



Biodiversity Beyond National Jurisdiction: Legal options for a new international agreement



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Citation

Fletcher, R., Scrimgeour, R., Rogalla von Bieberstein, K., Barritt, E., Gjerde, K., Hazin, C., Lascalles, B., Tittensor, D., Vinuales, J.F., Fletcher, S. (2017). *Biodiversity Beyond National Jurisdiction: Legal options for a new international agreement*. UNEP-WCMC, Cambridge, UK

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Executive Summary

The aim of this work is to support States participating in the Biodiversity Beyond National Jurisdiction Preparatory Committee meetings by presenting options for the content of the legal instrument appropriate for anticipated future changes in the pressures on biodiversity beyond national jurisdiction. In order to do this, three pressures on biodiversity beyond national jurisdiction were chosen: *physical loss and damage to the seabed; removal of biological resources; and ocean acidification*. The potential legal options for area based management tools and environmental impact assessment were then assessed for their ability to manage the likely future changes in pressure. The legal options were developed at three levels of ambition which reflected progressively greater need for capacity and funding.

The key findings of this review indicate that at the very least, the development of a legally binding Implementing Agreement will provide an opportunity to more effectively balance conservation, economic and development needs of Parties if it provides a platform for better cross-sectoral communication and collaboration for activities. Better cross-sectoral communication would then support the improved assessment of cumulative impacts of marine activities and would help facilitate the development of appropriate area-based responses in areas beyond national jurisdiction. There are a number of cross cutting issues which could provide valuable coordination of efforts for biodiversity conservation and sustainable use.

In areas beyond national jurisdiction, area-based measures are currently implemented under a sectoral and fragmented approach. The options here suggest ways of implementing area based planning in a cross sectoral way, while also preventing the undermining of existing High Seas area-based management tools, which could prove valuable. Environmental Impact Assessment is currently undertaken for some selected sectors, with varying approaches in areas beyond national jurisdiction. The coordination of environmental impact assessments across sectors under the options presented here would provide for a more consistent framework and the setting of international minimum standards to which States must adhere. The creation of such a framework could provide a greater degree of confidence in the environmental assessment process through coordination and the provision of capacity to more effectively assess the sustainability of marine activities.

There are a variety of legal options which could be used within the implementing agreement. They provide different levels of opportunity to manage the gap in cross sectoral communication. A greater level of ambition for each option will require additional capacity, but could provide increased benefits to the longevity of the resources upon which many people will rely.

It is recognised that there are many additional pressures on the marine environment to those included in this analysis. However it was important to make the legal options focused on the highest priority pressures on biodiversity beyond national jurisdiction. It is recommended therefore that further research is undertaken to extend this analysis to incorporate additional pressures and associated legal option.

ت ن ف ي ذ ي م ل خ ص

الوطنية الولاية خارج الواقعة المناطق في البحري البيولوجي التنوع بحفظ متعلق قانوناً ملزم دولي صك وضع حالياً تم عام واث نان، 2016 عام منها اث نان الصك، لوضع تحضيرية للمجان لقاءات أربعة عقد تم وقد. مس تدام نحو على واستخدامه قة الوثي هذه تساهم. ال نهائي النص على الاتفاقيات القانوني الصك مضمون لمناقشة فرصة للمقاعات هذه عدوً. 2017 بهدف البيئي التأثر يروت قديم المناطق أساس على القائمة الإدارية الأدوات من كلي باستخدام المتعلقة مناقشات في خلال من الوثي يقة هذه وضع تم. الوطنية الولاية نطاق خارج له الم ستدام والاستخدام البيولوجي لتنوعاً حفظ دعم وجامعة (Birdlife International) الدولية بـيردلايف منظمة (IUCN) الطبيعة لحفظ الدولي الاتحادي بين ما التعاون (UN Environment World Conservation Monitoring) المتحدة للأمم التابع البيئية لحفظ لرصد العالمي والمركز كام بيردج، ال بيئية حفظ الطبيعة ج د كام بري حن إحدى من بتمويل وذلك (Centre).

الولاية نطاق خارج البيولوجي التنوع حول التحضيرية للجنة اجتماعات في المشاركة الدول لدعم الم شروع هذا هدف الم توقع الم ستق بلية التغيرات مع تناسب بحيث القانوني الصك مضمون تخص خيارات تقديم خلال من الوطنية ضغوط لثة اختيار تم ذلك، قول تحققي. الوطنية الولاية نطاق خارج البيولوجي التنوع على الضغوط في حصولها الم وارد وإزالة البحر، لقاع المادي والضرر فقدان: الوطنية الولاية نطاق خارج البيولوجي التنوع لها يتعرض على القائمة الإدارية الأدوات بالنسبة الم احتملة القانونية الخيارات تقديم تم ومن الم محيطات وتحصن البيولوجية، في الم المرجح الم ستق بلية التغيرات مواجهة على قدرتها ناحية من ذلك، البيئي التأثر يروت قديم الم مناطق أساس تدريجياً الم تزايد الاحتيالات عكس بحيث الطموح، من مس تويات لثة ضمن القانونية الخيارات وضع تم وقد. الضغوط والتمويل القدرات من لكل.

لخلق الفرصة هيئية في الأقل على سيساعد قانوناً ملزم تنفيذي اتفاقيات وضع أن إلى المراجعة ههذ نتائج أهم وتشيرة منصتوف يرحال في وذلك، الأعضاء الدول لدى والتنموية الاقتصادية والاحتياجات البيئية حفظ بين ما أف ضلت وازن تقديم تطوير القطاعات بين الأف ضلت التواصل سيدعم ثم ومن. القطاعات مخ تلف بين الأنشطة في والتعاون لما تواصل في وذلك الم مناطق، أساس على القائمة الم ناسبة الاستجابات وضع لسياساتكمما البحرية، ل الأنشطة التراكمية التأثر يرات حفظ إلى ال رامية للمجهود قيمياً تنسيقاً تؤمن أن يمكن متداخلة مسائل عدة وه نالك. الوطنية الولاية خارج الواقعة الم مناطق. مس تدام نحو على واستخدامه البيولوجي عالتنو.

خارج الواقعة الم مناطق ضمن، ومجزاً قطاعي منهج على بناء، الم مناطق أساس على قائمة تدابير تنفيذية تم الراهن، الوقت في تشمل بطريفة الم مناطق أساس على القائمة الخطط لتنفيذ وسائل المتاحة الخيارات تقترح وه نا. الوطنية الولاية

قد والحي المناطق، أساس على والقائمة البحر عرض في الم وجود الإدارة الأدوات إضعاف ت فادي مع القطاعات، مختلف مقاربات وفق وذلك المختارة، القطاعات لبعض البيئي لتأثيرت قديم تنفيذ حالياً تم كذلك، لاحقاً أهمية لها مدى تشبي مختلف في البيئي لتأثيرت قديم عمليات بين ما المتنسيق إن الوسطانية الولا خارج الواقعة المناطق في مختلف على بيتوج التي الدنيا الدولية المعاي يروو وضع ثباتاً كثر عمل إطار بتوف يرك فلهنا الم خدمة الخيارات وفق القطاعات القدرات توف يرحال من البيئي قديم ال بعملية أعلى ثقة يؤمن أن الإطار هذا مثل لتأسيس ويمكن بها الا التزام الدول البحرية الأنشطة لاستدامة كفاءة كثر قديم إلى للتوص وتنسيقها

الهولة لردم الفرص من مختلف مس تويات رتوف وهي. التنفيذ الات فاق ضمن متنوعة قانونية خيارات استخدام يمكن فوائد يوف ر قد ل كنهه إضافة، قدرات فسي تطلب خيار لك الطموح مستوى رفع أما. القطاعات بين ما التواصل في البشر علمها سيع تمد التي الم وارد عمر إطالة حيث من أعظم

من أنه إلا. التحليل هذا في ذكرها يرد لم والحي البحرية البيئية على الأخرى الضغوط من العديد وجود الم معروف ومن نطاق خارج البيولوجي التنوع على الواقعة الكبرى الأولى. وية ذات الضغوط على القانونية الخيارات زترل أن بمكان الأهمية الإضافة الضغوط يشمل بحيث التحليل هذا إطار لتوسيع البحث من الم زيد بإجراء يوصى ولذلك. الوسطانية الولاية بها الم رت بطة القانونية والخيارات

执行摘要

针对保护和可持续利用国家管辖范围以外区域的海洋生物多样性（BBNJ），目前正在制定一项新的具有国际法律约束力的文件。为编制该文件将举行四次筹备委员会会议，其中两次在 2016 年举行，另外两次在 2017 年。这些会议为达成最终文本之前商讨该法律文件的内容提供了机会。本文件促成有关使用基于区域的管理工具和环境影响评估的讨论，从而为保护和可持续利用国家管辖范围以外的生物多样性提供支持。本文件是由世界自然保护联盟（IUCN）、国际鸟类联盟（Birdlife International）、剑桥大学和联合国环境规划署世界养护监测中心（UN Environment World Conservation Monitoring Centre）协作编制，由剑桥保育组织（Cambridge Conservation Initiative）提供资助。

本文件旨在针对国家管辖范围以外生物多样性所面临的压力的预期变化，介绍相应的法律文件内容选择，从而为参与国家管辖范围以外生物多样性筹备委员会会议的国家提供支持。为此，本文件先选择了国家管辖范围以外生物多样性所面临的三种压力：海床有形损失和损坏、生物资源动用、海洋酸化，随后对基于区域的管理工具和环境影响评估的潜在法律选择所具有的关联预期压力变化的能力进行了评估。这些法律选择的编制考虑了三个目标层面，体现了对能力和资金渐次扩大的需要。

此项评估的主要结果表明，如果能针对各种活动提供更好的跨部门沟通和协作平台，制定具有法律约束力的实施协议至少能为有效地平衡成员国的环境保护、经济和发展需要创造机会。通过改善跨部门沟通，将有利于更好地评估海上活动的累积影响，并且可促进在国家管辖范围以外的区域建立基于区域的合理响应。存在若干贯穿各领域的问题，可针对生物多样性保护和可持续利用举措提供宝贵的协调。

在国家管辖范围以外的区域，目前基于区域的措施是由不同部门实施的，呈分散状态。本文件所述的选择体现了跨部门实施基于区域规划的多种方式，同时避免破坏基于公海区域的现有管理工具，因为这些工具或许仍有价值。某些特定部门目前正在实施环境影响评估，在国家管辖范围以外区域所采用的方法不尽相同。根据本文件所述的选择，各部门对环境影响评估的协调将建立更加一致的框架，并且确立各国必须遵守的国际最低标准。该框架的建立可促进协调和建设更有效评估海上活动可持续性的能力，增加环境评估过程的信心。

有多种法律选择可应用于实施协议。这些法律选择提供了不同层次的机会，以管理跨部门沟通的缺口。对各个选择给予更高的期望要求具备更强的能力，但更大的目标能够为众多人口所依赖的资源的可持续性带来更多益处。

诚然，除了本文件的分析中所包含的内容，海洋环境还面临其他多种压力，但对国家管辖范围以外生物多样性所面临的首要压力做出针对性的法律选择是十分重要的。因此，建议开展进一步研究来扩展此分析，以涵盖其他压力及相应的法律选择。

Résumé exécutif

Un nouvel instrument international juridiquement contraignant concernant la conservation et l'utilisation durable de la diversité biologique marine dans les zones situées au-delà des juridictions nationales (BBNJ) est en cours d'élaboration. Quatre comités préparatoires sont en train d'être mis en place pour élaborer cet instrument, deux en 2016 et deux en 2017. Ces réunions seront l'occasion de discuter du contenu de l'instrument juridique avant que le texte final ne soit adopté. Ce document contribue à la discussion sur l'utilisation d'outils de gestion basés sur des aires bien définies et les Etudes d'impact sur l'environnement pour appuyer la conservation et l'utilisation durable de la diversité biologique au-delà de la juridiction nationale. Le document a été élaboré à travers une collaboration entre l'UICN, Birdlife International, l'Université de Cambridge et le Centre mondial de surveillance de la conservation de la nature de l'ONU Environnement et, financé par une subvention de l'Initiative de conservation de Cambridge.

Le but de ce travail est d'appuyer les États participant aux réunions du Comité préparatoire de la biodiversité au-delà des juridictions nationales en présentant des options pour le contenu de l'instrument juridique approprié pour anticiper les changements futurs prévus des pressions sur la biodiversité au-delà des juridictions nationales. Pour ce faire, trois pressions sur la biodiversité au-delà de la juridiction nationale ont été choisies : la perte physique et l'endommagement des fonds marins ; le prélèvement des ressources biologiques ; et l'acidification des océans. Les options juridiques possibles pour les outils de gestion basés sur des aires géographiques bien définies et les Etudes d'impact sur l'environnement ont été par la suite évaluées en fonction de leur capacité à gérer les changements de pression probables à l'avenir. Les options juridiques ont été élaborées à trois niveaux d'ambition, reflétant un besoin de plus en plus important de capacités et de financement.

Les conclusions clés de cet examen indiquent qu'au minimum, l'élaboration d'un Accord d'Exécution juridiquement contraignant permettra de mieux équilibrer les besoins de conservation, et les besoins économiques et de développement des États membres, si celle-ci fournit une plateforme pour une meilleure communication intersectorielle et une meilleure collaboration concernant les activités. Une meilleure communication intersectorielle appuierait alors une évaluation améliorée des impacts cumulés des activités marines et aiderait à faciliter l'élaboration de réponses appropriées pour des aires géographiques bien définies dans les zones situées au-delà des juridictions nationales. Il existe un certain nombre de questions transversales qui pourraient fournir une précieuse coordination des efforts pour la conservation de la biodiversité et l'utilisation durable des ressources naturelles.

Dans les zones situées au-delà de la juridiction nationale, les mesures basées sur des aires bien définies sont actuellement mises en œuvre sous une approche sectorielle et fragmentée. Les options proposées ici suggèrent

des façons de mettre en œuvre une planification basée sur des aires bien définies d'une manière intersectorielle tout en évitant de porter préjudice aux outils de gestion existants pour la Haute Mer qui pourraient s'avérer utiles. Une Etude d'impact sur l'environnement est actuellement entreprise pour certains secteurs choisis, avec des approches variées dans les zones au-delà des juridictions nationales. La coordination des Etudes d'impact sur l'environnement entre les différents secteurs dans le cadre des options présentées ici permettrait d'établir un cadre plus cohérent et de fixer des normes minimales internationales auxquelles les États devraient adhérer. La création d'un tel cadre pourrait renforcer la confiance dans le processus d'évaluation environnementale à travers la coordination et le renforcement de la capacité à mieux évaluer la durabilité des activités maritimes.

Il existe une variété d'options juridiques qui pourraient être utilisées au sein de l'Accord d'Exécution. Ceux-ci offrent différents niveaux de possibilités pour gérer les lacunes dans la communication intersectorielle. Un niveau plus élevé d'ambition pour chaque option exigera une capacité supplémentaire, mais pourrait fournir des avantages accrus à la longévité des ressources dont dépendent un grand nombre de personnes.

Il existe de nombreuses pressions supplémentaires sur le milieu marin à l'égard de celles qui sont incluses dans cette analyse. Cependant, il était important de faire en sorte que les options juridiques soient axées sur les pressions ayant la plus haute priorité sur la biodiversité au-delà de la juridiction nationale. Il est donc recommandé que d'autres recherches soient entreprises pour étendre cette analyse afin d'intégrer des pressions supplémentaires et des options juridiques appropriées.

Resumen Ejecutivo

Está en elaboración un nuevo instrumento internacional jurídicamente vinculante relativo a la conservación y el uso sostenible de la diversidad biológica marina en zonas situadas fuera de la jurisdicción nacional. Se previeron cuatro reuniones del Comité Preparatorio, dos para 2016 y dos para 2017. Estas reuniones presentan la oportunidad de discutir sobre el contenido del instrumento legal antes de que se acuerde sobre el mismo. El presente documento contribuye a la discusión sobre el uso de herramientas de planificación basada en áreas geográficas específicas y de la evaluación de impacto ambiental para apoyar la conservación y uso sostenible de la biodiversidad en zonas situadas fuera de la jurisdicción nacional. El documento fue elaborado mediante una colaboración entre la UICN, Birdlife International, la Universidad de Cambridge y el Centro Mundial de Monitoreo de la Conservación de ONU Medio Ambiente, financiado a través de una subvención de Cambridge Conservation Initiative.

El objetivo de este trabajo es apoyar a los Estados que participan en las reuniones del Comité Preparatorio sobre biodiversidad en zonas situadas fuera de la jurisdicción nacional a través de la presentación de opciones para el contenido del instrumento legal adecuadas para los cambios futuros que se anticipan en las presiones sobre la biodiversidad en dichas zonas. Con este fin se eligieron tres presiones sobre la biodiversidad en zonas situadas fuera de la jurisdicción nacional: pérdida física y daño en los fondos marinos; remoción de recursos biológicos y acidificación de los océanos. Las posibles opciones legales relativas a la evaluación de impacto ambiental y las herramientas de planificación basada en áreas geográficas específicas fueron evaluadas en función de su capacidad para manejar los posibles cambios futuros en las presiones. Las opciones legales fueron desarrolladas considerando tres niveles de ambición reflejando de modo progresivo una mayor necesidad de capacidades y recursos financieros.

Las principales conclusiones del estudio muestran que, como mínimo, si proporcionara una plataforma para una mejor comunicación y colaboración para la realización de actividades intersectoriales, la elaboración de un acuerdo de implementación jurídicamente vinculante brindará la oportunidad de equilibrar de modo más efectivo las necesidades de conservación, desarrollo económico y social de los Estados miembros. Una mejor comunicación intersectorial contribuiría a una mejora en la evaluación de los impactos acumulativos de las actividades marinas y ayudaría a facilitar el desarrollo de respuestas basadas en áreas geográficas específicas en zonas situadas fuera de la jurisdicción nacional. Hay una serie de temas transversales que podrían proporcionar una valiosa coordinación de esfuerzos para la conservación y el uso sostenible de la biodiversidad.

En la actualidad, las medidas de planificación basada en áreas geográficas específicas en zonas situadas fuera de la jurisdicción nacional son implementadas bajo un enfoque sectorial y fragmentado. Las opciones aquí incluidas sugieren formas que podrían ser valiosas para la implementación intersectorial de la planificación basada en

áreas, al mismo tiempo que se evite se socaven las herramientas de gestión basadas en áreas en alta mar existentes, que podrían ser valiosas. En la actualidad se llevan a cabo evaluaciones de impacto ambiental para ciertos sectores, con diversos enfoques sobre las zonas situadas fuera de jurisdicción nacional. La coordinación de evaluaciones de impacto ambiental entre sectores en virtud de las opciones que aquí se presentan, proporcionaría un marco más consistente y el establecimiento de estándares mínimos a nivel internacional, a los que los Estados deberían adherirse. La creación de dicho marco aportaría un mayor grado de confiabilidad en el proceso de evaluación ambiental mediante la coordinación y provisión de capacidades para evaluar la sostenibilidad de las actividades marinas de modo más efectivo.

Hay una variedad de opciones legales que podrían ser utilizadas en el acuerdo de implementación. Las mismas brindan distintos niveles de oportunidad para manejar la brecha existente en la comunicación intersectorial. Si bien un mayor nivel de ambición para cada una de las opciones requerirá mayores capacidades, también podrían proveer mayores beneficios para la durabilidad de los recursos de los que tantas personas dependen.

Se reconoce que, además de las que se incluyen en este análisis, hay muchas presiones adicionales sobre el ambiente marino. No obstante, era importante hacer que las opciones legales estuvieran lo más enfocadas posible en función de las principales presiones sobre la biodiversidad en zonas situadas fuera de la jurisdicción nacional. Se recomienda por lo tanto que se lleve a cabo mayor investigación para ampliar este análisis e incorporar otras presiones y las opciones legales relacionadas con las mismas.

управляющее резюме

В настоящее время разрабатывается новый международный юридически обязательный документ, касающийся сохранения и устойчивого использования морского биологического разнообразия в районах за пределами национальной юрисдикции (BBNJ). В настоящее время проводятся четыре подготовительных комитета для разработки документа: два в 2016 году и два в 2017 году. Эти совещания представляют собой возможность обсудить содержание правового документа до согласования окончательного текста. Этот документ способствует обсуждению использования инструментов управления на основе районов и оценки воздействия на окружающую среду в поддержку сохранения и устойчивого использования биоразнообразия за пределами национальной юрисдикции. Документ был разработан на основе сотрудничества между МСОП, Birdlife International, Кембриджским университетом и Всемирным центром мониторинга природоохраны ООН, финансируемым за счет гранта Инициативы по сохранению Кембриджской инициативы по природоохране (Cambridge Conservation Initiative).

Цель этой работы заключается в оказании поддержки государствам, участвующим в заседаниях Подготовительного комитета по биоразнообразию за пределами национальной юрисдикции, путем представления вариантов содержания правового документа, подходящего для предполагаемых будущих изменений в давлении на биоразнообразие за пределами национальной юрисдикции. Для этого были выбраны три фактора воздействия на биоразнообразие за пределами национальной юрисдикции: физические потери и ущерб морскому дну; Удаление биологических ресурсов; И подкисление океана. Затем были оценены потенциальные правовые варианты для инструментов управления на основе районов и оценки воздействия на окружающую среду в отношении их способности управлять вероятными будущими изменениями давления. Юридические варианты были разработаны на трех уровнях амбиций, что отражает все более возрастающую потребность в потенциале и финансировании.

Основные результаты этого обзора свидетельствуют о том, что, по крайней мере, разработка юридически обязывающего Соглашения об осуществлении обеспечит возможность более эффективно сочетать природоохранные, экономические и связанные с развитием потребности государств-членов, если он обеспечивает платформу для лучшего межсекторального взаимодействия и сотрудничества. Более эффективная межотраслевая коммуникация будет затем поддерживать улучшенную оценку кумулятивного воздействия морской деятельности и поможет содействовать разработке соответствующих региональных ответных мер в районах за пределами национальной юрисдикции. Существует целый ряд сквозных вопросов, которые могут обеспечить ценную координацию усилий по сохранению и устойчивому использованию биоразнообразия.

В районах, находящихся за пределами национальной юрисдикции, территориальные меры в настоящее время осуществляются в рамках секторального и фрагментированного подхода. Варианты здесь предлагают способы реализации территориального планирования в кросс-секторальном порядке, а также предотвращение подрыва существующих инструментов управления районами открытого моря, которые могут оказаться полезными. В настоящее время оценка воздействия на окружающую среду проводится для некоторых отдельных секторов с различными подходами в областях за пределами национальной юрисдикции. Координация оценок воздействия на окружающую среду в различных секторах в соответствии с представленными здесь вариантами обеспечит более согласованные рамки и установление международных минимальных стандартов, которым должны соответствовать государства. Создание такой структуры могло бы обеспечить большую степень уверенности в процессе экологической оценки посредством координации и предоставления возможностей для более эффективной оценки устойчивости морской деятельности.

Существует целый ряд правовых вариантов, которые могут быть использованы в рамках соглашения об осуществлении. Они предоставляют разные уровни возможностей для преодоления разрыва в межсекторальной коммуникации. Более высокий уровень амбиций по каждому варианту потребует дополнительных мощностей, но может принести дополнительные выгоды для долговечности ресурсов, на которые многие люди будут полагаться.

Признано, что существует множество дополнительных нагрузок на морскую среду для тех, кто включен в этот анализ. Вместе с тем важно, чтобы правовые варианты были сфокусированы на оказании наивысшего приоритета на биоразнообразие за пределами национальной юрисдикции. В связи с этим рекомендуется провести дополнительные исследования для расширения этого анализа с целью учета дополнительного давления и связанных с этим юридических вариантов.

1 Introduction

In 2015, the United Nations General Assembly ('UNGA') agreed to develop a new internationally legally binding instrument concerning the conservation and sustainable use of marine biological diversity in Areas Beyond National Jurisdiction ('biodiversity beyond national jurisdiction' or 'BBNJ') (UNGA, 2015, (A/RES/69/292)). The instrument will be an Implementing Agreement under the United Nations Convention on Law of the Sea ('UNCLOS') and will be described as the 'Implementing Agreement' throughout this document. UNGA decision 69/292 takes into account the recommendations of States through the BBNJ Working Group (established in 2006) and establishes a Preparatory Committee to make substantive recommendations to the UNGA on the "elements of a draft text of an international legally binding instrument under UNCLOS". Following the 2015 UNGA resolution, it was agreed that the instrument would focus on four overarching issues. These are known as the 'Package deal' and consist of: marine genetic resources; area-based management tools ('ABMTs' including Marine Protected Areas ('MPAs')); environmental impact assessments ('EIAs'); and capacity building and the transfer of marine technology (UNGA, 2014, (A/69/177*item 75). For a more detailed context, see Wright *et al.* (2016).

In January 2015 the Working Group reported that "*some delegations expressed concern about negotiating a new legally binding agreement without a clear understanding of what it would cover*" and that the original package of topics highlighted for discussion in 2011 "*was no more than a description of major topics to be addressed, which did not specify which activities would be covered by a new instrument*" (UNGA, 2014, (A/69/177*item 75). Taking these concerns into account, a project was devised to provide a set of legal options for discussion on how an agreement might be formulated in the context of a range of changing pressures on BBNJ.

The resulting Cambridge Conservation Initiative (CCI) funded project is a collaboration between International Union for Conservation of Nature (IUCN), Birdlife International, the University of Cambridge and the UN Environment World Conservation Monitoring Centre.

One of the key considerations of the project was to bring biodiversity experts together with legal experts to explore the options that States have in formulating the Implementing Agreement. To ensure effectiveness, it is important that the Implementing Agreement contains appropriate legal options to protect biodiversity and allow its sustainable use and thus to address identified key pressures. In addition, the agreement must reflect the changes in marine uses that might occur and recognise that the marine environment is highly mobile and interconnected. This report aims to support States participating in the BBNJ Preparatory Committee by presenting legal options that can respond to current and anticipated future changes in the pressures on BBNJ. The pressures on BBNJ are described in a separate document, a Horizon Scan of pressures on biodiversity also undertaken as part of this project (Eassom *et al.*, 2016).

The presentation of these options provides legal assessments/considerations in relation to the issues highlighted at the first Preparatory Committee meeting.¹ The aim of this document is not to provide definitive advice but to provide a number of legal options that encourage further consideration and discussion around two specific components of the ‘package’ of topics that the legal agreement will cover, namely ABMTs and EIAs. The legal options are also considered in light of some of the main issues facing the marine environment at this time (the three pressures described above).

The document is structured around the following sections:

- **Foundational concepts** – this chapter summarises the discussion regarding definitions and principles, and provides some examples of existing legal formulations.
- **Legal Options** - this chapter contains the three main sections of the report, the presentation of the legal options associated with ABMTs, the legal options associated with EIAs, and finally, the legal options for cross-cutting components spanning both ABMTs and EIAs. Within each section there is an assessment of the potential of the legal options to address the pressures described in the Horizon Scan foundation document (Eassom et al., 2016).
 - **Area Based Management Tools**
 - Legal options for components of a new agreement in the context of ABMTs
 - Application of ABMT-based legal options to key pressures on biodiversity
 - **Environmental Impact Assessment**
 - Legal options for components of a new agreement in the context of EIAs
 - Application of EIA-based legal options to key pressures on biodiversity
 - **Cross-cutting components** of a new Implementing Agreement (components that are applicable to both issues surrounding ABMTs and EIAs).
 - Key principles for the Implementing Agreement
 - Legal components that are relevant to both ABMTs and EIAs
 - Relevance of the legal options for addressing three key pressures on biodiversity
- **Conclusion**

The final chapter presents the conclusion and recommendations.

¹ Further details of discussions held at BBNJ Preparatory Committee Meeting 1 can be found in the [Chair’s Overview](#) (Charles, 2016a).

2 Foundational concepts

2.1 Definitions

An important component of the new Implementing Agreement is selecting the most relevant and accurate definitions of terms in accordance with the objectives of the agreement. Presently, many organisations such as the IUCN and Multilateral Environmental Conventions, such as the Convention on Biological Diversity (CBD), have existing definitions for terms such as, biological diversity and MPAs, which are relevant to a new agreement. A key discussion arising at the Preparatory Committee meetings in 2016, centred on whether or not existing definitions should be used as a basis for generating definitions for the new agreement. Care will also need to be taken to ensure that definitions used in the new agreement are consistent with, and do not contradict existing definitions used in UNCLOS. The issue of definitions was noted in the overview of Preparatory Committee 2 (Charles, 2016b). UNCLOS definitions for the **Area** (*“the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”* (UNCLOS, 1982 Article 1(1)); the **continental shelf** (*“...comprises the seabed and subsoil of the submarine areas... to a distance of 200 nautical miles from...”* (UNCLOS, 1982, Article 76(1)); the **High Seas** (*“... all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State...”* (UNCLOS, 1982, Article 86) will therefore be used for the new Implementing Agreement. Another fundamental definition is that of **marine biological diversity**, which is not defined in UNCLOS. A decision will therefore need to be made as to whether the definition given in the CBD will be sufficient in which **biological diversity** is defined as *“the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems”* (CBD, 1992, Article 2).

One definition that is being discussed at great length is that of **ABMTs**. At present there is no universally accepted definition of ABMTs, as tools are often sector-specific, although they *“... are generally understood to include spatial and non-spatial tools that afford a specified area higher protection than its surroundings due to more stringent regulation of one or more or all human activities”* (Molenaar & Elferink, 2009). Other suggestions for a universal definition include:

- *“Area based Management Tools (ABMTs) are regulations of human activity in a specified area to achieve conservation or resource management objectives.”* (IUCN, 2015); or
- *“Sectoral ABMTs include measures adopted by a competent international organisation to achieve biodiversity conservation objectives for a specific area such as International Maritime Organisation’s (IMO) Particularly Sensitive Sea Areas (PSSAs) ... Cross-sectoral tools are those that require cooperation and coordination across multiple organisations and bodies, including MPAs and MSP.”* (IUCN, 2015)

Various definitions of **MPAs** have already been agreed upon and therefore could be used within the new

Implementing Agreement. For example, IUCN defines a protected area as “a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values” (Dudley, 2008). Following Preparatory Committee meeting 2, IUCN issued a statement suggesting that the MPA definition used in a new agreement should include a clause stating the: “primary aim of long term conservation of nature including biodiversity and associated ecosystem services.” (IUCN, 2016). This specification would help distinguish MPAs from other ABMTs because other tools may not pursue long-term nature conservation as their primary goal, focusing instead, for example, on the mitigation of the impacts of a particular activity.

2.2 Principles and approaches

Guiding principles and approaches have been discussed at Preparatory Committee meetings 1 and 2, with some convergence on the inclusion of various approaches and principles in the new agreement. In order to ensure that Parties to the agreement can implement the new instrument effectively, these will need to be defined. Some that have been discussed are listed and existing definitions are provided below:

- **Ecosystem-based approach** defined by the CBD as “a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way” (CBD, 2016);
- **Precautionary principle/approach** as described in the preamble of the Convention on Biological Diversity: “where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat” (CBD, 1992). The principle is also a well-recognized norm of customary international law: States are typically bound by customary international law regardless of whether the states have codified these laws domestically or through treaties. The principle is enshrined in Principle 15 of the Rio Declaration on Environment and Development (1992).
- **Common but differentiated responsibilities** as characterised in Principle 7 of the Rio Declaration: “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities...” (United Nations, 1992b)
- **Common concern of mankind** as applied by the preamble of the Convention on Biological Diversity: “the conservation of biological diversity is the common concern of [hu]mankind” (CBD, 1992). It should be noted that this principle can also bring to the negotiating table other key principles of interest to States, such as intergenerational equity, international solidarity, shared decision making and accountability, and benefit and burden sharing through financial cooperation. It would allow a

meaningful link to be forged between the new Implementing Agreement and the Convention on Biological Diversity².

Preparatory Committee participants and Member States will therefore need to determine if such definitions are fit for the purposes of the new agreement, or if new definitions are required.

² See Bowling et al. (no date) for more information

3 Methodology

3.1 Scope of Work

Two elements of the ‘package deal’ of issues identified by the BBNJ Working Group in 2011 (UNGA, 2011, A/69/119) are addressed herein. The focus was to allow a more detailed analysis by the project team on the specifics of these two issues. This document concentrates on:

1. Area Based Management Tools (ABMT), including Marine Protected Areas (MPAs)
2. Environmental Impact Assessments (EIAs)

It is recognised that capacity development and technology transfer is another area where further work is recommended, and there is considerable work being undertaken on marine genetic resources by others. Due to the short duration of the project and in order to avoid losing focus by becoming too broad, these areas were excluded from the analysis.

In order to adequately understand the legal options discussed in this document and how well they would address pressures on the marine environment, key pressures were selected to ‘test’ the options against.³ An opportunity to identify key pressures arose at an expert workshop held by the Global Ocean Commission in 2015. In advance of this workshop, a survey was circulated among the invited experts requesting them to assess the current and future pressures on the marine environment. The survey listed threats to the marine environment drawn from published sources. These threats were ranked by severity and urgency by the expert participants. From this assessment, key pressures and the associated activities were identified. We recognise that there are many threats to the marine environment, including in Areas Beyond National Jurisdiction (ABNJ). However, in order to test this options-based approach, the number of pressures addressed in this document was limited to three (Table 1 below).

³ For the purpose of this exercise, key pressures are understood as those that currently or have a the potential to be cause significant impacts on the marine biodiversity

Table 1: The pressure categories and associated pressures assessed

No.	Pressure Category	Pressure
1	Physical loss & damage to the seabed	Physical loss (smothering)
		Physical damage (extraction)
		Physical damage (abrasion)
		Physical damage (siltation)
2	Removal of biological resources	The direct extraction of target species
		The direct extraction of non-target species
3	Ocean acidification	Ocean acidification

3.2 Foundation Documents

Following delineation of the scope of the project, a foundation review on pressures, and associated activities, within ABNJ was undertaken. This review was undertaken as a Horizon Scan, reviewing the three pressure categories listed above in Table 1, and identifying the associated activities. The intensity of these activities was assessed as part of the Horizon Scan. For more detail on the activities, pressures and trends please see Eassom *et al.* (2016). In parallel with this, a second foundation document comprising a legal scan was undertaken by the Cambridge Centre for Environment, Energy and Natural Resource Governance (C-EENRG), University of Cambridge (Barritt & Vinuales, 2016). The legal scan also focused on the same pressures and reviewed the legal context for the management of these pressures in ABNJ, including existing instruments.

3.3 Expert Workshop

Following the development of the Horizon Scan of pressures on biodiversity, and the associated legal review, a two-day workshop was convened in Cambridge in May 2016. The workshop gathered legal and biodiversity experts to inform the suggested legal options. The workshop started with a review of the existing situation and presentation of the two foundation documents. Detailed discussions on the gaps in the existing legal frameworks, and the implication for biodiversity followed. The second day focused on the two Package elements (ABMTs and EIAs), and the three pressures. Legal options to facilitate the implementation of the tools and address the pressures were drafted. As part of these discussions, it was recognised that the spectrum of legal options can be organised according to the level of ambition. The components and their associated options are drawn from an understanding of what may be required by the Implementing Agreement based upon discussions at the first and second sessions of the Preparatory Committee and the first two Chair's reports.

3.4 Side event at the 2nd session of the Preparatory Committee

Draft legal options were presented at a side event on the 8th September 2016 during Preparatory Committee meeting 2 in New York. This side event had two central objectives:

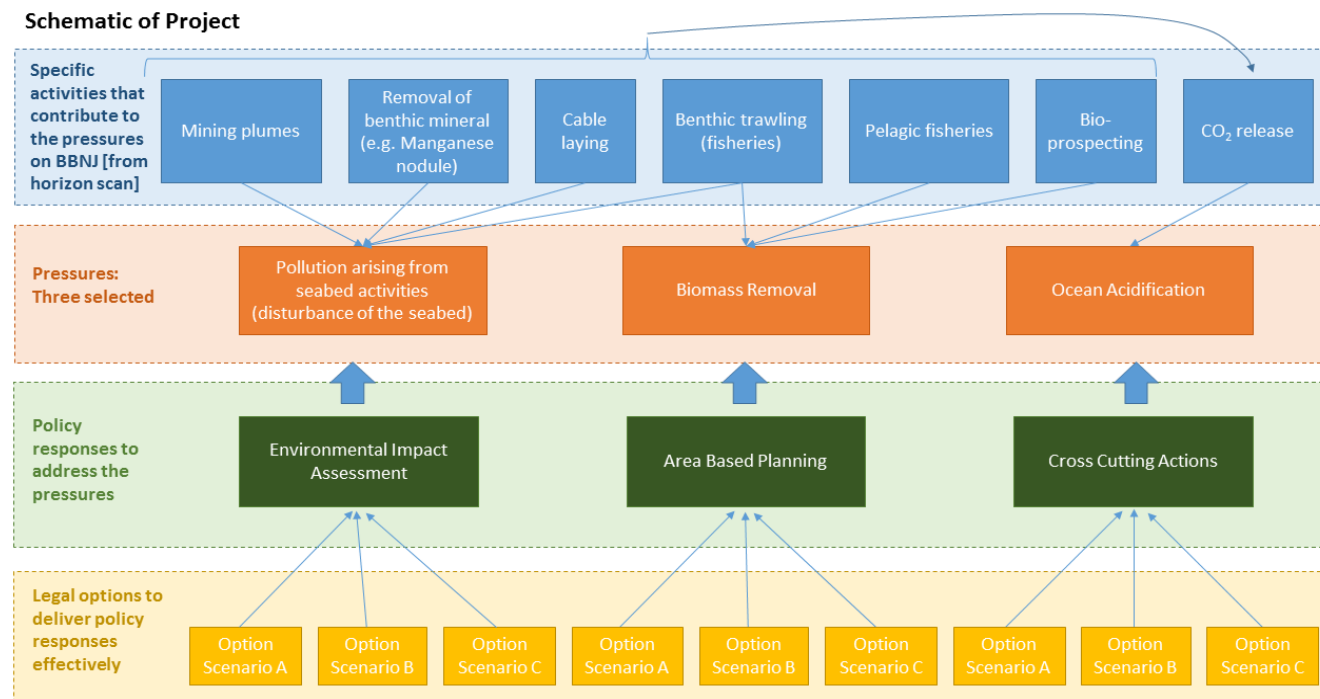
- 1) to assess the extent to which a package of legal options for ABMTs and EIAs is helpful to Preparatory Committee participating Member States; and
- 2) to initiate a discussion with Preparatory Committee participating Member States on how we may develop relevant institutional structures that support ABMTs and EIAs.

A facilitated discussion at the side event refined the legal options. The result of all these steps is presented in this document.

3.5 Schematic Summary

The figure (1) below provides a schematic summary of the project approach. Activities were identified that had the potential to contribute to pressures on biodiversity beyond national jurisdiction. Three pressures which derived from these activities, were selected. The policy responses to these pressures were provided by the ‘package deal’. What legal options could be used to implement policy responses were identified. Finally, how these could control the potential pressures on biodiversity was discussed.

Figure 1- Summary of project process.



4 Legal Options

4.1 Introduction

This chapter reviews two package issues, EIAs and ABMTs, and also includes selected cross-cutting components, relevant across all issues. The legal options for the suggested components (elements for which there should be provisions developed for within the Implementing Agreement, e.g. implementation and approval of measures, etc.) of the Implementing Agreement are presented. Three scenarios are suggested for each component in order of ambition and capacity. We then briefly discuss the potential of these options to address the effects of the three identified pressures on BBNJ. The cross-cutting issues are covered at the end of the chapter.

The figure (2) below illustrates the approach taken in this exercise. We consider a number of components which could be part of the Implementing Agreement. For each component we outline three legal options. The legal options are grouped into Scenarios, 1 to 3. The legal ambition, and likely necessary capacity, increase from Scenario 1 to Scenario 3. However, we consider that the best or most appropriate set of provisions for the Agreement may result from a combination of different levels of ambitions (different scenarios) to different Agreement components. Summary tables of the Scenarios and associated legal options are presented in Section 4 and the detailed legal tables are provided in Appendices 1-3.

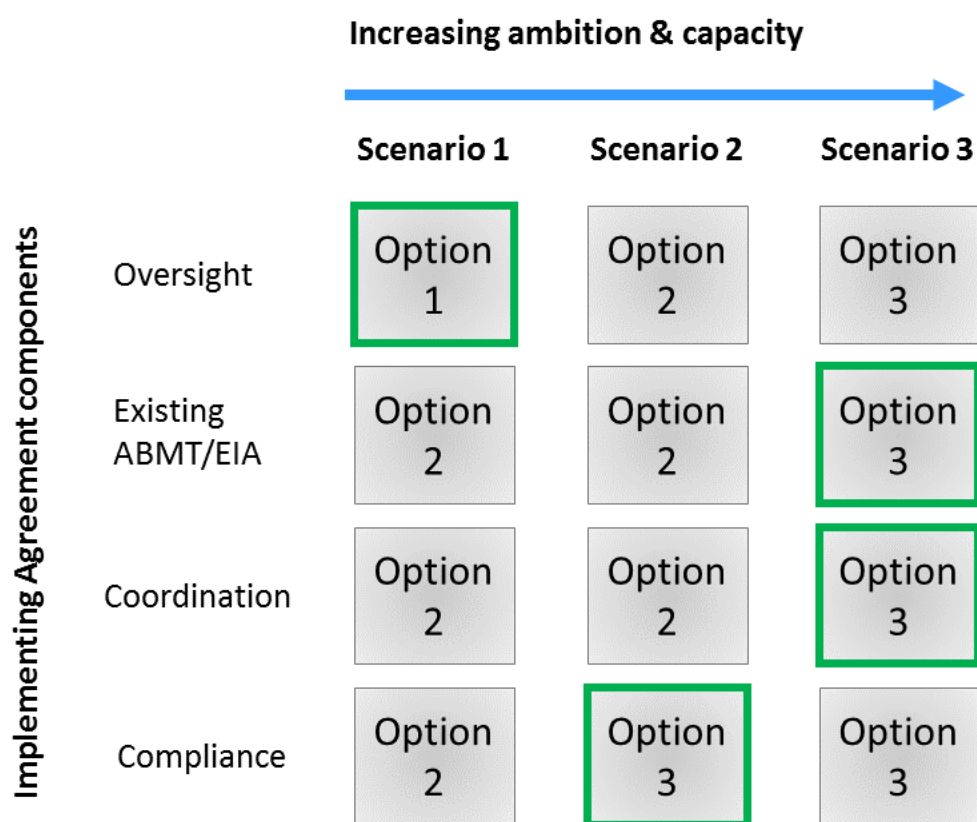


Figure 2: Legal options presented for various aspects of a new Implementing Agreement under UNCLOS. Options are grouped into Scenarios based on the level of ambition and capacity required to implement. Green borders reflect an example of the ‘pick and mix’ approach to selecting relevant options for the new Agreement.

Although the legal options relating to EIAs and ABMTs are described separately, there are some elements that are consistent between the two options (e.g. oversight, coordination, etc.), and were reviewed as cross-cutting components and presented in a dedicated section (section 4.5). The document pays particular attention to the applicability of the proposed legal options to selected threats to BBNJ on the basis of expert opinion and a thorough literature review.

4.2 Area Based Management Tools, including Marine Protected Areas

4.2.1 Introduction

This section provides a summary of the legal options which relate specifically to ABMTs, including MPAs. As noted previously, the legal options are presented in the form of three scenarios. A summary of the legal options is presented in Appendix 1, with a more detailed discussion of the components of the legal options described

here. The discussion of each component should therefore be read in conjunction with the summary table in Appendix 1. For ABMTs, each scenario provides a different level of management and protection options. As the level of ambition to conserve and sustainably use BBNJ increases from scenario 1 to 3, the components alluding to measures for protection, the tracking of progress towards targets, and scientific input etc., become more rigorous. The increasing level of ambition will require increasingly ambitious governance mechanisms. These more ambitious governance measures will additionally require increased capacity (including financial, administrative, technical and human) and it will therefore be necessary to think carefully about how capacity can be built to facilitate these suggestions. An analysis of the different levels of capacity required is currently beyond the scope of this report. However, it is thought that an analysis of how existing regional capacity and capacity building measures could be applied to BBNJ would provide a helpful input into future Preparatory Committee discussions.

New implementing Agreement and Existing Mechanisms for establishing ABMTs in ABNJ

At present, there are a number of sector specific mechanisms through which ABMTs can be designated in ABNJ. For example, Vulnerable Marine Ecosystems (VMEs) protect parts of the seabed from certain types of bottom contact fishing, and the International Maritime Organization supported 'Special Areas' under the International Convention for the Prevention of Pollution from Ships (MARPOL) aim to curtail or eliminate operational discharges (IMO, 2017). Those Regional Seas Programmes with a mandate in ABNJ, in their turn, can regularly also designate areas for protection of biodiversity.

4.2.2 Description and assessment of the legal options for Area Based Management Tools

In this section, we further detail the legal options described in the Appendix 1. Along with the description of the components, we also present a brief review of opportunities and challenges that option would offer under the different scenarios for a limited number of ABMT components. The Focus component is only described here to help provide a detailed framework and a focus for the structure of the Implementing Agreement.

Focus

Each scenario presented here is framed around biodiversity-focused MPAs and provides options for the use of other ABMTs, such as sectoral or cross-sectoral mechanisms (e.g. marine spatial planning). An Implementing Agreement under Scenario 3 would provide the most detailed framework, making explicit provisions for ABMTs specific to sustainable use of natural resources, such as marine spatial planning. However, Scenario 1 only introduces a reference to such ABMTs allowing potential future inclusion of other mechanisms in addition to marine protected areas.

When considering the **Focus** component, the creation of MPAs would help to reduce the likelihood of damage

to the seabed, and associated habitats, within a delineated boundary by restricting or prohibiting certain activities, such as deep sea bottom fishing. However, MPAs alone would be ineffective in preventing indirect damage caused to the area by activities occurring outside their boundaries (such as deep sea mining, which may cause large sediment plumes; or pelagic fishing that may remove important food supply). Therefore, the use of other ABMTs such as buffer zones, or MPAs that cover the full water column, have the potential to be very useful to mitigate both direct and indirect pressures to protected areas or ecologically resilient areas. Additionally, ABMTs combined with non-spatial tools may allow for management over greater geographic areas than MPAs, for example including the implementation of sophisticated measures (i.e. 'smart' trawling). ABMTs such as restrictions on particular activities would allow a specific threat to be managed over a larger area, and are therefore useful when trying to manage activities while at the same time allowing them to continue.

Existing MPAs and ABMTs

This component outlines designation options with regards to existing ABMTs (such as Particularly Sensitive Sea Areas (PSSAs) designated under the International Maritime Organisation or MPAs, designated under a Regional Sea Convention). The three scenarios presented in Appendix 1 suggest that the existing ABMTs will either: 1. be recognised in the Implementing Agreement but would still be under their respective original legal frameworks (Scenario 1); 2. included, individually, in a global list of existing ABMT measures (Scenario 2), and in this case would not be included under new designation procedures; or 3. proposed for reclassification under the new Implementing Agreement (Scenario 3). Under Scenario 2 the Agreement would respect the provisions of the existing ABMTs, at the same time providing them with a global, higher level recognition. Overarching management provisions of the new Agreement would apply to these areas. Under Scenario 3, ABMTs would be scrutinized for new criteria defined under the Implementing Agreement in order to be reclassified. As noted in the cross-cutting section (Section 4.5), the savings clause included in each scenario ensures that existing MPA or other ABMT measures will not be undermined, regardless of whether they are recognised, included or reclassified.

Review of Scenario feasibility

In **Scenario 1**, Existing MPAs and ABMTs are 'recognised'. Recognition ensures that existing processes are not undermined and that responsible oversight authorities can continue to manage certain areas. In doing so, existing sectoral measures, such as VMEs designated by Regional Fisheries Management Organisations or Areas of Particular Environmental Interest (APEI) designated by the International Seabed Authority, can contribute towards the objectives of the new Implementing Agreement, whilst remaining under the management of individual sectors.

Scenario 2 provides existing measures with a greater level of international recognition under the new Implementing Agreement. Consequently, there may be positive knock-on effects associated with global recognition, which could lead to fewer instances of non-compliance and greater respect of management

measures by other sectors.

In **Scenario 3**, existing MPAs and ABMTs are proposed for reclassification under the new Implementing Agreement. As such, in instances where measures are less stringent than those required by the new Agreement, measures may be upgraded to reflect the management commitments set out in the new agreement. However, an increase in management commitment is likely to require an increase in the capacity required by Parties.

Proposal and approval of ABMTs

Under Scenario 1, any Party to the agreement can propose new ABMTs, however States must reach consensus on new areas and the approval of measures. Regarding the proposers of new ABMT measures, Scenarios 2 and 3 recommend accepting proposals from Parties to the Agreement and decisions coming out of existing regional organisations (e.g. Regional Fisheries Bodies or Seas Programmes organisations) via a negative resolution approval process, whereby proposed measures will enter into force unless contested by another Member State or organisation. The options in these two scenarios allow other relevant institutions to propose new areas, for example international organisations (e.g. UNESCO, CBD, Food and Agriculture Organisation of the United Nations (FAO), IMO etc.), and under Scenario 3, civil society organisations and NGOs with support from the Scientific Committee. Finally, the options in Scenarios 2 and 3 create an opportunity for voluntary MPAs.⁴ Described as an ‘incubator’ because there is a mechanism for groups to feed in proposals for consideration by the Governing Body, this approach would be in line with Preparatory Committee discussions, which noted the importance of public participation for a new agreement.

Review of Scenario feasibility

Scenario 1 requires consensus for approval of any proposed measures. It can often be difficult to obtain consensus approval on matters such as MPAs due to the differences in economic interests and capacity of Parties. Therefore, under this Scenario, the approval of new areas could pose a challenge in the long term.

At a higher level of ambition in **Scenario 2**, new ABMTs can be proposed by not only Parties to the new Agreement, but also International Organisations such as the CBD, UNESCO, and IMO etc. Consequently, there may be increased research into, and recognition of sites that need to be protected from the pressures associated with activities within ABNJ such as bioprospecting or seabed mining. In addition, proposals are approved via a negative resolution process, whereby States actively have to contest a proposed ABMT, otherwise it will be accepted. As such, measures may be more easily implemented as consensus is not required, making it easier to effectively regulate the causes of pressures such as removal of biological resources or damage to the seabed, especially in light of increasing trends in these activities.

Scenario 3 includes the development of a new set of criteria for Proposal and Approval, which will require

⁴ Voluntary MPAs can be generated along the model of the Sargasso Sea Commission, through which NGOs play an increased role in facilitating and coordinating action.

substantial negotiations and a global review of existing criteria on areas already recognized for their ecological and biological importance or their management options (e.g. EBSAs, VMEs, and PSSAs). New criteria, based upon more recent scientific knowledge could facilitate the eventual implementation of more effective ABMTs that can respond directly to changes in activities and resulting pressures (for example, changes in intensity of bioprospecting). Under this scenario, civil society organisations and NGOs can propose new ABMTs in ABNJ. NGOs can provide insight or new ideas to support the work of the Governing Body in implementing relevant and effective ABMTs. **Scenario 3** also suggests that a Scientific Committee can propose new measures. The Scientific Committee may identify a significant area under threat that would benefit from having management measures in place. If new evidence of damage comes to light, then the scientific committee could propose new measures in response, in the hope of preventing significant and irreversible damage, and ensuring long term sustainable use is possible.

Adoption of Management Measures

The adoption of management measures refers to how measures approved by Parties to the Agreement are implemented (e.g. formally, informally or via coordinated efforts). It is important to note that the administration involved in designating new ABMTs will be undertaken by the decision-making body identified in the Implementing Agreement. Under Scenario 1, the management measures in any ABMT would be discussed among interested States and serve as guidance for management, but would not be formally adopted. Scenario 2 describes a similar approach, involving the Scientific Committee and/or regional organisations, and recognises the need for the formal adoption of management plans. Finally, Scenario 3 requires cooperation and communication between the Management Organisations, existing regional organisations and the Scientific Committee to develop a management plan that would be formally adopted by Parties.

Review of Scenario feasibility

In **Scenario 1**, there is little scope to implement formal management measures that are applicable to all Parties and sectors. Consequently, any measures approved by consensus will be subject to informal management, whereby management objectives may not be actively pursued. Monitoring and enforcement may also be insufficient to ensure measures are effective.

The **adoption of management measures** in **Scenario 2** is via cooperation between members States, organisations and sectors to develop a management plan. The coordination of a management plan is a significant step forward, allowing for cross-sectoral considerations and reducing the onus on individual sectoral organisations to produce a plan. A management plan may include specific provisions related to the removal of biological resources (for example the designation of no-take zones, the closure of vulnerable areas to extractive activities, and setting catch/extraction limits).

In **Scenario 3**, the Scientific Committee provides an enhanced level of consistency and coordination in the

development of a management plan.

Targets

The setting of **targets** is useful for tracking the effectiveness of policy responses and management measures implemented for the conservation and sustainable use of marine biological diversity under a new Implementing Agreement. At a low level of ambition in Scenario 1, there is no requirement for Parties or regional organisations to set targets. Scenarios 2 and 3 differ in that the first suggest the setting of targets for only MPAs and the latter for all ABMTs.

Review of Scenario feasibility

In **Scenario 1**, a lack of targets, may mean that it would be harder to track the progress of implementation of the new Agreement or to galvanise action in response to new emerging activities or pressures due to a lack of a record of progress. However, this option may be more appealing to Parties as there is less onus on the meeting of strict targets, the attainment of which may be capacity dependent. A lack of formal management measures may also mean that any set targets are not complied with.

Scenario 2 and 3 will include **Targets** that allow States to assess the success of measures and to identify and respond to gaps in implementation to prevent unsustainable practices. The inclusion of a timeline for the achievement of targets⁵ makes the achievement of sustainability more compelling and provides something at which to aim for implementation. While this reflects an increase in ambition and thus likely would require some increase in capacity, the outcome is more significant in securing long-term benefits that are tracked and visible. Capacity to secure benefits from biodiversity conservation could be developed through the inclusion of different stakeholder groups in the monitoring and compliance of new ABMTs. Stakeholders could include indigenous communities, different sectoral organisations and should ensure gender balance wherever possible. The management plan can set targets to ensure the sustainable removal of biological resources, or zoning measures to reduce damage to vulnerable seabed habitats. “SMART” Targets can allow for the monitoring of progress, which can therefore allow for regular assessment of the effectiveness of measures by the scientific committee. As such, measures or plans can be adapted in response to any failures detected. The addition of ABMT in Scenario 3 means that measures such as those above are applied more broadly.

4.2.3 Application of legal options for area based management tools to pressures

The purpose of this section is to present how each pressure category (e.g. removal of biological resources) would be addressed by the different legal scenarios. It intends to illustrate the effectiveness of the scenarios in reducing the impacts of those pressures on BBNJ by providing *examples* of the ways the different components of the Implementing Agreement could address the pressures.

⁵ Targets set under the new Agreement would ideally be SMART – specific, measurable, achievable, realistic and time-bound.

Removal of Biological Resources

For pressures posed by the removal of biological resources, all three scenarios of the **Focus** component provide a mechanism through which an organised network of MPAs can be designated to protect biodiversity in ABNJ from various human activities. The legal options also provide an opportunity for the linkage of biodiversity into sector-specific approaches. As such, through the new Implementing Agreement, MPAs could be designated where specific sectors may have previously designated zones. For example, fisheries may have restrictions on fishing in known spawning sites and a new MPA could provide additional protection from other sectors' activities. Therefore, this mechanism aims to work alongside and not undermine existing measures.

The following example, focusing on seabird conservation, illustrates how different ABMT measures respond to different conservation needs. A MPA can be an effective conservation measure to protect seabird species under threats in their breeding colonies. However, full site protection measures may not be feasible, or the most appropriate, for some species of seabirds. For example, albatross foraging ranges are extremely extensive, and one of the key pressures on foraging individuals originates from unsustainable fishing practices overlapping with foraging areas⁶. An effective conservation measure has been the adoption of by-catch mitigation measures by fishing vessels in zones where there is an overlap of intensive fishing efforts and seabird distribution⁷. This conservation measure is still considered area-based because it is spatially delimited, but it is not a MPA.

Scenario 1

MPAs can be used to address the direct impacts associated with the removal of biological resources on marine biological diversity depending on the management measures adopted for the area. However, alone they may be insufficient to address all direct and indirect impacts on both target and non-target species. Within Scenario 1 there is only reference to ABMT rather than more detailed elaboration of the provisions, making it potentially harder to apply more comprehensive and possibly more appropriate measures in some circumstances.

Scenario 2

The **Focus** of this scenario provides greater reference to ABMT, one of the potentially valuable large scale approaches to mitigating impacts, such as by-catch, on biological resources in ABNJ. **Existing MPA & ABMT** are included in the new Implementing Agreement under a more formal overarching mechanism, which in relation to the removal of biological resources means that measures such as gear restrictions will remain in place. The setting of **SMART Targets** in scenario 2 also provides a focus for action and coordination for MPAs, a measure which is likely to be particularly valuable for managing the removal of biological resources.

Scenario 3

Reclassification of **Existing MPAs and ABMT**, would provide a globally consistent approach to MPAs and ABMTs

⁶ [Birdlife Data Zone](#)

⁷ For example, Waugh et al., 2008

in ABNJ. Existing regionally-specific approaches would gain global recognition and the same legal protection under the new Implementing Agreement. Consequently, a global standard could be set for all ABMTs in ABNJ ensuring a consistent level of management for all measures.

Damage to the seabed

Scenario 1

A mechanism for the **Implementation** of ABMTs in ABNJ, such as MPAs or buffer zones, increases the level of protection afforded to the seabed, where previously there was little or none. Certain activities with a potentially substantial pressure footprint (e.g. deep sea mining) are predicted to start in the future. Therefore, the ability to implement ABMTs in ABNJ will become increasingly important in order to prevent irreversible damage to seabed communities where cross-sectoral considerations are needed. The ISA already proposes sector-specific mining management measures in ABNJ. However, under options 1 the **Adoption of Management Measures** is only informal, and as such, management plans may not be comprehensive in the inclusion of seabed features, potentially rendering them inadequate and making monitoring more difficult.

Scenario 2

Within Scenario 2 for **Adoption of Management Measures** there is an increasingly formal mechanism to include existing organisations' measures, helping to secure more effective conservation of seabed features. **Existing MPA & ABMT** are to be included in the new Implementing Agreement under a more formal international recognition mechanism which, in relation to damage to the seabed, is beneficial because a number of existing mechanisms to minimise seabed, such as VMEs and APEOs, will be recognised under the new agreement and therefore included in the global efforts.

Within **Additional Considerations**, an incubator for voluntary MPAs or ABMTs allows for public participation (noted in the cross-cutting section as a key **Guiding Principle/Approach** and a key topic of discussion at Preparatory Committee meeting 1 and 2). The incubator allows for additional scientific knowledge and capacity to be drawn from NGOs to help facilitate activities. The **Additional Considerations**, also includes voluntary measures which could provide some means of seabed protection in an area during the interim period between proposal and approval of new measures under the new agreement, thus working to prevent damage to the area whilst negotiations are underway.

Scenario 3

Under Scenario 3, specific provisions for other ABMTs, such as Marine Spatial Planning (MSP) are laid out in the ABMT **Focus** of the new Agreement. As such, new, more appropriate area-based measures can be implemented in instances where MPAs may be inadequate to address pressures resulting in damage to the seabed.

Existing MPAs and other ABMTs are proposed for reclassification under the new Implementing Agreement,

meaning that existing measures will be upgraded to a set of consistent global standards, helping to standardise conservation efforts in ABNJ. However, in instances where existing measures provide greater protection than those under the new Agreement, the existing measures shall remain. In addition, a management plan including formal management measures is required. These measures will be developed in conjunction with existing bodies and the Scientific Committee, based on best-available scientific evidence. Therefore, ABMTs can be appropriately tailored to address pressures in areas identified as for concern. The inclusion of science-based, formal management measures within the management plan, may also allow for the future addition of measures should pressures associated with damage to the seabed increase in future. For example, in the event of the discovery of deep sea minerals in a previously unexplored area.

Increasing CO₂ and Ocean Acidification

Scenario 1

It is acknowledged, that MPAs and ABMTs cannot directly mitigate the impacts of ocean acidification. The primary cause of ocean acidification is increasing concentrations of carbon dioxide in the atmosphere. However, the use of ABMTs, including MPAs, as a measure contributing to rehabilitation and restoration of marine ecosystems and the building of their resilience has been discussed at length at Preparatory Committee meetings 1 and 2. Through introduction in Scenario 1, a new mechanism for designating MPAs in ABNJ may provide an opportunity to support ecosystems at risk from acidification by protecting them from other direct human pressures, potentially supporting their resilience.

Scenario 2

Scenario 2, by allowing more elaborate provisions for ABMT in ABNJ, the Implementing Agreement could foster support for increased resilience to ocean acidification. For example, diverse areas which play a key role in trophic dynamics (e.g. seamounts), can be protected from additional human pressures which work to undermine ecosystem resilience to ocean acidification through the implementation of tailored area-based measures.

At this increased level of ambition, the **Additional Consideration** allows for the creation of voluntary ABMTs. Voluntary measures could play an important role in protecting resilient areas, and areas that may be important in the future, via their implementation under a precautionary approach. For example, high latitude areas into which species ranges may continue to move on account of climate change and ocean acidification.

Scenario 3

Under Scenario 3 of the **Proposal and Approval** component, the development of new criteria could mean that ABMTs could be proposed for any areas demonstrating some form of resilience to climate change, by not only Parties, but the Scientific Committee established under the new Implementing Agreement, international organisations, civil society organisations and NGOs. As each is likely to have different knowledge and expertise, and may carry out different research into the effects of climate change and ocean acidification, thus allowing for

the inclusion of a broader range of information and ideas. Under this scenario, voluntary MPAs and other ABMTs, highlighted in **Additional Considerations**, are encouraged. The coordination of NGOs or other collaborations to implement such measures, under the concept of Common Concern, aims to reduce the human pressure footprint on certain areas, which can improve ecosystem resilience to climate change and the effects of ocean acidification.

4.3 Environmental Impact Assessment

4.3.1 Introduction

Although there are established EIA processes in existing sectoral organisations (e.g. ISA), a coordinated EIA process for all activities occurring in ABNJ has yet to be established. Therefore, the formulation of an EIA mechanism for ABNJ is proposed here under all scenarios. It would provide visibility and transparency over activities that are not currently of common knowledge and would allow proponent States to plan for economic activities and integrate them with biodiversity conservation concerns. The three scenarios for each component of the legal options in the context of EIAs are presented in Appendix 2. These scenarios, similarly to those suggested for ABMT-related components, demonstrate different levels of ambition and conditions under which EIAs may be conducted for activities in ABNJ. The EIA process becomes subject to more detailed management measures as the level of ambition increases.

4.3.2 Description and Assessment of the Legal options in Areas Beyond National Jurisdiction

This section describes the different components addressed by the three scenarios and provides a review for components: EIA Determination, Scope, and Review, follow-up and monitoring of EIA.

EIA Determination

In order to determine whether an EIA is required for a certain activity, the options provide details of automatic requirements for specific activities and thresholds for activities, again with increasing levels of protection from Scenario 1 to 3. Under Scenario 1, an indicative list of relevant activities requiring an EIA is included. Scenarios 2 and 3 propose an Annex containing a list of activities automatically requiring an EIA. EIAs are also required for any activity occurring within an MPA in Scenario 2, and for any activity occurring within or affecting an MPA or any other sectoral ABMT under Scenario 3. Threshold tests are also included under Scenario 2 and 3, whereby non-Annex activities, surpassing a set threshold in extent or intensity, will require an EIA.

Review of Scenario feasibility

Scenario 1

An ABNJ EIA mechanism is established to provide a minimum standard to which activities with potentially harmful impacts to marine ecosystems, through direct seabed damage or the removal of biological resources, must adhere to. This may be appealing to States as it sets only a minimum standard, rather than stringent, capacity-intensive requirements. Parties may also amend the list of activities requiring an EIA, allowing them to add or detract activities based on the EIAs they conduct and their increased understanding of pressures.

Scenario 2

Stricter EIA requirements are included via addition of an Annex listing activities that automatically require an EIA. Threshold tests are also included in this scenario, whereby a proposed activity exceeding a threshold in space, time (intensity) and/or impact, requires an EIA. Consequently, States may assess the degree of pressures associated with various activities, including cumulative impacts, to a greater and more detailed extent. This may

be appealing to States as stricter criteria and an improved recognition of pressures may allow for a greater degree of protection to marine ecosystems through more effective activity management and the identification of appropriate mitigation responses.

Scenario 3

In addition to the requirements included in Scenario 2, EIAs are automatically required for all activities within or affecting MPAs, EBSAs or any other sectoral ABMTs. As such, the increasingly stringent EIA requirements require an increase in commitment from Proponent States to ensure that activities adhere to standards and as such, may afford such areas with a greater degree of protection. Increased capacity may be required in order to do so, which could however deter States from proposing to conduct an activity within or in proximity to such an area.

Screening

EIA screening involves the determination of whether a proposed activity will be subject to an EIA and which EIA process it will be subject to. Screening responsibilities differ depending on the level of ambition and thus the scenario. Under Scenario 1, Proponent States are responsible for conducting screening and are required to communicate their intention to conduct an EIA to existing regional organisations. Under Scenario 2, Proponent States are responsible for conducting screening and must communicate their intention to conduct an EIA to the Secretariat of the Implementing Agreement. Scenario 3 differs in that if an activity is determined to be above a certain threshold, then the permanent Scientific Committee is to be involved in the EIA process. Where activities are deemed to be below a set threshold, the screening process is left to the Proponent State.

Scope of EIA

The suggested level of detail needed within an EIA increases with increasing ambition. Scenario 1, whilst the lowest in ambition, sets an important minimum standard for EIA in areas where EIA processes do not currently exist. Scenarios 2 and 3 recommend that highly detailed criteria be set out under the Implementing Agreement to reduce variability between sectors and States.

Review of Scenario feasibility

Scenario 1

Scenario 1 sets out minimum criteria for EIAs, which are inclusive of transboundary impacts across the geographical ranges of sectoral organisations and across EEZs and ABNJ. Established criteria may encourage coordination between organisations and states for the cross-sectoral exchange of knowledge and practices, and this can allow for the identification of cross-sectoral cumulative impacts and transboundary impacts. These criteria provide the first means of determining the impacts associated with human activities in ABNJ and consequently, the first degree of protection against activities deemed to be detrimental. Minimum criteria may be appealing to Parties due to the lower capacity requirements for adhering to standards. However, minimum criteria may be insufficient to fully address the extent of pressures, especially in the case of vulnerable or sensitive areas, and may limit progress in the pursuit for conservation and sustainable use of marine biological diversity in ABNJ.

Scenario 2

This scenario sets out more detailed EIA criteria. Such criteria could make specific and detailed provisions for cumulative impacts, transboundary impacts with the aim of ensuring greater environmental protection. However, this may make it more difficult for proponent States to gain approval for marine activities in ABNJ and so may be perceived as detrimental for economic activities.

Conduct of EIA

The **conduct of the EIA** refers to the party responsible for carrying out an EIA for proposed activities. Under Scenario 1, the Proponent State is responsible for carrying out EIAs with peer review from at least 2 other potentially affected or otherwise relevant states. In Scenario 2, the permanent scientific committee provides assistance to the Proponent State in conducting the EIA and identifies at least two other affected or otherwise relevant States for peer review. Scenario 3 differs in that the number of States required to peer review the conduct of the EIA is greater, requiring 5 States identified by the Scientific Committee. Also, for any issues of contention, the Governing Body of the new Implementing Agreement is responsible for decision-making, with assistance from the Scientific Committee. The inclusion of mitigation measures, the use of the mitigation hierarchy and consideration of alternatives is considered to be good practice within EIA and therefore is assumed to be included in all three scenarios. Therefore, these elements of EIA are not discussed in great detail in this document.

Review of Scenario feasibility

Scenario 1

This scenario requires the Proponent State to conduct EIAs for proposed activities, thus requiring them to have the appropriate capacity to do so in accordance with the standards set out in the Agreement. A minimum of 2 relevant States to peer review the EIA is required and it is the responsibility of the Proponent State to identify these States. However, this may require good communication channels and international relations, and a willingness for States to coordinate and cooperate for a thorough and accurate EIA.

Scenario 2

Assistance is provided to Proponent States by the permanent Scientific Committee. This option may be appealing to States, especially where States may have limited or insufficient capacity with which to conduct an EIA. The provision of scientific and technical expertise by the Scientific Committee may also help States to develop appropriate and sufficient mitigation measures to recommend in the EIA.

Scenario 3

This scenario is similar to scenario 2, however the conduct of the EIA requires peer review from at least 5 affected or otherwise relevant states, which will increase the difficulty in obtaining the go-ahead for a proposed activity.

Review, follow-up and monitoring of EIA

The review of an EIA is an important component for consideration under a new Implementing Agreement and

relates to the party responsible for making decisions on the EIA. Under all 3 Scenarios, the relevant authorities of the Proponent State are responsible for the review of the EIA, with the level of assistance in which to do so differing between the options. Under Scenarios 2 and 3, the Proponent state is assisted by the permanent scientific committee and additional Parties to the Agreement. The number of additional Parties reviewing the EIA would depend on the level of severity of the impacts identified. At least two other Parties would need to be included in the review. In addition, where issues of contention may arise, Scenario 3 provides for the potential for the involvement of the Governing Body of the new Management Organisation to help in the decision-making process, with assistance from the scientific committee and with a majority vote of Parties to the Agreement in such circumstances. Under the legal options in Scenarios 2 and 3, a notification mechanism exists whereby permanent or long-lived impacts can be identified in the Environmental Impact Statement and the Governing Body notified.

Monitoring of the EIA is undertaken by both the relevant authorities of the Proponent State but is supported by at least two other Parties to the Agreement, ensuring transparency.

Review of Scenario feasibility

Scenario 1

Review of the EIA and monitoring of the resulting mitigation measures is the responsibility of the relevant authorities of the Proponent State. This may be appealing to Proponent States as the review process is within their realms of responsibility and is not reliant on any other party. However, States will require a certain level of capacity with which to conduct the review, and if insufficient then the EIA may not be reviewed to the standard required thus affecting coherence in decision-making and thus effectiveness. The decision on which other Parties to the Agreement support in the review and monitoring of mitigation measures would depend on the capacity and therefore this could provide an additional check on the quality.

Scenario 2

Proponent States are assisted by the permanent Scientific Committee in the reviewing of EIA. The assistance provided may be appealing to States as the Scientific Committee can provide technical expertise and input based on shared State, organisation and sectoral activity knowledge and data for various marine activities. In instances, where technical expertise and knowledge is insufficient due to limited capacity or communication, assistance in this form may be highly beneficial to States, and consequently aid informed and effective decision-making. Additional Parties to the Agreement involvement in the review and monitoring of mitigation measures would ensure a level of transparency and additional capacity where needed.

Scenario 3

This scenario makes provisions similar to those in Scenario 2, however includes the possibility of intervention from the Governing Body of the Management Organisation established by the Implementing Agreement should any issues of contention arise. As such, the decision is based on the knowledge and expertise of the body itself and the assistance provided by the Scientific Committee. This option may be appealing to states as where there

are issues surrounding capacity etc. assistance can be provided by the Governing Body. The inclusion of an increased number of State Parties, through the Governing Body, would allow increased capacity and transparency.

Additional Considerations

In order to effectively and holistically address the issue of EIAs under the new Implementing Agreement, a number of additional considerations should be made. Firstly, under all scenarios, there is an obligation to assess cumulative impacts in order to determine levels of pressure within an area and mitigate effectively. There is also an obligation to monitor progress of management measures under all scenarios. Scenarios 2 and 3 expand on this with a requirement to report progress and to adopt measures to ensure no significant adverse impacts which should help to improve transparency amongst Parties and prevent irreversible ecosystem damage. The likelihood and the occurrence of residual impacts from current and future activities must also be communicated under Scenarios 2 and 3. Notification of such impacts may allow Parties to better assess potential activities within an area prior to a proposal being submitted to the Governing Body. Understanding of residual impacts may also better inform decision-making and improve cross-sectoral transparency. Finally, Scenario 3 provides the new Management Organisation with the power to suspend, modify or terminate any ongoing activity if operations pose a significant threat to ecosystems and hence biodiversity through adverse impacts of likely residual impacts. Application of the Legal Options to address the pressure

It is acknowledged that the establishment of an EIA mechanism for ABNJ could address a number of additional pressures from those selected in this project, such as noise or ship strike. However, as previously mentioned, this report focuses on the three listed pressures as these were chosen to frame the discussion. Below, for each of the pressures, the potential for EIA to address the pressure is discussed.

Removal of Biological Resources

When considering the pressures associated with the removal of biological resources, coordination between proponent States and existing sectoral organisations is especially important to ensure an effective EIA process and prevent existing EIA processes from being undermined. For example, some regional marine fisheries organisations have established EIA processes for deep sea fish stocks. Ensuring coordination between processes is therefore critical in respect to the removal of biological resources, whereby the proposed removal of non-fish species (such as cold water corals or sponges) could undermine ecological processes important for fisheries. Additionally, coordination between bodies with existing mechanisms is important in supporting cross-sectoral activities, for example tuna and non-tuna Regional Fisheries Management Organisations. The Ecosystems Approach to fisheries management should include consideration of the interactions between different fisheries and other impacts on the ecological support for the target stock. The scientific support provided under the three scenarios is important when considering the removal of non-target species. Therefore, scientific bodies can be convened in instances where non-target species assessments are required under an ecosystems and precautionary approach to BBNJ. The removal of biological resources for scientific research purposes is also noted here. At present, the quantities of material removed are generally quite small and the pressure considered

minimal. However, should this increase in the future, the legal options in Scenarios 2 and 3 provide a means to manage the associated impacts of this activity via threshold tests.

Addressing the Pressure

Scenario 1

The new procedures and standards for an EIA can directly address the pressure associated with the removal of biological resources, through more effective impact assessments. Only sectoral EIA processes exist for activities occurring in ABNJ, leading to large differences in extent and quality of assessment, meaning that cross-sectoral coordination is important. It also sets a minimum standard across EIA processes for the assessment of removal of biological resources.

Scenario 2

Stricter criteria can help proponent states conduct activities associated with the removal of biological resources sustainably. Stricter criteria and thresholds can therefore be used to mitigate the impact of the removal of biological resources by limiting the intensity of associated activities, especially in conjunction with area based designations. For example, there may be requirement to undertake an EIA for any activity which removes biological resources within an existing designated area.

Scenario 3

Detailed criteria are set out for EIAs and stricter EIA determination rules apply. This is particularly important for addressing the removal of biological resources as this option requires EIAs for activities occurring within any sectoral ABMT, meaning that existing measures to protect ecosystems and their associated resources are not undermined.

Damage to Seabed

The establishment of an EIA mechanism is of great importance for activities that are associated with damage to the seabed (such as trawling, deep sea mining, and bioprospecting). The options provide a minimum cross sectoral standard for the EIA process to adhere to which provides greater potential to mitigate levels of seabed damage. The inclusion of detailed activity lists and threshold tests under Scenarios 2 and 3 provide a means of standardising the triggering of an EIA process between States. It would also provide an opportunity to standardise technical language, definitions and mitigation processes; recognising and supporting the different levels of capacity. Under the **Additional Considerations** component in Scenarios 2 and 3, a notification mechanism exists whereby permanent or long-lived impacts to the seabed can be identified in the Environmental Impact Statement and the decision-making body notified. The ability to identify and notify of permanent or long-lasting impacts is especially important for deep sea mining activities which harvest sea floor resources that have accumulated over millennia. The residual impacts of removing such features on associated ecosystems and biodiversity, may not recover on human timescales.

Assessment

Scenario 1

At this level of ambition, the mandate of existing organisations is expanded to include EIA in ABNJ. However sectoral organisations have a wide mandate pertaining to other issues within their regulatory area and so may have limited scope and capacity to address additional EIA procedures or requirements adequately. Cross-sectoral coordination between existing organisations is encouraged and is particularly important to ensure that existing EIA processes are not undermined, such as the EIA procedures being developed by the ISA. The risks are that the individual sectors do not coordinate well and that cross-sectoral impacts are not identified or communicated. The existing fragmented situation is improved but not resolved at this level of ambition leading to potential deep sea impacts.

Scenario 2

Damage to the seabed may be more directly addressed via the creation of an organisation with a specific EIA mandate in ABNJ. With increasing ambition, the level of protection from potentially destructive activities increases with increasingly detailed EIA criteria that allow the inclusion of specific assessment types as part of a formal EIA. There is also an obligation for proponent States to assess cumulative impacts in the EIA and to assess transboundary impacts in a Transboundary EIA (TEIA). Consequently, appropriate measures can be implemented to reduce transboundary damage to the seabed. Finally, states are obligated to identify and notify other organisations and sectors of residual impacts. Notification of residual impacts may be particularly important for vulnerable seabed areas that have formed over thousands of years and therefore residual impacts are likely if any activities take place that disturb or remove this habitat. The likelihood is that damage to some of these deep seabed habitats will be irreversible on human timescales.

Scenario 3

Damage to the seabed can be better prevented under an ecosystem-based management mandate. Deep sea ecosystems are often interconnected with other ecosystems, and damage to one will adversely impact the others. Under such a mandate, seabed ecosystems of particular biodiversity importance (such as seamounts and deep sea corals) can be more effectively identified and measures implemented to prevent damage. Increasingly detailed criteria are likely to reduce the likelihood of damage to the seabed, as States will have to abide by more stringent standards, including of residual impacts, to gain approval for proposed activities. There is also an obligation for proponent States to assess cumulative impacts in the EIA and to assess transboundary impacts in a TEIA. In addition, proponent states are required to conduct EIAs with peer review from at least 5 affected or otherwise relevant states. Whilst this is more likely to ensure a thorough and accurate EIA that meets detailed criteria, it will become increasingly complex for states to attain approval for proposed activities in ABNJ, and hence may be less appealing to Parties. Additionally, sectors operating in the vicinity of a proposed activity will be notified of any cross-sectoral impacts that may affect their operations to ensure consideration of cumulative impacts. Criteria for new ABMTs could make specific reference to preventing damage to the seabed, aiming to be precautionary and proactive in protecting significant seabed areas. This could be especially important in

transboundary cases whereby the impacts of drilling on an extended continental shelf can be felt by nearby seabed communities in ABNJ, i.e. waste products, sediment plumes.

Introduction of CO₂ and therefore Ocean Acidification

Similarly to ABMTs, there is limited scope for EIA processes to directly influence ocean acidification on large scales. However, EIAs provide a mechanism to assess the impacts of climate change mitigation measures, such as geoengineering, on the ocean as well as to assess the level of CO₂ emissions from the proposed activity. EIAs could therefore help answer questions such as *‘do geoengineering processes such as Iron Fertilisation affect biodiversity and how so?’*; *‘what role does this play in ocean acidification?’* and *‘what are the synergistic effects?’* The effect of climate mitigation engineering processes could be negative for ocean biodiversity and exacerbate the effect of ocean acidification. This is especially the case where the proposed activity does not remove CO₂ from the atmosphere but actually increases it. In addition, other activities such as waste dumping could increase the effects of ocean acidification and thus should be assessed in that context. It is recognised that EIA processes are unlikely to reduce the effect of ocean acidification, as this will be contingent on a reduction of carbon dioxide in the atmosphere. Additionally, the inclusion of a flexible list of EIA-requiring activities in all three Scenarios provides the opportunity to include future climate change mitigation technologies for addressing ocean acidification directly or reducing ecosystem vulnerability to ocean acidification.

Review of Scenario feasibility

Scenario 1

The establishment of an overarching mechanism for EIA in ABNJ can be used to address the pressure associated with Ocean Acidification. Minimum criteria for the assessment of impacts associated with listed activities set out in the agreement can be inclusive of CO₂ emissions from ABNJ activities. The criteria can also set out minimum criteria for mitigation measures to minimise direct human impacts, allowing Parties to the agreement to make specific provisions for areas that are particularly vulnerable to ocean acidification. An obligation to assess transboundary and cumulative impacts of overlapping activities could also identify the contribution of proposed activities to ocean acidification, and proponent states could identify relevant mitigation measures where possible. The existence of an EIA process for ABNJ is an advantage so that any engineered approach to mitigation of climate change can be assessed for its potential to exacerbate ocean acidification. The lack of a compliance body at this level of ambition could be considered a disadvantage in that there is no way of enforcing EIA standards, and the contributions of activities such as IUU and illegal waste dumping may go unchecked.

Scenario 2

Increasingly detailed criteria are established at this level of ambition, whereby CO₂ emissions from activities in ABNJ can be assessed in more detail. Detailed information pertaining to factors such as predicted CO₂ emissions, likelihood of spills, or waste products, will allow for a more accurate assessment of the contribution of proposed activities to ocean acidification, and permits can be issued accordingly. An obligation to assess cumulative and transboundary (including EEZ to ABNJ and vice versa) impacts can also include contributions from land-based

activities towards global ocean acidification, and more accurate activity thresholds can be set, in the context of global mitigation.

Scenario 3

The establishment of a new Management Organisation with a specific EIA mandate in ABNJ may allow Parties to more directly address the drivers of Ocean Acidification in ABNJ. At this level of ambition, activities that exceed a set threshold for environmental impacts (i.e. CO₂ emissions, other waste products, spills etc.) require the involvement of a permanent scientific committee associated with the new Management organisation. An obligation to assess cumulative and cross-sectoral impacts means that the contribution of activities towards the pressure of ocean acidification will be communicated to other sectors operating in proximity to proposed activities. This is particularly important when considering the long-term consequences of ocean acidification and its economic impact on other marine industries. For example, increasingly acidic waters may drive ecosystem shifts in biodiverse deep sea ecosystems, affecting the potential for genetic discovery via bioprospecting, or the reduction of viable fish stocks. The increased number of states required to peer review EIAs for proposed activities may make it more difficult for states to gain approval for activities, however this provides a greater degree of protection in ABNJ from the impacts of ocean acidification.

4.4 Cross-cutting Components of a new Implementing Agreement

Although the primary focus of this document is to describe and evaluate possible legal options for the new agreement in the context of ABMTs and EIAs, there are a number of core components of the agreement which would lay the foundations for these and other issues. The relevant cross-cutting components of a new Implementing Agreement are presented in what follows.

4.4.1 *Description and Review of cross-cutting components*

This section reviews the cross-cutting components of the Implementing Agreement. The detailed legal options are presented in Appendix 3 and should be read in conjunction with the descriptions below. In this section, we further detail the legal options described in the Appendix 3. Along the description of the components, we also present a brief **review of opportunities and challenges** that components would offer under the different Scenarios for selected components.

Institutional Arrangement

A key point of discussion arising from Preparatory Committee meetings 1 and 2 is the institutional arrangement of a new Implementing Agreement. There are a number of institutional elements that need to be considered in detail before an arrangement is finalised. These elements include:

- a **Governing Body** composed of Parties with decision-making responsibilities for matters pertaining to the new Implementing Agreement;
- a **scientific committee** to provide assistance to Parties for evidence-based decision-making and to

support the setting of standards;

- an **information and data sharing mechanism** to facilitate the sharing of data, information and other knowledge between Parties; and
- a **secretariat** to facilitate the implementation of the agreement and to support coordination with sectoral or regional organisations (Charles, 2016b, Appendix V).

A Governing Body is a cross-cutting component which is relevant to all four overarching ‘package’ issues; marine genetic resources, EIAs, ABMTs and capacity building and the transfer of technology; and should be “*fit-to-purpose, cost effective and efficient*” (Charles, 2016b, Appendix V). With this in mind, the legal options provided for the Institutional Arrangements, suggested here for both EIAs and ABMTs issues, are similar and become increasingly ambitious from Scenarios 1 to 3.

Scenario 1 proposes an **extension to the mandate of existing organisations**, in terms of geographical coverage or scope. For example an extension of the geographic mandate of Regional Seas Programmes to include ABNJ, or expansion of the scope and content of Regional Fisheries Management Organisations mandates to include activities not currently covered. The extension of existing sectoral and institutional mandates to include ABNJ, provides a mechanism through which measures and procedures may be implemented to address a wide range of pressures associated with human activities in ABNJ. Regarding administrative functions, as in the case of UNCLOS, secretariat functions could be provided by the UN Secretary General (UN Department for Ocean Affairs and the Law of the Sea (‘DOALOS’)). Alternatively, UN agencies such as, the International Maritime Organisation (‘IMO’), or the International Seabed Authority (‘ISA’), could act as the Secretariat for the Agreement. Scenario 2 **extends the role of the Governing Body of the Implementing Agreement** to have decision making power through a voting mechanism. It will also provide support and recommendations to Parties to the Agreement.⁸ A permanent **Scientific Committee** is also established under the new Agreement, and may be responsible for making recommendations to the Governing Body on a number of issues including: MPA designation criteria; assessing cross-sectoral MPA and ABMT proposals; assessing EIA reports; and assessing MPA management plans, targets, and compliance. Scenario 3 proposes the establishment of a **new Management Organisation**, following a similar model to that of the International Seabed Authority. The role of the Organisation would be to provide support to Parties and to make recommendations and decisions under the new Agreement. The permanent Scientific Committee would provide recommendations to the body based on scientific evidence, upon which decisions to implement measures, such as issuing permits, can be based. Consequently, responsibility for the implementation of measures lies with the Management Organisation itself.

Review of Scenario feasibility

Scenario 1

⁸ It is important to note that, in the case of EIA specifically, the stage in the EIA process at which oversight may be required, if at all, is an important consideration and was discussed at Preparatory Committee 2, with little convergence on this issue as of yet.

Existing sectoral bodies currently have mandates to uphold. Increased regulatory responsibilities in ABNJ, under extended and strengthened institutional mandates, will require increased capacity in order to effectively uphold both existing and new obligations under the new Implementing Agreement. For example, it may be difficult for an existing organisation to coordinate and facilitate EIAs due to the capacity demands of their current mandates. As such, existing institutions may be reluctant to accept more responsibility without the provision of additional capacity (including financial or human), thus adding another degree of complexity to negotiations as to how capacity can be provided. Should the Agreement be hosted by an existing Agency, for example the IMO, Parties may benefit as the secretariat functions to the Agreement could be exercised by such institutions. Utilisation of existing technical and administrative capacity in this manner could help to resolve potentially complex capacity negotiations.

The lack of a dedicated scientific body, and reliance on the scientific bodies of existing institutions, may mean gaps in the capacity of these existing bodies to consider elements currently outside their normal scope. In addition, capacity in relation to time for an existing organisation to consider additional work could be an issue resulting in decisions being delayed or not taken.

Scenario 2

A Governing Body of the Implementing Agreement with decision-making capabilities will further the implementation of the Implementing Agreement as it will have a specific mandate for the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. The establishment of a permanent Scientific Committee is also valuable. A Scientific Committee can provide beneficial advice and analysis for both ABMT and EIA. For example, the capacity to provide impartial assessment of the EIA proposals could prevent activities going ahead which could potentially be harmful to biodiversity and the economic interests of Parties to the Agreement.

Scenario 3

A new Management Organisation will require significant capacity in order to operate and make recommendations and decisions, thus requiring the establishment of a monetary and non-monetary contribution system for Parties to the Agreement, or another means of providing capacity which could prove challenging. However, in terms of coordinating information from multiple countries and across sectors covering dynamic issues, a single cross cutting body with management responsibilities would be very valuable. The issues at stake in the marine environment have the potential to affect the whole world if not managed correctly. The oceans are a source of food for millions of people, the basis for huge tourist economies and valuable resources. The connectivity with EEZs means that activities that are not governed well in ABNJ could materially affect the coastlines and economies of States. Therefore the potential benefits from a new governing body could outweigh the costs.

Implementation

Under Scenario 1, implementation of measures is the responsibility of Parties, which may receive input from the

scientific bodies of existing sectoral organisations. In Scenario 2 implementation of the new Implementing Agreement is further supported by the Secretariat of the Governing Body and existing Regional Seas Organisations with extended ABNJ mandates. Scenario 3 creates a new management organisation.

Review of Scenario feasibility

Scenario 1:

Challenges exist in capacity of some Parties to have the funding needed or the human capacity to implement measures.

Scenario 2:

Scenario 2 provides advantages for Parties in that there is technical support available. The Governing Body can also support Parties via the recommendation and adoption of measures, based on scientific evidence, to be implemented by Parties themselves.

Scenario 3:

Provides a dedicated function to support States. It will, however, require adequate resources.

Coordination

In order for a new agreement to be effective in protecting BBNJ, the legal options must include a coordination mechanism (Gjerde et al., 2008). Coordination and collaboration between existing international, regional and sectoral institutions, and Parties has been noted as an important, cross-cutting component of convergence at Preparatory Committee 1 and 2. As such, the legal options for both EIAs and ABMTs presented in this document have been proposed based on the importance of international collaboration and coordination for a more consistent approach to the conservation of BBNJ.

Coordination of State, organisational and sectoral efforts, information and capacity are important to provide good practice guidance and ensure that minimum standards are adhered to across areas beyond national jurisdiction and that existing mechanisms are not undermined, especially in instances where the implementation of measures is left to individual Parties. Coordination is necessary in circumstances where the decisions made by States or sectors that have proposed an activity, may affect other activities occurring in different regions, and therefore requires the cooperation of the relevant regional and sectoral organisations, or where the impacts of an activity in areas beyond national jurisdiction may affect waters within coastal State jurisdiction. Coordination mechanisms also provide a means of sharing non-monetary benefits between Parties —a principle advocated at Preparatory Committee meetings 1 and 2.

Under Scenario 1, coordination and collaboration between Parties is encouraged by existing regional organisations via annual meetings. Cross-sectoral coordination between existing organisations, sectors and States, and in line with a transparent and science-based approach is *encouraged* to improve information sharing, with the aim of better identifying cumulative impacts. Coordination relevant to EIA includes the creation of a public repository of EIAs and the proponent of EIA is required to *identify cross-sectoral cumulative impacts* as

part of assessment.

In Scenario 2, coordination is facilitated via the creation of a communication platform to encourage collaboration between Parties and sectors, whereby institutional procedures and practices can be shared. Information exchange is further facilitated via a standard method for information exchange prior to decisions on EIA or ABMT. A data repository is created where data is shared, for example procedures, surveys, monitoring and compliance etc. and implementation gaps identified. In the case of EIA, a harmonising mechanism is proposed (in line with the savings clause detailed in the Guiding Principles and Approaches) to ensure that none of the existing sectoral EIA processes are undermined. The EIA proponent is required to undertake a cross-sectoral impact analysis. The new Management Organisation created in Scenario 3 has a mandate for cross-sectoral coordination. The data sharing mechanism noted in Scenario 2 has been extended to include sectoral data and spatial information. There is a cross-sectoral platform for international communication between Parties and existing organisations. The data platform also includes a clearing house mechanism. This platform could also be used to share information between relevant existing legal Agreements, such as the UN Fish Stocks Agreement (1995). In addition, formal channels are established to encourage public participation throughout the entirety of the development process for new management measures under the new Implementing Agreement, including the proposal of measures, development, implementation, monitoring and compliance. Inclusion of **all** stakeholders, including *inter alia* NGOs, scientific and legal experts, local communities, women and indigenous peoples, in the negotiation and coordination of new measures can contribute more effectively towards the implementation of measures to meet biodiversity goals. These groups can bring new insights, expertise and local knowledge, and may provide financial, technical or human capacity, at any stage of measure development or implementation, in instances where institutional capacity is insufficient to meet the requirements of a new measure in the interim or in the long-term.

Coordination relevant to EIA includes A harmonising mechanism is proposed for sectoral EIA approaches to make the global approach in the ABNJ space less fragmentary and variable.

Review of Scenario feasibility

Scenario 1

This scenario relies upon the willingness of existing organisations to cooperate and coordinate, which has to date been difficult to achieve for many reasons, including a lack of capacity. Annual meetings, proposed by scenario 1, may prove to be less effective at ensuring coordinated efforts than a year-round coordination mechanism. The regular assessment of activities and the suitability of measures may be difficult to undertake if the only avenue is an annual meeting.

Scenario 2

In Scenario 2, the Governing Body of the new Agreement is responsible for facilitating coordination between Parties, sectors, and existing institutions via the Agreement's secretariat, annual meetings, workshops and public data repositories. The creation of an international communication platform through the new Agreement

encourages all states and organisations to collaborate, taking into account the work of the permanent scientific committee and existing institutional scientific bodies.

Data exchange may also allow the permanent Scientific Committee to better assess cumulative impacts, associated with removal of biological resources or damage to the seabed, and respond accordingly, e.g. stricter application of the ecosystem approach with a cross sectoral perspective or more detailed standards for sectoral activities. However, there may be complexities associated with sectoral data sharing standards and/or intellectual property issues. The combination of improved communication, data sharing and transparency between states and sectors will allow for a better understanding of overlapping activities and cumulative impacts resulting in damage to the seabed in a particular area.

Scenario 3

Within Scenario 3, the creation of a shared **cross-sectoral** spatial data repository would significantly improve collaboration and allow understanding of spatial designations from the different sectors (e.g. area closures, seasonal closures, gear restrictions etc.). In addition, the sharing of proposals for new activities would provide visibility into various procedures and processes, for example the EIA process, and facilitate stakeholder engagement and the identification of cumulative impacts associated with the removal of biological resources. There would need to be institutional arrangements between the sectors to ensure the data is provided to the platform which would be challenging. However, the benefits for transparency of activities, risks of cross sectoral impacts and availability of information for assessment, would be great. The current fragmented sectoral approach means that management efforts to implement an Ecosystems Approach, could be considered ineffective in some instances due to inter-sectoral undermining of measures. The cross-sectoral coordination that could be achieved through the Implementing Agreement would therefore be beneficial by ensuring that the location of designations are shared and by facilitating better coordination.

Cross-sectoral Considerations for Management Plans

Scenario 1

Parties are required to identify cross-sectoral implementation gaps as part of the informal adoption of management measures. Any management plans that are written by Parties, whether for ABMT or for EIA mitigation measures, must include the identification of potentially overlapping activities. These overlapping activities should be taken account of in EIA processes where an EIA is being undertaken to take into account cumulative impacts.

Scenario 2

Where overlapping activities are identified and are included within an EIA, the proposer of the activity must make arrangements with those responsible for other activities, such as sectoral organisations. Any area based measures which have management plans created, existing international organisations and Parties, must identify potential cross-sectoral implementation gaps. The Scientific Committee will facilitate identification of these gaps. It is encouraged that an EIA is undertaken before any designation of a marine protected area to identify

cross-sectoral implementation gaps.

Scenario 3

In order to coordinate activities, and support relevant management measures, the Management Organisation provides a coordinating role. In addition, the scientific committee has a role in marine spatial planning processes. The Scientific committee has an additional role in the context of identifying overlapping activities as part of the development of management plans as part of MPA or EIA processes. Building on the encouragement of EIAs as part of marine protected area designation, in Scenario 3 there is a *requirement* to undertake one. Finally, states have a responsibility to ensure management plans are included with ABMT (including marine protected areas).

Compliance

Scenario 1

Scenario 1 suggests the creation of a Stakeholder forum including Parties, existing regional and international organisations and relevant civil society. Issues of non-compliance are identified, discussed and potential solutions are considered. In the options of Scenario 1, the level of ambition proposed is much lower as there is no compliance body and no monitoring and control mechanism. Instead, issues of non-compliance can be identified through a Stakeholder Forum, but not necessarily addressed, as this forum has no recommendation or decision-making mandate. However, a forum such as this could be invaluable when considering a participative approach, as noted in Preparatory Committee discussions.

Scenario 2

The legal options in Scenarios 2 propose the creation of a specific compliance body, similar to that of the Montreal Protocol. It would be a non-adversarial process. Through these bodies, States are encouraged to self-report or report other Parties.⁹ Self-referral mechanisms provide an opportunity for Parties to refer themselves if they are failing to meet targets or if they lack the capacity to implement measures. This referral can then be assessed by the compliance body, and additional support may be provided to such States to facilitate compliance.

Scenario 3

The legal options in Scenario 3 propose the creation of a specific compliance body, but instead of the basis being the Montreal Protocol, under this Scenario the basis is the Aarhus Convention. It would be a non-adversarial process but the two approaches (Montreal Protocol and Aarhus Convention) differ, for example, in the composition of the compliance committee. Specifically, a compliance procedure based on the system of the Aarhus Convention could be triggered by a submission from the public or relevant civil society organisations. Through these bodies, States are still encouraged to self-report or report other Parties, and in addition to this

⁹ Compliance with the Implementing Agreement as a whole is a separate consideration and beyond the scope of this project (see figure 1 of the Legal Scan (Barritt & Vinuales, 2016)). However, compliance mechanisms that relate specifically to AMBTs and EIAs have been included here for completeness in respect of the three scenarios. These suggestions may be helpful for compliance with other aspects of the Implementing Agreement.

within Scenario 3, the public or NGOs can report issues of non-compliance.

Assessment

Scenario 1

The relatively weak **Compliance** mechanism means that successfully addressing pressures, including removal of biological resources, may prove challenging, especially for activities such as IUU fishing.

Scenario 2

In this scenario, a Compliance Body is established, with the capacity to enforce standards and measures implemented in Areas Beyond National Jurisdiction, a greater standard of enforcement than currently exists in Areas Beyond National Jurisdiction. The option to self-report provides an opportunity for Parties to identify the reasons behind non-compliance and communicate the need for assistance. A compliance body with the self-reporting mechanism could allow channelling of funding to provide capacity for the States that have self-reported.

Scenario 3

There is scope for the inclusion of a global surveillance mechanism to support control in particular areas, or flag States given control rights if their ships are in the area. Alternatively, a commandeering mechanism could be established whereby a monitoring and control centre can call upon a ship within the vicinity to support the collection of evidence for non-compliance. The compliance mechanism is currently absent in ABNJ so a globally consistent supporting mechanism would be a considerable advantage. However, it would require funding and support. The Compliance component of scenario 3 includes self-reporting by states but in addition, other actors such as sectoral organisations and NGOs can report issues of non-compliance. As such, issues of non-compliance which might otherwise have gone unaddressed due to a lack of Member State monitoring capacity are reported using private capacity, thus helping to mitigate the impacts of illegal, unsustainable or unauthorised removal of biological resources. In addition, this mechanism may be effective in allowing States to request support where they are likely to be non-compliant and use this as a means to appropriately develop capacity in relevant areas. In addition, there is increased transparency and participation from a wider range of stakeholders.

Guiding Principles & Approaches

Following Preparatory Committee meetings 1 and 2, there has been some convergence on various components of a new mechanism. For example, it has been agreed that guiding principles and approaches, such as Transparency, Ecosystems- and Science-based Approaches, Precautionary principle/approach, and Common Concern of Humankind should be used in the establishment of ABMTs. The following elements are included in all three scenarios:

- Precautionary Approach
- Focus on Biodiversity
- Transparency

- Public participation
- Common concern
- Science-based approach
- Savings clause

Treatment of Ecosystem Approach in all 3 scenarios

A fundamental cross-cutting approach identified at the Preparatory Committee meetings is the Ecosystems Approach. Scenario 1 includes Ecosystem Approach referenced in the preamble. Scenario 2 extends this to include the ecosystem approach in the main text. Scenario 3 further extends the application by additionally making reference to an annex elaborating specific mechanisms and cross-sectoral approaches that use the Ecosystems Approach, e.g. the Ecosystems Approach to fisheries. A Science-based Approach has also been noted at Preparatory Committee meetings and is relevant to the application of the Ecosystem Approach.

Review of Scenario feasibility

The ecosystem approach is integral to recognition of biodiversity and ensuring that sustainable use is possible. The increasing visibility of the Ecosystems Approach through the three scenarios, may facilitate improved sectoral recognition and understanding of the wider ecosystem implications associated with, for example the removal of significant numbers of a species population, and how such actions may affect other marine sectors. A more detailed approach may prove difficult to implement successfully due to the increasing demands for detailed analysis of not only the impacts of the proposed activity, but of the cumulative impacts of all activities occurring within an area.

Treatment of Savings Clause in all 3 scenarios

A crucial element of the new agreement, re-emphasised by State members of the BBNJ Preparatory Committee process, is to ensure that the existing legal framework applicable to Areas Beyond National Jurisdiction is not undermined by the new agreement. The specific meaning of this requirement and its specific manifestations have not been spelt out in detail. The understanding of this requirement used to develop these legal options is that all States agree that BBNJ must be protected and that therefore, the measures envisioned in the new agreement must be consistent with existing law should there be any overlaps. Consistency has been achieved by a levelling of the protection offered by different instruments through a simple technique, namely a 'savings clause' whereby existing measures will take precedence over the Implementing Agreement in all those cases where this agreement is less comprehensive or less stringent. All three Scenarios contains a 'savings clause'. Thus, the Implementing Agreement would 'level up' the existing international regime rather than 'levelling it down'. For example, in the context of EIAs, the savings clause would ensure that existing EIA processes, such as those set out by Regional Fisheries bodies or the ISA in Areas Beyond National Jurisdiction, are not undermined if the criteria set out in the new agreement are considered to be less comprehensive. Similarly, existing ABMTs in ABNJ, such as the OSPAR marine protected area network, will not be undermined if these measures are

deemed to be more stringent than those mandated in the new agreement. The decision on whether a measure is more or less protective could be allocated in different ways depending on the coordination systems.

4.4.2 Application of cross-cutting legal aspects to pressures

This section contains the review of the various scenarios of the three identified pressures and identifies where the cross cutting mechanisms have specific benefits to manage one of these pressures. The text does not assess every component in every section, instead, specific components are selected to provide examples of particular supporting mechanisms to manage pressures.

Removal of biological resources

Scenario 1

There is potential to alleviate pressures on biological resources by the Implementing Agreement supporting cross sectoral communication and coordination. However, at the lower level of ambition some of the measures which may be required to ensure sustainable use may be lacking.

Scenario 2

The existence of a permanent Scientific Committee would provide assistance in the assessment of the cross-sectoral EIA reports and ensure that the removal of biological resources takes into account the ecosystem approach and that there is recognition of the impacts of these actions. The scientific committee can therefore also make recommendations to Parties on the implementation of management measures in light of scientific evidence pertaining to the impacts associated with the removal of biological resources. Stronger cross sectoral governance and compliance would be beneficial to ensure effective and coherent implementation of the agreement.

Institutional Arrangements under this scenario provide decision-making responsibilities to the Governing Body of the Implementing Agreement, and which also provides support to Parties in their **implementation** of measures under the new Agreement. In **coordination**, the existence of a cross-sectoral data repository would support the visibility of pressures and centralisation of data, information and coordination of management. The benefits of centralised spatial data would allow better understanding of various biological resources (and therefore the ecosystem) which are located in highly connected and dynamic environments. It could also reduce issues of management information and experiences being stored in regional and sectoral silos, therefore allowing future measures to be coordinated and visible to all Parties.

Scenario 3

In Scenario 3 **Institutional Arrangements** provide for the creation of a new Management Organisation with decision-making functions and which is responsible for the **implementation** of measures under the new agreement. With respect to the **Guiding Principles & Approaches**, an additional annex is proposed to elaborate specific mechanisms and cross-sectoral approaches that use the Ecosystem Approach. **Communication** is facilitated and the systematic integration of the key elements of the ecosystem approach into decision-making

has the potential to minimise over-exploitation of certain *resources*, or reduce activities that will directly impact a key link within the ecosystem that could cause destabilisation, for example the primary production basis. An ecosystem approach can be used to assess and recognise the impacts associated with the removal of biological resources making specific recommendations to Parties based on scientific evidence.

Damage to the seabed

Scenario 1

The mandate of existing organisations is expanded to include EIA processes in ABNJ. Damage to the seabed may potentially be directly addressed through the creation of a mechanism through which measures to reduce seabed damage, such as buffer zones, gear restrictions or marine protected areas, can be implemented. Standards for activities that threaten the seabed (such as trawling, mining, and bioprospecting) can be set in Areas Beyond National Jurisdiction. Additional support beyond just that outlined in Scenario 1 may be required to fully recognise these benefits.

Coordination, in line with a transparent and science-based approach, may allow for improved pressure analysis and assessment of cumulative impacts from overlapping activities that may result in damage to the seabed. Collaborative pressure and cumulative impact analyses would also allow states and organisations to determine if existing measures are sufficient to address the level of pressure, and to develop new measures where necessary.

Guiding Principles & Approaches include a savings clause to ensure that no existing processes are undermined by the measures implemented under the new Implementing Agreement. For example, the ISA already has a EIA process in place for deep sea mining, and Regional Fisheries Management Organisations have various area based management measures in place to prevent damage to the seabed from bottom fishing activities, for example Vulnerable Marine Ecosystems.

Scenario 2

A **compliance** body can also work with states and Regional Fisheries Management Organisations, or new sectoral activities, to reduce damaging practices and hence reduce impacts on seabed biodiversity. **Guiding Principles & Approaches** include ecosystem approaches that can be implemented to may prohibit activities occurring in proximity to sensitive areas or areas where the cumulative pressure of seabed damage is too great.

Scenario 3

Through **coordination**, improved information sharing in the data repository can therefore allow the permanent scientific committee to identify overlapping activities that threaten the seabed, and to address any associated implementation gaps to reduce the likelihood of damage to the seabed. A new **compliance body** can enforce measures to reduce damage to the seabed from activities occurring in ABNJ, and by providing the opportunity for states, NGOs and existing regional organisations to report on issues of non-compliance may broaden the scope of the compliance body to more effectively address activities causing damage to the seabed.

Ocean acidification

Scenario 1

At the initial level of ambition, an Implementing Agreement based upon the Precautionary Approach and the Ecosystems Approach will allow existing regional organisations to implement measures in ABNJ that could be used to directly and indirectly mitigate the pressure of ocean acidification. Coordination between organisations, sectors and Parties is encouraged and the sharing of information could help regional organisations to identify overlapping activities and to better assess the cumulative impacts of these activities towards ocean acidification. A non-undermining approach is also advocated at this level of ambition so as to ensure that existing legislation and standards to address ocean acidification are not undermined. However, the lack of a compliance mechanism means that there is little opportunity to ensure measures are implemented, and may also lead to discord amongst Parties.

Scenario 2

With increasing ambition, the Governing Body of the Implementing Agreement with a specific biodiversity mandate in ABNJ could work to mitigate the effects of ocean acidification. A through the creation of specific measures to protect areas with the potential to be climate change resilient or those containing particularly high biodiversity from the cumulative impacts of human activities in proximity to these areas. Areas protected from multiple impacts have the potential to be more resilient to climate change. Science-based and Precautionary Approaches may allow for the identification of resilient areas and connectivity pathways between biodiverse areas that, under a precautionary approach, can be safeguarded from human impacts until scientific understanding and technology improves to a state in which it can address ocean acidification directly. Improved communication may allow for collaboration between sectors and/or States to work together to implement measures (for example to reduce CO₂ emissions from activities in ABNJ) to protect the global commons into the future. The new scientific committee has the potential to coordinate with other scientific bodies, such as those working on climate change, to be aware of the most recent science and integrate that into the practices and understanding of how to protect biodiversity and associated ecosystems from this pressure.

Scenario 3

Building on the elements of Scenario 2, improved coordination between sectors, organisations and Parties could potentially promote collaborative efforts to implement networks of measures to address ocean acidification, especially regarding connectivity between areas of resilience or of biodiversity importance. The creation of new centralised data platform may allow for improved identification and spatial verification of vulnerable and resilient areas, and hence, sectors may use this information to better plan future activities in ABNJ.

5 Conclusion

An Implementing Agreement under UNCLOS, focusing on BBNJ, **provides many opportunities** to improve the state of the marine environment. At a basic level, the agreement could provide a mechanism for **implementing management measures in ABNJ** such as ABMTs and EIAs. This would be a significant step forward because the existing legal and regulatory landscape is fragmented and contains significant gaps. Establishing appropriate and effective **cross-sectoral coordination** will be a critical feature of the Implementing Agreement and must take the views and insights of all stakeholder groups into consideration to be effective. Within ABNJ there are sectoral enclaves that manage their activities in isolation from other sectors that may have overlapping impacts. At present, these sectors have limited potential to manage their activities in the context of another sector's work, particularly where there is limited cross-sectoral understanding or communication and coordination. Accordingly, facilitated cross-sectoral coordination will help account for the overlapping and cumulative impacts of various pressures and in turn address some of the problems associated with legal and regulatory fragmentation.

The **Ecosystems Approach** would provide a useful means to frame the understanding of any pressures and activities in the marine environment. As the ecosystem is the framework in which biodiversity is contained, it can be used to understand the effect of individual impacts on parts of the ecosystem. It may be a useful framework on which to base **assessment of cumulative impacts and cross-sectoral pressures**.

Further work is required, in particular analysis of the legal options in relation to **other pressures** to biodiversity that are present in ABNJ, such as noise pollution. The legal options outlined in this report should take into account other current and future pressures, as well as accommodate additional concerns expressed by Member States at the next Preparatory Committee meeting. **Next steps**, subject to funding availability, are to further develop the coordination between the **legal** proposals and discussions at the Preparatory Committee and to integrate the **biodiversity considerations** with these. The two other elements of 'The Package', **capacity development and technology transfer** and **marine genetic resources**, also require consideration.

6 References

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7 Appendix ABMT Legal Options

Legal options table for components relating to ABMTs under a new BBNJ Implementing Agreement.

This table provides the detailed legal options related to the components described above. Each component has three scenarios with increasing levels of ambition. As discussed previously, these scenarios are presented as ideas to generate discussion. The components and scenarios are drawn from an understanding of what may be required by the implementing agreement drawn from discussion at the Preparation Committees and the first two chair's reports.

Component - ABMT	Scenario 1	Scenario 2	Scenario 3
Focus	- Biodiversity focused MPA - Reference to ABMT (explicitly referring to biodiversity safeguard)	- Biodiversity focused MPAs - Specific elaboration of provisions for other ABMTs (explicitly referring to biodiversity safeguard)	- Biodiversity focused MPAs - Explicit provisions for other ABMT (explicitly referring to biodiversity safeguard), for example MSP
Existing MPA & ABMT	Existing MPAs and ABMT proposed for international recognition but not re-designated	Existing MPAs and ABMT included in a global list of recognised measures in the Implementing Agreement	Existing MPAs and ABMT proposed for reclassification under the Implementing Agreement
Proposal & Approval	- Parties propose - Proposal based on regional designation criteria - Consensus vote approval process	- Parties or Regional Seas Organisations may propose new measures - Approval is by the Governing Body of the Implementing Agreement with a negative resolution approval process, whereby States representing a minimum of 51% would formally vote against the proposed	- Scientific Committee, Parties or Regional Seas Organisations may propose - International organisations e.g. CBD, UNESCO, IMO, FAO, UNEP may also propose. - Relevant civil society organisations/NGOs with

Component - ABMT	Scenario 1	Scenario 2	Scenario 3
	by Parties	measures, otherwise they are adopted - International organisations e.g. CBD, UNESCO, IMO, FAO, UNEP may also propose. - Proposal based on existing internationally recognised designation criteria to be identified	support from the Scientific Committee may also propose. - Approval is by the Governing Body of the Management Organisation with a negative resolution approval process requiring consensus to block designation (in the absence of consensus to block, designation would proceed) - A new set of criteria developed incorporating existing criteria: EBSA, VME, PSSA, e.g. a scientific global review of all criteria for deep sea and ABNJ activities
Adoption of Management Measures	Informal management measures decided between proposers and relevant international, regional and sectoral bodies.	Cooperation between existing international, regional and sectoral bodies to decide management plan with assistance from the Scientific Committee where necessary	Management measures required and to be included in the Management Plan decided by Scientific Committee in consultation with existing international, regional and sectoral bodies.
Targets	No set targets	A timeline of targets set in the agreement for the designation of MPAs	A timeline of targets set in the agreement for the designation of MPAs and other ABMTs
Additional Considerations	Savings clause	- Savings clause - Creation of an incubator for voluntary MPAs such as MCA and SSC, with an increased role for NGOs to help facilitate	- Savings clause - Creation of an incubator for voluntary MPAs such as MCA and SSC, with formal channels for NGOs to help facilitate these and to coordinate

Component - ABMT	Scenario 1	Scenario 2	Scenario 3
		these and to coordinate action. Review process to assess progress towards MPA targets	action. Review process to assess progress towards MPA targets and ABMTs

8 Appendix - EIA Legal Options

Component - EIA	Scenario 1	Scenario 2	Scenario 3
Focus	EIA	EIA	EIA
EIA Determination	Treaty to contain an indicative list of relevant activities that give rise to EIA, including those with transboundary or global commons impacts.	- EIA required for activities listed in Annex I and for any activity within or affecting MPA - Threshold test, inclusive of transboundary or global commons impacts	- EIA required for all activities other than those listed in Annex I - EIA required for any activities (even if included in the list above) within or affecting MPA, EBSA or sectoral ABMT - Threshold test, inclusive of transboundary and global commons impacts
Scope of EIA	Minimum criteria for EIA and Transboundary Environmental Impact Assessment (TEIA) (minimum criteria to include mention of mitigation measures, the mitigation hierarchy and consideration of alternatives)	- Detailed criteria for EIA and TEIA (minimum criteria to include mention of mitigation measures, the mitigation hierarchy and consideration of alternatives) - Minimum criteria for Strategic Environmental Impact Assessment (SEIA)	- Detailed criteria for EIA and TEIA (building on minimum criteria to include further detail on mitigation measures, the mitigation hierarchy and consideration of alternatives) - Detailed criteria for SEIA
Screening	Conducted by proponent States	- Conducted by proponent States - Intention to conduct EIA	If above certain threshold, new permanent Scientific Committee to be involved in scoping, review and decision-making. If below threshold,

Component - EIA	Scenario 1	Scenario 2	Scenario 3
	State intention to conduct EIA communicated to existing organisations	communicated to Secretariat of Implementing Agreement	process left to proponent state
Conduct of EIA	Proponent State, with peer review from at least 2 other potentially affected or otherwise relevant States	Proponent State, with assistance from Scientific Committee and peer review from at least 2 other potentially affected or otherwise relevant States identified by Scientific Committee	- State, with assistance from Scientific Committee and peer review from at least 5 other potentially affected or otherwise relevant States identified by Scientific Committee - Where contested, possibility of resort to the Management Organisation which allocates, with assistance from Scientific Committee and on a majority vote, responsibility for the conduct of EIA
Review, follow-up and monitoring of EIA	Relevant authorities of proponent State and at least two other Parties to the Agreement	- Relevant authorities of the proponent State with assistance (through formal channels) from Scientific Committee and a set number of Parties to the Agreement, depending on the residual impacts identified (greater number of states suggested where permanent or long-lived impacts identified) - Monitoring by nominated Parties to the Agreement other than the	- Relevant authorities of the Proponent State with assistance (through formal channels) from existing organisations and new Scientific Committee, and a set number of Parties to the Agreement, depending on the residual impacts identified (greater number of states suggested where permanent or long-lived impacts identified). - Where contested, possibility of resort to the Management Organisation which decides, with assistance from Scientific Committee and on a

Component - EIA	Scenario 1	Scenario 2	Scenario 3
		proponent State	majority vote, on whether the EIA meets certain minimum appropriateness criteria ▪ Monitoring by nominated Member State other than the proponent State
Additional Considerations	▪ Obligation to assess cumulative impacts ▪ Advisory ecosystems based management mandate ▪ Obligation to monitor progress	▪ Obligation to assess cumulative impacts ▪ Advisory ecosystems based management mandate ▪ Obligation to monitor and report on progress ▪ Obligation to adopt measures to ensure no significant adverse impacts ▪ Notification procedure for residual impacts and cross-sectoral transparency	▪ Obligation to assess cumulative impacts ▪ Ecosystems based management mandate ▪ Obligation to monitor and report on progress ▪ Obligation to adopt measures to ensure no significant adverse impacts ▪ Power of Management Organisation to suspend, modify or terminate activity if poses threat of significant adverse impacts (akin to ISA) ▪ Notification procedure for residual impacts and cross-sectoral transparency

9 Appendix – Cross-cutting components of a new Implementing Agreement

Component – cross cutting	Scenario 1	Scenario 2	Scenario 3
Institutional Arrangement	Structure ▪ Governing Body (of the Implementing Agreement); ▪ Secretariat of the Implementing Agreement); ▪ Stakeholder Forum ▪ Expanded mandate of existing organisations (e.g. Regional Seas Programmes (RSP) or RFMO) to cover ABNJ not yet covered by existing organisations. ▪ Utilises scientific bodies within existing organisations e.g. RSPs, IMO, ISA ▪ Governing Body can assist decision-making on issues if	Structure ▪ Governing Body (of the Implementing Agreement); ▪ Secretariat of the Implementing Agreement); ▪ Scientific Committee; ▪ Compliance Committee ▪ Decision making is via a voting system for Parties within the Governing Body of the Implementing Agreement ▪ Establishment of permanent Scientific Committee and a Secretariat of the Implementing Agreement	Structure ▪ Management Organisation; ▪ Secretariat (of the Management Organisation); ▪ Scientific Committee; ▪ Compliance Committee; ▪ Data Platform/Clearinghouse Mechanism; ▪ Cross-sectoral Repository ▪ Establishment of new Management Organisation with secretariat ▪ Management Organisation with regulatory and decision-making functions and responsibility for issuing permits ▪ Establishment of permanent Scientific Committee and a Secretariat of the Management Organisation

Component – cross cutting	Scenario 1	Scenario 2	Scenario 3
	contention arises.		
Implementation	Parties	Parties with support from new Secretariat and expanded regional seas organisations	New Management Organisation
Coordination	- Existing organisations coordinate with each other through annual regional meetings facilitated by UNEP. - Secretariat of Implementing Agreement encourages collaboration between proponent States and existing organisations - Secretariat of Implementing Agreement manages a public repository for relevant EIAs throughout various stages - EIA proponent required to identify potential cross-sectoral cumulative impacts as part of the assessment process.	- Secretariat of Implementing Agreement provides platform for international communication between Parties and existing organisations (IMO, ISA, RFMOs) - Information exchange with organisations prior to decision on EIA or ABMT. - Creation of centralised, cross-sectoral spatial data repository for data communication - Formal channels for public participation - Secretariat of Implementing Agreement manages a public repository for relevant EIAs throughout various stages - Harmonising mechanism for sectoral EIA approaches - EIA proponent required to undertake cross-sectoral impact analysis	- Coordination entrusted to the new Management Organisation - Information exchange with organisations prior to decision - Formal channels for public participation - Secretariat provides platform for international communication between Parties and existing organisations (IMO, ISA, RFMOs) - New data platform/clearinghouse mechanism to facilitate sharing of information from international, regional seas and sectoral organisations to assist with the preparations of the EIA - Creation of centralised, cross-sectoral spatial data repository for data communication and cross-sectoral coordination - Harmonising mechanism for sectoral EIA approaches - EIA proponent required to undertake cross-sectoral impact analysis.

Component – cross cutting	Scenario 1	Scenario 2	Scenario 3
Cross-sectoral Considerations for management plans	- Parties required to identify potential cross-sectoral implementation gaps as part of the informal adoption of management measures for area based management. - Proposer of activity to identify potentially overlapping activities and account for in EIA	- Proposer of activity to identify potentially overlapping activities, take account for activities in EIA and to make arrangements with those responsible for overlapping activity - Existing international, regional and sectoral organisations as well as Parties required to identify potential cross-sectoral implementation gaps as part of the development of a management plan for area based measures. - Secretariat of the Implementing Agreement to facilitate the identification of cross-sectoral implementation gaps by notifying international, regional seas and sectoral organisations and encouraging them to coordinate activities and where necessary to adhere to relevant exclusion zones - EIA encouraged before designating an MPA to identify cross-sectoral implementation gaps	- Secretariat of the Management Organisation to identify overlapping activities, take account for activities in EIA and communicate with both the proposer of the new activity and those responsible for existing overlapping activities and coordinate arrangements - In conjunction with the Scientific Committee, existing international, regional and sectoral organisations as well as Parties required to identify potential cross-sectoral implementation gaps as part of the development of a management plan - Governing Body of the Management Organisation to oversee and facilitate coordination by notifying international, regional seas and sectoral organisations and encouraged to coordinate activities and where necessary to adhere to relevant exclusion zones - EIA incorporated into the designation process to identify cross-sectoral implementation gaps - MSP undertaken by the Scientific Committee - Area based management tools (including MPAs) include management plans with

Component – cross cutting	Scenario 1	Scenario 2	Scenario 3
			designated States.
Compliance	- Stakeholder forum (including: Parties; existing international, regional and sectoral organisations; and relevant civil society organisations/NGOs) whereby issues of non-compliance are identified, discussed and potential solutions to ensure compliance considered - No formal facilitation or enforcement - Support for RFMOs' existing IUU processes and globally communicated through processes in Implementing Agreement	- Compliance Committee established along similar lines to the Montreal Protocol, whereby States can self-report or where States can report on other States. - Compliance Committee would have both a facilitative and enforcement approach depending on the relevant circumstances - RFMOs required to record and report IUU supporting of Parties.	- Compliance Committee established along similar lines to the Aarhus Convention, whereby States can self-report, States can report on other States, the Secretariat can also report, and the public (including NGOs as well as regional and sectoral organisations) can report issues of non-compliance. - Compliance Committee would have both a facilitative and enforcement approach depending on the relevant circumstances - RFMOs required to record and report IUU supporting of Parties. - Global surveillance mechanism
Guiding Principles & Approaches	- Ecosystems approach referenced in preamble - Precautionary approach - Focus on biodiversity - Transparency	- Reference to ecosystems approach in preamble and in <i>main text</i> - Precautionary approach - Focus on biodiversity	<i>Reference to ecosystems approach in preamble and Management Organisation, and annex to elaborate specific mechanisms and cross-sectoral approaches which use ecosystem approach e.g. ecosystems approach to fisheries (EAF)</i> <i>Stewardship</i>

Component – cross cutting	Scenario 1	Scenario 2	Scenario 3
	- Public participation - Common concern - Science-based approach - Savings clause	- Transparency - Public participation - Common concern - Science-based approach - Savings clause	- Precautionary approach - Focus on biodiversity - Transparency (reference to suitable mechanism) - Public participation - Common concern - Science-based Approach (reference to Scientific Committee) - Savings clause

