

Statement



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

Third Statement of the Permanent Senate Commission on Fundamental Issues of Biological Diversity (SKBV) of the DFG on the further revised draft text of the Agreement from 26th August 2022

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January 2023

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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 different versions of the revised draft text (document A/CONF.232/2020/3, dated 18th November 2019¹ as well as the document dated 30th May 2022²).

The Permanent Senate Commission on Fundamental Issues of Biological Diversity welcomes the significant progress achieved in the first part of the 5th session of the Intergovernmental Conference (IGC) (15 – 26 August 2022) in negotiating an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). We highly appreciate the fact that many open questions were resolved, and we are particularly pleased to see that the further revised draft text of this agreement developed in August 2022 addresses many of the concerns and comments made in our last statement.

The Senate Commission continues to support the negotiation of the new agreement, which can hopefully be finalised at the resumed 5th ICG session to be held from 20 February – 3 March 2023 in New York. Our BBNJ experts have analysed the further refreshed draft version of the agreement (dated 26 August 2022) and would like to draw your attention to the following points:

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.dfg.de/download/pdf/dfg_im_profil/gremien/senat/biologische_vielfalt/220714_stellungnahme_bbnj_en.pdf.

1 General issues

1.1 The need for definitions of principles and terms used in the agreement

Although the current draft agreement text is a considerable improvement on the previous version of May 2022, the provisional text of the treaty still contains numerous references to principles that lack a clear legal framework and to terms that are not clearly defined. For example, Art. 5 includes a list of general principles and approaches in guiding Parties to achieve the objective of the agreement. However, none of these principles and approaches are defined, which means they are open to interpretation. We also note that the term "*The application of precaution*" is still in square brackets. We understand that the wording of this term was the subject of intense debate at the first 5th ICG session, and we also consider it to be important in the context of Art. 5. However, experience in other international contexts has shown that Parties have differing interpretations of "precaution" and "precautionary measures/actions". For this reason, we suggest using terms that are as specific as possible. The term "*precautionary principle*" carries greater legal weight than the rather weak term "*precautionary approach*", and we encourage the use of formulations in the Agreement which are as specific as possible.

Other examples of indefinite legal terms are "*resilience*" – used in Art. 5 (g), Art. 14 (c) and in Annex I (r) – and "*best available science and scientific information*". The latter is used in Art. 5 (h), Art. 17 (3), Art. 20 ante (b), Art. 21 (5) and in Art. 30 (a) (iv), (b), (c). Similar concerns apply to the notion of the "*best available information about a region*" in Art. 41ter (2). Experience in other international frameworks such as the Antarctic Treaty System has shown that without a clear and agreed definition of the term "*best available science and scientific information*", certain Parties may use this term to block progress on essential work with respect to the establishment of area-based management tools, including marine protected areas, and environmental impact assessments. This has had a significant impact on the work of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) as part of the Antarctic Treaty.

It is very important for the new agreement to provide as much legal certainty and clarity as possible in order to achieve a working mechanism. We acknowledge that this will be difficult and potentially very time-consuming to achieve in the second session of the 5th ICG. As a result, many of the above-mentioned principles and terms will remain without a clear definition (to some extent deliberately in order to aid consensus). It is therefore crucial that at least the role of the Conference of Parties and that of the Scientific and Technical Body are clearly outlined. For this reason, we welcome Art. 48 and 49.

In addition, if the European Union is considering issuing a declaration or statement in accordance with Art. 63bis, it might be worthwhile including some text setting out the EU interpretation and understanding of certain principles and terms (especially those mentioned in Art. 5).

1.2 The need to address and (as far as possible) reduce or simplify the notification and reporting requirements for Parties

Another general concern for science are the numerous new notification and reporting requirements set out in the draft agreement, for example in:

- Part II (Marine Genetic Resources) – Art. 10, Art. 13 (2) and (3)
- Part III (Area-based Management Tools) – Art. 21 (1)
- Part IV (Environmental Impact Assessment) – Art. 18 (4), Art. 22 (3), Art. 23 (4), (5), (6) and (7), Art. 24 (b) 1bis, Art. 34, Art. 35, Art. 38 (b), Art. 40, Art. 41 (2) (a) and (6) (a)
- Part V (Capacity Building) – Art. 47 (4)
- Part VIII (Implementation and Compliance) -Art. 53 bis

Proper implementation of these notifications and reporting requirements, especially those in Art. 10 (6) regarding the utilisation of MGR and the various EIA information obligations in Part IV, will be very onerous and time-/resource-consuming for Parties. This entails the risk that Parties, in particular those with less administrative capacity, will not be able to fulfil all notification and reporting requirements in a timely manner and/or (at best) provide only partial information. This will seriously impede the usefulness of any clearing house mechanisms and databases set up to make this information available.

There might be limited scope and time during the second part of the 5th ICG negotiations to address the notification and reporting requirements. For this reason, we suggest the BBNJ Secretariat, the Scientific and Technical Body and the Conference of Parties look into this issue at an early stage with a view to reducing the burden on Parties by simplifying the notification and reporting requirements and combining them into one coherent annual report format covering all parts of the agreement, including guidance on how this annual reporting format should be completed by the Parties.

2 Specific issues

2.1 Article 1 (2) – DSI according to CBD

We welcome the fact that the COP 15 of the Convention on Biological Diversity succeeded in reaching a decision on digital sequence information (CBD/COP/DEC/15/9). Although unresolved questions remain concerning *inter alia* the term itself, the scope of the Convention and its compatibility with existing national legislation, the Parties to the Convention decided in principle that a multilateral and decoupled mechanism is to be established for benefit-sharing from the use of digital sequence information on genetic resources, including a global fund and open access to data. It is necessary to adopt a common approach to open access to DSI across the individual treaties under international law in order not to significantly restrict basic research that is reliant on free access to DSI. Benefit-sharing should also be designed to be effective and efficient. The existence of different reporting concepts would result in high transaction costs, with the different formats blocking each other's effectiveness. For this reason it is important to regulate access to and benefit-sharing for DSI, taking into account the corresponding development under the CBD.

2.2 Article 1 (17), 9 (5), 10 (6) – Definition of utilisation

The definition of the term "Utilisation of marine genetic resources" in Art. 1 (17) includes scientific studies undertaken as basic, academic research (without any commercial interests). Given the inclusion of basic research in this definition it will be difficult if not impossible to comply with the subsequent reporting and information requirements set out in Art. 10 (6) a-d. Genetic and 'genomic' analyses have become a standard and routine way of studying biological material collected in the marine environment and are carried out on thousands of samples, yielding billions of sequences each year in Germany alone. It is unrealistic to assume that information on each of these samples and analyses can be reported as stipulated in Art. 10.

2.3 Article 13, 17-19 – Scientific and Technical Body

The Scientific and Technical Body as envisioned in the current draft has far reaching responsibilities which even go beyond the articles mentioned here, also encompassing the supervision of area-based management (Article 21) and environmental impact assessment (Article 23). It is therefore of utmost importance that this body is established with the necessary expertise and breadth in terms of disciplines and regions. It must be capable of reflecting the scientific discourse on MGR, area-based management and environmental impact assessment, and it should be able to act without direct political influence being exerted on the body itself.

2.4 Articles 22-24, 30, 34 and 38 – Environmental Impact Assessments

Taking into account that the texts of all the above-mentioned Articles under Part IV still include alternative options, it is very difficult to assess the potential impact these EIA procedures and requirements will have on marine scientific research and how much additional workload this will create for institutions and individual scientists.

The overwhelming majority of marine scientific research activities in areas beyond national jurisdiction have less than a minor or transitory effect on the marine environment and do not cause substantial pollution of, or significant and harmful changes to, the marine environment. It is therefore important to ensure that such scientific research activities fall below the thresholds for conducting EIAs set out in Art. 24, i.e. that they will be exempt from EIA requirements. It will render marine science impossible, if every water, sediment or plankton sample taken in areas beyond national jurisdiction requires an EIA and the associated reporting, monitoring, consultation and public notification procedures.

While there might be limited scope and time to address this in the upcoming second part of the 5th ICG negotiations, it will be very important to ensure these considerations are brought forward and taken into account in the further work of the Scientific and Technical Body on standards and guidelines related to EIAs as set out in Art. 41bis.



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