

**Preparatory Committee on Conservation and Sustainable Use of Marine Biological Diversity
of Areas Beyond National Jurisdiction**

New Zealand Submission

December 2016

Preparatory Committee (Prepcom) participants have been invited by the Prepcom Chair, H. E. Ambassador Eden Charles, to present views on draft elements for inclusion in an Implementing Agreement to assist in informing the Chair's preparation of a non-paper for circulation to delegations in advance of the third session of the Prepcom in 2017.

Introduction

New Zealand considers that a new Implementing Agreement on conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ) under the UN Convention on the Law of the Sea (UNCLOS) will be a significant achievement for the international community. We welcome the constructive dialogue that has taken place in the Prepcom on the elements that would provide the basis for such an Agreement. The views set out in this submission build on earlier views submitted by New Zealand before and during the Prepcom process, informed by the discussions at the first and second sessions of the Prepcom.

New Zealand considers it will be particularly important for participants at the third and fourth sessions of the Prepcom to develop a better understanding about how an Implementing Agreement will function and interact with other existing sectoral or regional bodies and frameworks with mandates relevant to the conservation and sustainable use of marine biodiversity in ABNJ. This is a key cross-cutting issue.

In this respect, New Zealand considers the Agreement should represent a framework which sets out internationally agreed standards and obligations at the global level, a number of which (e.g. those pertaining to area based management tools (ABMTs) and marine protected areas (MPAs)) will require practical implementation by states through relevant regional and sectoral frameworks.

The Implementing Agreement can promote greater global coherence and coordination through a comprehensive set of obligations that would guide actions by states individually, as well as through their participation in relevant regional and sectoral frameworks. Regular reporting on how Parties are meeting their obligations, including for activities undertaken regionally and sectorally in relation to ABNJ, would be submitted back to the Implementing Agreement Conference of Parties to inform further policy decisions and recommendations and promote broader cooperation. In this way, the Implementing Agreement would play a crucial role in promoting greater accountability among the range of different players and actors whose collective actions will be crucial to delivering on the objectives of the new Implementing Agreement.

A General and Cross-Cutting Issues

Objectives

New Zealand supports a concise overall objective for the new Implementing Agreement that is consistent with UNGA Resolution 69/292. We also support drawing on the Article 2 objective of the UN Fish Stocks Agreement (UNFSA) where applicable, in particular the concept of *long term* conservation and sustainable use and its reference to UNCLOS. A possible overall objective could be:

“To ensure the long term conservation and sustainable use of marine biodiversity beyond national jurisdiction through effective implementation of the relevant provisions of the Convention.”

New Zealand also supports supplementary objectives for each of the four main aspects of the Implementing Agreement (i.e. marine genetic resources and the sharing of benefits; area-based management including marine protected areas; environmental impact assessments; and capacity building and transfer of marine technology).

Definitions

Where possible, definitions should be consistent with those of UNCLOS and UNFSA as well as other relevant international instruments such as the Convention on Biological Diversity (CBD), adjusted as necessary to the ABNJ context.

Scope

In terms of the different elements of scope, New Zealand:

- supports the Agreement being open for signature, ratification and accession by all States and other entities on the same basis as provided for in UNFSA (UNFSA Articles 37-39);
- envisages the Agreement applying to the high seas, i.e. the water column beyond national jurisdictions, as well as the Area, i.e. the seabed and subsoil beyond the limits of national jurisdiction; and
- envisages the Agreement covering all existing and new activities and sectors impacting on marine biodiversity beyond national jurisdiction with respect to the elements identified in the “package”, while not undermining existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.

Relationship to UNCLOS

With respect to the relationship of the new Implementing Agreement with UNCLOS, New Zealand supports a provision similar to Article 4 of UNFSA.

Guiding approaches and principles

Many useful guiding approaches and principles that could be applied in giving effect to the new Agreement have been discussed at the first two Prepcom sessions. Some of these relate to governance and process issues, e.g. accountability and transparency, and others relate to the manner in which marine biodiversity should be conserved and sustainably used under the new Agreement, reflecting international best practice, e.g. precautionary approach, ecosystem approach, decisions based on best available scientific information.

In relation to the latter category of principles and approaches, New Zealand supports the inclusion of a specific article in the new Implementing Agreement that sets out general approaches and principles to be applied when giving effect to the Agreement, similar to Article 5 of UNFSA. Some approaches and principles may benefit from further elaboration in an article of their own, similar to Article 6 of UNFSA (Application of the Precautionary Approach). Some approaches and principles could also be set out in the preamble of the Agreement.

Any definitions and/or interpretation of guiding approaches and principles should be consistent with those already agreed under UNCLOS, UNFSA, CBD and other relevant international instruments.

Approaches and principles that are particularly important to New Zealand are:

- Recognition of need for a comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of ABNJ;
- Recognition of existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies (in particular UNCLOS, UNFSA, regional fisheries management organisations and arrangements (RFMO/As), the International Maritime Organisation, the International Seabed Authority, and regional seas conventions);
- Enhanced cooperation and coordination between and among States and organisations to conserve and sustainably use marine biodiversity in ABNJ;
- Application of the precautionary approach;
- Application of an ecosystem approach;
- Decision-making based on the best available scientific information;
- An ability to address cumulative impacts;
- Transparency and stakeholder involvement; and
- Recognition of the role of adjacent coastal states as well as other states.

Relationship to other instruments and frameworks

As agreed in UNGA Resolution 69/292, the new Agreement should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies. New Zealand considers that a new Agreement could significantly improve on the existing international legal framework governing the conservation and sustainable use of biological diversity of areas beyond national jurisdiction by complementing – not replacing – the current sectoral and regional arrangements with additional guidance, requirements and related institutional arrangements.

We see the Agreement (and any subsidiary documents developed under it) providing guidance and recommendations to States, including through existing global, sectoral or regional organisations involved in the conservation and sustainable use of marine biodiversity beyond national jurisdiction in the form of goals, procedures, criteria, standards and guidelines.

We would expect implementation to be the responsibility of States themselves, particularly through regional and sectoral organisations, where these exist, on the basis of clearly set global objectives, timeframes for their implementation and reporting requirements. In this respect the Implementing Agreement could draw inspiration from Part III of UNFSA.

We also envisage the new Agreement promoting further cooperation and coordination between States and regional and sectoral bodies. This will promote coherence and consistency between existing bodies and bring about a greater understanding of/ability to address cumulative impacts. There may also be a need to establish new formal or informal regional cooperation mechanisms to enable more effective cooperation and coordination between existing bodies in the delivery of the objectives of the new Agreement.

The new Agreement should also create an incentive for existing organisations to improve their performance, and where necessary, expand their mandates, through their implementation of the global standards and guidelines reflected in the Implementing Agreement (Article 13 UNFSA refers).

Where there is no body with a mandate for the conservation or sustainable use of marine biodiversity in a particular sector or geographic area of ABNJ, or in cases where there are a number of bodies but no effective coordination mechanism, New Zealand would support the new Agreement encouraging the establishment of a relevant body or effective coordination mechanism within a specific timeframe (Article 8(5) UNFSA refers).

Institutional arrangements

New Zealand supports institutional arrangements and processes that promote accountability and transparency, while being cost-effective. The Agreement is likely to require a decision making body, such as a Conference of Parties, that will most likely need to meet regularly, e.g. annually, to review progress, develop guidance, make recommendations and take decisions.

It is too early to know the extent of secretariat services that will be required to service the Implementing Agreement. Whether a permanent Secretariat is required or whether secretariat services could be provided by an existing international body, such as the UN Secretariat's Division for Ocean Affairs and the Law of the Sea (DOALOS), secretariat services should be provided in a cost effective manner.

Transparency

New Zealand believes that transparency is a fundamental requirement for sound governance. To ensure transparency, the actions, decisions and decision-making processes under the new Implementing Agreement will need to be open to an appropriate level of scrutiny by Parties, civil society and, where appropriate, outside institutions. Specifically, the following are important:

- Participation in meetings should be open to non-Contracting Parties, relevant non-governmental organisations (NGOs) and inter-governmental organisations (IGOs), and other stakeholders, in an observer capacity.
- Clear information principles should be established that allow meeting papers, meeting reports, decisions, annual reports and results of any performance monitoring of the organisation to be made available in a timely manner to Parties, civil society and outside institutions.
- Exchange of information and data should be promoted between States as well as relevant regional, sectoral and international organisations (similar to Article 17 of CBD).

Responsibility and liability

On responsibility and liability, New Zealand supports a provision similar to Article 35 of UNFSA.

Monitoring and review

New Zealand supports the establishment of a mechanism for regular review of the effectiveness and implementation of the Agreement, similar to the review mechanism set out in Article 36 of UNFSA. Reviews should be carried out, based on agreed criteria, within a set period of time after entry into force of the Agreement, for example after five years, and regularly thereafter.

Dispute settlement

Dispute settlement procedures in UNCLOS and UNFSA for compulsory settlement of disputes could be drawn on when developing dispute resolution procedures for the new Implementing Agreement.

The option to seek an advisory opinion from the International Tribunal for the Law of the Sea should also be considered as a useful means for resolving differences in interpretation of the new Agreement.

Final provisions

New Zealand supports final provisions based on those in Articles 37 to 50 UNFSA.

B Marine Genetic Resources including questions on sharing of benefits

A pragmatic, *sui generis* regime for the sharing of benefits from marine genetic resources could support the conservation and sustainable use of marine biodiversity in ABNJ.

The Agreement could facilitate and encourage the equitable sharing of benefits from the collection of MGRs while encouraging and not creating disincentives for marine scientific research, including research into and development of MGRs. In considering the kinds of benefits that might be shared, it would be useful to bear in mind the value of data and knowledge sharing, including existing mechanisms for data sharing, such as data banks, sample collections, and open access gene pools, and the need to create incentives for the development of such mechanisms on a more comprehensive basis. The value of collection and sharing of data and knowledge on the associated marine environment, biodiversity and ecosystems could also be recognised and such practices encouraged.

The definition of MGRs in the new Agreement could be based on relevant definitions that exist in other international agreements.

C Area-Based Management Tools, including Marine Protected Areas: Global Policy Guidance Implemented Regionally

In considering the role of a new instrument in the area of ABMTs, as highlighted earlier, it is important to recognize that there already exist a number of relevant bodies and arrangements with mandates and competencies to manage activities in ABNJ. The Implementing Agreement provides an important opportunity to provide global policy advice that would guide Parties in pursuing cooperation to establish ABMTs. Failure to take these bodies into account in the design of an appropriate ABMT/MPA framework within the Implementing Agreement would cause legal uncertainty and impede wide acceptance and practical, effective implementation of the Implementing Agreement. At the same time, the Implementing Agreement should be a catalyst for more active engagement among these bodies.

The Implementing Agreement should therefore promote greater global coherence by establishing a more specific framework, objectives and relevant guidance aimed at achieving more effective implementation of ABMT and MPA initiatives at the regional and sectoral level. This could include:

- recognising that MPAs represent an important mechanism for States to meet their obligations to protect and preserve the marine environment and, in this regard, requiring States and other entities to cooperate in the identification, designation and implementation of a comprehensive and representative network of marine protected areas, including through relevant regional and sectoral bodies;
- providing an avenue for States to seek guidance on areas identified as needing additional levels of protection and requiring reporting within a set time frame on actions taken to implement this guidance (UNFSA 8(6) also relevant in this context);
- providing standards and policy guidance on the design and process for ABMT/MPA initiatives that would guide Parties in pursuing initiatives through relevant bodies;
- promoting regular and meaningful engagement within and between these bodies, and where appropriate, encouraging the establishment of regional coordinating mechanisms in cases where a number of bodies are active players in a specific ABMT/MPA regional context; and
- mandating regular reporting by states, including through such bodies, in accordance with requirements established under the Implementing Agreement, to the Conference of Parties.

Definitions

In New Zealand's view, a definition of Marine Protected Areas in this Implementing Agreement could distinguish them as a subcategory of ABMTs which have a primary stated objective of achieving long-term conservation of marine biodiversity and ecosystems.

The Implementing Agreement should also recognise that MPAs will have varying levels of protection which would correspond to their specific objectives, ranging from full ecosystem protection to more discrete protection for specified conservation objectives, while also allowing for varying levels of sustainable use where appropriate.

The Implementing Agreement should mandate the design and implementation of ABMTs to be consistent with agreed criteria or standards, and on the basis of the guiding principles and approaches referred to earlier.

Development of Proposals for ABMTs and MPAs in ABNJ

The Implementing Agreement should set out objectives that ABMTs and MPAs developed and implemented at the regional level should meet.

In particular, MPA proposals should include specific objectives that contribute to one or more general objectives or criteria for which it is agreed that MPAs are an appropriate tool. These could draw on existing commitments under UNCLOS and other internationally agreed objectives and criteria for MPAs, including:

- the UNCLOS commitment to “protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”;
- CBD scientific criteria for identifying ecologically and biologically significant marine areas (EBSAs);
- FAO criteria for VMEs as defined in the 2009 FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas;
- IMO criteria for Particularly Sensitive Sea Areas and special areas under MARPOL;
- General objectives described in CCAMLR Conservation Measure 91-04; and
- Primary objectives described in the 2008 IUCN Guidelines for Applying Protected Area Management Categories.

These issues would all need to be addressed in the specific regional context in which an MPA was located.

Relevant information about the progress being made on MPA initiatives as well as the implementation of MPAs at the regional level would be submitted to the Conference of Parties to demonstrate how the objectives of the Implementing Agreement were being implemented.

D Environmental Impact Assessments

The Implementing Agreement provides an important opportunity to improve consistency in the conduct and assessment of environmental impact assessments (EIAs) for activities in ABNJ. Amongst other roles, a new global framework for EIAs in ABNJ should:

- Provide for a central repository of publicly available data and information on EIAs, strategic environmental impact assessments (SEAs), and baseline data on ABNJ;
- Provide guidance on the use of SEAs;
- Provide for coordination of information between countries, regions, sectoral, global and regional organisations, and relevant scientific bodies to facilitate the preparation, decision-making,

monitoring and review of EIAs. This would help with transparency, accountability, effectiveness, and complement, not duplicate, the roles of existing international, regional or sectoral organisations; and

- Provide guidance to Parties on effectively implementing existing UNCLOS obligations relating to EIAs and improve coordination and implementation of EIAs.

Definitions

The new Agreement will need to define the scope and functions of SEAs and EIAs. New Zealand is not convinced at this stage that it is necessary to specifically define a transboundary EIA. Transboundary impacts, whether they cross national jurisdictions, ecosystems, sectors or any other boundary, are important considerations in every EIA.

Scope

Ideally SEAs should be developed at a regional level and prior to activities requiring EIAs commencing. Regional and international organisations would be encouraged to prepare SEAs where they have existing mandates. In addition the new Agreement could encourage States to co-operate and develop regional SEAs in furtherance of their obligations to protect and preserve the marine environment.

The Implementing Agreement will need to articulate when proposed activities in ABNJ trigger the need for an EIA. These could be based on one or more of the following options:

- activities in ABNJ not already covered by existing obligations and agreements;
- specified activities listed in the new Implementing Agreement; and/ or
- all activities reaching and/or exceeding an agreed threshold of effects.

Content and Process for EIA

The Implementing Agreement could provide standard information on what an EIA needs to contain, a generic EIA template and guidance on its use, and guidance on decision-making processes for EIAs in ABNJ. This would enable proposers of an activity to know what the EIA should cover and reviewing agencies what to expect. The template should not be too prescriptive as content may differ between activities and areas.

An EIA should at a minimum identify the full range of environmental effects including cumulative impacts and an activity's indirect or secondary effects. Some activities may have impacts on areas beyond the immediate activity area – for example trenching or mining may cause plumes of sediment which could travel some distance from the site of the original activity. The effects on these “environmental impact areas” should be considered, along with any dependent or associated ecosystems.

States are responsible for meeting their obligations under UNCLOS, and as Parties to an Implementing Agreement, would be responsible for ensuring that EIAs are conducted by them in accordance with agreed criteria and processes.

Consultation will be an important and necessary part of the SEA and EIA processes and who and how consultation should take place with, will need to be decided. This should however, include

consultation with relevant coastal and adjacent States, and interested stakeholders, including people with existing interests in an area.

Monitoring and Review

The Implementing Agreement could provide for monitoring and review mechanisms to be developed and included in SEA and EIA processes.

In this context, New Zealand considers adaptive management is an essential tool to deal with the general lack of information on ecosystems in the ABNJ marine environment. Adaptive management allows the decision maker to decide whether an activity should be discontinued, or continued with or without changes, on the basis of the assessment of the effects. In keeping with the precautionary approach, activities need to be carefully managed and regularly assessed and adjusted in light of the potential environmental impacts.

E Capacity building and the transfer of marine technology

New Zealand supports the need for meaningful capacity-building that is responsive to the needs of developing States, as identified by those States and consistent with the objective of the Implementing Agreement. The Implementing Agreement can play an important role in ensuring the implementation of the Sustainable Development Goals (SDGs), in particular SDG 14.

The Implementing Agreement should enhance the implementation of UNCLOS obligations to promote the development of marine scientific research capacity in developing states and to promote the transfer of marine science and technology. It could facilitate the sharing of knowledge and expertise relating to conservation and sustainable use of marine biological diversity in ABNJ and to MGRs and related technologies.

The new Agreement could play a role in coordination of, and sharing of information about, capacity building and transfer of marine technology activities. This could be in the form of a clearinghouse mechanism for example. Provisions under the new Agreement relating to the transfer of marine technology should take into account as appropriate, the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology.