

Date: August 20th, 2019

Re: Earth Law Center recommendations to the draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

Issue:

The draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction arrives at a pivotal moment as a response to the current environmental condition.

The third session of the Intergovernmental Conference (IGC3) taking place from August 19-30, 2019, will allow national governments to negotiate legal text of a new Agreement under UNCLOS for the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. Additionally, with only two sessions remaining, it will be setting the tone for the next and final session.

Considering the urgency of the matter at hand, this brief consists some of Earth Law Center's key issues and recommendations with respect to the draft text recently put forth by the President of the General Assembly.

An anthropocentric approach has created global environmental issues that have left more than 60% of the Ocean in a state of rapid decline, and more than one-third of marine mammals, sharks and fish are under threat of extinction.

With this new instrument, the international community can take the lead in shifting from the current anthropocentric view to a comprehensive holistic philosophy, thus proliferating the awareness of the importance of the Ocean and its interconnectedness with every other element of life. Furthermore, in this time of environmental turmoil, it would ascertain the validity of efforts some national legislatures have made by giving Nature legal personhood and its rights; starting with Ecuador in 2008, followed by Bolivia, New Zealand, India, and Toledo, Ohio, to name a few.

Hence, it is the legitimate duty of the international community to act in favor of equitable treatment of the Ocean, as to ensure higher quality of life for all that will come.

Response:

Part XII of UNCLOS provides the general obligations, which apply to all maritime zones and it marked the first comprehensive regime for the protection and preservation of the marine environment. Articles 192 and 194 of UNCLOS established the duty for all states to protect and preserve the marine environment and to prevent, reduce and control its pollution.

Simultaneously, coastal states are to take all measures to ensure that activities within their jurisdiction do not cause damage to other states and their environment. This includes implementing measures necessary 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. Additionally, the sovereign right of coastal states to exploit their natural resources is also limited through national environmental policies and their duty under international law to protect and preserve the marine environment. As a result, it is our obligation to respect and balance the interests of the marine environment with our own.

In addition to protecting our rights to the Ocean, we recommend to recognize the rights of the Ocean. The draft text of the treaty as of July 2019 mentions right/s 29 times. All these mentions are specific to human, property (intellectual) and State rights. However, the Ocean also has inherent rights that should be protected. As stated in the draft Preamble, there is a “need [for this treaty] to respect the balance of rights, obligations and interests set forth under the Convention.”

It is critical that we view the Ocean as a legal entity subject of rights. Just as humans have inherent rights for being and existing, so too do the ecosystems and species with whom we have coevolved. Countries worldwide have already designated ecosystems as legal entities, including New Zealand (Whanganui River, Te Urewera National Park, Mt. Taranaki), Colombia (Atrato River and Amazon Rainforest), India (Ganges and Yamuna Rivers, Himalayan ecosystem) and United States (Lake Erie). Additionally, we have also granted legal personhood to other nonhuman entities, including some animals, boats, and corporations. Granting legal personhood to High Seas, the seabed and floor beyond national jurisdictions, as well as subsuming the national protection to international protection, thus ensuring a unified approach, would give way to new stream of thought and action that could dissuade further reckless and overly utilitarian behavior. But for that there needs to be a legal and political unity in place resonating both in national and international waters.

Taking into account the above mentioned as well as existing negotiations regarding the new treaty for Biodiversity on the High Seas, ELC suggests changes to the draft text as follows:

PREAMBLE

“Stressing the need to respect the balance of rights, obligations and interests, *including those of the Ocean itself*, set forth under the Convention,”

RATIONAL: If we do not highlight the importance of the Ocean’s own interests. human interests will continue to outweigh that of the environment, and gridlock, pollution and degradation will continue. The Scientific and Technical Body established under the implementing agreement can be assigned with ensuring the Oceans interests and values are represented in decision making and review, but the focus should be on the Ocean itself as a primary subject of the protection. Anthropocentric approach has led us to this point, and it is crucial to replace it with an approach that will protect that was is most vulnerable as it is done in any other situation in need of urgent humanitarian attention. To illustrate the necessity to mention the subject of the legal text in the preamble, one can just take a look at the preamble of the Convention on the Rights of the Child where its subject, child and its childhood, is mentioned no less than 9 times.

ARTICLE 3, paragraph 2

“This Agreement does not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, ~~for the time being~~, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, ~~so far as is reasonable and practicable~~, with this Agreement.”

RATIONAL: Firstly, allowing this exception creates uncertain ground for effective Ocean protection as there are no measures, except national ones which might vary in degree, interpretation, and applicability, or guarantees that would ascertain what said vessels or aircrafts will not act contrary to the aim of this Agreement, nor is there any guarantee that the non-commercial government services in themselves will not be harmful to the cause of the Agreement. Secondly, even if the article was to stay in the Agreement, there is no viable need to create loopholes by limiting the applicability to one type of vessels or its use, or by limiting

the application of this provision 'as far as is reasonable and practicable'. By omitting these elements from the provision, the possibility for misuse and misinterpretation is being diminished.

ARTICLE 4

"Relationship between this Agreement and the Convention and other ~~[existing]~~ relevant legal instruments and frameworks and relevant global, regional and sectoral bodies"

RATIONAL: By omitting 'existing' there is less possibility of confusion and later misinterpretation of document, as the contrary could imply relationship with legal instruments and framework existing thus far and not in the future as well.

ARTICLE 5

"(a) Apply a holistic and integrated approach that balances both human well-being and ecological well-being;

(b) Take into consideration the Oceans inherent rights and values and our responsibility and our obligation to conserve and protect marine biodiversity

(c) Recognize, value and respect the Ocean as a legal entity subject of rights

...

(d) Endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should ~~[in principle]~~ bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment;"

RATIONAL: In regards to a), the current definition of integrated focuses on the unified control of aspects of production or the incorporation of a group of individuals, whereas holistic means that is concerned with wholes or with complete systems. Considering the current state of Ocean, and its connection to the functioning of all Earth's systems, the anthropocentric integrated approach focusing on useable oceanic elements does not suffice any more. There is a need to take a holistic approach, taking into account not only what can be used in production, but all the causes and consequences derived from it. If the integrated approach was sufficient, the devastating changes mentioned above would not have happened.

In regards to c), it is crucial that the Ocean is mentioned as a rightsholder, not only to fortify the Preamble, but also to give this crucial addition an explicit legal provision thus minimizing the

chances of having it twisted and misinterpreted. Moreover, we recommend that through the Convention itself, other articles refer to this provision as well.

In regards to d), there is no need to add the “in principle” as every polluter should bear the cost of pollution, as the inclusion of this would impose the question ‘who else?’ Moreover, the compensation and damages owed by the infringers, could be reinvested into protection and further scientific exploration and preservation of the Ocean.

ARTICLE 6, paragraph 3

“States Parties shall cooperate to establish new global, regional and sectoral bodies, where necessary, to fill governance gaps.”

RATIONAL: As previously stated, there should be an independent entity that advocates, controls and protects the Ocean’s rights when they are infringed upon beyond national borders, but also that decides in disputes between states as an ultimate international judicial entity, as well as acts as an advisory body when needed.

ARTICLE 8, paragraph 1 and 2

“1. The provisions of this ~~part~~ [Agreement] shall apply to marine genetic resources [of ~~accessed in~~] [originating from] areas beyond national jurisdiction.]

[2. The provisions of this ~~Part~~ [Agreement] shall apply to:

[(a) [The use of fish, other marine life, ~~samples~~] and other biological resources for research into their genetic properties”

RATIONAL: In regards to paragraph 1, the provisions of this Agreement as a whole should apply to marine genetic resources that have originated from the ABNJ, as this formulation provides us with the most comprehensive protection and consideration of all life in said areas. In regards to paragraph 2, protection should not be limited to samples, nor should it lessen the protection of other marine life except for fish.

ARTICLE 10, paragraph 2 and 5

“[Alt. 2. a [permit] ~~licence~~] issued in the manner and under the terms and conditions set forth in paragraph 2.]

...

[5. States Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure that activities with respect to marine genetic resources in areas beyond national jurisdiction that may result in the utilization of marine genetic resources found in areas both within and beyond national jurisdiction are subject to the prior [consent] [,] ~~[notification and consultation]~~ of the coastal States [and any other relevant State] concerned, with a view to avoiding infringement of the rights and legitimate interests of [that] [those] State[s].]"

RATIONAL: In regards to paragraph 2, by establishing an independent international body that would govern this issue, and thus exercise control and give out permits as necessary, there would be less of a chance for national interests, or corporate interests, to come in conflict with the aim of this Agreement. In regards to paragraph 5, it is necessary to obtain consent from coastal States, or their representatives in the above-mentioned international body, to ensure that their national interest will not be harmed. This is crucial as the majority of small coastal countries whose livelihood and economy depend on the health of the sea around it, are often disregarded and quieted for the benefit of larger exploiters. Also, it would seem appropriate to refer to Article 5. c) to emphasize the Ocean as a rightsholder equal to human rightsholder.

ARTICLE 12, paragraph 2

"States Parties shall cooperate to ensure that intellectual property rights are supportive of and do not run counter to the objectives of this Agreement [, and that no action is taken in the context of intellectual property rights that would undermine benefit-sharing and the traceability of marine genetic resources of areas beyond national jurisdiction]."

RATIONAL: There needs to be additional information regarding what is considered an intellectual property right, which type of rights does this provision apply to, as well as what are the limitations regarding it, to ensure unified application and interpretation. Also, by omitting the last part of the paragraph, the Agreement is opening itself to prevailing of corporate interest. Also, it would seem appropriate to refer to Article 5. c) to emphasize the Ocean as a rightsholder equal to human rightsholder.

ARTICLE 15, alternative to paragraph 1. b

"2. Alt. to para. 1. (b) (ii) Where there is no ~~[existing]~~ relevant legal instrument or framework or relevant global, regional or sectoral body to ~~[establish]~~ ~~[designate]~~ area-based management

tools, including marine protected areas, States Parties shall cooperate to establish such an instrument, framework or body and shall participate in its work to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.”

RATIONAL: To be able to fully reap the benefits of this Agreement, it is necessary for it not to be limited by the existence of legal instruments or frameworks or bodies, but simultaneously to be governed by a new independent international body consisting of experts, so that at any given moment the best educated choice can and will be made.

ARTICLE 16

“Areas requiring protection through the [~~establishment~~] [~~designation~~] of area-based management tools, including marine protected areas, shall be identified on the basis of the best available science, the precautionary [~~approach~~] [~~principle~~] and a holistic and ecosystem approach and take into account relevant traditional knowledge of indigenous peoples and local communities.”

RATIONAL: The term principle allows for a more comprehensive protection of the marine areas at it lays down prerequisite for present and future actions and regulation. Also, the ecosystem approach is not enough, and should be supported by holistic approach, to ensure a well rounded approach that takes into account both causes, consequences, as well as side effects.

ARTICLE 19, alternative 1

“(b) Proposals submitted under this Part, on a case-by-case basis and taking into account the scientific advice or recommendations and the contributions received during the consultation and assessment process, including in relation to:

- (i) The identification of areas requiring protection;
- (ii) The [~~designation~~] [~~establishment~~] of area-based management tools, including marine protected areas, and related conservation and management measures to be adopted to achieve the specified objectives, [~~taking into account~~] [~~recognizing~~] existing measures under relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, as appropriate;
- (c) Where there are [~~existing~~] relevant legal instruments or frameworks or relevant global, regional or sectoral bodies:

- (i) Whether to recommend that States Parties to this Agreement promote the adoption of relevant measures through such instruments, frameworks and bodies, in accordance with their respective mandates;
- (ii) Whether to adopt measures complementary to those adopted under such instruments, frameworks and bodies;
- (d) Where there are no ~~[existing]~~ relevant legal instruments or frameworks or relevant global, regional or sectoral bodies, the adoption of conservation and management measures.”

RATIONAL: As per the urgent state of the Ocean, it is crucial that proposals are considered on a case-by-case basis, as the opposite would promote the destruction of the Ocean in favor of short-term consumerist and anthropocentric interests. Again, no need to limit the application of the Agreement to existing instruments or frameworks, although it should be taken into account when achieving specific objectives. Also, it would seem appropriate to refer to Article 5. c) to emphasize the Ocean as a rightsholder equal to human rightsholder.

ARTICLE 22, paragraph 3

“The requirement in this Part to conduct an environmental impact assessment applies ~~only to activities conducted in areas beyond national jurisdiction~~ [to all activities that have an impact in areas beyond national jurisdiction”

RATIONAL: Activities might have an impact on the ABNJ without being conducted in said area. As per the connectedness of land and sea, it is not enough to limit the assessments on areas where the activities are conducted as their impacts cannot be contained to one just one area. In order to achieve a positive change it is necessary to take a holistic approach, as well as to take into consideration all of effects and subjects of these effects. This can be seen in the effects of plastic pollution and chemical runoff from land to sea.

ARTICLE 24, paragraph 1 alternative 2

“When States Parties have reasonable grounds for believing that planned activities under their jurisdiction or control are likely to have more than a minor or transitory effect on the marine environment, they shall conduct a[n] [initial] ~~[simplified]~~ environmental impact assessment on the potential effects of such activities on the marine environment in the manner provided in this Part.”

RATIONAL: Initial presumes further assessments, as well as broader scope of the assessment, whereas simplified presumes diminished scope that could lead to false results and conclusions.

ARTICLE 30, paragraph 1

“~~[A State Party]~~ [The proponent of the planned activity] shall [determine] [be responsible for determining] whether an environmental impact assessment is required in respect of ~~fa planned activity under its jurisdiction or control~~ [the planned activity].”

RATIONAL: The proponent of the planned activity can be a corporation with multiple HQ, or multiple sister or connected entities, and as such has to be held responsible for its actions, including determining whether an assessment is required in respect of the activity it planned. By limiting the responsibility to State only, we are exculpating driving forces behind most of the damage done thus far.

ARTICLE 32, paragraphe 3 alternative 2

“The environmental impact assessment shall be conducted by an independent consultant appointed by a panel of experts designated by the Scientific and Technical [Body] ~~[Network]~~.”

RATIONAL: Establishing the Scientific and Technical Body, as an independent international body of experts, would enable consistent expert input, as well as decision-making. By creating a stable body, a stable current of thought and influence would be created as well. Consistency is the key for positive developments in regards to the current state of health of the Ocean, whereas all and every divergence could ultimately cause more damage.

ARTICLE 34, paragraph 2 and 4

“2. Stakeholders in this process include potentially affected States, where those can be identified, [in particular adjacent coastal States] [, indigenous peoples and local communities with relevant traditional knowledge in adjacent coastal States,] relevant global, regional and sectoral bodies, non-governmental organizations, the general public, academia [, scientific experts] [, affected parties,] [adjacent communities and organizations that have special expertise or jurisdiction] [, interested and relevant stakeholders] [, and those with existing interests in an area].”

...

4. Substantive comments received during the consultation process [from adjacent coastal States] shall be considered and ~~addressed~~ [responded to] by States Parties. States Parties shall give particular regard to comments concerning potential transboundary impacts. States Parties shall make public the comments received and the descriptions of how they were addressed.]”

RATIONAL: To avoid further disregard of sensitive groups or expert opinions, stakeholders should be included in the list, but not exhaustively. Also, it is necessary to introduce obligatory response to comments, and not just addressing, as the former includes giving requested information whilst the latter only mentioning it. By omitting them from the list, as well as omitting obligation of giving responses, we are just continuing the streak that has led us to the current state of affairs. Also, it would seem appropriate to refer to Article 5. c) to emphasize the Ocean as a rightsholder equal to human rightsholder; this way, the Ocean can be stakeholder itself.

ARTICLE 35, paragraph 1

“States Parties shall be responsible for the preparation of an environmental impact assessment report for any such assessment undertaken pursuant to this Part.”

RATIONAL: An independent expert body that would give out permits, should also be one in control of States’ environmental impact assessment reports in order to not only enable for a consistency in application of the Agreement, but also to enable preemptive and qualitative assessment of said assessment.

ARTICLE 40, alternative 3

“1. Alt. 3. [States Parties] [and] [~~Existing~~] relevant legal instruments and frameworks and relevant global, regional or sectoral bodies] shall [periodically] report on [the environmental impacts of the authorized activity] and [the results of the monitoring and review required under articles 39 and 41].)”

RATIONAL: Reports should be issued periodically regarding the environmental impacts, as well as the results of the monitoring and review, to establish a comprehensive instrument of control

that will be given enough time to act in case of emergency, misinterpretation of data, or need for verification of said data, by independent international body of experts.

ARTICLE 41, paragraph 1 alternative 1

"1. Alt. 1. [The Scientific and Technical [Body] ~~[Network]~~ shall] ~~[States Parties shall]~~ ~~[States Parties shall require the proponent to]~~ review the [environmental impacts of the authorized activity], [results of the monitoring required under article 39], and [conditions set out in the authorization of the activity]."

RATIONAL: Review should be done by an independent international body of experts to avoid any conflict of interest. Also review should not exclude any information to be reviewed, but rather be as inclusive as possible.

ARTICLE 48, paragraph 5

"5. The Conference of the Parties [shall] ~~[may]~~, at intervals to be determined by it, or based on popular demand, or demand of The Scientific and Technical Body, assess and review the adequacy and effectiveness of the provisions of this Agreement and, if necessary, propose means of strengthening the substance and methods of implementation of those provisions in order to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction."

RATIONAL: Deliberation regarding the adequacy and effectiveness of this Agreement and its provision cannot, and must not, be left solely in the hands on the Conference of the Parties. For adequate and effective assessment and review of provisions of this Agreement, those who are directly affected by it, or who are experts in the field, must be given the possibility to demand it in order to avoid further harm due to political inactivity. Also, said assessment and review must be made obligatory to ensure consistent review and changes to ensure consistency, accuracy, and relevance.

ARTICLE 49, paragraph 4 alternative 1

"Alt. 1. Under the authority and guidance of the Conference of the Parties, [and upon its request,] the [Body] ~~[Network]~~ shall:

(a) Provide scientific and technical advice to the Conference of the Parties;

[(b) Have advisory competence with regard to marine genetic resources, including questions on the sharing of benefits;]

...

(o) Perform such other functions as may be determined by the Conference of the Parties or assigned to it under this Agreement.”

RATIONAL: Functions of The Scientific and Technical Body must be stated in the Agreement itself to strengthen its position and validity. By allowing the Conference of the Parties to exclusively decide on the functions, would allow for bigger influence of politics, as well as lead to inconsistent variations, that would lead to inefficiency of this Agreement, thus, rendering it useless.

ARTICLE 52, paragraph 7

“7. Access to funding under this Agreement shall be open to developing States Parties [and other stakeholders] ~~[on the basis of need]~~ [, taking into account the needs for assistance of] ~~[giving priority to]~~ States, and stakeholders , with special requirements, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries].”

RATIONAL: In order to avoid domination of wealthy companies, juridical or natural persons, or States, as well as their connected entities, a provision putting forth needs of less fortunate States and stakeholders must be included; only this way will a more equitable use of funds and benefits provided by this Agreement be managed.

ARTICLE 64, paragraph 1

“1. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Agreement, applicable solely to the relations between them, provided that such agreements do not relate to a provision the derogation from which is incompatible with the effective execution of the object and purpose of this Agreement or respect and recognition of Ocean’s rights, and provided further that such agreements shall not affect the application of the basic principles or any provision explicitly referring to Ocean’s rights embodied herein, and that the provisions of such agreements do not affect the enjoyment

by other States Parties of their rights or the performance of their obligations under this Agreement nor do they affect Ocean's enjoyment of its own rights.

RATIONAL: It is crucial for Ocean and its rights to be introduced in this article so to avoid said rights infringed by bilateral and multilateral agreements.