CROSS-CUTTING ISSUES

Suggested responses to questions regarding three cross-cutting issues based on the document entitled, "Chair's indicative suggestions of clusters of issues and questions to assist further discussions in the informal working groups at the second session of the Preparatory Committee"

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Introduction

The International Union for Conservation of Nature (IUCN) is submitting this paper to the Chair of the Preparatory Committee, H.E. Mr. Eden Charles of Trinidad and Tobago, in response to a letter dated 18 December 2015, inviting submissions of views on the elements of a draft text of an international legally binding instrument (Agreement) under the United Nations Convention on the Law of the Sea (UNCLOS) for the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (ABNJ).

It is IUCN's hope that the information contained herein might be useful not only for the on-going United Nations (UN) Preparatory Committee (PrepCom) meetings concerning the marine environment and marine biodiversity in ABNJ but for future PrepCom meetings as well.

This submission[1] provides suggested responses to three cross-cutting issues: **i) Institutional Arrangements, ii) Responsibility and liability and iii) Final clauses**, based on the document entitled, "Chair's indicative suggestions of clusters of issues and questions to assist further discussions in the informal working groups at the second session of the Preparatory Committee."[2]

These responses are based on briefs prepared for IUCN by Cymie R. Payne, Associate Professor, Rutgers University and member of the IUCN World Commission on Environmental Law, cp@cymiepayne.org, with input from other members of the IUCN delegation.

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Additional online resources include:

- IUCN Matrix of Suggestions (interactive version): www.marinebiodiversitymatrix.org; or alternatively at www.bbnjmatrix.org.
- Nippon Foundation Nereus Program Policy Briefs links: http://www.un.org/depts/los/biodiversity/prepcom_files/Nippon_Foundation_Nereus_Policy_briefs_links.pdf
- Considerations Regarding Deep-Sea Marine Scientific Research in Areas Beyond National Jurisdiction: http://www.un.org/depts/los/biodiversity/prepcom_files/DOSI.pdf
- Sargasso Sea Commission, Lessons from the Sargasso Sea: http://www.un.org/depts/los/biodiversity/prepcom_files/Sargasso_Sea_Commission_Lessons_Learned.pdf
- Bowling, Pierson and Ratté (2016), The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas: http://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf
- Measures such as Area-Based Management Tools, Including Marine Protected Areas: http://www.un.org/depts/los/biodiversity/prepcom_files/Prep_Com_webpage_views_submitted_by_delegations.pdf

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[1] IUCN's first submission to the Chair is available at: http://www.un.org/depts/los/biodiversity/prepcom_files/IUCN.pdf

[2] http://www.un.org/depts/los/biodiversity/prepcom_files/IWGs_Indictive_Issues_and_Questions.pdf

Cross-Cutting Issues: Institutional Arrangements

This section focuses on the question of **the role(s)/function(s) of an institutional arrangement(s) global mechanism under an international agreement.** Such question was posed as one of the cross-cutting issues with respect to institutional arrangements, as set forth in the Chair's list of indicative issues and questions poses the following for consideration during PrepCom2:

1.1 Roles and functions

The UN General Assembly has recognized both that "problems of ocean space are closely interrelated and need to be considered as a whole through an integrated, interdisciplinary and intersectoral approach"[3] and that the new international agreement "should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies."[4] To achieve both goals, some new mechanism may be useful to provide coordination between the functions that already exist and with those functions that do not exist.

While recognizing the exclusive jurisdiction of the flag states over certain functions, save in exceptional cases expressly provided for in international treaties or under UNCLOS, consistency, coordination, international legitimacy, and, most importantly, the strength of numbers has historically been better achieved through a multilateral organization that includes national representation and adequate administrative and expert support.

An institutional framework such as an annual conference of parties could lower the cost of operation by enabling States to address issues in a purposive, rational manner, rather than through an *ad hoc* patchwork and often crisis-driven approach. It could further promote reciprocal implementation by allowing States to delineate precisely what each party is expected to do, provide clarity on applicable norms and encourage all countries to cooperate so efforts by one country are not undermined by another.[5] Together, such coordination and cooperation could serve to build trust, improve knowledge, reduce misperceptions, and increase the legitimacy of existing institutions and agreements.

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[3] UN General Assembly resolution A/RES/66/231 (2011) preamble.

[4] UN General Assembly resolution 69/292 (2015) para. 3.

[5] See: D., *The Art and Craft of International Environmental Law*, Harvard University Press, Cambridge, MA, 2010), 136-153.

1.2 Tasks

An institutional framework for BBNJ could carry out diverse functions, including administrative; financial; technical; scientific; and diplomatic.[6] Some of these tasks could be handled by existing institutions but may benefit from coordination at the global level. For example:

Administrative functions

- Administer and coordinate capacity building and technology transfer activities.
- Administer any benefit-sharing, capacity-building, and liability funds.
- Administer non-monetary benefit-sharing activities related to marine genetic resources.
- Enhance cooperation and coordination amongst existing institutions, which may include competent international organizations such as International Seabed Authority, secretariats for CMS, CITES and CBD, IMO, IOC/UNESCO, Antarctic Treaty System, regional fisheries management organizations (RFMOs), regional seas organizations, donor institutions such as the Global Environment Facility as well as commercial entities such as submarine cable companies.
- Support a funding mechanism for research and monitoring, data collection and storage to provide a common source of information for management of resources in ABNJ.
- Outreach and provision of information to stakeholders and the general public.

Global representation

- Provide a global perspective on priorities and actions needed to ensure conservation and sustainable use of marine biodiversity in ABNJ;
- Provide opportunities for representation of the interests of all humankind, including present and future generations.

Environmental impact assessments (EIAs) and strategic environmental assessments (SEAs)

- Conduct, or oversee compliance with requirements/guidelines for EIAs and SEAs, and where no sectoral EIA process exists, review compliance with mitigation conditions and ongoing monitoring of impacts. Such tasks could involve scientific, administrative, communication, and decision-making functions.[7]
- Identify and address cumulative and synergistic impacts to ABNJ involving multiple sectors.
- Advise on and ensure the consideration of adverse impacts, such as climate change related impacts, including warming, ocean acidification and deoxygenation in sectoral management and ABMTs.

[6] Robin M. Warner, Conserving marine biodiversity in areas beyond national jurisdiction: Co-evolution and interaction with the law of the sea, Frontiers in Marine Science (20 May 2014) 9-10.

[7] Protocol on Environmental Protection to the Antarctic Treaty, signed in Madrid on October 4, 1991, entered into force in 1998, Articles 11, 12(d) (Committee for Environmental Protection).

Area-based management tools (ABMTs) including marine protected areas (MPAs)

- Define, review and update criteria to identify priority areas for area-based management including sectoral ABMTs and MPAs (based on recommendation of scientific body).
- Prepare guidelines for the designation of sectoral ABMTs, MPAs and marine spatial planning (MSP).
- Assess proposals and draft management plans for marine protected areas, ensuring expert review, wide consultation and public participation.
- Review and revise MPAs and keep management plans under periodic review, based on recommendations from a scientific body.
- Oversee the management of designated MPAs where no appropriate regional mechanism exists.
- Other relevant tasks as necessary for MSP in coordination with others.

Monitoring, review and compliance

- Provide a global mechanism for reporting, monitoring, assessment of progress, and a framework for responsibility and accountability.
- Draft and implement regulations where no organization exists to do so. This may apply to novel technologies (e.g., geoengineering not covered by the London Protocol), and species or regions that are not covered (fisheries).
- Develop guidelines and assist in the development of regional frameworks and national regulations to implement monitoring, review and compliance measures.
- Provide authoritative decision-making.
- Support cooperative information exchange, monitoring and surveillance to inform enforcement processes.
- Provide or assist with enforcement. Such function may require development of procedures to allow, e.g., a state with enforcement capacity to act against the nationals of another cooperating state or to act against stateless actors.[8]

Other Matters

- Provide or assist with remediation of environmental damage or pursuit of compensation.
- Provide intellectual property management if necessary for marine genetic resources that may require special arrangements.[9]
- An institution or institutions created by the international agreement could be granted standing to use international courts and tribunals, including arbitral tribunals, as needed and appropriate, eg to pursue ITLOS advisory opinions to interpret legal questions.[10]

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[8] *See, e.g.,* Eve de Coning & Emma Witbooi, "Towards a new 'fisheries crime' paradigm: South Africa as an illustrative example" *Marine Policy* 60 (2015) 208-215.

[9] See Gaps Analysis text at footnote 92.

[10] UNCLOS, Annex VI-Statute of the International Tribunal for the Law of the Sea, Article 21 and Rules, Article 138; *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, para. 60.

Responsibility & Liability

This section responds to the question of "***How might an international instrument address responsibility and liability***" in the Chair's Indicative suggestions of clusters of issues and questions to assist further discussion at PrepCom2.

2.1 Responsibility

The role of responsibility and liability is to ensure the performance of obligations assumed in this agreement and to make affected States and the international community whole when there is a breach of obligations.

Conduct (or failure to act) that is inconsistent with the obligations that a state assumes through its international agreements involves the state's responsibility, if the conduct is attributable to the state.[11] Although not every act or omission of a state's nationals is attributable to the state,[12] the International Tribunal for the Law of the Sea (ITLOS, Law of the Sea Tribunal) explained that a state *is* liable if it has not taken all necessary and appropriate measures to meet its "due diligence" obligations.[13]

IUCN suggests that, in addition to specific responsibility and liability provisions that might be included in particular sections,[14] States may wish to consider the following general provisions:

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. Any State Party to this agreement and any competent international organization is entitled, on behalf of itself or of the international community, to invoke the responsibility of another State that has breached its obligations under this agreement.
3. Redress of any environmental damage shall prioritize recovery of ecological integrity as determined by use of the best available science.

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[11] ILC, Draft articles on the effects of armed conflicts on treaties, with commentaries, Yearbook of the International Law Commission, 2011, vol. II, Part Two, Articles 1, 2, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf. *Corfu Channel case (United Kingdom v. Albania)* Merits, 1949, ICJ Rep. 1949 4, 22–23.

[12] ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion* (2011), para. 112, ITLOS, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf. *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion* (2015), para. 146, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf.

[13] ITLOS, *Sub-Regional Fisheries Commission Advisory Opinion* (2015) paras 148, 219(4).

[14] IUCN, Matrix of Suggestions (16 December 2015).

4. Recognizing that the marine environment is an essential Earth system, all environmental damage, including that which is not economically quantifiable, shall be subject to reparations in consideration of any ecosystem services and integral functions that have been lost.

Paragraph 1 above restates the first paragraph of Article 235, UNCLOS, Part XII (Protection and Preservation of the Marine Environment), Section IX. It is a general rule of international law that has been discussed and affirmed in several decisions of international tribunals, including both of the Law of the Sea Tribunal's advisory opinions.[15]

The proposed agreement will contain different kinds of obligations, whose breach or omission to perform could entail different consequences. UNCLOS provides for a consistent approach to responsibility and liability that is adapted to the different circumstances of States and International Organizations and different aspects of the Convention (*see* UNCLOS, Article 139 regarding the Area; Article 235 regarding Part XII – Protection of the Marine Environment; Article 263 regarding Part XIII – Marine Scientific Research; and Article 304 regarding Part XVI, General Provisions). Terms stating responsibility and liability under the proposed agreement should be consistent with these provisions in UNCLOS. It may be desirable to follow this approach found in UNCLOS to provide more detailed responsibility and liability provisions for specific contexts, or a simple statement such as the proposed text may suffice.

An alternative approach is taken in the Protocol on Environmental Protection to the Antarctic Treaty, Article 16, which did not provide for liability but committed the Parties to elaborating liability rules and regulations in the future, eventually resulting in Annex VI – Liability Arising from Environmental Emergencies. However, the parties to other treaties with similar provisions have sometimes not completed the liability and reparations rules, to the detriment of the legal regime.

Paragraph 2 states explicitly the customary international law rule that parties to the agreement can implement state responsibility and liability; authorized organizations are included here in recognition of the likelihood that the international character of ABNJ might result in no State assuming the interests of the international community to invoke the responsibility of another State. The general rule is stated and explained in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 33, 42 and 48.[16]

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[15] ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion* (2011) and ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion* (2015) para. 144. *See also*, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 3 (Hereinafter Fish Stocks Agreement or FSA), Article 35, Responsibility and Liability, stating "States Parties are liable in accordance with international law for damage or loss attributable to them in regard to this Agreement."

[16] *See also*, *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)* [1970] I.C.J. Rep. 3 at para. 33; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Rep. 1974, 457, paras 51-53; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 226, 258, para. 83. All are available at: www.icj-cij.org. See also, Greenpeace, Governance Principles Relevant to Marine Biodiversity in Areas Beyond National Jurisdiction, Submission to the Chair (Feb. 2016) (discussion of public trust) pp. 5-6, 11-12.

Coastal states and the international community—which are those most likely to suffer harm—are thus assured that they can uphold their rights and enforce obligations under the agreement.[17]

Paragraph 3 focuses redress on the environment itself. As the purpose of the agreement is to ensure the conservation and sustainable use of marine biological diversity in ABNJ, the purpose and intent of the agreement is best served by restoration of the environment when prevention of harm has failed, and therefore environmental recovery should be the priority. Financial compensation and satisfaction are common forms of redress in inter-state reparations that may be appropriate responses to certain types of damage; however, they do not provide a complete remedy in the case of harm to essential Earth systems.[18] (As it is well-known that ecological restoration after environmental damage is exceedingly difficult to achieve, it should not be seen as a default choice over the conservation of intact ecosystems, particularly given the high level of scientific uncertainty about ecosystems in ABNJ.)

Paragraph 4 states explicitly that environmental damage includes "pure" environmental damage, also called "non-use values" or "non-market values".[19] The United Nations Compensation Commission, established by the Security Council, stated that international law recognizes reparations for this kind of environmental damage and made substantial awards of compensation intended to be used for restoration of pure environmental damage.[20]

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2.2 Liability

As a general matter, a State Party that incurs responsibility for a breach or omission of an obligation is required to cease the activity, to offer guarantees of non-repetition if appropriate, and is liable for reparations.[21] Reparations include satisfaction, restitution and compensation. States can, of course, agree to the specific consequences that will apply to a particular part of the Agreement, subject to other conventional and customary international law.[22]

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2.3 Reparations

[17] *See*, UN General Assembly Resolution 66/231 (2011) paras 113-114, 136 (advising that liability regime be developed).

[18] ILC, Draft Articles on State Responsibility, Article 34. *See*, UNCC, Decision 258, S/AC.26/Dec.258 (2005), available at: http://www.uncc.ch/sites/default/files/attachments/Dec%20258%20with%20corrected%20annex.pdf.

[19] ILC, Draft Articles on State Responsibility, Commentary, p. 101, paras 14-15.

[20] UNCC, *Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims*, U.N. Doc. S/AC.26/2005/10 (June 30, 2005) paras. 52-58, available at: www.uncc.ch.

[21] ILC, Draft Articles on State Responsibility, Articles 30, 31, 34.

[22] ILC, Draft Articles on State Responsibility, Article 55.

In national legal systems that provide a remedy for natural resource and environmental damage, the government manages the financial accounting and oversees the work to get the best environmental outcome in the most cost-effective manner. A government entity acting in this capacity is called a "trustee" and acts on behalf of the public interest.[23] In ABNJ, the institutional mechanism might take this role on behalf of humankind.

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2.4 Fund

In the special circumstances of ABNJ, that is, its vast extent and the relatively small number of people present, it is expected that sometimes the responsible parties that caused damage will be impossible to identify or will for other reasons be unable to fully compensate for the damage. In such cases, a fund might be used to provide emergency response, mitigate, remediate, repair, restore, or off-set the damage. This approach has been used in both international and domestic legal regimes, and was suggested by the ITLOS Seabed Disputes Chamber in the context of damage from seabed mining in the Area,

> Taking into account that, as shown above in paragraph 203, situations may arise where a contractor does not meet its liability in full while the sponsoring State is not liable under article 139, paragraph 2, of the Convention, the Authority may wish to consider the establishment of a trust fund to compensate for the damage not covered. The Chamber draws attention to article 235, paragraph 3, of the Convention which refers to such possibility.[24]

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[23] Peter H. Sand, "Environmental Principles Applied" in Cymie R. Payne and Peter H. Sand (eds), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford University Press 2011) 174-189; David D. Caron, "The Place of the Environment in International Tribunals" in Jay E. Austin and Carl E. Bruch (eds) in *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives* (Cambridge: Cambridge University Press 2000) 250, 257; Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (UN University Press, Tokyo 1989); Catherine Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester University Press, Manchester 1999); Mary Turnipseed, Raphael Sagarin, Peter Barnes, Michael C. Blumm, Patrick Parenteau and Peter H. Sand, Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law, 52:5 Environment 6 (2010).

[24] ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion* (2011), para. 205.

Final Clauses

Below we seek to address the Chair's indicative suggestions of clusters of issues and questions to assist further discussions in the Informal working groups at the second session of the Preparatory Committee with respect to final clauses. The questions addressed herein are:

Section A: What final clauses might an international instrument include?

Section B: What examples might be relevant for an international instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction?

3.1 Section A: What final clauses might an international instrument include?

This section provides a list of the types of final clauses that may be incorporated in an international instrument on the conservation and sustainable use of marine biodiversity in BBNJ. The final clauses listed below are typically used in international instruments.

- Dispute settlement
- Signature
- Ratification, Acceptance, Approval and Accession
- Entry into Force
- Reservations, declarations
- Relation to Other Agreements
- Amendment
- Withdrawal (Denunciation)
- Participation by International Organizations
- Depositary
- Authentic texts

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3.2 Section B: What examples might be relevant for an international instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction?

This section provides examples of specific final provisions geared to language that might be relevant for an international instrument on the conservation and sustainable use of marine biodiversity in BBNJ, with comments on the relevant examples. It refers to five relevant conventions:

- UNCLOS
- Fish Stocks Agreement
- MARPOL 1978 Protocol
- Minamata Mercury Convention
- Vienna Convention on the Law of Treaties

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3.2.1 Article on Dispute Settlement and Advisory Opinion

Provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.

[Additional text as needed, detailing various means of dispute settlement and when the dispute settlement provisions of other treaties, such as regional agreements, apply]

The [Conference of the Parties or similar body] may authorize [secretariat official] to submit a request for an advisory opinion on a legal question to the International Tribunal for the Law of the Sea.

Comment: The Fish Stocks Agreement dispute settlement provisions, Article 30, could provide a model that would be compatible for States that are parties to UNCLOS and those that are not, with regard to contentious matters.
The issue of institutional legal standing may require further discussion. Some international organizations have legal standing to use international courts and tribunals. For example, the International Seabed Authority has standing before the International Tribunal for the Law of the Sea (ITLOS) Seabed Disputes Chamber for matters related to the Area, including non-compliance. An institution or institutions created by the international instrument could be granted standing to use international courts and tribunals, including arbitral tribunals, as needed and appropriate. In particular, the international instrument could – and should at a minimum – provide authority for its institutions to seek advisory opinions from ITLOS to interpret legal questions.

Sources:
UNCLOS, Part XV; Article 159, 162(2)(u), 187.
FSA, Article 27-32
Minamata Convention, Article 25
Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission, Article 33

UNCLOS, Annex VI-Statute of the International Tribunal for the Law of the Sea, Article 21 and Rules, Article 138; Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), para. 60
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3.2.2 Article on Signature, Ratification, Acceptance, Approval and Accession

This Agreement shall be open for signature by all States and the other entities referred to in article X, and shall remain open for signature at [depositary] for [time period], and shall thereafter remain open at [depositary] until [date]. States may become Parties to the present Agreement by:

(a) Signature without reservation as to ratification, acceptance or approval; or

(b) Signature, subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(c) Accession.

2. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the [official of depositary].

Comment: This language can vary from the briefer formula in FSA, Article 37 to the longer MARPOL 73/78, Article IV. A separate article may be used for ratification, acceptance or approval, see Minamata Convention, Article 30. That article also encourages parties to indicate measures that they plan to take to implement the convention at the same time. The competences of regional economic integration organizations may be referred to in the same article.

Sources:
UNCLOS, Articles 305-307
FSA, Articles 37-39
MARPOL 73/78, Article IV
Minamata Convention on Mercury, Articles 29-30
Vienna Convention on the Law of Treaties, Articles 11-12
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3.2.3 Article on Entry into Force

This Agreement shall enter into force XX days after the date of deposit of the [required number]th instrument of ratification, acceptance, approval or accession.

For each State or entity which ratifies, accepts or approves the Agreement or accedes thereto after the deposit of the [required number]th instrument of ratification or accession, this Agreement shall enter into force on the [number]th day following the deposit of its instrument of ratification or accession.

For the purposes of paragraphs 1 and 2, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of that organization

Comment: Instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon their deposit with the depositary. The proposed language brings the treaty into force within a certain period on a certain number of ratifications, acceptances, approvals or accessions.
Key considerations for an entry into force article are:

- *whether certain states are needed to make the agreement work; or a certain number of states;*
- *how much time states need to prepare before the treaty enters into force, for example, if the States need to pass domestic legislation;*
- *what resources and activities are needed for any institutions created by the agreement to be established.*

Sources:
UNCLOS, Article 308
FSA, Article 40
MARPOL V
Minamata, Article 31
Vienna Convention on the Law of Treaties, Articles 11-17
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3.2.4 Article on Reservations, declarations

Option 1:

No reservations or exceptions may be made to this Agreement. This does not preclude a State or entity, when signing, ratifying or acceding to this Agreement, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Agreement, provided that such declarations or

statements do not purport to exclude or to modify the legal effect of the provisions of this Agreement in their application to that State or entity.

Note: The second sentence allows declarations including those of regional economic cooperation organizations, such as the European Union.

Source: FSA, Article 42

Option 2:

Reservations and declarations that are compatible with its objective and purpose may be made on ratification, acceptance, approval or accession to the Agreement.

Option 3:

Reservations and declarations with respect to [list specific sections] must be accepted by all parties to the Agreement.

Source: Vienna Convention on the Law of Treaties, Article 14, 16, 17

Comment: The Agreement relies on cooperation by all States. One view is that therefore the practice whereby a reservation results in a treaty obligation being inapplicable as between the reserving State and any other State undermines the objective and purpose of the treaty. An alternative view is that States may have special circumstances, such as disputed maritime boundaries or cooperation through other agreements that would make it reasonable to allow declarations and reservations of this nature. Multilateral environmental agreements generally do not allow reservations. Declarations are generally allowed for various purposes that do not exclude or modify the provisions of the agreement.

Sources:
UNCLOS, Articles 309-310
FSA, Articles 42-43
Minamata Convention, Article 32
Vienna Convention on the Law of Treaties, Articles 17, 19
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3.2.5 Article on Relation to Other Agreements

Language to be proposed in a future submission.

Comment: A statement could be made regarding consistency with other treaties; for example, specifying that UNCLOS applies if there is any inconsistency.

Sources:
UNCLOS, Article 311
FSA, Article 44
Vienna Convention on the Law of Treaties, Article 26
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3.2.6 Article on Amendment

Language to be proposed in a future submission.

Comment: This will depend in part on what subject matter is included in the agreement and in part on the institutional structure. For example, the Antarctic Treaty Environment Protocol does not allow amendment except by consensus of all Consultative Parties for a limited period of fifty years from its entry into force.

Sources:
UNCLOS, Articles 312-316
FSA, Article 45
Minamata, Article 26
Protocol on Environmental Protection to the Antarctic Treaty, signed in Madrid on October 4, 1991, entered into force in 1998.
Vienna Convention on the Law of Treaties, Article 36
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3.2.7 Article on Withdrawal (Denunciation)

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, denounce this Agreement and may indicate its reasons. Failure to indicate reasons shall not affect the validity of the denunciation. The denunciation shall take effect [time period] after the date of receipt of the notification, unless the notification specifies a later date.

2. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Agreement to which it would be subject under international law independently of this Agreement.

Comment: This language is fairly standard, with some variation as to the time period for taking effect, from one year (UNCLOS) to three years (Minamata). The Minamata Convention refers to this as withdrawal, rather than denunciation.

Sources:
UNCLOS, Article 317
FSA, Article 46
Minamata Convention, Article 33
Vienna Convention on the Law of Treaties, Article 39, 51, 53
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3.2.8 Article on Participation by International Organizations

Language to be proposed in a future submission.

Comment: It may be appropriate to provide for membership in the agreement by international organizations. UNCLOS, Annex IX, provides one model for the terms and conditions that might apply. The proposed article on declarations would allow for a clear statement of the relative competences of an international organization Party and its member States Parties.
Source:
UNCLOS, Annex IX
FSA, Article 47
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3.2.8 Article on Depositary

The Secretary-General of the United Nations shall be the depositary of this Agreement and any amendments or revisions thereto.

Comment: This is usually very simple language. UNCLOS and MARPOL 1978 Protocol also list several functions that the depositary shall perform.

Sources:
UNCLOS, Article 319Vienna Convention on the Law of Treaties, Article 319
FSA, Article 49
MARPOL, 1978 Protocol, Article VIII
Minamata Convention, Article 34
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3.2.9 Article on Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of this Agreement are equally authentic.

Comment: Treating versions of the text in the six United National official languages as equally valid are the norm. Sometimes variations in the use of terms in multilingual treaties can give rise to problematic variations in interpretation, as was required in the ITLOS Seabed Disputes Chamber's advisory opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, paragraphs 61-71. Consider whether there are any languages regarding which special care should be taken to ensure that critical terms are correctly translated to achieve consistency of legal and technical meaning. If there are, those terms with preferred translations may be included into the negotiation record. Note the different formulation in MARPOL 1978 Protocol: "The present Protocol is established in a single original in the English, French, Russian and Spanish languages, each text being equally authentic. Official translations in the Arabic, German, Italian and Japanese languages shall be prepared and deposited with the signed original."*

Sources:
UNCLOS, Article 320
FSA, Article 50
MARPOL 1978 Protocol, Article IX
Minamata Convention, Article 35
Vienna Convention on the Law of Treaties, Article 33

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