International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

IUCN Comments

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International Union for Conservation of Nature
World Commission on Environmental Law - Ocean Specialist Group
Global Marine and Polar Programme
&
Environmental Law Centre

Note: Comments on the first version of the BBNJ text are available here.

Additional resources are available at: www.iucn.org/bbnj

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The suggestions, recommendations and opinions provided below belong solely to the authors and do not necessarily represent the policies of IUCN.

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Cross-cutting comments

A key omission from this text is the absence of a clear obligation to conserve and sustainably use marine biodiversity and similarly to ensure that activities under a State Parties' jurisdiction or control do not cause significant harm to the marine environment in ABNJ. These obligations are core components of the duty to protect and preserve the marine environment and should be more explicitly stated.

PREAMBLE

Draft Text	Proposed text	Commentary
The States Parties to this Agreement, *Recalling* the relevant provisions of the United Nations Convention on the Law of the Sea, including the obligation to protect and preserve the marine environment, *Stressing* the need to respect the balance of rights, obligations and interests set out in the Convention, *Stressing* the need for the comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, *Desiring* to act as stewards of the ocean in areas beyond national jurisdiction on behalf of present and future generations, *Respecting* the sovereignty, territorial integrity and	*Recognizing* the urgent need to enhance international cooperation to protect and restore the health, productivity and resilience of the ocean and marine ecosystems in areas beyond the limits of national jurisdiction, and to maintain their biodiversity *Aware* that the conservation of marine biodiversity is a common concern and the shared responsibility of all States and that States have the obligation to protect and preserve the marine environment in ABNJ and to assist other States to do the same*;* *Recognizing* the ecological, social, economic, scientific, educational, and cultural importance and intrinsic value of biodiversity beyond national jurisdiction for maintaining ocean health	The Preamble does not yet reflect the scale or scope of ambition reflected in the outcome document from Rio+20 (para. 158): "We therefore commit to protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, and to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities impacting on the marine environment, to deliver on all three dimensions of sustainable development."

political independence of all States, *Desiring* to promote sustainable development, Aspiring to achieve universal participation, *Have agreed* as follows:		

PART I GENERAL PROVISIONS

Draft text	**Proposed text**	**Commentary**
Article 1 Use of terms For the purposes of this Agreement: [1. "Access" means, in relation to marine genetic resources, the collection of marine genetic resources [, including marine genetic resources accessed *in situ*, *ex situ* [and *in silico*] [[and] [as digital sequence information] [as genetic sequence data]]].] 2. "Activity under a State's jurisdiction or control" means an activity over which a State has effective control or exercises jurisdiction. 3. "Area-based management tool" means a tool, including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives [and affording higher protection than that provided in the surrounding areas]. 4. "Areas beyond national jurisdiction" means the high seas and the Area. 5. "Convention" means the United Nations Convention on the Law of the Sea of 10	1. "Access" means, in relation to marine genetic resources, collecting, taking, obtaining or exploiting marine genetic resources [and associated data] for their utilization. 3. "Area-based management tool" means a **management measure** ~~tool~~, including a marine protected area, for a [~~geographically~~ defined area through which one or several~~-sectors or~~ activities are managed **to ensure the** ~~with the aim of achieving particular~~ conservation and sustainable use **of marine biodiversity** ~~objectives [and affording higher protection than that provided in the surrounding areas]~~. [4. "Areas beyond national jurisdiction" **include** ~~means~~ the high seas **and its superjacent airspace**, and the Area.][*no definition*] *Insertion:* "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.	1(1) It is problematic to see multiple definitions of DSI in different fora. In order to ensure that this process is aligned with the CBD DSI process, the definition of "Associated data" could be determined by the decision-making body at a later date. 1(3) The ABMT definition should be more closely aligned with the CBD art. 8.which focuses on a broad range of measures to promote in situ conservation of nature. 1(4) ABNJ is not defined in UNCLOS and should not be defined in this text. UNCLOS defines the marine areas that are subject to varying levels of national jurisdiction; what remains is beyond national jurisdiction. Accordingly, a definition adds nothing to the term itself. On the other hand, this definition omits air space, which is referenced in UNCLOS (e.g., art. 78(1), 87(b), 135, 212(1), and which should therefore be included if ABNJ is defined. 1(6) It is important that "cumulative impacts" be "cumulative" across different uses (within a sector or across sectors) at any time as well as over time. The wording of the draft article is confusing because it refers to climate change and

December 1982. [6. “Cumulative impacts” means impacts on the same ecosystems resulting from different activities, including past, present or reasonably foreseeable activities, or from the repetition of similar activities over time, including climate change, ocean acidification and related impacts.] [7. Alt. 1. “Environmental impact assessment” means a process to evaluate the environmental impact of an activity [to be carried out in areas beyond national jurisdiction [, with an effect on areas within or beyond national jurisdiction]] [, taking into account [, *inter alia*,] interrelated [socioeconomic] [social and economic], cultural and human health impacts, both beneficial and adverse].] [7. Alt. 2. “Environmental impact assessment” means a process for assessing the potential effects of planned activities, carried out in areas beyond national jurisdiction, under the jurisdiction or control of States Parties that may cause substantial pollution of or significant and harmful changes to the marine environment.] [8. “Marine genetic material” means any material of marine plant, animal, microbial or other origin containing functional units of heredity.] [9. Alt. 1. “Marine genetic resources” means any material of marine plant, animal, microbial or other origin, [found in or] originating from areas beyond national jurisdiction and containing functional units of heredity with actual or potential value of their genetic and biochemical properties.] [9. Alt. 2. “Marine genetic resources” means marine genetic material of actual or potential value.] 10. “Marine protected area” means a	*Insertion:* "Conservation" means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species. 9. “Marine genetic resources” means material of marine plant, animal, microbial or other origin containing functional units of heredity and utilized within the meaning of this Part. 10. “Marine protected area” means a geographically defined marine area that is designated and managed to achieve ~~specific~~ [long-term ~~biodiversity~~] conservation. ~~and sustainable use objectives [and that affords higher protection than the surrounding areas].~~ 11. “Marine technology” means information and data, provided in a user-friendly format, ~~on marine sciences and related marine operations and services~~; manuals, guidelines, criteria, standards, reference materials; sampling and methodology equipment; observation facilities and equipment (e.g., remote sensing equipment, buoys, tide gauges, shipboard and other means of ocean observation); equipment for *in situ* and laboratory observations, analysis and experimentation; computer and computer software, including models and modelling techniques; and expertise, knowledge, skills, technical, scientific and legal know-how and analytical methods related to **the conservation and sustainable use of marine biodiversity, including but not limited to** marine scientific research and observation. 13. “Strategic environmental assessment” means the **integrated** evaluation of the likely environmental, ~~including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the~~	acidification as activities, which they are not. These are “impacts” themselves even if they have (cascading) consequences. 1(9) The definition of MGR follows the CBD (art. 2) where one definition relies on another one. Consolidating the definition is more straightforward and simple and avoids the problem of defining actual or potential value. Defining in terms of “utilization” allows better differentiation between commodities and genetic resources. It is still compatible with the CBD definition. 1(10) The definition of “MPA” should be consistent with the IUCN definition to ensure comparable reporting in the World Database on Protected Areas (WDPA) and compatible protection standards within and beyond national jurisdictions.(IUCN WCPA, 2018). Most important elements are persistence (long term) and a primary objective of conservation. Activities should be managed consistently with that objective (IUCN WCPA 2019). 1(11)/1(14) 1(11) “marine technology” and 1(14) “transfer of marine technology” should be better linked. For example, in the definition of ‘marine technology transfer’ [14] reference should be made to expertise. The draft definition of “marine technology” reflects the IOC Criteria and Guidelines on the Transfer of Marine Technology and therefore has a focus on marine sciences and related services. While these forms of technology will be important for the BBNJ agreement, other relevant forms of technology (such as monitoring, control and surveillance technologies) may not be currently captured in the definition. The definition could be made broader. 1(13) The draft definition of SEA describes the process of an SEA but does not provide a definition of an SEA. Moreover, in

geographically defined marine area that is designated and managed to achieve specific [long-term biodiversity] conservation and sustainable use objectives [and that affords higher protection than the surrounding areas]. [11. "Marine technology" means information and data, provided in a user-friendly format, on marine sciences and related marine operations and services; manuals, guidelines, criteria, standards, reference materials; sampling and methodology equipment; observation facilities and equipment (e.g., remote sensing equipment, buoys, tide gauges, shipboard and other means of ocean observation); equipment for *in situ* and laboratory observations, analysis and experimentation; computer and computer software, including models and modelling techniques; and expertise, knowledge, skills, technical, scientific and legal know-how and analytical methods related to marine scientific research and observation.] 12. (a) "States Parties" means States that have consented to be bound by this Agreement and for which this Agreement is in force. (b) This Agreement applies mutatis mutandis: (i) To any entity referred to in article 305, paragraph 1 (c), (d) and (e), of the Convention, and (ii) Subject to article 67, to any entity referred to as an "international organization" in annex IX, article 1, of the Convention that becomes a Party to this Agreement, and to that extent "States Parties" refers to those entities. [13. "Strategic environmental assessment" means the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental	~~carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.~~]l effects of proposed plans or programmes, or of proposed technologies or novel activities, including potential cumulative effects. *13.bis. Insertion*. **"Sustainable use" means the use of components of biological diversity in a way and at a rate that does not lead to the loss of or long-term decline in biological diversity and is assessed to ensure such use does not cause significant adverse impacts, individually or cumulatively, thereby maintaining its potential to meet the needs and aspirations of present and future generations.** [14. "Transfer of marine technology" means the transfer of the instruments, equipment, **expertise,** vessels, processes and methodologies required to produce and use knowledge to improve the study and understanding of the nature and resources of the ocean.] **15. "Utilization" means, in relation to genetic resources, to conduct research and development for any purpose on the genetic and/or biochemical composition of genetic resources, [and derivatives]and on second, third and fourth generation genetic resources.**	the draft text, there is no difference between EIA and SEA definitions, except that in SEA, the text refers to the details of the structure (scope) and process (participation, etc.) which apply also (but are not described) in the EIA paragraph above. The integrated aspect of SEA should be emphasized. Suggested additional terms to define: In addition to "sustainable use" it would be helpful to include definitions for "science-based", "best-available science", "ecosystem approaches", "precautionary approach/principle". These appear under art. 5 (General principles and approaches) but it would be an opportunity to clarify and unify terminology (*e.g.* refer to CBD COP Decision V/6)

report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.] [14. "Transfer of marine technology" means the transfer of the instruments, equipment, vessels, processes and methodologies required to produce and use knowledge to improve the study and understanding of the nature and resources of the ocean.] [15. "Utilization of marine genetic resources" means to conduct research and development on the genetic and/or biochemical composition of marine genetic resources [, as well as the exploitation thereof].]		
Article 2 General Objective The objective of this Agreement is to ensure the [long-term] conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination.		2 Additional objectives, obligations or principles could be included, in this article or other articles, Such objectives could include: ● Promote the protection of ecosystems, natural habitats and maintenance of viable populations of species in natural surroundings ● Apply internationally agreed scientific criteria and guidelines ● Integrate conservation and sustainable use into decision-making ● Adopt measures to avoid or minimize adverse impacts ● Cooperate to establish a system of MPAs and adopt other effective conservation measures. These provisions may be based on the provisions of UNCLOS art. 194.5, CBD art. 8 & 10, UNFSA art. 10; Aichi Target 11; UNGA res. 61/105.

Article 4 Relationship between this Agreement and the Convention and relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies 1. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention. 2. The rights and jurisdiction of coastal States in all areas under national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone, shall be respected in accordance with the Convention. 3. This Agreement shall be interpreted and applied in a manner that [respects the competences of and] does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies. [4. The legal status of non-parties to the Convention or any other related agreements with regard to those instruments is not affected by this Agreement.]	3. This Agreement shall be interpreted and applied in a manner that [~~respects the competences of and~~] **promotes coherence and cooperation** and does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.	4(3) There is still value in text that promotes coherence and coordination as was addressed in prior draft text.
Article 5 General [principles] [and] [approaches] In order to achieve the objective of this Agreement, States Parties shall be guided by the following: [(a) The principle of non-regression;] (b) [The polluter pays principle] [The endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should [, in principle,] bear the cost of pollution, with due		5. This list is missing many key principles and obligations from UNCLOS. UNCLOS Part XII starts with Article 192: General obligation. States have the obligation to protect and preserve the marine environment. Moreover, some of these principles will require some elaboration to clarify. For example, the Principle of Equity may need some more explanations, e.g.: equity in recognition, and representation (in decision-making) as well as distribution of costs and benefits (c.f. CBD). It may also not be clear what is meant by an integrated approach or the `non-

regard to the public interest and without distorting international trade and investment]; [(c) The principle of the common heritage of mankind;] (d) The principle of equity;] (e) The precautionary [principle] [approach]; (f) An ecosystem approach; [(g) An integrated approach;] (h) An approach that builds ecosystem resilience to the adverse effects of climate change and ocean acidification and restores ecosystem integrity; (i) The use of the best available [science] [scientific information and relevant traditional knowledge of indigenous peoples and local communities]; (j) The non-transfer, directly or indirectly, of damage or hazards from one area to another and the non-transformation of one type of pollution into another.		transfer" of damage or hazards in the case of marine migratory species..
Article 6 International cooperation 1. States Parties shall cooperate under this Agreement for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and members thereof in the achievement of the objective of this Agreement. 2. States Parties shall promote international cooperation in marine scientific research and in the development and transfer of marine technology	2. States Parties shall promote international cooperation in marine scientific research and in the development and transfer of marine technology ~~consistent with the Convention~~ in support of the objective of this Agreement. ~~[~~3. States Parties shall cooperate to establish new global, regional and sectoral bodies, where necessary **to support the objective of this Agreement.~~t~~.~~]~~	6(2) There is a need for a more ambitious text regarding the promotion of international cooperation in MSR and transfer of marine technology to recognise that the current state of international cooperation in MSR is inadequate (*see* comment on art. 4(4) above).

consistent with the Convention in support of the objective of this Agreement. [3. States Parties shall cooperate to establish new global, regional and sectoral bodies, where necessary.]		

PART II MARINE GENETIC RESOURCES, INCLUDING QUESTIONS ON THE SHARING OF BENEFITS

Draft text	Proposed text	Commentary
Article 7 Objectives The objectives of this Part are to: [(a) Promote the [fair and equitable] sharing of benefits arising from the [collection of] [access to] [utilization of] marine genetic resources of areas beyond national jurisdiction;] [(b) Build the capacity of developing States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle - income countries, to [collect] [access] and utilize marine genetic resources of areas beyond national jurisdiction;] [(c) Promote the generation of knowledge and technological innovations, including by promoting and facilitating the development and conduct of marine scientific research in areas beyond national jurisdiction, in accordance with the Convention;] [(d) Promote the development and transfer of marine technology [, subject to all legitimate interests, including, inter alia, the rights and duties of holders, suppliers and recipients of marine technology].]	(c/d) Promote the generation, development and transfer of marine technology and marine scientific research in areas beyond national jurisdiction subject to all legitimate interests, including, inter alia, the owners of intellectual property rights and the rights and duties of holders, suppliers and recipients of marine technology. States shall ensure that intellectual property rights shall be subject to specific limitations which are permitted under international intellectual property framework in furtherance of technology transfer related to marine technology under this Agreement	7(a) The inclusion of "fair and equitable" is important to move away from a focus on commercial reward and to ensure that there is wider benefit to all including those with less capacity to be involved in generating benefit in the first place 7(b) The listing of States is unnecessary and lacks flexibility to allow for future inclusion of other types of States. 7(c) and 7(d) Should be combined and cover generation, development and transfer of knowledge and technological innovation, which could be worded so as to cover results of work with MGR. The reference to "rights and duties" should clearly cover IP rights and limits which can be imposed on them under the international IP regime. This article does not engage directly with the issue of information sharing with regards to MSR and the delay that could be involved while a patent application is being prepared. There is no reference to time. If a patent is granted, there will need to have been a sharing of information at some point. More concerning is the prospect of the choice to keep information a trade secret. One option to address this is to establish a period during which secrecy is permitted and after which information must be available to all. A disclosure within this period may be permitted (in line with public interest defences) if the information is used to contribute to ecologically sustainable practices.

		(*see* comment on art. 45).
[Article 8 Application] [1. The provisions of this [Part] [Agreement] shall apply to: [(a) Marine genetic resources, insofar as they are collected for the purposes of being the subject of research into their genetic properties;] (b) Marine genetic resources [collected] [accessed] *in situ*, [and] [accessed] *ex situ* [and *in silico*] [[and] [as digital sequence information] [as genetic sequence data]] [and their utilization]; [(c) Derivatives.]] [2. The provisions of this [Part][Agreement] shall not apply to: [(a) The use of fish and other biological resources as a commodity.] [(b) Marine genetic resources accessed *ex situ* [or *in silico*] [[and] [as digital sequence information] [as genetic sequence data]] [and their utilization];] [(c) Derivatives;] [(d) Marine scientific research.]] [3. The provisions of this Agreement shall apply to marine genetic resources [collected] [accessed] *in situ*, [and] [accessed] *ex situ* [and *in silico*] [[and] [as digital sequence information] [as genetic sequence data]] [and their utilization] after its entry into force, including those resources [collected] [accessed] *in situ* before its entry into force, but accessed *ex situ* or [*in silico*] [[and] [as digital sequence information] [as genetic sequence data]] [or utilized] after it.]		8 It should apply to "MGR and associated data" in order to allow the inclusion of Omics data. *See e.g.* Draft NOAA 'Omics Strategy 8(1)(a) Including derivatives makes this agreement consistent with Nagoya and allows for the very real possibility of the discovery of derivatives which have as much value as DSI, e.g. chemical structures which can be synthesised in the lab. . It is not clear how to ascertain that resources were collected "for the purposes of being the subject of research into their genetic properties". They may be collected for taxonomy and there may be a change of use. 8(1)(b) and 8(2)(b) Engaging with DSI is very important to future proof and indeed present proof the agreement. DSI is an essential tool for conservation and use of MGR. Currently DSI is shared in an open fashion and restrictions are likely to impede ability to develop conservation measures and new MGR-based products and processes. 8(3) There should be no retrospective application to MGR or DSI. The definition of DSI needs to be the same across all fora to prevent 'jurisdiction shopping' (*see* comment on art. 1.1)

[Article 9 Activities with respect to marine genetic resources of areas beyond national jurisdiction] [1. Activities with respect to marine genetic resources of areas beyond national jurisdiction may be carried out by all States Parties and their natural or juridical persons under the conditions laid down in this Agreement.] [2. In cases where marine genetic resources of areas beyond national jurisdiction are also found in areas within national jurisdiction, activities with respect to those resources shall be conducted with due regard for the rights and legitimate interests of any coastal State under the jurisdiction of which such resources are found.] [3. No State shall claim or exercise sovereignty or sovereign rights over marine genetic resources of areas beyond national jurisdiction [, nor shall any State or natural or juridical person appropriate any part thereof]. No such claim or exercise of sovereignty or sovereign rights [nor such appropriation] shall be recognized.] [4. The utilization of marine genetic resources of areas beyond national jurisdiction shall be for the benefit of mankind as a whole, taking into consideration the interests and needs of developing States, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries.] [5. Activities with respect to marine genetic resources of areas beyond national jurisdiction shall be carried out exclusively for peaceful purposes.]		9(2) The meaning of due regard in this situation could refer to process or substantive rights. If the intention is to allow for notification of coastal States, or to provide information (etc…), this could be more clearly spelled out, with due regard as a backstop. It may be best to leave it so that whichever jurisdiction the actual material was obtained from is applied. 9(3) This could raise a patent issue if there were to be direct patenting of MGR, but even the loosest application of patent law should not lead to this. It could depend on what is meant by appropriation – e.g. setting on one a path to an innovation, although that is not the standard meaning and is likely not what is meant here. 9(4) Is not inconsistent with the existence of patents building on MGR as development and sharing of innovation can be consistent with the benefit of all (eventually) 9(5) This provision may be difficult to monitor and enforce. As an example, marine toxins are studied for their effect on human health, but they could easily be subverted to be used as biowarfare agents (in fact, the OPCW register mentions compounds with such properties). Military funding is a significant source of funding for biotechnology research.

[Article 10 [Collection of] [and] [Access to] marine genetic resources of areas beyond national jurisdiction] [1. *In situ* [collection of] [access to] marine genetic resources within the scope of this Part shall be subject to [Alt. 1. [prior] [and] [post-cruise] notification to the secretariat [, which shall include an indication of the location and date of [collection] [access], the resources to be [collected] [accessed], the purposes for which the resources will be utilized and the entity that will [collect] [access] the resources] [of [collection of] [access to] marine genetic resources of areas beyond national jurisdiction].] [Alt. 2. a [permit] [licence] issued in the manner and under the terms and conditions set forth in paragraph 2.]] [2. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that *in situ* [collection of] [access to] marine genetic resources within the scope of this Part shall be subject to: (a) An indication of the geographical coordinates of the location where marine genetic resources were [collected] [accessed]; (b) Capacity-building; (c) The transfer of marine technology; (d) The deposit of samples, data and related information in open source platforms, such as databases, repositories or gene banks; (e) Contributions to the special fund; (f) Environmental impact assessments; (g) Other relevant terms and conditions as may be determined by the Conference of the Parties,	10(2)(c) The transfer of marine technology including through the imposition of limits on intellectual property rights and compulsory licensing as is consistent with the international intellectual property framework and in particular to enable research for any purposes and the use of underlying technology and innovation for energy transition or ecologically sustainable products.	10(1) This provision should include prior notification of listed items with an update post cruise. 10(2)(c) Private IP rights over relevant technology could restrict the effective transfer of marine technology - reference could be made to TRIPS art. 9, 30 and 31 that provide exceptions and compulsory licensing provisions, in particular regarding ongoing research by anyone for any purpose and the sharing of patents for use for energy transitions or ecologically sustainable products. This would not remove all reliance on rights, depending on the activity or the need for some payment but it would engage directly with the issue. Silence on this matter in UNFCCC agreements has been unproductive, and challenges remain at WTO and UNFCCC regarding the power of intellectual property (*see* Brown monograph 2019 Intellectual Property, Climate Change and Technology, in particular ch. 1). *See* wording from CBD (and TRIPS above) (and *see* IUCN contribution on art 12 at end IGC 3 but note that the reference there to restrictions in the context of plant life, human life, avoiding serious prejudice to the environment is quite wide. 10(2)(d) What is meant by open source? Does this mean functionally accessible and interoperable or does it mean free of charge or free of restriction as to onward use? There may be claims that information submitted to the banks, etc. is secret, that collections of such data are subject to database rights and that a software which operates for banks, etc. currently or in the future is subject to a patent. This could restrict the workability of this solution. *Benefit sharing: combining intellectual property, trade secrets, science and an ecosystem-focused approach*, edited collection from Malmo conference May 2019).

including in relation to [the collection of] [access to] marine genetic resources in ecologically and biologically significant areas, vulnerable marine ecosystems and other specially protected areas, in order to ensure the conservation and sustainable use of the resources therein.] [3. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that *ex situ* access to marine genetic resources within the scope of this Part is free and open [, subject to articles 11 and 13].] [4. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that access to [marine genetic resources *in silico*] [[and] [digital sequence information] [genetic sequence data]] is facilitated [, subject to articles 11 and 13].] [5. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that activities with respect to marine genetic resources of areas beyond national jurisdiction that may result in the utilization of marine genetic resources found in areas both within and beyond national jurisdiction are subject to the prior notification and consultation of the coastal States [and any other relevant State] concerned, with a view to avoiding infringement of the rights and legitimate interests of [that] [those] State[s].] [6. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that marine genetic resources of areas beyond national jurisdiction utilized within their jurisdiction have been [collected] [and] [accessed] in accordance with this Part.]		• This provision may be better used in the benefit sharing section. • A formal definition of the terms (open access, open source…) should clarify the provision. Another issue arises from the common practice of providers of material requesting a handling charge to send materials reducing the burden on them. 10(3) There is a lack of clarity with regards to the definition of free and open (*see* comments on art. 10(2)(d) above). 10(4) Providing for access to DSI is critical to prevent fragmentation of databases. The value rests with the collection of information, not individual sequences. 10(5) This section is highly problematic. In case of conflict, it is unclear where the burden of proof would lie. If one develops a product from an MGR found in ABNJ and that it is subsequently found in the EEZ of a coastal state, will they have to share benefits? The same problem arises when something found in an MGR from an ABNJ is also found in a terrestrial species in a landlocked state. This is inapplicable. The whole issue of adjacency and rights of coastal States is irrelevant. The jurisdiction where the GR is found should govern how benefit sharing is applied.

[Article 10bis Access to traditional knowledge of indigenous peoples and local communities associated with marine genetic resources [collected] [accessed] in areas beyond national jurisdiction] [States Parties shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that traditional knowledge associated with marine genetic resources [collected] [accessed] in areas beyond national jurisdiction that is held by indigenous peoples and local communities shall only be accessed with the prior and informed consent or approval and involvement of these indigenous peoples and local communities. The clearing-house mechanism may act as an intermediary to facilitate access to such traditional knowledge. Access to such traditional knowledge shall be on mutually agreed terms.]		10bis. This article is important, but much of the traditional knowledge will be known from the EEZ and be applicable in ABNJ. How can this be covered legally?
[Article 11 [Fair and equitable] sharing of benefits] [1. States Parties, including their nationals, that have [collected] [accessed] [utilized] marine genetic resources of areas beyond national jurisdiction [shall] [may] share benefits arising therefrom [in a fair and equitable manner] with other States Parties, with consideration for the special requirements of developing States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries [, in accordance with this Part].] [2. Benefits [shall] [may] include [monetary and] non-monetary benefits.] [3. Benefits arising from the [collection of]		11(1) It is important to emphasize that benefits should be shared in a fair and equitable manner. Art. 11(2) is not necessary, given art. 11(3). It will be important to make clear decisions about what monetary and non-monetary benefits are covered and how. 11(3)(a) The rate of payments of monetary benefits could be determined by the COP. The ILBI could specify that different rates must be determined by nature of use of MGR (e.g. lower if products encourage sustainable activity). This would set down a marker consistent with fair and equitable benefit sharing and with overall principles, and also with 11(4), while still leaving details to be discussed and adopted at the COP. *Benefit sharing: combining intellectual property, trade secrets, science and an ecosystem-focused approach*, chapter to edited collection from Malmo

[access to] [utilization of] marine genetic resources of areas beyond national jurisdiction [shall] [may] be shared at different stages, in accordance with the following provisions: [(a) Monetary benefits [shall] [may] be shared against an embargo period for [marine genetic resources *in silico*] [digital sequence information] [genetic sequence data] or upon the commercialization of products that are based on marine genetic resources of areas beyond national jurisdiction [in the form of milestone payments]. The rate of payments of monetary benefits shall be determined by the Conference of the Parties. [Payments shall be made to the special fund];] [(b) Non-monetary benefits [, such as access to samples and sample collections, sharing of information, such as pre-cruise or pre-research information, post-cruise or post-research notification, transfer of technology and capacity-building,] [shall] [may] be shared upon [collection of] [access to], [utilization] of marine genetic resources of areas beyond national jurisdiction. Samples, data and related information [shall] [may] be made available in open access [through the clearing-house mechanism [upon [collection] [access] [after […] years]]]. [[Marine genetic resources *in silico*] [Digital sequence information] [Genetic sequence data] related to marine genetic resources of areas beyond national jurisdiction [shall] [may] be published and used taking into account current international practice in t he field.]] [4. Benefits shared in accordance with this Part shall be used: [(a) To contribute to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction;]		conference May 2019).). Since both monetary and non-monetary benefits cost money, the true cost of 'non-monetary benefits' should be recognised and factored in any calculations on levels of benefit provided. 11(3)(a)/11(3)(b) DSI can be shared without loss of materials, whereas MGR are limited and may be collected for specific research project. Therefore, an embargo on physical MGR makes more sense than an embargo for DSI. Sharing of MGR should be based on availability, suitability of material and non-competing use. 11(3)(b) seems to cover this better (current international practice in the field). 11(3)(b) *See* comments under art. 10(2)(d) above on open access 11(4) This provision is really positive. It will be important to find ways to monitor these benefits and ensure that their value is factored into benefit calculations. Art. 11(5) needs to ensure that this information is not kept by each State, but shared via a clearing house mechanism in order to ensure transparency. This open clause could be seen as enabling States to rely on provision from TRIPS discussed in comments on art. 10(2)(c) above.

[(b) To promote scientific research and facilitate [the collection of] [access to] marine genetic resources of areas beyond national jurisdiction;] [(c) To build capacity to [collect] [access] and utilize marine genetic resources of areas beyond national jurisdiction [, including through common funding or pool funding for research cruises and collaboration in sample collection and data access where adjacent coastal States [shall] [may] be invited to participate, taking into account the varying economic circumstances of States that wish to participate];] [(d) To create and strengthen the capacity of States Parties to conserve and use sustainably marine biological diversity of areas beyond national jurisdiction, with a focus on small island developing States;] [(e) To support the transfer of marine technology;] [(f) To assist developing States Parties in attending the meetings of the Conference of the Parties.]] [5. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from [the collection of] [access to] [the utilization] of marine genetic resources of areas beyond national jurisdiction by natural or juridical persons under their jurisdiction are shared in accordance with this Agreement.]		
[Article 12 Intellectual property rights] [1. States Parties shall cooperate to ensure that intellectual property rights are supportive of and do not run counter to the objectives of this Agreement [, and that no action is taken in the context of intellectual property rights that would		12(1) *See* comments under art. 10(2)(c) and art. 11(5). This wording could work or it could be seen as ensuring a maximalist approach to IP and there could be reluctance to pursue flexibilities in TRIPS because of fear as to approaches which would be better. It would be preferable to opt for

undermine benefit-sharing and the traceability of marine genetic resources of areas beyond national jurisdiction].] [2. [Marine genetic resources [collected] [accessed] [utilized] in accordance with this Agreement shall not be subject to patents except where such resources are modified by human intervention resulting in a product capable of industrial application.] [Unless otherwise stated in a patent application or other official filing or recognized public registry, the origin of marine genetic resources utilized in patented applications shall be presumed to be of areas beyond national jurisdiction.]] [3. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that: (a) [Users of] [Applicants for patents on inventions that utilize or have utilized] marine genetic resources of areas beyond national jurisdiction disclose the origin of the marine genetic resources that they utilize; (b) Intellectual property rights applications related to the utilization of marine genetic resources of areas beyond national jurisdiction that do not comply with this Part are not approved.]		clarity. There is a lot of scholarship on this in the domain of health, *see e.g.* Carlos Correa, 2000*;* Carlos Correa, 2002; Daniel J. Gervais, 'Trips 3.0: Policy Calibration and Innovation Displacement' in Chantal Thomas and Joel P Trachtman (eds), *Developing Countries in the WTO Legal System* (Oxford University Press, New York, 2009) and Abdulqawi (eds, 3 ed) *Intellectual Property and International Trade: The TRIPS Agreement* (Wolters Kluwer, Netherlands, 2016). 12(2) The first sentence of this provision repeats internationally accepted limits on patenting. There is a concern that a requirement that there must be disclosure of origin to get a patent, then this is a new ground for validity and this would be moving beyond the requirements of TRIPS. The presumption avoids concerns that a new requirement for validity would be imposed, (which would be inconsistent with TRIPS) and does not create a new procedural requirement (which could be problematic under the Patent Cooperation Treaty (*see* Chiarolla, 2018). For this to work, however, there needs to be a link between this and the benefit sharing provisions (art. 11) and this point may be better made there. 12(3) This provision links to the legal issues highlighted in comments to art. 12(2). There could be a requirement that States do it, many already do (*see* WIPO, disclosure requirements table) and research shows it would not be expensive *(see* Castalia (2018). Economic Evaluation of Disclosure of Origin Requirements). A focus on users and collection of information elsewhere could be a different solution but this

		may be practically difficult. If patent offices are seen as the easiest way of collecting this for all use and not only for patents (reference to users is important), this could be made clear. Patent offices could just be a collection house rather than there being any link with patent law. The disclosure of origin could be introduced at national level to meet requirements under Nagoya and it could be delivered in patent offices. This must not, however, be linked with the validity of there being a patent. 12(3)(a) Disclosure of origin is essential to show you did not obtain material from AWNJ so you do not have to comply with the NP. 12(3)(b) Would be a problem under TRIPS.
[Article 13 Monitoring] [1. The Conference of the Parties shall adopt appropriate rules, guidelines or a code of conduct for the utilization of marine genetic resources of areas beyond national jurisdiction.] [2. Monitoring of the utilization of marine genetic resources of areas beyond national jurisdiction shall be carried out through the [clearing-house mechanism] [Scientific and Technical Body] [obligatory prior electronic notification system managed by the secretariat and mandated existing international institutions set forth in Part […]].] [3. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that: [(a) An identifier is assigned to marine genetic resources [collected] [accessed] *in situ*. In the case of marine genetic resources accessed *ex situ* [and *in silico*] [[and] [as digital sequence information] [as genetic sequence data]], such identifier shall be		13(3)(a) There is a distinction between traceability and track and trace. The former is achievable and relies on the end user having the identifier when publishing/patenting etc. Track and trace will be very onerous and difficult to achieve, compliance will also be an issue. It should be clear how this process covers digital sequence information. 13(3)(b) may be too onerous. It should be sufficient to provide the identifier to the user that accesses the ex-situ materials. Sending that information to the clearing house every time someone access materials from an ex-situ collection is overly complicated. 13(3)(c) This system is used in national systems, such as in Fiji, for monitoring compliance with the Nagoya Protocol. It is not clear how it will work in a multilateral system. Who will collect, check and curate information? Most MSR will have a null return each year unless there is a change of use. 13(5) This is potentially very onerous. How can

assigned when databases, repositories and gene banks submit the list mentioned in article 51 (3) (b) to the clearing-house mechanism;] [(b) Databases, repositories and gene banks within their jurisdiction are required to [notify the [clearing-house mechanism] [Scientific and Technical Body]] [send a notification through the obligatory prior electronic notification system managed by the secretariat and mandated existing international institutions set forth in Part […]] when marine genetic resources of areas beyond national jurisdiction, including derivatives, are accessed;] [(c) Proponents of marine scientific research in areas beyond national jurisdiction submit periodic status reports [to the clearing-house mechanism] [to the Scientific and Technical Body] [through the obligatory prior electronic notification system managed by the secretariat and mandated existing international institutions set forth in Part […]], as well as research findings, including data collected and all associated documentation.]] [4. States Parties shall make available to the clearing-house mechanism information on the legislative, administrative and policy measures that have been adopted in accordance with this Part.] [5. States Parties shall submit reports to the Conference of the Parties about their utilization of marine genetic resources of areas beyond national jurisdiction. The Conference shall review such reports and make recommendations.]		states collect this information?

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

Draft text	Proposed text	Commentary
Article 14 Objectives The objectives of this Part are to: [(a) Enhance cooperation and coordination in the use of area-based management tools, including marine protected areas, among States, relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, which will also promote a holistic and cross-sectoral approach to [ocean management] [conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction];] [(b) Implement effectively obligations under the Convention and other relevant international obligations and commitments;] [(c) Conserve and sustainably use areas requiring protection, including by establishing a comprehensive system of area-based management tools, including marine protected areas;] [(d) Establish a system of ecologically representative marine protected areas that are connected [and effectively and equitably managed];] [(e) Rehabilitate and restore biodiversity and ecosystems, including with a view to enhancing their productivity and health and building resilience to stressors, including those related to climate change, ocean acidification and marine	**Article 14 Objectives** The objectives of this Part are to: 14(a) Establish a system of ecologically representative marine protected areas that are connected and effectively and equitably managed **and protected** (currently 14(d)) 14(c) [(c) Conserve and sustainably use areas **to promote the protection of ecosystems, natural habitats and maintenance of viable populations of species in natural surroundings**, including by establishing a comprehensive system of area-based management tools, including marine protected areas **and other effective area-based conservation measures**; 14(e) **Protect, maintain, and** ~~r~~Rehabilitate and restore **where necessary**, biodiversity and ecosystems, including with a view to enhancing their productivity and health and building resilience to stressors, including those related to **but not limited to, marine pollution, the impacts of** climate change, **such as** ocean acidification**, increasing sea-surface temperatures and ocean deoxygenation** ~~and marine pollution~~;]	14(a) The primary objective of this Part, to establish a system of effectively protected marine protected areas, should be stated first. MPA networks are crucial for maintaining the full range of biodiversity; safeguarding key habitats for migratory species; linking sources and sinks of food supply and larval flow; and encompassing other ecological, oceanographic and genetic connectivities. 14(c) In addition to MPAs, an array of ABMTs may be needed to promote the protection of ecosystems, natural habitats and maintenance of viable populations of species in natural surroundings (cf CBD Article 8(d)) and other areas of ecological, biological, scientific or cultural significance. 14(e) The "Rehabilitate/restore" objective here should be broadened to include protect and maintain, consistent with the precautionary approach and Rio+20, in particular Para 158.A/RES/66/288 - The Future We Want (*see* comment on preamble).

pollution;] [(f) Support food security and other socioeconomic objectives, including the protection of cultural values;] [(g) Create scientific reference areas for baseline research;] [(h) Safeguard aesthetic, natural or wilderness values;] [(i) Promote coherence and complementarity.]		
Article 15 International cooperation and coordination 1. [To further international cooperation and coordination with respect to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,] States Parties shall promote coherence and complementarity in the establishment of area-based management tools, including marine protected areas, through: [(a) Relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, without prejudice to their respective mandates, in accordance with this Part;] [(b) The process in relation to area-based management tools, including marine protected areas, set out in this Part, including by: (i) Adopting conservation and [management] [sustainable use] measures to complement measures designated under relevant legal instruments and frameworks and relevant global, regional, subregional or sectoral bodies; [(ii) Establishing area-based management tools, including marine protected areas, and adopting conservation and [management] [sustainable use]	15(1) ~~[To further international cooperation and coordination with respect to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,]~~ States Parties shall promote ~~coherence and complementarity in~~ the establishment of area-based management tools, including marine protected areas, through: ~~[~~(~~b~~ **a**) The process in relation to area-based management tools, including marine protected areas, set out in this Part~~, including b~~y: ~~(i) Adopting conservation and [management] [sustainable use] measures to complement measures designated under relevant legal instruments and frameworks and relevant global, regional, subregional or sectoral bodies;~~ ~~[(ii) Establishing area-based management tools, including marine protected areas, and adopting conservation and [management] [sustainable use] measures where there is no relevant legal instrument or framework or relevant global, regional, subregional or sectoral body.]]~~ (b) ~~Relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral~~	15(1) This paragraph should clearly state that the obligation is to "promote the establishment of ABMTs including MPAs through…" The current emphasis on "coherence and complementarity" is vague and more akin to an objective than an elaboration of the duty to cooperate. Also missing is an obligation for States Parties to cooperate to promote a more biodiversity-inclusive, integrated and ecosystem-based approach to management both directly through the BBNJ Agreement and as members of global, regional and sector-based organisations. Such an explicit obligation could help to strengthen measures to protect ecosystems, habitats and species and require that ongoing or any future activities do not cause significant adverse effects. 15(1)(a) This provision should be clarified to refer more specifically to "competent international bodies" as it is the competence of the body to adopt conservation measures that may be most relevant. 15(1)(b)(i) and (ii). These provisions summarize parts of art. 19 and therefore are redundant and unnecessary. Moreover, they create a danger of different wording in different places leading to

measures where there is no relevant legal instrument or framework or relevant global, regional, subregional or sectoral body.]] [2. Alt. to para. 1. (b) (ii) Where there is no relevant legal instrument or framework or relevant global, regional, subregional or sectoral body to establish area-based management tools, including marine protected areas, States Parties shall cooperate to establish such an instrument, framework or body and shall participate in its work to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.] 3. States Parties shall make arrangements for consultation and coordination to enhance cooperation with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies with regard to area -based management tools, including marine protected areas, as well as coordination among associated conservation and [management] [sustainable use] measures adopted under such instruments and frameworks and by such bodies. 4. Measures adopted in accordance with this Part shall not undermine the effectiveness of measures adopted by coastal States in adjacent areas within national jurisdiction and shall have due regard for the rights, duties and legitimate interests of all States, as reflected in relevant provisions of the Convention. Consultations shall be undertaken to this end, in accordance with the provisions of this Part. 5. In cases where an area-based management tool, including a marine protected area, established under this Part subsequently falls under the national jurisdiction of a coastal State, either wholly or in part, it shall be adapted to cover any	~~bodies~~, **Competent international bodies**, without prejudice to their respective mandates, in accordance with this Part; [2. ~~Alt. to para. 1. (b) (ii)~~ **Where there is no competent international body** ~~relevant legal instrument or framework or relevant global, regional, subregional or sectoral body~~ to establish **or coordinate** area-based management tools~~, including~~ **or manage** marine protected areas, States Parties ~~shall~~ **may** cooperate to establish such an instrument, framework or body and shall participate in its work **to promote the objectives of this Part** ~~and to ensure the conservation and sustainable use of marine biological diversity within the relevant of areas beyond national jurisdiction.~~] 3. ~~States~~ **Under this agreement**, **The Conference of the** Parties shall ~~make arrangements for~~ **establish a** consultation and coordination to enhance cooperation with and among…. 4. Measures adopted in accordance with this Part shall **be compatible with and complementary to** ~~not undermine the effectiveness of~~ measures adopted by coastal States ... 5. In cases where an area-based management tool, including a marine protected area, established under this Part subsequently falls under the national jurisdiction of a coastal State, either wholly or in part, it shall be adapted **upon request** to cover any remaining area beyond national jurisdiction ~~or otherwise cease to be in force~~	different interpretations. It would be advisable to delete these here, and include the detailed provisions in art. 19. 15(2) Atl. to para 1(b)(ii) The establishment of a new body should not be required, as it may be time-consuming and complex. However, the evolution of such bodies, based on the devolved authority of the COP, could be a useful way to support wider scale regional planning and implementation of ABMTs including MPAs. 15(3) The COP is the best place to charge with establishing an arrangement or arrangements for consultation and coordination. States Parties may not have equal capacities to establish their own coordination and collaboration mechanisms resulting in unequal progress across regions. This is an important paragraph for institutional cooperation. 15(4) A more proactive way to express this could be "measures adopted in accordance with this Part shall be compatible with and complementary to the ABMTs adopted by coastal States in adjacent areas within national jurisdiction."

remaining area beyond national jurisdiction or otherwise cease to be in force.		
Article 16 Identification of areas [requiring protection] 1. Areas requiring protection through the establishment of area-based management tools, including marine protected areas, shall be identified on the basis of the best available [science] [scientific information and relevant traditional knowledge of indigenous peoples and local communities], the precautionary [approach] [principle] and an ecosystem approach. 2. Indicative criteria for the identification of areas requiring protection through the establishment of area-based management tools, including marine protected areas, under this Part, may include those specified in annex I. 3. The indicative criteria specified in annex I [shall] [may] be further developed and revised as necessary by the Scientific and Technical Body for consideration and adoption by the Conference of the Parties. [4. The indicative criteria specified in annex I, as well as any that may be further developed and revised in accordance with paragraph 3, shall be applied, as relevant, by the proponents of a proposal under this Part and shall be taken into account by the Scientific and Technical Body, as relevant, in the review of a proposal under this Part. [Such criteria shall also be [applied] [taken into account] by States Parties in the establishment of area-based management tools, including marine protected areas, under relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.]]		16(1) 'best available science' could be defined somewhere in the text (e.g. Article 1). The role, credibility and authority of science for the identification of areas requiring protection should be further explored. 16(2) There are already well established principles and guidance for the establishment of MPAs, OECM, EBSAs, etc., their monitoring and their performance evaluation. These should be adapted (usually slightly) and applied. There is no need to restart from square one. 16(3) The process is unclear here. If the COP adopts revisions, what are their legal status as compared to the Annex? In multilateral environmental agreements, there would usually be a process to amend the Annex through a majority vote by the COP. It would be better if this process is specified in the Agreement text, instead of delaying further developments for the adoption of rules of procedure. 16(4) The text now in brackets regarding application of criteria by States Parties should be accepted and broadened to encourage States Parties and other competent bodies to also apply the criteria contained in the BBNJ agreement as this could encourage greater cooperation, consistency and coherence between existing bodies and the BBNJ agreement.

Article 17 Proposals 1. Proposals in relation to the establishment of area-based management tools, including marine protected areas, under this Part shall be submitted by States Parties, individually or collectively, to the secretariat. [2. States Parties may collaborate with relevant stakeholders in the development of proposals.] 3. Proposals shall be formulated on the basis specified in paragraph 1 of article 16. 4. Proposals shall include, at a minimum, the following elements: (a) A geographic or spatial description of the area that is the subject of the proposal; (b) Information on any of the indicative criteria specified in annex I, as well as any criteria that may be further developed and revised in accordance with paragraph 3 of article 16, applied in identifying the area; (c) Specific human activities in the area, including uses by indigenous peoples and local communities in adjacent coastal States; (d) A description of the state of the marine environment and biodiversity in the identified area; (e) A description of the specific conservation and sustainable use objectives that are to be applied to the area; (f) A description of the proposed [conservation and [management] [sustainable use] measures] [priority elements for a management plan] to be adopted to achieve the specified objectives; [(g) A duration for the proposed area and measures;]	(a) A geographic or spatial description of the area that is the subject of the proposal (d) A description of ~~the state~~ **key aspects** of the marine environment and biodiversity in the identified area	17. In this article and the following sections (Articles 17 and 18) it may be better to avoid being too specific in the Agreement as too much detail may make it hard if not impossible to adapt once adopted. It may be more appropriate to leave the details into annexes that may be more easily adapted to evolving knowledge and needs. 17(4)(d): The Agreement should avoid a requirement to have full info about the environment before an MPA can be established. 17(4)(e) As is reflected in the IUCN MPA Standards, the primary focus of MPAs should be conservation, while ABMTs could be established for both objectives: conservation and sustainable use. According to the IUCN MPA Standards, there is a need for clarity on conservation objectives for MPAs from the outset to determine the types of management measures needed. 17(4)(f) There may need to be different requirements for MPA proposals versus other ABMTs as other types of ABMTs may not require a management plan, simply a plan for monitoring and review. An MPA proposal should contain proposed conservation and management measures as well as "priority elements" for a management plan. The priority elements could be the categories of actions considered necessary to achieve the specific conservation objectives of a proposed MPA given the available knowledge at the time.

(h) A monitoring, research and review plan, including priority elements; (i) Information on any consultations undertaken with adjacent coastal States and/or relevant global, regional, subregional and sectoral bodies. 5. Further requirements regarding the contents of proposals [shall] [may] be elaborated by the Scientific and Technical Body as necessary, for consideration and adoption by the Conference of the Parties.		
Article 18 Consultation on and assessment of proposals 1. Consultations on proposals submitted under article 17 shall be inclusive, transparent and open to all relevant stakeholders. 2. Upon receipt of a proposal, the secretariat shall transmit it to the Scientific and Technical Body for a preliminary review. The outcome of such review shall be conveyed by the secretariat to the proponent. The proponent shall retransmit the proposal to the secretariat, having taken into account the preliminary review of the Scientific and Technical Body. The secretariat shall make that proposal publicly available and facilitate consultations thereon as follows: (a) States, in particular adjacent coastal States, shall be invited to submit, *inter alia*: (i) Views on the merits of the proposal; (ii) Any relevant [additional] scientific inputs; (iii) Information regarding any existing measures in adjacent areas within national jurisdiction; (iv) Views on the potential implications of the	4. The proponent shall ~~consider~~ **take into account** the contributions received during the consultation period and **may** ~~shall~~ either submit a revised ~~the~~ proposal ~~accordingly~~ or continue the consultation process.	18(1) In consultations on proposals, it would be helpful to explicitly include civil society, including IGOs, environmental NGOs and industry as well as scientific and technical experts. 18(2) what would the preliminary review entail? What criteria would be applied? Simply to ensure that the required elements are included, or would there be a more substantive review? The "assessment" should use to a large extent the same criteria required in the identification, for obvious coherence. 18(2)(a)(ii) should be strengthened to reflect the need to get access to data and information from sectoral actors in order to develop proposals for specific conservation measures. 18(2)(b)(vi) In addition to being invited to submit views, 18(2)(b)(vi) could be amended to explicitly request relevant legal instruments and bodies to share and facilitate access to data and information relevant to activities and potential conservation and management measures. 18(4) This provision is ambiguous as it could be interpreted to require the proponent to continue the consultation process ad infinitum until it has

proposal for areas under national jurisdiction; (v) Any other relevant information; (b) Bodies of relevant legal instruments and frameworks and relevant global, regional and sectoral bodies shall be invited to submit, *inter alia*: (i) Views on the merits of the proposal; (ii) Any relevant [additional] scientific inputs; (iii) Information regarding any existing measures adopted by that instrument, framework or body for the relevant area or for adjacent areas; (iv) Views regarding any aspects of the [conservation and [management] [sustainable use] measures] [priority elements for a management plan] identified in the proposal that fall within the competence of that body; (v) Views regarding any relevant additional measures that fall within the competence of that instrument, framework or body; (vi) Any other relevant information; (c) Indigenous peoples and local communities with relevant traditional knowledge, the scientific community, civil society and other relevant stakeholders shall be invited to submit, *inter alia*: (i) Views on the merits of the proposal; (ii) Any relevant [additional] scientific inputs; (iii) Any relevant traditional knowledge of indigenous peoples and local communities; (iv) Any other relevant information. 3. Contributions received pursuant to paragraph 2 shall be made publicly available by the		revised the proposal to embrace all comments from those consulted. It may be clearer if it said: the proponent "may" revise the proposal to "take into account" the contributions received. There should be no obligation to continue the consultation until consensus is achieved on its contents. 18(5) To prevent delays, relevant bodies and instruments should be requested to establish an expedited procedure for the consideration of MPA and other ABMT proposals.

secretariat. 4. The proponent shall consider the contributions received during the consultation period and shall either revise the proposal accordingly or continue the consultation process. 5. The consultation period shall be time-bound. 6. The revised proposal shall be submitted to the Scientific and Technical Body, which shall assess the proposal, and make recommendations to the Conference of the Parties. 7. The modalities of the consultation and assessment process shall be further elaborated by the [Scientific and Technical Body] [Conference of the Parties], as necessary [, and shall take into account the special circumstances of small island developing States].		
Article 19 Decision-making 1. The Conference of the Parties [shall] [may] take decisions on matters related to area-based management tools, including marine protected areas, with respect to: [(a) Objectives, criteria, modalities and requirements, as provided for under articles 14, 16, 17 and 18;] [Alt. 1 (b) Proposals submitted under this Part, on a case-by-case basis and taking into account the scientific advice or recommendations and the contributions received during the consultation and assessment process, including in relation to: (i) The identification of areas requiring protection;	[Alt. 1 (b) Proposals submitted under this Part, on a case-by-case basis and taking into account the scientific advice or recommendations and the contributions received during the consultation and assessment process, including in relation to: (i) The identification of areas requiring protection; (ii) The establishment of area-based management tools, including marine protected areas, (ii) bis:. **For an MPA, the adoption of a management plan and a research and monitoring plan including the identification of** ~~and related~~ conservation and [management] ~~[sustainable use]~~ measures to be adopted to achieve the specified **conservation** objectives, taking into account existing measures under relevant legal instruments and frameworks and	Alt. 1 19(1)(b)(i) If the identification of areas requiring protection is intended as a separate step, one consequence of identification could be a legal obligation on States Parties to share information and to actively promote the adoption of measures to protect the area. Provisional measures might also be needed to freeze the expansion of existing activities and new activities by States Parties while the management plan is under development. Alt. 1 19(1)(c) The language as it stands creates confusion about who has the responsibility of decisions on area based management tools, (especially with regards to the chapeau and this section). Here the term " relevant instruments or bodies" should be narrowed to "competent international organizations." Neither instruments nor advisory bodies have the ability to adopt measures. Hence, such instruments and bodies

(ii) The establishment of area-based management tools, including marine protected areas, and related conservation and [management] [sustainable use] measures to be adopted to achieve the specified objectives, taking into account existing measures under relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, as appropriate; (c) Where there are relevant legal instruments or frameworks or relevant global, regional or sectoral bodies: (i) Whether to recommend that States Parties to this Agreement promote the adoption of relevant conservation and [management] [sustainable use] measures through such instruments, frameworks and bodies, in accordance with their respective mandates; (ii) Whether to adopt conservation and [management] [sustainable use] measures complementary to those adopted under such instruments, frameworks and bodies; (d) Where there are no relevant legal instruments or frameworks or relevant global, regional or sectoral bodies, the adoption of conservation and [management] [sustainable use] measures.] [Alt. 2 (b) Matters related to identifying potential area-based management tools, including marine protected areas; (c) Recommendations relating to the implementation of related management measures, while recognizing the primary authority for the adoption of such measures within the respective mandates of relevant legal instruments and frameworks and relevant global, regional and	relevant competent international organizations~~global, regional and sectoral bodies~~, as appropriate; (ii) ter: **for other area-based management tools**, **the identification of** conservation and [management] ~~[sustainable use]~~ measures to be adopted to achieve the specified objectives, taking into account existing measures under relevant legal instruments and frameworks and relevant competent international organizations ~~global, regional and sectoral bodies~~, as appropriate; (c) Where there are relevant **competent international organizations:** ~~relevant legal instruments or frameworks or relevant global, regional or sectoral bodies:~~ (i) Whether to recommend that States Parties to this Agreement promote the adoption of conservation and ~~[~~management] ~~[sustainable use]~~ measures falling within the competence of such bodies through ~~instruments, frameworks and~~ those bodies, in accordance with their respective mandates; (ii) Whether to adopt conservation ~~and [management] [sustainable use]~~ measures ~~complementary to~~ **that are not inconsistent with** those adopted under such instruments, frameworks and bodies; (d) Where there are no relevant ~~legal instruments or frameworks or relevant global, regional or sectoral bodies~~, **competent international organizations** the adoption of conservation and [management~~]~~ ~~[sustainable use]~~ measures.]	would not be "relevant" to the adoption of conservation or management measures. "Competent international organization" is the term used in UNCLOS, which provides greater clarity over whether an organization has competence over any functions relevant to BBNJ, and what those functions are. Alt. 1 19(1)(c)(i) It will be important to clarify what "relevant measures" means. At minimum, such measures should be sufficient to achieve the objectives of the MPA, in accordance with the respective mandates of the competent organizations. 19(1)(d). *See* comment on section Alt. 1 19(1)(c) above, the provision "Where there are no relevant legal instruments or bodies" should be clarified to only refer to "competent international organizations".

sectoral bodies.]		
Article 20 Implementation 1. States Parties shall ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted under this Part. 2. Nothing in this Agreement shall prevent a State Party from adopting more stringent measures with respect to its vessels or with regard to activities under its jurisdiction or control in addition to those adopted under this Part, in conformity with international law. [3. The implementation of the measures adopted under this Part shall not impose a disproportionate burden on small island developing States Parties, directly or indirectly.] [4. States Parties shall promote the adoption of measures within relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies of which they are members to support the implementation of the conservation and management objectives of the measures adopted under this Part.] [5. States Parties shall encourage those States that are entitled to become Parties to this Agreement, in particular those whose activities, vessels, or nationals operate in the area that is the subject of an established area-based management tool, including a marine protected area, to adopt measures supporting the conservation and management objectives of the measures adopted and area-based management tools established under this Part.] [6. A State Party that is not a participant in a		20(1) Activities under a State's jurisdiction or control should be read to include activities carried out by a country's flag vessels, nationals, state enterprises and corporations registered in or with significant linkages to the State or using its ports (UNCLOS art. 139; Port State Agreement; PCIJ Lotus Case; CBD art. 4). 20 (4), (5), (6) provide important reminders to encourage implementation. In practice it will be worth considering how States will work through existing instruments to implement the measures adopted. This should be considered in the process in which the implementing measures are adopted, during which relevant bodies should be consulted.

relevant legal instrument or framework, or a member of a relevant global, regional, subregional or sectoral body, and that does not otherwise agree to apply the conservation and management measures established under such instruments, frameworks or bodies is not discharged from the obligation to cooperate, in accordance with the Convention and this Agreement, in the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. [Such State Party shall ensure that activities under its jurisdiction or control are conducted consistently with measures related to area - based management tools, including marine protected areas, established under relevant frameworks, instruments and bodies.]]		
Article 21 Monitoring and review 1. States Parties, individually or collectively, shall report to the Conference of the Parties on the implementation of [area-based management tools, including marine protected areas] [relevant elements of the decisions of the Conference on area -based management tools, including marine protected areas], established under this Part. Such reports shall be made publicly available by the secretariat. 2. Area-based management tools, including marine protected areas, established under this Part, including related conservation and [management] [sustainable use] measures, shall be monitored and periodically reviewed by the Scientific and Technical Body. 3. The review referred to in paragraph 2 shall assess the effectiveness of measures and the progress made in achieving their objectives and provide advice and recommendations to the		21(1) It is good to have a reporting and review mechanism at the COP but it is also important to keep in mind that the daily monitoring could be put at the lowest appropriate level.

Conference of the Parties. 4. Following the review, the Conference of the Parties shall, as necessary, take decisions on the amendment or revocation of area-based management tools, including marine protected areas, including any associated conservation and [management] [sustainable use] measures, [as well as the extension of time-bound area-based management tools, including marine protected areas, which would otherwise automatically expire,] on the basis of an adaptive management approach and taking into account the best available [science] [scientific information and knowledge, including relevant traditional knowledge of indigenous peoples and local communities], the precautionary [approach] [principle] and an ecosystem approach. 5. The relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies [shall] [may] be invited to report to the Conference of the Parties on the implementation of measures that they have established.		

PART IV ENVIRONMENTAL IMPACT ASSESSMENTS

Draft text	Proposed text	Commentary
Article 21bis Objectives The objectives of this Part are to: [(a) Operationalise the provisions of the Convention on environmental impact assessment, by establishing processes, thresholds and guidelines for conducting and reporting assessments by States;] [(b) Enable consideration of cumulative impacts;] [(c) Provide for Strategic Environmental Assessments;] [(d) Achieve a coherent environmental impact assessment framework for activities in areas beyond national jurisdiction.]	(b) ~~Enable consideration~~ **Facilitate the examination** of cumulative impacts **in environmental assessments**;~~]~~	21(b) suggested amendment is intended to enhance the emphasis on cumulative impacts.
Article 22 Obligation to conduct environmental impact assessments 1. States Parties shall [as far as practicable] assess the potential effects of planned activities under their jurisdiction or control [on the marine environment] [in accordance with their obligations under articles 204 to 206 of the Convention]. 2. On the basis of articles 204 to 206 of the Convention, States Parties shall take the necessary legal, administrative or policy measures, as appropriate, to implement the provisions [of this Part] [[and any further measures [on the conduct of environmental impact assessments] adopted by the Conference of the Parties]. 3. The requirement in this Part to conduct an	1. States Parties shall ~~[as far as practicable]~~ assess the potential effects of planned activities under their jurisdiction or control **before irretrievable commitments of resources have been made**, ~~[on the marine environment]~~ [in accordance with their obligations under ~~articles 204 to 206 of~~ the Convention **and international law**]. 2. ~~On the basis of articles 204 to 206 of the Convention,~~ States Parties shall take the necessary legal, administrative or policy measures, as appropriate, to implement the provisions [of this Part] [[and any further measures [on the conduct of environmental impact assessments] adopted by the Conference of the Parties].	22(1) - EIA should be conducted at a stage when alternatives can be modified (*Pulp Mills Case* para 205). UNCLOS provides other obligations related to environmental impact assessment which should not be excluded; there is no need to specify selected articles. International law regarding EIA applies. 22(3) States have a legal obligation to conduct EIA for activities with impacts in ABNJ, as well as obligations to protect marine biodiversity, under UNCLOS and customary international law (UNCLOS art. 204-206; 1994 Agreement, Annex, Section 1(7); *Pulp Mills Case*, para. 204). This is consistent with existing rules of many States and

environmental impact assessment applies [only to activities conducted in areas beyond national jurisdiction] [to all activities that have an impact in areas beyond national jurisdiction].		with the ecosystem approach.
Article 23 Relationship between this Agreement and environmental impact assessment processes under other relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies 1. The conduct of environmental impact assessments pursuant to this Agreement shall be consistent with [the obligations under] the Convention. [2. Alt. 1. The Scientific and Technical Body shall consult and/or coordinate with relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies with a mandate to regulate activities [with impacts] in areas beyond national jurisdiction or to protect the marine environment. [Procedures for consultation and/or coordination shall include the establishment of an ad hoc interagency working group or the participation of representatives of the scientific and technical bodies of those organizations in meetings of the Scientific and Technical Body].] [2. Alt. 2. State Parties shall cooperate in promoting the use of environmental impact assessments in relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies for planned activities that meet or exceed the threshold contained in this Agreement.] [3. Alt. 1. [Global minimum standards] [and] [guidelines] for the conduct of environmental impact assessments [under relevant legal instruments and frameworks and relevant global,	3. The provisions of this Part constitute global minimum standards for environmental impact assessments for areas beyond national jurisdiction. **More detailed standards and guidelines may be set out in an annex to this Agreement and may be updated periodically. The Scientific and Technical Body shall develop recommendations through consultation or collaboration with relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.** 4. Alt. 1. **Parties to this Agreement shall make best efforts to ensure that** relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies with a mandate in relation to marine biological diversity of areas beyond national jurisdiction shall conform to the strict environmental impact assessment standards set forth in this Part.	23(2)(Alt. 1) Consultation and coordination will be more efficient and comprehensive if conducted through the Scientific and Technical Body as in Alt 1. 23(2)(Alt. 2) lacks transparency and is likely to give rise to duplicative efforts and noncompliance. 23(3) - This Agreement should state specific elements of EIA in its main text and provide for further development of global minimum standards in cooperation with others. The Agreement should include: Process ● Steps in the EIA, including screening, scoping, etc. ● Modalities for notification and consultation with States, public, existing bodies, affected local communities ● Incorporation of comments/revision ● Monitoring and review ● Scientific review Content ● Minimum requirements, including management measures ● Cumulative effects, including climate change ● Transboundary effects 23(3)(Alt. 1) places responsibility for developing global minimum standards with the Scientific and Technical Body. It provides for a means to update them in cooperation with other relevant entities

regional, subregional and sectoral bodies] shall be developed [by the Scientific and Technical Body] [through consultation or collaboration with relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies]. [These [global minimum standards] [and] [guidelines] shall be set out in an annex to this Agreement and shall be updated periodically].] [3. Alt. 2. The provisions of this Part constitute global minimum standards for environmental impact assessments for areas beyond national jurisdiction.] [4. Alt. 1. Relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies with a mandate in relation to marine biological diversity of areas beyond national jurisdiction shall conform to the strict environmental impact assessment standards set forth in this Part.] [4. Alt. 2. No environmental impact assessment is required under this Agreement for any activity conducted in accordance with the rules and guidelines appropriately established under relevant legal instruments and frameworks and by relevant global, regional, subregional and sectoral bodies, regardless of whether or not an environmental impact assessment is required under those rules or guidelines.] [4. Alt. 3. No environmental impact assessment is required under this Agreement where relevant legal instruments and frameworks and relevant global, regional, subregional or sectoral bodies with mandates for environmental impact assessments for planned activities [with impacts] in areas beyond national jurisdiction already exist, regardless of whether or not an environmental impact assessment is required for the planned		(*see e.g.*, the appendices of the Espoo Convention and Annex I to the Madrid Protocol to the Antarctic Treaty). This will provide for an adaptive and future-proofed agreement that will be responsive to changing threats, technology and oceanographic conditions, while encouraging consistency and streamlining across EIA mandates. 23(4)(Alt. 1) While this instrument cannot control others, States Parties to both agreements have that power and can commit themselves to using it in pursuit of the goals of this Agreement. 23(4) Alt. 2-3 appear to authorise noncompliance with UNCLOS EIA obligations and should be deleted.. 23(4) Alt. 4 could be 23(5), and it could ensure that where multiple EIA obligations apply to an activity, the most stringent and comprehensive elements be used to conduct a single EIA process and set of documents. This is already done elsewhere.

activity under the jurisdiction or control of a State Party.] [4. Alt. 4. Where a planned activity under the jurisdiction or control of a State Party [with impacts] in areas beyond national jurisdiction is already covered by existing environmental impact assessment obligations and agreements, it is not necessary to conduct another environmental impact assessment of that activity under this Agreement [, provided that the [State with jurisdiction or control over the planned activity] [body set forth in Part […]] [, following consultation with relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies,] determines that: [(a) The outcome of environmental impact assessment under those obligations or agreements is effectively implemented;] [(b) The environmental impact assessment already undertaken is [[functionally] [substantively] equivalent to the one required under this Part] [comparably comprehensive, including with regard to such elements as the assessment of cumulative impacts];] [(c) The threshold for the conduct of environmental impact assessments meets or exceeds the threshold set out in this Part.]]		
Article 24 Thresholds and criteria for environmental impact assessments [1. Alt.1 1. When States have reasonable grounds for believing that planned activities under their jurisdiction or control [may cause substantial pollution of or significant and harmful changes to] [are likely to have more than a minor or transitory	**1. Alt.2(1)(c) When the effects of the proposed activity are unknown or poorly understood, an environmental impact assessment will always be required.**	24(1) Alt.2 – The "minor or transitory effect" threshold triggers a screening EIA; a fuller EIA is conducted if it appears that the higher threshold will be surpassed. Deep-sea habitats are characterized by enhanced vulnerability - activities that would not be considered 'significant' in other environments could have significant and irreversible impacts in

effect on] the marine environment [in areas beyond national jurisdiction], they shall, [individually or collectively,] as far as practicable, [assess the potential effects of such activities on the marine environment] [ensure that the potential effects of such activities on the marine environment are assessed].] [1. Alt.2 1. When States Parties have reasonable grounds for believing that planned activities under their jurisdiction or control: (a) Are likely to have more than a minor or transitory effect on the marine environment, they shall conduct an environmental impact assessment on the potential effects of such activities on the marine environment in the manner provided in this Part; (b) May cause substantial pollution of or significant and harmful changes to the marine environment, they shall [conduct] [ensure that] a [full] [comprehensive] environmental impact assessment [is conducted] on the potential effects of such activities on the marine environment [and ecosystems] and shall submit the results of such assessments [for technical review] in the manner provided in this Part. [2. Environmental impact assessments shall be conducted in accordance with the threshold and criteria [set out in this Part and as further elaborated upon pursuant to the procedure set out in paragraph […]] [, which shall be developed by the Scientific and Technical Body].]		the deep-sea. A threshold for EIAs of "significant and harmful" will miss repetitive ongoing changes such as noise pollution that can negatively impact ecosystems but taken individually may be less than "significant". Moreover, it is difficult to assess whether a change is significant and harmful given limited knowledge about much of the deep sea environment. Thresholds and criteria for EIAs should be in accordance with the precautionary principle.
Article 25 Cumulative impacts 1. Cumulative impacts shall [as far as possible] be [taken into account] [considered] in the conduct of		25(2) Assessment of cumulative impacts should follow consistent procedures. 25(2) Alt. 2, which leaves this up to individual States could result in

environmental impact assessments. [2. Alt. 1. Guidelines for assessing cumulative impacts in areas beyond national jurisdiction and how those impacts will be taken into account in the environmental impact assessment process for planned activities shall be developed by the Conference of the Parties.] [2. Alt. 2. In determining cumulative impacts, the incremental effect of a planned activity under the jurisdiction or control of a State Party when added to the effects of past, present and reasonably foreseeable future activities shall be examined regardless of whether the State Party exercises jurisdiction or control over those other activities.]		inconsistency and therefore, failure to meet objectives.
Article 26 Transboundary impacts 1. Possible transboundary impacts shall be taken into account in environmental impact assessments. 2. Where relevant, the environmental impact assessment process shall also take into account possible impacts in [adjacent] [coastal States] [areas within national jurisdiction, including the continental shelf beyond 200 nautical miles].		26(2) To effectively conserve and sustainably use BBNJ, possible impacts on areas within national jurisdiction should be considered because marine ecosystems within and beyond national jurisdiction are ecologically connected.
Article 28 Strategic environmental assessments 1. States Parties, individually or in cooperation with other States Parties, shall ensure that a strategic environmental assessment is carried out for plans and programmes relating to activities [under their jurisdiction or control,] [conducted] [with impacts] in areas beyond national jurisdiction, which meet the threshold/criteria established in article 24. [2. As one type of environmental assessment, strategic environmental assessments shall follow	**2. Strategic environmental assessment processes shall ensure effective consultation, transparency and application of the best available scientific information. Where scientific information is inadequate to enable an informed decision, further scientific research shall be conducted.**	28(2) SEAs are important to achieve the objectives of a future ILBI. SEAs are different from EIAs and require different processes.

mutatis mutandis the process set out in this Part.]		
Article 29 List of activities that [require] [or] [do not require] an environmental impact assessment [1. An indicative non-exhaustive list of activities that [normally] [require] [or] [do not require] an environmental impact assessment [is contained in annex […]] [shall be [prepared by the Conference of the Parties as voluntary guidelines on the basis of recommendations by the Scientific and Technical Body]].] [2. The list shall be regularly updated by the Conference of the Parties.]		Not recommended.
Article 30 Screening 1. A State Party shall determine whether an environmental impact assessment is required in respect of a planned activity under its jurisdiction or control. [2. The initial screening of activities shall consider the characteristics of the area where the planned activity under the jurisdiction or control of a State Party is intended to take place, as well as where the potential effects are going to be felt. Should such planned activity take place in or adjacent to an area that has been identified for its significance or vulnerability, regardless of whether the impacts are expected to be minimal or not, an environmental impact assessment shall be required.] [3. If a State Party determines that an environmental impact assessment is not required for a planned activity under its jurisdiction or control, [the approval of the Scientific and Technical Body must be obtained] [it must provide information to support that conclusion]. [The		30(2) Guidelines for screening will provide consistency and predictability.

Scientific and Technical Body shall verify that the information provided by the [State Party] satisfies the requirements in this Part].]		
Article 32 Impact assessment and evaluation 1. A State Party [that has determined that a planned activity under its jurisdiction or control requires an environmental impact assessment under this Agreement] shall ensure that the identification and evaluation of impacts in such an assessment is conducted in accordance with this Part, using the best available scientific information and relevant traditional knowledge of indigenous peoples and local communities [, and an examination of alternatives]. 2. Nothing in this Part precludes States Parties, in particular [small island] developing States, from conducting joint environmental impact assessments. [3. A State Party may designate a third party to conduct an environmental impact assessment required under this Agreement. Such third party [shall] [may] be drawn from the pool of experts created pursuant to paragraph 4 below. Environmental impact assessments conducted by such third parties must be submitted to the State for review and decision-making.] [4. A pool of experts shall be created under the Scientific and Technical Body. States Parties with capacity constraints may commission those experts to conduct and evaluate environmental impact assessments for planned activities.]		32(4) EIAs are complex processes and some States may not have the resources to fulfil their EIA obligations.
Article 34 Public notification and consultation 1. States Parties shall ensure early notification to stakeholders about planned activities under their		34(5) Confidentiality exclusions should not be allowed, or allowed in limited circumstances and subject to review by a third party. Experience

jurisdiction or control and effective, time-bound opportunities for stakeholder participation throughout the environmental impact assessment process, including through the submission of comments, before a decision is made as to whether to proceed with the activity. [2. Stakeholders in this process include potentially affected States, where those can be identified, [in particular adjacent coastal States] [, indigenous peoples and local communities with relevant traditional knowledge in adjacent coastal States,] relevant global, regional, subregional and sectoral bodies, non-governmental organizations, the general public, academia [, scientific experts] [, affected parties,] [adjacent communities and organizations that have special expertise or jurisdiction] [, interested and relevant stakeholders] [, and those with existing interests in an area].] 3. Public notification and consultation shall be transparent and inclusive [, and targeted and proactive when involving adjacent small island developing States]. 4. [Substantive] comments received during the consultation process [from adjacent coastal States] shall be considered and [addressed] [responded to] by States Parties. States Parties shall give particular regard to comments concerning potential transboundary impacts. States Parties shall make public the comments received and the descriptions of how they were addressed. 5. States Parties [undertaking an environmental impact assessment pursuant to this Agreement] shall establish procedures allowing for access to information related to the environmental impact assessment process under this Agreement. [Notwithstanding this, States Parties shall not be		shows that failure to disclose information can expose human and environmental health to risk. 34(6) is a key provision that should be included to facilitate the remainder of art. 34.

required to disclose non-public information or information that would undermine intellectual property rights or other interests]. [6. Procedures may be developed by the Conference of the Parties to facilitate consultation at the international level.]		
Article 35 Preparation and content of environmental impact assessment reports 1. States Parties shall [be responsible for] [ensure] the preparation of an environmental impact assessment report for any such assessment undertaken pursuant to this Part. 2. Where an environmental impact assessment is required in accordance with this Part, the environmental impact assessment report [shall] [may] include [as a minimum, the following information]: (a) A description of the planned activity under the jurisdiction or control of a State Party and its purpose [, including a description of the location of [the] [such a] planned activity]; (b) A description of the results of the scoping exercise; (c) A description of the marine environment likely to be affected; (d) A description of the potential effects of the planned activity under the jurisdiction or control of a State Party on the marine environment, including [social, economic, cultural and other relevant impacts,] and [reasonably foreseeable potential direct, indirect,] cumulative and transboundary impacts, [as well as an estimation of their significance] [, including a description of the likelihood that the assessed activity will cause		

substantial pollution of or other significant and harmful changes to the marine environment in areas beyond national jurisdiction and its biodiversity]; (e) A description [, where appropriate,] of reasonable alternatives to the planned activity under the jurisdiction or control of a State Party, including the no- action alternative; [(f) A description of the worst-case scenario that could be expected to occur as a result of the planned activity under the jurisdiction or control of a State Party;] (g) A description of any measures for avoiding, preventing [, minimizing] and mitigating impacts [and, where necessary and possible, redressing any substantial pollution of or significant and harmful changes to the marine environment] [and other adverse social, economic, cultural and relevant impacts]; (h) A description of any follow-up actions, including any monitoring and management programmes, any plans for post-project analysis where scientifically justified, and plans for remediation; (i) Uncertainties and gaps in knowledge; (j) [A non-technical summary] [and/or a technical summary]; [(k) The identification of the sources of the information contained in the report;] [(l) An explicit indication of predictive methods and underlying assumptions, as well as the relevant environmental data used;] [(m) The methodology used to identify environmental impacts;]		

[(n) An environmental management plan, including a contingency plan for responding to incidents that have an impact on the marine environment;] [(o) The environmental record of the proponent;] [(p) A review of the business plan for the planned activity under the jurisdiction or control of a State Party;] (q) A description of consultations undertaken in the environmental impact assessment process, including with relevant global, regional, subregional and sectoral bodies. [3. Further [details] [guidance] regarding the required content of an environmental impact assessment report [shall] [may] be developed by the Conference of the Parties as an annex to this Agreement and shall be based on the best available scientific information and knowledge, including relevant traditional knowledge of indigenous peoples and local communities. [[These details] [This guidance] shall be reviewed regularly].]		
Article 36 Publication of [assessment] reports States Parties shall publish [and communicate] the reports of the results of the assessments in accordance with [articles 204 to 206 of] the Convention [, including through the clearing-house mechanism].		36 The assessment report *and* decision should be communicated, therefore art. 36 should be moved to after decision making. The final decision on whether and how the activity goes forward should also be reported. This contributes to the integrity of the EIA process and to the database of knowledge for future EIAs, including cumulative impacts analysis.

PART V CAPACITY-BUILDING AND TRANSFER OF MARINE TECHNOLOGY

Draft text	Proposed text	Commentary
Article 42 Objectives The objectives of this Part are to: (a) Assist States Parties, in particular developing States Parties, in implementing the provisions of this Agreement, to achieve its objectives; (b) Enable inclusive and effective participation in the activities undertaken under this Agreement; [(c) [Promote and encourage] [Ensure] access to marine technology by and transfer of marine technology for peaceful purposes to developing States Parties for the attainment of the objectives of this Agreement;] (d) Increase, disseminate and share knowledge on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; (e) Develop the marine scientific and technological capacity of States Parties with regard to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; (f) Ensure that developing States Parties have: [(i) Access to, and benefit from, the scientific information resulting from [the collection of] [access to] resources in areas beyond national jurisdiction, in particular marine genetic resources;] [(ii) Access to, and that their special requirements receive consideration in, the sharing of benefits from marine genetic resources and in marine scientific research;]		42(c) The clear and enforceable wording of 42(d), 42(e) and 42(f) could support the inclusion of "ensure" in 42(c). The word "ensure" brings a significant obligation and there are many uncertainties on funding, IP rights, capacity building, which must be addressed throughout the agreement to enable meeting this obligation.

[(iii) [Collection of] [Access to] marine genetic resources *in situ*, *ex situ* [and *in silico*] [[and] [as digital sequence information] [as genetic sequence data] [and their utilization];] [(iv) [Endogenous] [Local] research capabilities relating to marine genetic resources and products, processes and other tools;] (v) The capacity to develop, implement, monitor and manage, including to enforce, any area-based management tools, including marine protected areas; (vi) The capacity to conduct and evaluate environmental impact assessments [and strategic environmental assessments].		
Article 43 Cooperation in capacity-building and transfer of marine technology 1. States Parties, directly or through relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, shall [promote] [ensure] cooperation, [in accordance with [this Agreement] [Part XIV of the Convention],] in accordance with their capabilities, in capacity-building and the transfer of marine technology to assist States Parties that need and request it, in particular developing States Parties in achieving the objectives of this Agreement. 2. Capacity-building and the transfer of marine technology under this Agreement shall be [carried out] [promoted] through enhanced cooperation at all levels and in all forms, including partnerships with and involving all relevant stakeholders, such as, where appropriate, [the private sector,] civil society and holders of traditional knowledge, and by strengthening cooperation, coordination and synergies between relevant legal instruments and	2. Capacity-building and the transfer of marine technology under this Agreement shall be [carried out] [promoted] through enhanced cooperation at all levels and in all forms, including partnerships with and involving all relevant stakeholders, such as, where appropriate, ~~[~~the private sector,~~]~~ civil society and holders of traditional knowledge, and by strengthening cooperation, coordination and synergies between relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.	43(1)/43(2) *See* comments on art. 42(c) referring to the wording. It would be useful to include references to engaging with the private sector, civil society and TK holders and for synergy between different agreements. For instance, no obligations are imposed on the private sector but it is recognised that they have a place in delivery on the ground and potentially in blocking.

frameworks and relevant global, regional, subregional and sectoral bodies. 3. In giving effect to the duty to [cooperate] [promote cooperation] under this article, States Parties shall give full recognition to the special requirements of developing States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries.		
Article 44 Modalities for capacity-building and the transfer of marine technology 1. States Parties, recognizing that capacity-building, access to and the transfer of marine technology, including biotechnology, among States Parties are essential elements for the attainment of the objectives of this Agreement, [undertake to provide or facilitate] [shall promote] [shall ensure] access to and the transfer of marine technology, and capacity-building, for developing States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle - income countries. 2. Capacity-building and the transfer of marine technology [shall] [may] be provided on a [mandatory and voluntary] [voluntary] [bilateral, regional, subregional and multilateral] basis. 3. Capacity-building and the transfer of marine technology shall be transparent and country-driven [, and shall not duplicate existing programmes]. Capacity-building and the transfer of marine		44(1) "Biotechnology" is singled out, but could be made broader to refer to technologies that relate to the use of marine genetic resources 44(2.) It is not clear how capacity building could be provided on a bilateral basis. There needs to be a clearing house for capacity building (that, among other things provides for needs identification, requests for assistance etc) and a multilateral fund that can be paid into, and to which developing countries can submit applications. Actual costs of monetary and non-monetary benefits should be accounted for so that it can be truly 'equitable' on all sides. 44(3) It is presumed that 'and shall not duplicate existing programmes' is meant to prevent double counting of existing capacity building. 44 (5) opens the possibility of an annex containing this information. It is not clear how this relates to the annex mentioned in article 46.

technology shall be guided by lessons learned, including those from capacity-building and the transfer of marine technology activities under relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, and should be an effective, iterative process that is participatory, cross-cutting and gender-responsive. 4. Capacity-building and the transfer of marine technology shall be based on and be responsive to the needs and priorities of developing States Parties [as determined by] [informed by] a needs assessment [on an individual case-by-case, subregional or regional basis]. Such needs and priorities may be self-assessed or facilitated through a mechanism, which may be established by the Conference of the Parties. [5. Detailed modalities, procedures and guidelines for capacity-building and the transfer of marine technology [may] [shall] be developed and adopted by the Conference of the Parties.]		
Article 45 Additional modalities for the transfer of marine technology 1. The [development and] transfer of marine technology shall be carried out [on fair and most favourable terms, including on concessional and preferential terms] [according to mutually agreed terms and conditions]. [2. Alt. 1. The transfer of marine technology shall [take into account the need to protect intellectual property rights] [be carried out with due regard for all legitimate interests, including the rights and duties of holders, suppliers and recipients of marine technology].] [2. Alt. 2. States Parties shall [protect] [respect the	2. The transfer of marine technology shall be carried out with due regard for all legitimate interests, including the owners of intellectual property rights and rights and duties of holders, suppliers and recipients of marine technology. States shall ensure that intellectual property rights shall be subject to specific limitations which are permitted under international intellectual property framework in furtherance of technology transfer related to marine technology under this Agreement.	45(2) The points in 42(d), 43(2) and 44(2) can only be delivered effectively and certainly can only meet the ensuring threshold if there is an engagement with IP. The suggested wording provides an anchor for use of existing possibilities. For example, relevant possibilities in TRIPS are art. 9, art. 30, art. 31 . Particular reference could be made to enabling research and use of technology for energy transitions or ecologically sustainable products. A period during which secrecy is permitted and after which information must be available to all could be established (*see* comment on art.7).

protection of] intellectual property rights.] [2. Alt. 3. Intellectual property rights [related to resources of areas beyond national jurisdiction] shall [not preclude the transfer of marine technology] [be subject to specific limitations in furtherance of technology transfer related to marine technology] under this Agreement.] 3. Marine technology transferred pursuant to this Part shall be appropriate, reliable, affordable, up to date, environmentally sound, available in an accessible form for developing States Parties and relevant to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. [States Parties shall ensure that such transfer is not conditional on onerous reporting requirements].		
Article 46 Types of capacity-building and transfer of marine technology 1. In support of the objectives set out in article 42, the types of capacity-building and transfer of marine technology may include, and are not limited to: (a) The sharing of relevant data, information, knowledge and research; (b) Information dissemination and awareness-raising, including with respect to relevant traditional knowledge of indigenous peoples and local communities; (c) The development and strengthening of relevant infrastructure, including equipment; (d) The development and strengthening of institutional capacity and national regulatory		46(1)(a) This should be consistent with the information sharing provisions under the MGR section. There is a possibility for conflicts if these provisions are not aligned. 46(3) provides for amendment of the annex, but the process for amendment is not described here or in the Final Provisions. It should be clear how the types of capacity building and technology transfer described in the Annex relate to the modalities, procedures and guidelines described in 44(5).

frameworks or mechanisms; (e) The development and strengthening of human resources and technical expertise through exchanges, research collaboration, technical support, education and training and the transfer of technology; (f) The development and sharing of manuals, guidelines and standards; (g) The development of technical, scientific and research and development programmes, including biotechnological research activities. 2. Further details concerning the types of capacity-building and transfer of marine technology identified in this article are elaborated in annex II. 3. The types of capacity-building and transfer of marine technology set out in annex II [shall] [may] be reviewed, assessed and amended periodically by the Conference of the Parties to reflect technological progress and innovation and to respond and adapt to the evolving needs of States, subregions and regions.		
Article 47 Monitoring and review 1. Capacity-building and the transfer of marine technology activities undertaken in accordance with this Agreement shall be monitored and reviewed periodically. 2. The monitoring and review referred to in paragraph 1 shall be aimed at: (a) Reviewing the needs and priorities of developing States Parties in terms of capacity-building and transfer of marine technology, including the support required, provided and mobilized, and gaps in meeting requirements of		47 This is a critical provision lacking a clear mechanism for it to be implemented. The Global Ocean Science report under the IOC tries to collate baseline information about marine science capacity - and it has proven to be challenging. One solution consists in:: 1) The S&T body could develop criteria for monitoring CB/TT. This could include the number of countries undertaking and publishing needs assessments on the ClHM and the number of initiatives to meet CB/TT needs.

developing States Parties; (b) Measuring performance on the basis of objective indicators and reviewing results-based analyses, including the output, progress and effectiveness of capacity- building and transfer of marine technology activities, successes and challenges; (c) Making recommendations for proposed ways forward and follow-up activities, including on how capacity-building and the transfer of marine technology could be further enhanced to allow developing States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle - income countries, to fully meet their obligations and exercise their rights under this Agreement. 3. Monitoring and review shall be carried out by the Conference of the Parties, which shall decide upon the details and modalities of such review and monitoring, including with regard to any subsidiary body that it may wish to establish in this respect. 4. The monitoring and review of capacity-building and transfer of marine technology activities under this Agreement shall include all relevant actors involved in the process, including at the subregional and regional levels. 5. In supporting the monitoring and review of capacity-building and the transfer of marine technology, States Parties [and regional committees on capacity-building and the transfer of marine technology] may submit, on a voluntary basis, reports, which may be made publicly available, on capacity-building and the transfer of marine technology given and received. States Parties shall ensure that reporting requirements for developing		2) A special committee under the S&T body could review progress, deliver periodic reports to the CoP identify gaps, share best-practice approaches and make recommendation. 3) Contribute to standard process for monitoring progress and feed into reports such as Ocean science report and others

States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries, are streamlined and not onerous.		

PART VI INSTITUTIONAL ARRANGEMENTS

Draft text	Proposed text	Commentary
Article 48 Conference of the Parties 1. A Conference of the Parties is hereby established. 2. The first meeting of the Conference of the Parties shall be convened no later than one year after the entry into force of this Agreement. Thereafter, ordinary meetings of the Conference shall be held at regular intervals to be determined by the Conference at its first meeting. 3. The Conference of the Parties shall agree upon and adopt rules of procedure for itself and for any subsidiary body that it may establish. [3bis. As a general rule, the decisions of the Conference of the Parties shall be taken by consensus. If all efforts to reach consensus have been exhausted, the procedure established in the rules of procedure adopted by the Conference shall apply.] [3ter. Decisions of the Conference of the Parties shall be made publicly available by the secretariat and shall be transmitted to all States Parties in a timely manner, [in particular, to adjacent coastal States] as well as to relevant legal instruments and		48(3bis) it is highly unusual not to have a decision making process set out in the treaty. If the procedure is not in the treaty, then there is the risk that a majority vote process could not be adopted because the COP could not reach consensus. References for decision making procedures include: Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, art. 16; Convention on the Conservation of Antarctic Marine Living Resources, art. 12.

frameworks and relevant global, regional, subregional and sectoral bodies.] 4. The Conference of the Parties shall [monitor and] keep under review the implementation of this Agreement and, for this purpose, shall: (a) Adopt decisions and recommendations related to the implementation of this Agreement; (b) Exchange information relevant to the implementation of this Agreement; (c) Promote cooperation and coordination with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, with a view to promoting coherence among efforts towards, and the harmonization of relevant policies and measures for, the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction [, including by establishing processes for cooperation and coordination with and among relevant global, regional, subregional and sectoral bodies] [, including by inviting other global, regional, subregional and sectoral bodies to establish processes for cooperation]; (d) Establish such subsidiary bodies as deemed necessary for the implementation of this Agreement [, which may include: [(i) An access and benefit-sharing mechanism;] [(ii) A capacity-building and transfer of marine technology committee;] [(iii) An implementation and compliance committee;] [(iv) A finance committee]]; (e) Adopt, at each ordinary meeting, a budget for the financial period until the following ordinary meeting;		

(f) Undertake other functions identified in this Agreement or as may be required for its implementation. [5. The Conference of the Parties [shall] [may], at intervals to be determined by it, assess and review the adequacy and effectiveness of the provisions of this Agreement and, if necessary, propose means of strengthening the substance and methods of implementation of those provisions in order to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.]		
Article 49 Scientific and Technical Body 1. A Scientific and Technical Body is hereby established. 2. The Body shall be composed of experts, taking into account the need for multidisciplinary expertise [, including expertise in relevant traditional knowledge of indigenous peoples and local communities], gender balance and equitable geographical representation. 3. The Body may also draw on appropriate advice from [existing arrangements, such as the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection] [relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies], as well as other scientists and experts, as may be required. 4. Under the authority and guidance of the Conference of the Parties, the Body shall: (a) Provide scientific and technical advice to the Conference of the Parties; [(b) Monitor the utilization of marine genetic resources of areas beyond national jurisdiction;]		49(4) - Alternatives in Article 22, Obligation to conduct environmental impact assessment, identify roles for the Scientific and Technical Body that would need to be provided for here.

[(c) Possess recommendatory functions with respect to measures such as area- based management tools, including marine protected areas, including regarding: (i) Standard-setting and review; (ii) The assessment of proposals; (iii) The monitoring and review of measures;] [(d) Elaborate guidelines with respect to environmental impact assessments;] [(e) Make recommendations to the Conference of the Parties with respect to environmental impact assessments;] [(f) Review environmental impact assessment standards to ensure consistency with the requirements under this Agreement;] [(g) Identify innovative, efficient and state-of-the-art technology and know- how relating to the conservation and sustainable use of marine biological diversity;] [(h) Advise on ways and means to promote the development and transfer of marine technology;] [(i) Assess the effectiveness of the implementation of measures and programmes for capacity-building and the transfer of marine technology, including by assessing whether capacity gaps are decreasing;] [(j) Collaborate with regional and subregional committees on capacity- building and the transfer of marine technology or regional needs assessment mechanisms;] [(k) Elaborate programmes for capacity-building and the transfer of marine technology;] [(l) Establish subsidiary bodies as required;]		

(m) Perform such other functions as may be determined by the Conference of the Parties or assigned to it under this Agreement.		
Article 51 Clearing-house mechanism 1. A clearing-house mechanism is hereby established. 2. The clearing-house mechanism shall consist primarily of an open-access web- based platform. [It shall also include a network of experts and practitioners in relevant fields.] The specific modalities for the operation of the clearing-house mechanism shall be determined by the Conference of the Parties. 3. The clearing-house mechanism shall serve as a centralized platform to enable States Parties to have access to, [collect,] [evaluate,] [make public] and disseminate information with respect to: [(a) Activities related to marine genetic resources of areas beyond national jurisdiction, including notices of forthcoming *in situ* collection of marine genetic resources, research teams, ecosystems where the marine genetic resources are collected, the [digital] [genetic] properties of the marine genetic resources, their biochemical components, genetic sequence data [and information] [and the utilization of marine genetic resources];] [(b) Data and scientific information on, as well as [, in line with the principle of prior informed consent,] traditional knowledge associated with, marine genetic resources of areas beyond national jurisdiction, including through lists of databases, repositories or gene banks where marine genetic resources of areas beyond national jurisdiction are currently held, a registry of such resources, and a track-and-trace mechanism for marine genetic	2. The clearing-house mechanism shall **include** ~~consist primarily of an~~ **one or more** open-access web- based platform**s**. ~~[~~It shall also include a network of experts and practitioners in relevant fields.~~]~~ The specific modalities for the operation of the clearing-house mechanism shall be determined by the Conference of the Parties.	51(2) There are a number of existing platforms that provide access to scientific and technical ocean information; their users and hosts have suggested that a single may not be the most functional approach. It is similarly critical that the clearinghouse mechanism includes a human element, e.g., for providing assistance and training on use of said web-based platforms. 51(2) The term 'open access' is unclear and key questions will need to be addressed to make this a functional system. For example, is this free of charge/ use for any purposes or just non-commercial purposes? Addressing this point would cover points arising from substance of information to be delivered under 51(3)(b). There are a lot of existing platforms and they are hard to locate and use. The most important opportunity of the Clearing house is to make information findable, accessible and usable; and to enable community-wide engagement in information exchange. 51(3) It would be useful to have a catch-all clause such as "any other information that the COP may determine necessary". 51(3)(b) Utilise existing databases rather than developing new ones. Ensure identifier is associated with each database entry to allow traceability. Full track and trace will be difficult to achieve, hence traceability via a unique identifier may be the best option. 51(3)(c) Make sure that the actual value of 'non-monetary benefit sharing' is factored into this so it

resources of areas beyond national jurisdiction and their utilization;] [(c) The sharing of benefits, including through reports on the status of monetary benefits shared and on their use through the publication of the proceedings of the meetings of the Conference of the Parties;] [(d) Environmental impact assessments [, including: (i) Environmental impact assessment reports; (ii) Guidelines and technical methods on environmental impact assessments];] [(e) Opportunities for capacity-building and the transfer of marine technology, such as activities, programmes and projects being conducted in areas beyond national jurisdiction, including those relevant to building capacity for skills development in activities covered in this Agreement [, as well as availability of funding];] [(f) Requests for capacity-building and the transfer of marine technology on a case-by-case basis;] [(g) Research collaboration and training opportunities, including in relation to information on universities and other organizations that offer study grants and facilities in the field of marine science, marine research institutes that offer laboratory facilities, equipment and opportunities for research and training, and offers of cruise studies at the global, regional and subregional levels;] [(h) Information on sources and availability of technological information and data for the transfer of marine technology and opportunities for facilitated access to marine technology.]		is accounted for. 51(3)(d) The Clearing House Mechanism is needed to provide a central access point for notices of activities subject to screening and/or EIA, for submission of public comments, and for final EIAs. The centralized information provided by the Clearing House Mechanism can be used in preparing EIAs to reduce effort, cost, and time by avoiding duplication and facilitating access to information. The same resources will be valuable for cumulative effects analysis, as will the information referred to in (b) and (c). The Clearing House Mechanism can also provide technical support for national capacity to implement EIA obligations. 51(3)(f) *See* Minas, S. (2018). Marine Technology Transfer under a BBNJ Treaty: A Case for Transnational Network Cooperation. *AJIL Unbound*, *112*, 144-149. doi:10.1017/aju.2018.46 51(4)(e) - a distinction then could or should be drawn between this openness and accessibility and the links to more private platforms in 51(4)(c). 51(7) Confidentiality should be limited and subject to review by an appropriate third party. This issue is discussed in relation to specific articles above. It is really important that in the same way that information can not be the subject of wide IP claims, it is not to be the subject of unchallenged and unjustified claims to confidentiality. “Due regard” to confidentiality of information could be appropriate. If there is a more direct engagement with IP in 51(2) then this could pick up the confidentiality point in more depth, making clear that not all claims to confidentiality need and should always be respected (*see* comment on art.

[4. The clearing-house mechanism shall: (a) Match capacity-building needs with the support available and with providers for the transfer of marine technology, including governmental, non-governmental or private entities interested in participating as donors in the transfer of marine technology, and [provide] [facilitate] access to related know-how and expertise; [(b) Promote linkages to relevant global, regional, subregional, national and sectoral clearing-house mechanisms and other databases, repositories and gene banks [, including experts in relevant traditional knowledge of indigenous peoples and local communities];] [(c) Link to private and non-governmental platforms for the exchange of information;] [(d) Build on regional and subregional clearing-house institutions, if applicable, when establishing regional and subregional mechanisms under the global mechanism;] (e) Facilitate enhanced transparency, including by providing baseline data and information; (f) Facilitate international cooperation and collaboration, including scientific and technical cooperation and collaboration.] [5. The clearing-house mechanism shall recognize the special circumstances of small island developing States Parties [and archipelagic developing States Parties], facilitate access to the mechanism to enable those States to utilize it without undue obstacles or administrative burdens, and include information on activities to promote information-sharing, awareness-raising and dissemination in and with those States, as well as provide specific programmes for those States.]		45(2) above referring to the secrecy period). On the other hand, "due regard" could be seen as having inherent limits in it and if there is engagement with IP in this section the confidentiality provision could be argued to come within the same limits.

[6. The clearing-house mechanism shall be managed by [the secretariat] [the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization, in association with relevant organizations, including the International Seabed Authority and the International Maritime Organization, and shall be informed by the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology].] [7. Due regard shall be given to the confidentiality of information provided under this Agreement.]		

[PART VII FINANCIAL RESOURCES [AND MECHANISM]]

Draft text	**Proposed text**	**Commentary**
[Article 52 Funding] [1. Funding in support of the implementation of this Agreement, in particular capacity-building and the transfer of marine technology under this Agreement, shall be adequate, accessible, transparent [, sustainable and predictable] and [both voluntary and mandatory] [voluntary].] 2. Funding may be provided through public and private sources, both national and international, including but not limited to contributions from States, international financial institutions, existing funding mechanisms under global and regional instruments, donor agencies, intergovernmental organizations, non-governmental organizations and natural and juridical persons, and through public-private partnerships.		52(1) There should be a clear link between funding and the benefit sharing provisions, not only capacity building and technology transfer. Payments to a fund based on user fees could be calibrated to facilitate and promote benefit sharing and conservation goals. For example, payments to the fund could be lower for research used to develop and sell ecologically sustainable solutions. This type of incentive mechanism reflects the fact that in innovating in this manner, debts to the ocean and society can be seen as already paid in part. *Benefit sharing: combining intellectual property, trade secrets, science and an ecosystem-focused approach*, edited collection from Malmo conference May 2019). 52(2) Public-private partnerships will be an important option for funding. It may be important

3. States Parties shall ensure that, for the purposes of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, developing States Parties are granted preference by international organizations in the allocation of appropriate funds and technical assistance and the utilization of the ir specialized services. 4. A voluntary trust fund to facilitate the participation of representatives of developing States Parties in the meetings of the bodies under this Agreement shall be established by the Conference of the Parties. It shall be funded through voluntary contributions. [Alt.1 5. In addition to the voluntary trust fund, a special fund [may] [shall] be established by the Conference of the Parties to: (a) Fund capacity-building projects, including effective projects on the conservation and sustainable use of marine biological diversity; (b) Fund activities and programmes, including training, related to the transfer of technology; (c) Assist developing States Parties to implement this Agreement; (d) Finance the rehabilitation and ecological restoration of marine biological diversity of areas beyond national jurisdiction; (e) Support conservation and sustainable use programmes by holders of traditional knowledge of indigenous peoples and local communities; (f) Support public consultations at the national, subregional and regional levels; (g) Undertake any other functions as agreed by		to consider how this can work in practice. 52 Alt. 1(5) The reference to a special fund is key, but the list provided can be streamlined. The reference under a) to "effective" projects is not clear and the reference under d) to restoration in BBNJ should be complemented by work to preserve and maintain. Restoration of marine biodiversity and ecosystems may be very challenging and expensive, hence efforts to preserve and maintain should also be prioritized 52 Alt.1(5bis)(b) The inclusion of MGR payments and EIAs under these provisions unnecessarily adds complexity. These aspects can be settled in the respective MGR and EIA sections and art. 52 can only include a catch-all provision to state that payments under this Agreement will be made into the Special Fund. 52 Alt.1(5bis)(c) The inclusion of Endowments only works if this is a list of voluntary measures. From a drafting perspective it would be preferable to list the various voluntary measures and have a single reference to any mandatory payments agreed to elsewhere under the agreement to be paid into the finance mechanism to be set up. 52 Alt.1(5bis)(d) The reference to existing financial mechanisms is unclear. As far as the GEF is concerned it would be more appropriate to consider language similar to the CBD Article 21 and Article 39 if a GEF arrangement is to be considered. The reference to the GCF is not appropriate, unless it is proposed that a separate financial ocean institution is suggested. This would require a separate proposal. 52 Alt.1(5bis)(e) Art. 52(2) already provides for the ability of funds to come from various private entities and such donations should not be restricted purely to those undertaking marine biodiversity

the States Parties. 5bis. The special fund shall be funded through: (a) Voluntary contributions; [(b) Mandatory sources, including: (i) Contributions from States Parties and royalties and milestone payments resulting from the utilization of marine genetic resources; (ii) Payments as a condition of access to, and utilization of, marine genetic resources, premiums paid during the approval process of environmental impact assessments, in addition to cost recovery, fees and penalties, and other avenues for mandatory payments;] (c) Endowments by States Parties; (d) Existing financial mechanisms, such as the Global Environment Facility and the Green Climate Fund; [(e) Private entities wishing to engage in the exploration and exploitation of marine biological diversity of areas beyond national jurisdiction.]] [Alt.2 5. States Parties shall cooperate to establish appropriate funding mechanisms to assist developing States Parties with achieving the objectives of capacity-building and the transfer of marine technology under this Agreement.] 6. The funding mechanisms established under this Agreement shall be aimed at ensuring efficient access to funding through simplified approval procedures and enhanced readiness of support for developing States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States,		exploration and exploitation. 52 Alt.2(5) Restricts the funding mechanism to capacity-building and the transfer of technology which is unnecessarily restrictive and ignores the potentially significant funding needs to deliver the appropriate measures under the BBNJ. A streamlined Alt.1(5) would be preferable. In the event that the Parties agree to language under 5, it may be desirable to be more explicit about the institutional mechanism to handle implementation, for instance by setting up a Finance Committee under the COP that would be authorised to engage external parties.

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

PART VIII IMPLEMENTATION [AND COMPLIANCE] – No Comments

[PART IX SETTLEMENT OF DISPUTES]

Draft text	Proposed text	Commentary
[Article 55 Procedures for the settlement of disputes] [1. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.] [2. Any procedure accepted by a State Party to this Agreement and the Convention pursuant to article 287 of the Convention shall apply to the settlement of disputes under this Part, unless that State Party, when signing, ratifying or acceding to this Agreement, or at any time thereafter, has accepted another procedure pursuant to article 287 for the settlement of disputes under this Part.] [3. A State Party to this Agreement that is not a Party to the Convention, when signing, ratifying or acceding to this Agreement, or at any time thereafter, shall be free to choose, by means of a written declaration, one or more of the means set out in article 287, paragraph 1, of the Convention for the settlement of disputes under this Part. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is a	4. Where a dispute concerns a matter of a technical nature, the States concerned may refer the dispute to an ad hoc expert panel established by them. The panel shall confer with the States concerned and shall endeavour to resolve the dispute expeditiously without recourse to binding procedures for the settlement of disputes. 5. Any court or tribunal to which a dispute has been submitted under this Part shall apply the relevant provisions of the Convention and of this Agreement as well as generally accepted standards for the conservation and management of marine biodiversity and other rules of international law not incompatible with the Convention, with a view to ensuring the conservation of marine biodiversity in areas beyond national jurisdiction.	A provision to authorise a request for an advisory opinion from ITLOS is an option that seemed attractive to some delegations at IGC3 and one that seems advantageous. An advisory opinion could be requested by the COP or possibly another IGO if there is a question about the intersection between the BBNJ and another instrument. Should that be desired, *see* Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission ITLOS Reports 2015, paras 37-69. Other parts of the UNFSA provisions that could be brought into BBNJ, with some minor changes, are art. 29, proposed here as art. 55(4), and art. 30(5), proposed here as art. 55(5). Art. 31 on provisional measures does makes some advances on art. 290 of UNCLOS, but not so much that it needs to be repeated here.

party that is not covered by a declaration in force. For the purposes of conciliation and arbitration in accordance with annexes V, VII and VIII to the Convention, such State shall be entitled to nominate conciliators, arbitrators and experts to be included in the lists referred to in annex V, article 2, annex VII, article 2, and annex VIII, article 2, for the settlement of disputes under this Part.]		

[PART X NON-PARTIES TO THIS AGREEMENT] – No Comments

PART XI GOOD FAITH AND ABUSE OF RIGHTS – No Comments

PART XII FINAL PROVISIONS – No Comments

[ANNEX I Indicative criteria for identification of areas]

Draft text	Proposed text	Commentary

[(a) Uniqueness; [(b) Rarity;] (c) Special importance for the life history stages of species; (d) Special importance of the species found therein; (e) The importance for threatened, endangered or declining species or habitats; (f) Vulnerability, including to climate change and ocean acidification; (g) Fragility; (h) Sensitivity; (i) Biological diversity [and productivity]; [(j) Representativeness;] (k) Dependency; [(l) Exceptional naturalness;] (m) Ecological connectivity [and/or coherence]; (n) Important ecological processes occurring therein; [(o) Economic and social factors;] [(p) Cultural factors] [(q) Cumulative and transboundary impacts;] (r) Slow recovery and resilience; (s) Adequacy and viability; (t) Replication; (u) Feasibility.]		The list of indicative criteria is good but should be amended slightly to be consistent with the criteria used in CBD COP Decision IX/20 (annex 1) to describe ecologically or biologically significant areas (EBSAs), e.g. the CBD EBSA criteria only refer to "naturalness" and not "exceptional naturalness" "Productivity" is missing from the Annex. Feasibility" the last item in the Annex, is not relevant to ecological values and should be deleted (Further details on the EBSA criteria are available at: https://www.cbd.int/doc/meetings/mar/ebsaws-2014-01/other/ebsaws-2014-01-azores-brochure-en.pdf). The consistent application of the CBD EBSA criteria in ABNJ would enable more consistent description and protection of ecosystems and habitats within and beyond national jurisdiction.

These comments were prepared by the

International Union for Conservation of Nature

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&

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