Statement

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

Updated statement issued by the DFG Permanent Senate Commission on Fundamental Issues of Biological Diversity (SKBV) on the draft text of the Agreement (based on the further revised draft dated 30 May, 2022)

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The Permanent Senate Commission on Fundamental Issues of Biological Diversity is an interdisciplinary, independent body of experts in biodiversity research which evaluates selected topics on the basis of scientific findings with regard to their social and political significance and advises various bodies of the German Research Foundation (DFG, Deutsche Forschungsgemeinschaft) as well as governments and policymakers, both at national and international level. By studying the ocean and its role in the Earth system, marine scientific research makes important contributions to understanding global matter cycles, the climate system and the diversity of life on Earth. Climate change and biodiversity loss pose global economic, political, and societal challenges that can only be addressed through a global scientific effort. Marine scientists have a key role to play as members of intergovernmental scientific expert bodies such as the Intergovernmental Panel on Climate Change (IPCC), World Ocean Assessment (WOA) and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), since strategies for the protection of marine ecosystems and for their sustainable use must be developed based on best scientific knowledge available. The high seas and the deep seabed pose a particular challenge since research in this area is very time-consuming and technologically demanding and, due to the lack of national sovereignty, are only protected by international law, in particular international treaties such as the United Nations Convention on the Law of the Sea (UNCLOS).

The Permanent Senate Commission on Fundamental Issues of Biological Diversity supports the negotiation progress on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) and has already commented on the revised draft text (document A/CONF.232/2020/3, dated 18 November 2019).[1]

From a research perspective, the further revised draft text[2] dated 30 May, 2022 for the Fifth Session of the Intergovernmental Conference (IGC) regarding an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction shows significant progress. However, some problematic issues remain or have newly arisen. This statement focuses on these essential issues and aims to raise awareness of the needs and concerns of maritime scientific research.

Part II

Article 8 (3)

We strongly support the EU position of preferring Option B. The alternative Option A has two major pitfalls. First, many potentially dysfunctional aspects may arise from the ambition to regulate ex situ access to genetic resources. Scientific use and publication of these data generally requires

[1] Accessible under: https://www.dfg.de/download/pdf/dfg_im_profil/gremien/senat/biologische_vielfalt/220303_statement_bbnj_en.pdf.

[2] Accessible under: https://www.un.org/bbnj/sites/www.un.org.bbnj/files/igc_5_-_further_revised_draft_text_final.pdf.

making them available in public repositories, which allow open access. Making this access dependent on a clearing-house mechanism will complicate the sharing of knowledge and thus non-monetary benefits. This would be contrary to the FAIR Guiding Principles.

Second, the extension to historical samples and data if they are accessed after the Agreement's entry into force imposes difficulties as it requires exact knowledge of the provenience of these samples and data.

We also observe that the discussion on ex situ access and DSI is running parallel under CBD and BBNJ negotiation processes. It would be highly damaging if the two sets of negotiations were to produce different outcomes. The two processes are interconnected and should therefore be co-ordinated.

Article 9 (2)

This paragraph needs to be deleted as it jeopardises marine research at large. First, the fluid nature of the ocean makes the appearance of the same MGR in both ABNJ and in coastal areas inevitable. This problem is exacerbated by two linguistic aspects in the wording "where marine genetic resources of areas beyond national jurisdiction are also found in areas within national jurisdiction". The wording leaves open which aspect of MGR is meant. We interpret it to mean "same species" but it could well be understood as a nucleotide sequence, a protein or environmental DNA. This would potentially affect every biological material from molecular levels to organisms and thus become insurmountable. It further leaves open whose responsibility it is to prove that the MGR is "found" in areas within national jurisdiction. If this obligation were to be imposed on researchers, the conduct of research projects would be infeasible as it would require monitoring adjacent coastal areas every time when sampling in ABNJ.

Article 10

While the scope of application has become clearer now, it is still debatable as to whether this approach fulfils the aims of the Agreement. The 6-month period for the transmission of certain information to the clearing-house mechanism according to Article 10 (3) appears to be ambitious at least and might be infeasible in some countries due to the short time available between the funding decision and the actual cruise. Furthermore, a pre-cruise notification can only be preliminary, as the exact nature and location of samples are often decided during the course of the cruise by the chief scientist and the captain in the light of weather conditions and overall cruise progress. It would be much more practical to agree on a mandatory post-cruise notification including the publication of cruise reports. We strongly support the joint EU-UK initiative to replace the current wording of Article 10 with the requirement of a post-cruise documentation of this kind.

Article 10

While we see limited applicability of this article, potentially to a few larger species such as marine mammals, we also see little negative impact in keeping it. However, it again remains unclear where the burden of proof lies. As researchers, we have limited options to verify whether a MGR used or sampled is also part of traditional knowledge.

Article 11

Option I of Article 11 would best fit Option B in Article 8 as preferred here. However, the question remains as to whether benefits are generated through the mere collection of samples or only through their utilisation. Option I only covers collection, not utilisation. With its focus on access and the associated feeding of databases, it is closely connected to capacity-building. For this reason, the regulation should be read in conjunction with the provisions on capacity-building and these issues should be negotiated together. Option II covers the utilisation aspect and describes potential non-monetary benefits, but it has the disadvantage that (contrary to Option I) it includes the wording "access ex situ, including as digital sequence information". On this matter, see our comment on Art. 8 (3) above.

Article 13

The obligation to use the open and self-declaratory notification system within the clearing-house mechanism when using databases containing DSI from MGR (Article 13 (3) lit. b) is highly unfeasible. There are numerous standard and automated procedures for identification of new DSI of any origin (e.g. the BLAST algorithm) which are based on comparison against all deposited DSI, including those based on MGR. In such procedures, any comparison of new DSI with existing databases would require such a notification, resulting in extremely high number of notifications. We urgently warn that implementing this i) counteracts the open data principle for scientific database access, ii) creates an unmanageable number of requests and/or reports to the clearing-house mechanism, and iii) hinders scientific progress while not effectively impacting on commercial activities. From a research perspective, it seems problematic to declare every corresponding database access to be a “benefit”. Benefit sharing and therefore also the monitoring and transparency requirements should be linked to commercial and not scientific use. At least the differences between these uses should be reflected in the scope of application.

Part III

There is a general concern that the role of science is pushed back with respect to area-based management, e.g. it is not explicitly mentioned in Art. 18 and only appears at the downstream level of decision-making according to Article 19. Also, care should be taken to ensure the scientific qualification of the Scientific and Technical Body. On this matter, see our comment on Article 49 below.

It is good to see that consensus has been found on many aspects regarding the decision-making process (Article 19), as well as international cooperation and coordination (Article 19bis) with respect to matters related to measures such as area-based management tools, including MPAs. It is also very positive that the Conference of Parties, while respecting relevant legal instruments, frameworks and relevant global, regional, or sectoral bodies, is also to take decisions on measures complementary to those adopted under such instruments, frameworks and bodies (Article 19 (2)).

Article 20 (1) and (2)

It is unclear why these two paragraphs are included here and applicable to only this Part. One would assume that these two paragraphs are applicable to the whole BBNJ agreement.

Part IV

Article 22 (3)

The requirement to carry out an environmental impact assessment should only apply to activities conducted in areas beyond national jurisdiction (text in the first square bracket). To extend this obligation to all activities that have an impact in areas beyond national jurisdiction (text in the second square bracket) poses the challenge of identifying whether an activity taking place in national waters or on land has an impact in ABNJ and could potentially increase the number of EIAs enormously.

Article 23

Option B is preferred, however paragraph 4b is under Option A and should be included under Option B, as it is important to have some kind of interim guidance while global minimum standards and guidelines are being developed by the Scientific and Technical Body.

For practical reasons, it is essential that there are no conflicting duties to conduct EIAs under other obligations and agreements. It is necessary to create a clear and concise hierarchy of norms. For this reason, Paragraph 5 is very important, as it addresses activities for which it is not necessary to conduct an environmental impact assessment. Regarding the criteria which have to be met for no EIA to be carried out, Option 1 is the most practicable and comprehensive option.

Article 24

It is very important that the BBNJ agreement provides Parties with good, clear and operable guidance on EIA thresholds and criteria. For this reason, Option B would be slightly preferable, as it

is currently somewhat clearer than Option A. It is crucial to clearly define when an obligation to carrying out an EIA applies, as well as the scope of possible minor or transitory effects. If activities having typically only minor or transitory effects on the marine environment such as scientific research were confronted with an EIA obligation, these activities would be considerably affected due to the time requirement involved. We propose that positive standard lists should be used that specify activities, projects and plans for which an EIA must be carried out. This would also make it easier to compare whether there is already an EIA obligation under other agreements for such an activity. Without such guidance, there is a considerable risk that the EIA processes and decisions by Parties will differ depending on which Party is carrying them out.

The involvement of a BBNJ body, e.g. the Scientific and Technical Body, in the EIA decision-making process would be helpful to ensure consistency across Parties. However, this involvement should only apply to EIA for projects which may cause substantial pollution of or significant and harmful changes to the marine environment, or which could result in more than a minor or transitory effect on the marine environment. Otherwise, the Scientific and Technical Body might be swamped by cases, leading to unacceptable delays in the EIA decision-making process.

It is also important to ensure that any such EIA thresholds and criteria adopted under BBNJ take into account (to the extent possible) any such EIA thresholds and criteria that already apply under other global (e.g. under the International Seabed Authority) or regional (e.g. under the Antarctic Treaty) treaties to ensure compatibility in the EIA processes between the different obligations and agreements.

Article 30

The order of the different steps of an environmental impact assessment "*Screening"*, "*Scoping"*, "*Impact assessment and evaluation"* and "*Mitigation, prevention and management of potential adverse effects"* is logical, but one has to carefully evaluate whether all the requirements contained in this article under these headings can be fulfilled in a reasonable and timely manner. In the "*Screening"* section, paragraph 1 (a) (iii) could potentially lead to a lengthy and repeated circle between the Parties concerned and the BBNJ bodies, which would have to review the Parties´ decision. Again, clear guidance on the criteria to be applied in the "*Screening"* process would support consistency in the screening carried out by Parties, so that a review by a BBNJ body might not be necessary.

The inclusion of public consultation procedures under the "*Scoping"* step complicates the whole process and might lead to delays. Again, guidance provided by the BBNJ agreement itself or a subsequent decision by the COP would help ensure that the scoping is carried out by Parties in a consistent manner.

The steps of the *"Impact assessment and evaluation"* and the "*Mitigation, prevention and management of potential adverse effects"* currently only addresses Parties. This involves risks. Very

positive experience has been gained with the EIA system applied under the Antarctic Treaty (Annex I to the Protocol on Environmental Protection to the Antarctic Treaty)[3], which establishes the following:

1. for activities with less than a minor or transitory impact on the environment (Category I), it is left to the Parties to decide whether an impact assessment should be carried out. Only the activity itself is reported to the Antarctic Treaty Secretariat (ATS);
2. for activities with a minor or transitory impact on the environment (Category II), Parties carry out an "Initial Environmental Evaluation (IEE)" on their own. The result of this IEE is submitted to the ATS and stored in a database accessible to all Parties;
3. for activities with more than a minor or transitory impact on the environment (Category III), Parties have to carry out a "Comprehensive Environmental Evaluation (CEE)", which is made publicly available and is to be circulated to all other AT Parties for comment and then subsequently discussed by the CEP and ATCM (i.e. equivalent to the BBNJ scientific committee and the COP). Only these Category III projects and the CEE produced in this context require a public consultation procedure.

Finally, paragraphs 3 and 4 of this Article concerning the designation of a third party to conduct an environmental impact assessment, especially if drawn from the pool of experts provided for under paragraph 4, is supported. The creation of such a pool of experts would be a great help, especially for Parties with capacity constraints and mirrors a similar 'group of experts' to be established in the context of the marine geoengineering decisions taken by the London Convention and Protocol on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter under the IMO.

Article 34

It is very important for the public notification and consultation procedures to reflect the outcome of the EIA process, i.e. it should be clear whether and to what extent the assessed activity has an environmental impact.

Activities with less than a minor or transitory impact on the environment should not require any public notification or consultation procedures.

Activities with a minor or transitory impact on the environment should likewise not require any public notification or consultation procedures. However, the outcome of the EIA process should be communicated to the BBNJ Secretariat/clearing-house mechanism for storage in a database accessible to all Parties.

Only activities with more than a minor or transitory impact on the environment should require public notification and consultation procedures.

[3] Accessible under: < https://leap.unep.org/sites/default/files/treaty/TRE-147839.pdf>.

Both options under Art 34 currently provide that Parties are to establish procedures for public notification and consultation. It would be much better if such procedures were to be established within the framework of the BBNJ Agreement.

Art. 35

The requirements of this Article with respect to environmental impact assessment reports should not apply to activities with less than a minor or transitory impact on the environment for which there is no existing requirement for an EIA to be carried out. For such activities, simply notifying the BBNJ Secretariat/clearing-house mechanism of the activity itself should be sufficient.

The environmental impact assessment reports for all other activities should be submitted to the BBNJ Secretariat/clearing-house mechanism and made accessible to all Parties.

Art. 38

Option A of paragraph 1 would be in line with the comments provided above and is the preferred option with respect to activities likely to have equal to or less than a minor or transitory effect on the marine environment.

However, the COP should play a role in the decision-making process with respect to activities likely to have more than a minor or transitory effect on the marine environment. It is one of the few weaknesses of the EIA system under the Antarctic Treaty that the final decision even with respect to Category III activities (see comment on Art. 30 above) still remains with the Party carrying out the EIA. There is no requirement that the Party has to take into account the comments and suggestions made by other Parties in the EIA process (even though many Parties do their best to address and include the comments of other Parties in their final decision).

Art. 39, Art. 40 and Art. 41

It is rather unclear whether and how the continuous monitoring or surveillance of the impacts/effects of an approved activity required in Art. 39 can be achieved, and whether it is feasible (or indeed necessary) for some of the activities in the first place. Although no longer mentioned specifically, the monitoring/surveillance requirement still poses the risk of post-activity monitoring, which for most scientific research activities in ABNJ is not feasible.

It would be good to have continuous monitoring or surveillance requirements for those activities which have more than a minor or transitory impact on the environment, or which may cause substantial pollution of or significant and harmful changes to the marine environment.

Such continuous monitoring or surveillance requirements might also be required for activities which under normal circumstances would not cause significant impacts or effects on the marine

environment but where there is a risk that these could occur (i.e. during the course of the activity, it switches from a Cat. II to a Cat. III activity).

Art. 41bis

It is to be welcomed that the BBNJ agreement itself stipulates that different guidance is to be developed by the Scientific and Technical Body. The guidance to be developed under paragraph 2 (a) would be particularly important, as it is in line with the comments above on Art. 24.

There is a need to insert a new paragraph at the end of this Article along the lines of:

2. (d) any other guidance requested by the Conference of Parties.

This would ensure that the work of the Scientific and Technical Body is not limited to the issues listed in this Article but can also address any future needs for EIA guidance.

Art. 49

We welcome the creation of the Scientific and Technical Body and would like to emphasise the need for the appointment of experts with suitable scientific qualifications as expressed in paragraph 2. Depending on the tasks assigned to the Body, care must be taken to ensure that it is sufficiently legitimated. The role of database representatives as advisors should also be mentioned.

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