Statement

Agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

Statement of the Permanent Senate Commission on Fundamental Issues of Biological Diversity (SKBV) of the DFG on the revised draft text of the Agreement

Helmut Hillebrand (Carl von Ossietzky University Oldenburg), Saskia Brix (Senckenberg, Hamburg), Stefan Hain (Alfred-Wegener-Institute, Helmholtz Centre for Polar and Marine Research, Bremerhaven), Michal Kucera (University Bremen), Pedro Martinez Arbizu (Senckenberg, Wilhelmshaven), Sabine Schlacke (University Greifswald), Sebastian Unger (IASS Potsdam), Alice Vadrot (University Wien)

February 2022

Deutsche Forschungsgemeinschaft
Kennedyallee 40 · 53175 Bonn · Deutschland
Telefon: + 49 228 885-1 · Fax: + 49 228 885-2777 · postmaster@dfg.de · www.dfg.de

The Permanent Senate Commission on Fundamental Issues of Biological Diversity is an interdisciplinary, independent body of experts in biodiversity research, which evaluates selected topics on the basis of scientific findings with regard to their social and political significance and advises various bodies of the German Research Foundation (DFG, Deutsche Forschungsgemeinschaft) as well as national and international governments and policymakers.

By studying the ocean and its role in the Earth system, marine scientific research makes important contributions to understanding global matter cycles, the climate system and the diversity of life on Earth. Climate change and biodiversity loss represent global economic, political, and societal challenges that can only be addressed through a global scientific effort. Marine scientists play a central role in intergovernmental scientific expert bodies such as the Intergovernmental Panel on Climate Change (IPCC), World Ocean Assessment (WOA) and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), as strategies for the protection of marine ecosystems and for their sustainable use must be developed based on best available scientific knowledge. The high seas and the deep seabed pose a particular challenge, as they can only be researched at great expenses in terms of time and technology and, due to the lack of national sovereignty, are only protected by international law, in particular international treaties such as the United Nations Convention on the Law of the Sea (UNCLOS).

Integrating the current state of science and our scientific expertise, we take the following position on the revised draft text (document A/CONF.232/2020/3, dated 18 November 2019) of an Agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). We then present specific proposals for improving the draft text.

Acknowledge the role of <u>non-commercial knowledge-driven</u> research for BBNJ

Non-commercial research is the essential source of knowledge needed for the development of effective protection and sustainable management of marine systems. The design of area-based management and the monitoring of environmental impacts, thus two main aspects of the Agreement, ultimately rely on non-commercial research. This research is often collaborative by nature and offers a wide range of options for

capacity building, technological transfer, and other non-monetary benefits. Thus, the Agreement should be designed in a way that enhances and does not impede non-commercial research. The framework in which non-commercial research operates should not be restricted by, for example, a high administrative load or costly procedures. Wherever possible, simplified procedures should be offered for non-commercial research. Moreover, the Agreement touches upon many important aspects of science, *inter alia* with respect to intellectual property rights, publication of findings and data, use of databases, as well as “open data” or “open science” policies. A failure to acknowledge these aspects jeopardizes non-commercial research in the ocean at its core and thereby undermines the important role this research plays for achieving the goals of the BBNJ Agreement.

In this context it is very important to note that the publication of data and findings is the key currency for scientists and science funding. For funding and publication, ideas of “open data” and “open science” are promoted. Especially the ongoing debate on digital sequence information (DSI) under the Nagoya Protocol is highly critical from a non-commercial research perspective. If such data would be restricted, e.g. not free for access and use by third parties, publications in agreement with well-established scientific standards would not be possible anymore. The ultimate consequence is that the respective research would no longer take place in the future.

We therefore strongly encourage the negotiators not to lose sight of the non-commercial research framework conditions when discussing all paragraphs of the Agreement. In the detailed comments we address some of these conditions.

Further, we acknowledge that a definition of “marine scientific research” is hardly possible. Beyond research fields easily identified as “marine scientific research”, research on marine genetic resources often is in areas that are less intuitively captured by this term, e.g. fundamental biochemical or genetic research across groups of organisms which also includes marine samples. Thus, we would argue for using the term “non-commercial research” or “non-commercial knowledge-driven research”. For the remainder of the text, and for brevity, we will use “non-commercial research”.

Task the COP with the details

In several places, the draft BBNJ Agreement text provides alternatives, i.e. a paragraph with detailed requirements, criteria etc. for state parties to apply or comply with, and an alternative paragraph saying that these requirements, criteria will be developed and agreed by the COP. In general, it would be good for the text of the Agreement to provide at least a framework. However, if this becomes too detailed it might cause lengthy negotiations, especially on complex and controversial issues. There is a risk that in order to achieve progress towards consensus, the negotiations will result in a very weak text. In these circumstances, it might be better to task the COP with establishing the detailed requirements, criteria etc.

If the details are established afterwards, there is also a better chance for expert scientific involvement in the establishment process.

Formulate advice and regulations on how to deal with confidential data

The current draft BBNJ Agreement text provides no or hardly any advice and regulations on how to deal with confidential data, especially in the context of Part I (MGR) and Part III (EIA). There might be a need to address the confidentiality issue under these Parts and/or in an overarching paragraph at the beginning of the Agreement text. Here a balance between the commercial interests of companies investing and the public interest in these data needs to be found.

Specific comments and proposals for the further development of the draft text

The table only presents sections from the revised draft text in which changes are proposed.

Part I: General provisions

Article 1 Use of terms

[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]]].]

How digital sequence information (DSI) is to be addressed under the Nagoya Protocol and the CBD is currently under negotiation. We recommend that BBNJ should not pre-empt or pre-judge these very difficult discussions.

Moreover, access is here equalized to collection, which we recommend to clarify. In the EU-Nagoya Protocol Regulation "Access" means the acquisition of genetic resources or of traditional knowledge associated with genetic resources in a Party to the NP (Article 3(3) Regulation (EU) No 511/2014). Acquisition includes commercial retrieval of material or data and is thus different from collection. In the same context, to publish sequence data is a necessary need to non-monetary scientific benefit and reputation of the publishing scientist. Free access to data is a mandate for science and "access" to scientifically generated sequence data is already organized in online platforms like "GenBank" or others.

[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].]

We recommend that EIA requirements under the BBNJ Agreement should also consider activities, which are taking place in areas under national jurisdiction but have likely a significant adverse environmental impact on areas beyond national jurisdiction.

[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.]

We support a definition that reduces overlap to the CBD and EU Nagoya Protocol regulations as stated in Alt. 1. We see major problems with the term "originating", as this is sometimes not (or no longer) known. The term "potential value" is insufficiently defined and should be narrowed to actual or potential commercial value.

[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].]

This is a definition very similar to the one in the Nagoya Protocol. Critical is "and" in the term "research and development". In the Nagoya Protocol this is meant as "and/or", which keeps non-commercial research (without development) in the scope. What does this "and" mean here? This needs to be clarified, since this determines if non-commercial research is affected or not.

Article 3 Application

---

2. This Agreement does not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State Party shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Agreement.

Based on this formulation there could easily be a difference between states on whether and how they apply the BBNJ requirements to their state owned or operated research vessels.

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 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.

We recommend avoiding references to approaches and principles that have very divergent and often ambiguous definitions. For example, resilience has a plethora of definitions, is not congruent with restoration, and is difficult to quantify. Since there is no single, universally accepted understanding between states of what some of the above mentioned principles (e.g. the precautionary principle) actually mean and how they are to be implemented in practical terms, they need to be used with caution. If included, their meaning in the BBNJ context needs to be discussed by the scientific and technical body and clarified in a transparent COP process.

Part II: Marine genetic resources, including questions on the sharing of benefits

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] [the utilization of] marine genetic resources of areas beyond national jurisdiction;]

Benefit sharing can only be based on the utilization of MGR. Benefits do not arise when collecting material (e.g., during an expedition) or accessing MGR information. Imposing the need to demonstrate the absence of benefits at the collection or access stage burdens non-commercial research unnecessarily with high administrative workloads.

[(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;]

As detailed in the general comments, non-commercial research plays an active and important role in capacity building.

Article 8 Application

[1. The provisions of this [Part] [Agreement]

[(a) Marine genetic resources, insofar as they are collected for the purpose of conducting 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.]]

Firstly, different sections of this paragraph are inconsistent in their logic. As formulated, 1(a) suggests development is not in the scope of the Agreement, only research, as this is the stage of collections. Development would only be included if the term "utilization" would be used / added. Paragraph 1(b) by contrast discusses whether ex situ and in silico are included, but offers collection and access as alternatives. Utilization is only mentioned in one bracket. Derivatives (1c) are mentioned without discussing their origin ex situ or in silico.

Secondly, the term "derivates" needs to be defined. We recommend to use a definition as in the Nagoya Protocol, where 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 (Article 2(e) NP)."

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

[(a) The use of fish and other biological resources as a commodity.]

As formulated, the sentence bears the risk to make the entire Agreement obsolete with respect to development. If restricted to this Part (first squared bracket) the term "fish and other biological resources" is so broad that it includes all MGR as a commodity. The formulation as stated here would exclude all commercial use of biological resources from the entire Part and non-commercial research (as it lacks commodity) would be the only aspect falling under this Part. If this statement would even be extended to the entire Agreement (second squared bracket), the major environmental impacts of fisheries and use of other biological resources would be exempted from the

EIA Part, as well as the relationships between fisheries and area-based management in MPA establishment.

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

[(c) Derivatives;]

We note that these exemptions are exact opposite of Paragraph 1 b-c in this Article.

[(d) Marine scientific research.]]

We anticipate that this exclusion will not be part of the final Agreement. However, we strongly encourage that the text and measures in the Agreement do not hinder the development of non-commercial scientific research (see general comments). It should be considered whether non-commercial research (basic research without any commercial interest and intent) could be treated and regulated differently to research carried out with commercial purposes. This requires a differentiation between "commercial" and "non-commercial" research. We are aware that such a differentiation is non-trivial.

Legal scholars tend to use the term marine scientific research (MSR) to designate Legal scholars tend to use the term marine scientific research (MSR) to designate any scientific investigation, which has the marine environment as its object. UNCLOS includes provisions on MSR, but it does not provide a legal definition; neither does it list activities that fall under this term.

[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.]

Depending on the formulation, this section implies that all regulations apply to MGR from material collected prior to the entry into force of the BBNJ Agreement but used afterwards ex situ or in silico. This is not feasible as needed information on origin and timing of sampling is not always available. It would also impede research on many if not all historical samples. "In silico" would mean that sequence data from such samples would be no longer available and would have to be deleted from databases (since the database policies prohibit the storage of data with restricted usage rights). "Ex situ" would imply that using museum and collection material would fall under

restrictions impeding (instead of promoting) research. We strongly recommend to avoid the half sentence starting with ", including…".

[Article 9 Activities with respect to marine genetic resources of areas beyond national jurisdiction]

[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.]

This paragraph is potentially highly critical and unfeasible, threatening research and the goals of this Agreement. First, the question whether MGR that are found in ABNJ are also found in areas under national jurisdiction cannot conclusively been answered with the knowledge we have on the distribution of species and their migration. Due to the high connectivity of marine habitats, organisms and material containing MGR drifts often from ABNJ into national waters, which means that the number of countries that would need to be involved cannot be estimated. For other large parts of the marine ecosystem, such as plankton, they are known to actually or potentially occur everywhere in the ocean (or in large parts of it). Depending who would be responsible for documenting this occurrence or its absence would delay any scientific activity.

Second, even if the knowledge was there, paragraph 2 basically means that if the marine genetic resource occurs both in national waters and beyond, researchers would have to follow the procedures of the coastal state, even if you access the resource outside of national waters. This becomes impossible as marine organisms can occur in national marine waters of more than one coastal state, which would mean receiving a permit from each of these coastal states.

We strongly recommend to delete this paragraph.

[Article 10 [Collection of] [and] [Access to] marine genetic resources of areas beyond national jurisdiction]

According to the definition in Art 1.1 ""Access" means, in relation to marine genetic resources, the collection of marine genetic resources". The title of this article would thus be a duplication if both brackets are used. We recommend to use "access to".

[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].]

If a comprehensive EIA system is established for BBNJ (e.g. similar to the Antarctic Treaty system), it makes no sense to have a separate system (consisting of application, EIA and permit system) for MGR. We therefore recommend to have this aspect only under EIA.

[Alt. 2. a [permit] [licence] issued in the manner and under the terms and conditions set forth in paragraph 2.]]

We strongly recommend not to have permit and license requirements, but to establish a notification system for non-commercial research as a simplified procedure. Permits are not feasible within the established cycles of marine research, e.g. with respect to funding decisions and project durations. Here, the periods between application, notification of funding and conduction of research are in the order of months, a permit or licence system that is not able to respond in this time frame undermines the science needed for achieving the goals of this Agreement. It also impedes capacity building as the time to permit is not included in the education time span of early career scientists, which would be the core group to be included in the capacity building. This regulation seems moreover to contradict UNCLOS Article 238 Right to conduct marine scientific research "All States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in this Convention."

[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].]

We recommend to delete this paragraph in concordance with a previous comment. As detailed above, this regulation is not feasible in marine systems as it will not be possible to conclude on or preclude the use of MGR in areas both within and outside national areas. To show the impracticability, consider a research project addressing plankton, that due to its small size and drift potential can potentially occur in all coastal waters. This project would accordingly need a notification from all countries with a coastline.

[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.]

Article 9 requires State Parties to implement the MGR requirements under the new BBNJ treaty similar to the Nagoya Protocol. To avoid that this is interpreted and implemented by all states differently, we recommend that the Agreement promotes coherence and a level playing field for all counties, which needs to be guided by the COP.

[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.]

We acknowledge the importance of traditional knowledge, but recommend careful consideration of a scale issue. For the Nagoya Protocol, traditional knowledge by definition has a regional, often clearly area-based context. However, as stated here, the Agreement offers local, indigenous knowledge a potentially unrestricted global relevance for all ABNJ.

[Article 11 [Fair and equitable] sharing of benefits]

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

From a research perspective, it would be desirable that benefit sharing is restricted to non-monetary. Here, we see a lot of convergence. The fair and transparent sharing of information and data is a cornerstone of open, reproducible science. Monetary benefits should only be considered (if at all) upon commercialization of a product.

If monetary benefits cannot be avoided, an unduly amount of restrictions to non-commercial research needs to be avoided, e.g. regarding the effort needed to document benefits. Basic research does not create commercial

benefits directly and cannot foresee whether potential benefits will arise from its results in the future.

[3. Benefits arising from [the collection of] [access to] [the 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 [the collection of] [access to] [the 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 the 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;]

[(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];]

We recommend the terminology of (b) regarding the promotion of scientific research and collaboration. This is already implemented in international calls for collaborative research, association of third party countries to EU-wide and international research calls, etc. A mandatory statement, that presently is

possible in (c) by using "shall", is dysfunctional and potentially harmful to science. Many systems already exist to foster participation in cruises and research campaigns, share technology and build capacity. A participation of one or several coastal state representatives on research expeditions in international waters is not possible in all cases. A mandatory statement could be interpreted in a way that any coastal state could claim that they want an observer on board.

[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 undermine benefit-sharing and the traceability of marine genetic resources of areas beyond national jurisdiction].]

In this article, all formulations need to be carefully considered how each of them interacts with requirements of research. For example, scientific publishing requires the transfer of copyright or selection of a Creative Common license that is not fully free to transform and change. The need of early career researchers to complete their theses with the data collected is another area of concern. Intellectual property rights are so integral for non-commercial research that massive collateral damage can derive from too broad or restrictive formulations.

[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.]]

[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.]

In order to avoid a Nagoya Protocol situation, it is absolutely vital that the COP provides clear measures, rules and guidance on how the MGR requirements in the BBNJ Agreement are to be implemented by states.

[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 an identifier shall be assigned when databases, repositories and gene banks submit the list mentioned in article 51 (3) (b) to the clearing-house mechanism;]

The option "[and in silico]" is impossible to implement, as it requires identifiers for all billions of sequences derived from a single sample of seawater. Modern technologies such as metabarcoding, eDNA or BLAST searches would potentially magnify the amount of identifiers needed. We recommend to put identifiers to samples based on the notification procedure above.

[(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;]

This suggestion is not feasible. First, the clearing-house mechanism will be flooded by thousands or millions of notifications every time a sequence on GenBank is accessed in a Blast search (to determine the identity of an unknown sequences, it is compared to all sequences deposited, including all sequences derived from marine life). Second, it is possible to upload genetic data to set local bioinformatic pipelines (to increase speed), in which case no notification of subsequent uses is possible.

[(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.]]

Here we recommend that no additional reporting pressure is placed upon non-commercial research. This research normally already has a reporting cycle. We recommend that the provisions in paragraph 3 (a), (b) and (c) would by adopted by the COP in form of measures, rules or guidance.

Part III: Measures such as area-based management tools, including marine protected areas

---

We acknowledge and welcome the need to define and implement ABMT including MPAs. Nevertheless, other aspects of conservation of BBNJ and management tools that are not area-based are also broadly discussed in many regional and global

frameworks (e.g. species conservation under CITES). Any holistic approach to BBNJ needs to consider multiple approaches, including non-area-based management.

Article 14 General Objectives

The objectives of this Part are to:

…

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

This is a key provision, however, instead of "systems" the term used here should be "network" (as in the CBD). Unfortunately, so far no process for establishing such as network has been proposed. Individual MPAs, however, will not be able to achieve coherence representativity. We therefore recommend the development of a coherent process. Moreover, we suggest to replace "Establish" by "Establish and manage", as without effective management, MPAs often have little use. Developing management concepts and providing the baseline information (point g) and foster international cooperation (Article 15) are at the core of non-commercial research activities. Thus, research is fundamental for achieving the general objectives formulate in this Part.

…

[(g) Create scientific reference areas for baseline research;]

Article 15 International cooperation and coordination

[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.

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 remaining area beyond national jurisdiction or otherwise cease to be in force.

Article 16 Identification of areas [requiring protection]

A key question is whether and what action can be taken under the BBNJ Agreement in areas, where there is a relevant global, regional, subregional, or sectoral body, but this body is not willing or able to adopt area-based management tools, including MPAs or vice-versa where a regional body agrees on a spatial measures but the global instrument does not follow.

Article 17 Proposals

[2. States Parties may collaborate with relevant stakeholders in the development of proposals.]

It should be considered if proposals could also be made by the Scientific and Technical body (with subsequent sponsoring by (a) State(s)). This might be particular important to move towards the 30x30 goals and ensure ecological coherence of future MPA networks.

4. Proposals shall include, at a minimum, the following elements:

…

(i) Information on any consultations undertaken with adjacent coastal States and/or relevant global, regional, subregional and sectoral bodies.

Article 18 Consultation on and assessment of proposals

The requirements of Art.18 Para. 2-6 are quite detailed. If the IGC does not reach consensus it could be considered to task the COP upon advice by the Scientific and Technical Body to find a technical agreement.

Article 19 Decision-making

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;

(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 sectoral bodies.]

We suggest to opt for Alt.1; Alt.2 is very weak and non-descriptive.

Article 20 Implementation

---

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.

It is not clear why this is here specifically set out for the area-based management part – to our understanding, this applies to the whole BBNJ Agreement.

Article 21 Monitoring and review

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, that 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.

Monitoring and review is very important. Part of the non-monetary benefit exchange can be that expeditions that take samples in MPAs also deliver data for the monitoring program. It would be important also to review the coherence and representativeness of the MPA network established under the Agreement; the global 30x30 goal has set a numerical objective but there is no assessment foreseen whether the "right" areas have been protected and what follow-up process is foreseen to close the gaps (who should take action – individual States who feel inclined or could the COP and its Science body propose areas?).

Part IV: Environmental impact assessments

Article 22 Obligation to conduct environmental impact assessments

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

The latter option is ill defined. Firstly, who decides what activity has an impact? Secondly, nearly every activity has ultimately an impact, be it very small, in ABNJ. Consideration of all activities would increase the number of EIAs considerably.

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

[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 inter-agency 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, 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.]

We promote Alt. 1 over Alt 2, but the standards and/or guidelines should not be attached to the Agreement and instead be adopted as measures by the COP. This makes it easier to review and revise them.

[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 the 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

In Art. 24 only activities which cause substantial pollution, significant and harmful changes or more than minor and transitory effects are mentioned. This means that (unlike to the EIA requirements under the Antarctic Treaty System) there is no EIA requirement for all activities. Although the terms / criteria used are subject to interpretation, this would mean that most marine scientific research activities would not require an EIA. Art. 24 also indirectly sets out that all activities would have to be notified to a national competent authority.

If an EIA requirement covering all activities in ABNJ is to be considered, we agree with such a classification into less than minor/transient, minor/transient and larger than minor/transient impacts as of the Antarctic Treaty.

Article 25 Cumulative impacts

[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.]

The inclusion of cumulative impacts is an important role for the new Agreement that is not taken into account in the current sectoral legal and institutional approach taken in ABNJ.

The COP and its Technical and Scientific Body is best placed to establish such guidelines (Para. 2 Alt. 1) rather than to try and come up with a regulation text in the Agreement itself (Para. 2 Alt. 2).

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.

This is a crucial Part of the overall EIA process. To determine whether or not a planned activity requires an EIA, a notification procedure has to be put in place in each member state. At the end of Para. 1 a cross-reference to the criteria in Art. 24 would be good. General or specific assessment frameworks established under other international bodies (e.g. under the London Convention for marine geoengineering activities) should also be considered.

[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.]

Para. 2 qualifies the criteria in Art. 24.

There should be a cross-reference to Art. 27 inserted in this paragraph.

[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 Scientific and Technical Body shall verify that the information provided by the State Party satisfies the requirements in this Part.]]

Here a cross-reference to Art. 29 should be inserted, as activities identified as not requiring an EIA should be put on the negative list. The involvement of the Scientific and Technical Body in the process is welcomed. However, workload for this body might become large, so rather than approval, the latter verification option might therefore be better.

Article 31 Scoping

[1. States Parties shall establish procedures to define the scope of the environmental impact assessments that shall be conducted [under the provisions of this Part].]

To leave the establishment of scoping procedures to State Parties will create differences and inconsistencies. These scoping procedures have to be established by the COP, at least in form of guidelines.

Article 33 Mitigation, prevention and management of potential adverse effects

[States Parties shall establish procedures for the prevention, mitigation and management of potential adverse effects of [authorized] activities under their jurisdiction or control. Such procedures shall include the identification of alternatives to the planned activity under their jurisdiction or control.]

Again, COP should at least provide a general framework or guidance for these procedures to ensure international consistency.

Article 34 Public notification and consultation

The information on some planned activities might contain confidential information. There might be a need for a separate Article with respect to how confidential information will be handled in the EIA process.

1. States Parties shall ensure early notification to stakeholders about planned activities under their jurisdiction or control and effective, time-bound opportunities for stakeholder participation throughout the environmental impact assessment process, including through the submission of comments, before a decision is made as to whether to proceed with the activity.

Art. 34 Para. 1 should start with "If a planned activity has been identified as requiring an EIA, ..."

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

Article 38 Decision-making

[1. Alt. 1. Where a planned activity is under the jurisdiction or control of a State Party, that State shall be responsible for determining whether the planned activity under its jurisdiction or control may proceed.]

[1. Alt. 2. The Conference of the Parties shall be responsible for determining whether a planned activity under the jurisdiction or control of a State Party may proceed, in accordance with the following procedural requirements:

(a) The environmental impact assessment report shall be submitted to the Scientific and Technical Body for review, which shall, having regard to the inputs received during public consultation, review the report and make a recommendation to the Conference of the Parties on whether the planned activity under the jurisdiction or control of a State Party should proceed[;]

[(b) A revised environmental impact assessment report may be submitted to the panel of experts, appointed by the Scientific and Technical

Body, for reconsideration where the Scientific and Technical Body has recommended that the planned activity under the jurisdiction or control of a State Party should not proceed.]]

We recommend Para. 1 Alt. 2 over Para. 1 Alt. 1.

Article 39 Monitoring

In accordance with articles 204 to 206 of the Convention, States Parties shall [[continuously] monitor the effects of authorized activities] [ensure that the environmental impacts of the authorized activity are [continuously] monitored [and supervised]] [, in accordance with the conditions set out in the approval of the activity].

There is a need for monitoring, but it is not possible to carry out excessive and lengthy pre- and post-monitoring in ABNJ. This would jeopardize a large range of non-commercial research. There is also a need to insert another paragraph under Art. 39 to stipulate that the COP, upon advice by the Scientific and Technical Body, will prepare guidance for this monitoring.

Article 41 Review

[2. A [non-adversarial consultation] process shall be established to resolve [controversies] [differences] [disagreements] in respect of monitoring [, without recourse to judicial or non-judicial bodies].]

Para. 2 belongs to Art. 39.

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

This will be very difficult to achieve in praxis.

Part V: Capacity-building and transfer of marine technology

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

[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.]

The German marine research offers capacity building and transfer through joint cruises and programs. There is a need for these detailed modalities procedures and guidelines to be developed – the text of the BBNJ

Agreement, together with UNCLOS itself, can only provide the overarching frame for capacity building.

Part VI: Institutional arrangements

Article 48 Conference of the parties

[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.]

This is very important. If consensus cannot be reached, it should be possible to make a majority (e.g. 2/3) decision. The reservations of those members, who cannot support a decision, should be reviewed periodically by the COP to see whether they have changed their position over time. Within the OSPAR Convention such a reservations review procedure is being implemented very effectively.

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

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

The first subsidiary body on the following list should be a Scientific and Technical Committee with a reference to Art. 49.

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

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

[(iii) An implementation and compliance committee;]

Experience in other international organisations (e.g. in CCAMLR), that such an implementation and compliance body is important but can also cause extremely difficult discussions and controversy.

Article 50 Secretariat

[1. Alt. 1. A secretariat is hereby established.]

[1. Alt. 2. The Conference of the Parties shall [, at its first ordinary meeting,] designate the secretariat from among those existing competent international organizations that have signified their willingness to carry out the secretariat functions under this Agreement.]

[1. Alt. 3. The secretariat functions for this Agreement shall be performed by the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations.]

Para. 1 Alt. 3 might be the most appropriate to ensure consistency with UNCLOS.

Article 51 Clearing-house mechanism

1. A clearing-house mechanism is hereby established.

Taking into account the amount of different material and information to be included in the clearing house mechanism, it might be better to establish 4 clearing house mechanisms (i.e. one for each main BBNJ Agreement Part).

[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].]

We recommend that the clearing house mechanism(s) should be managed by the Secretariat, which then can ask / cooperate with other relevant international organizations as appropriate.

Annex II: Types of capacity-building and transfer of marine technology

[Under this Agreement, capacity-building and the transfer of marine technology initiatives may include, and are not limited to:

…

(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, such as:

(i) Collaboration and cooperation in marine science, including through data collection, technical exchange, scientific research projects and programmes, and the development of joint scientific research projects in cooperation with institutions in developing States;

It should be avoided that developing countries require that their national scientists / experts have to be a partner in marine scientific research projects or have to participate on a research cruise. This can be done where possible, but should not become a mandatory requirement (as some States

require under the Nagoya Protocol for research carried out in the national waters).