to the agreement are not discharged from their general obligations under UNCLOS and customary international law, including the obligation to protect and preserve the marine environment as well as the obligation to cooperate.<sup>745</sup>

## X. RESPONSIBILITY AND LIABILITY

- Provision similar to article 35 of UNFSA.<sup>746</sup>
- The Articles on Responsibility of States for Internationally Wrongful Acts elaborated by the International Law Commission and attached to the UN General Assembly resolution 56/83 represent an authoritative body of international law in this field. They are frequently referred to by international courts as reflecting rules of customary international law. Hence, there is no need for any provision on responsibility in the implementing agreement.<sup>747</sup>
- Reflect and build upon the responsibility of States under international law to not cause damage to areas beyond national jurisdiction or to other States, by “ensur[ing] that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.<sup>748</sup>
- The BBNJ instrument can allow its States Parties to establish liability and seek compensation in connection with pollution and other environmentally harmful activities of private entities and other States Parties regarding BBNJ, perhaps by fashioning a dispute resolution mechanism that provides for such recourse.<sup>749</sup>

## XI. REVIEW

- Establishment of a mechanism for regular review of the effectiveness and implementation of the agreement, similar to the review mechanism set out in article 36 of UNFSA. Reviews should be carried out, based on agreed criteria, within a set period of time after entry into force of the agreement, for example after five years, and regularly thereafter.<sup>750</sup>

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<sup>744</sup> High Seas Alliance

<sup>745</sup> EU

<sup>746</sup> New Zealand

<sup>747</sup> EU

<sup>748</sup> WWF

<sup>749</sup> PSIDS

<sup>750</sup> New Zealand

## XII. FINAL ELEMENTS

- The implementing agreement should contain standard final clauses. Their consideration is premature at this stage, though, and should be hence left to the future intergovernmental conference.<sup>751</sup>
- This section should be addressed at a later stage, if the General Assembly decides to convene an intergovernmental conference, and could include provisions relating to settlement of disputes; signature; ratification and accession; entry into force; reservations and exceptions; declarations and statements; amendment; denunciation; participation by international organizations; depository; and authentic texts.<sup>752</sup>
- Final provisions based on those in articles 37 to 50 UNFSA.<sup>753</sup>
- One of the issues which could be given some consideration at a later stage is the necessity and possibility of provisional application of the implementing agreement.<sup>754</sup>
- Universal participation in the instrument should be sought and participation should be open to all States, regardless of whether they are parties to UNCLOS.<sup>755</sup>
- Consider universal participation, where parties and non-parties to UNCLOS can become party to it.<sup>756</sup>
- Participation in the instrument should extend to all States and other entities in like manner as the participation in the UNFSA.<sup>757</sup>
- Similarly to article 305 in connection with Annex IX of UNCLOS, it should also be open for signature by international organizations allowing for the participation of the European Union.<sup>758</sup>
- Open for signature, ratification and accession by all States and other entities on the same basis as provided for in UNFSA (UNFSA articles 37-39).<sup>759</sup>

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<sup>751</sup> EU

<sup>752</sup> USA

<sup>753</sup> New Zealand

<sup>754</sup> EU

<sup>755</sup> Chair's understanding on cross-cutting issues

<sup>756</sup> G77&China

<sup>757</sup> CARICOM

<sup>758</sup> EU

<sup>759</sup> New Zealand