



**PERMANENT MISSION OF JAMAICA
TO THE UNITED NATIONS**

STATEMENT BY

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**ON BEHALF OF
THE CARIBBEAN COMMUNITY (CARICOM)**



**AT THE INFORMAL WORKING GROUP ON CROSS-CUTTING ISSUES
DURING THE SECOND SESSION OF THE INTERGOVERNMENTAL
CONFERENCE ON AN INTERNATIONAL LEGALLY BINDING
INSTRUMENT 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, 25 MARCH - 5 APRIL 2019**

Part two Aid to negotiations

II. General elements

CARICOM attaches importance to the section on General Elements and believes that there are useful suggestions made for further consideration during the IGC. With respect to definitions, we want to ensure that they are consistent and coherent throughout the text.

CARICOM has in the past and in the context of the PrepCom advanced definitions for several terms including “biological diversity,” “ecosystem,” biological resources,” “genetic material,” “genetic resources,” “derivatives,” “sustainable use” and stands ready to reiterate these concepts in the context of the IGC. In terms of the list before us, we are open to many of what is proposed for inclusion but are mindful that much will depend on how the text evolves and that account will have to be taken of what already exists and how these also evolve with developments. We would nonetheless still like to highlight some points as follows:

- With respect to number 8 on marine genetic material, we would add under Option I, in keeping with the interventions that we have made on MGRs, the inclusion of the word “derivatives” as well as “information” so that there can be reference to genetic sequence data and information. We have some reservation as to whether the reference to the geographical scope in this definition adds values to its meaning;**
- On the specific question of the definition of the term “utilisation,” CARICOM would recommend the Nagoya Protocol as a useful starting point but we are leaning towards an understanding that utilisation goes beyond just collection of samples. Consequently, if used and defined in the Implementing Agreement, it should be used consistently throughout the text, thereby eliminating references to “exploitation” which is currently referenced in the document;**
- For number 9 on MGRs, CARICOM would support Option I (A) as we regard it as the most compact of the options presented;**
- Concerning number 15 on ABMTs, we are more attracted to Option I;**
- For number 19 and consistent with the interventions made by CARICOM in the informal working group on EIAs, we would like to see that language in this paragraph takes account, *inter alia*, of interrelated social and economic impacts. We would want these impacts to be considered in their own right and as part of a broader set of impacts, which is why we would also propose the specific insertion of the words, “*inter alia*;**

- **CARICOM would also propose that the “marine environment” be listed as a term to be defined in the context of this Agreement;**
- **We have, as CARICOM, discussed the utility of trying to define the term “capacity-building” and are still reviewing the matter; and**
- **On point 23 on the transfer of marine technology, we would be open to looking further at a possible merging of both Options A and B.**

1. Use of terms¹

For the purposes of this instrument:

[Terms raised in relation to marine genetic resources, including questions on the sharing of benefits]

- (1) **OPTION I:** “Access” means [...]
OPTION II: *No text*
- (2) **OPTION I:** “Bioprospecting” means [...]
OPTION II: *No text*
- (3) **OPTION I:** “Biotechnology” means [...]
OPTION II: *No text*
- (4) **OPTION I:** “Derivatives” means [...]
OPTION II: *No text*
- (5) **OPTION I:** “*Ex situ*” means [...]
OPTION II: *No text*
- (6) **OPTION I:** “*In silico*” means [...]
OPTION II: *No text*
- (7) **OPTION I:** “*In situ*” means [...]
OPTION II: *No text*
- (8) **OPTION I:** “Marine genetic material” means any material of plant, animal or microbial origin containing functional units of heredity collected from the Area; it does not include material made from material, such as derivatives, or information describing material, such as genetic sequence data.
OPTION II: *No text*
- (9) **OPTION I:** “Marine genetic resources” means:
Option A: Any material of marine plant, animal, microbial or other origin, found in or originating from areas beyond national jurisdiction and containing functional units of heredity, as well as

¹ Suggestions were made that some specific definitions of relevance to only one part of the instrument could be included under the respective parts. Suggestions were also made to draw from the definitions under existing instruments and bodies.

any material, derivatives and/or data thereof, with actual or potential value of their genetic and biochemical properties.

~~**Option B:** Any material of marine plant, animal, microbial or other origin containing functional units of heredity of actual or potential value.~~

~~**Option C:** Any marine genetic material of plant, animal or microbial origin of actual or potential value collected from the Area.~~

OPTION II: *No text*

- (10) **OPTION I:** “Marine scientific research” means [...]

OPTION II: *No text*

- (11) **OPTION I:** “Origin” means [...]

OPTION II: *No text*

- (12) **OPTION I:** “Source” means [...]

OPTION II: *No text*

- (13) **OPTION I:** “Use” means [...]

OPTION II: *No text*

- (14) **OPTION I:** “Utilization of marine genetic resources” means [...]

OPTION II: *No text*

[Terms raised in relation to measures such as area-based management tools, including marine protected areas]

- (15) “Area-based management tool” means:

OPTION I: A tool designed and applicable in a specified area located beyond national jurisdiction with a view to achieving defined objectives.

~~**OPTION II:** A spatial management tool for a geographically defined area through which one or several sectors/activities are managed with the aim of achieving particular conservation objectives and affording higher protection than the surrounding areas.~~

- (16) “Marine protected area” means a geographically defined marine area that is designated or regulated and managed to achieve specific conservation objectives.

[Terms raised in relation to environmental impact assessments]

- (17) **OPTION I:** “Cumulative impacts” means impacts on the same ecosystems resulting from different activities or from the repetition of similar activities over time.

OPTION II: *No text*

- (18) **OPTION I:** “Strategic environmental assessment” means [...]

OPTION II: *No text*

- (19) “Environmental impact assessment” means a process to evaluate the environmental impacts of an activity to be carried out in areas beyond national jurisdiction, with an effect on areas within or beyond national

jurisdiction, taking into account interrelated socioeconomic, cultural and human health impacts, both beneficial and adverse.

(20) “Environment” means [...]

(21) “Thresholds” means [...]

(22) “Criteria” means [...]

[Terms raised in relation to capacity-building and the transfer of marine technology]

(23) **OPTION I:** “Transfer of marine technology” means [...]

Option A: Transfer of instruments, equipment, vessels, processes and methodologies required to produce and use knowledge to improve the study and understanding of the nature and resources of the oceans.

Option B: Transfer of information on the use of technology, including intellectual property rights

OPTION II: *No text*

(24) **OPTION I:** “Marine technology” means information and data, in a user-friendly format, on marine sciences and related marine operations and services; manuals, guidelines, criteria, standards, reference materials; sampling and methodology equipment; observation facilities and equipment (e.g. remote sensing equipment, buoys, tide gauges, shipboard and other means of ocean observation); equipment for in situ and laboratory observations, analysis and experimentation; computer and computer software, including models and modelling techniques; expertise, knowledge, skills, technical/scientific/ legal know-how and analytical methods related to marine scientific research and observation.

OPTION II: *No text*

(25) “Capacity-building” means [...]

2. Scope of application

2.1 Geographical scope

- (1) The provisions of this instrument apply to areas beyond national jurisdiction.
- (2) The rights and jurisdiction of coastal States over all areas under national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone shall be respected.

2.2 Material scope

Under material scope, CARICOM supports paragraph 1. We note paragraph 2 and the Options provided therein. In our view and at this juncture, we are minded to call for the deletion of Option I, thereby supporting the “no text” option.

- (1) Unless otherwise provided, this instrument applies to the conservation and sustainable use of marine biological diversity of areas beyond

national jurisdiction, in particular, together and as a whole, marine genetic resources, including: questions on the sharing of benefits; measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building; and the transfer of marine technology.

- (2) **OPTION I:** This instrument does not apply to any warship, naval auxiliary or 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 instrument.

OPTION II: *No text*

3. Objectives

Under Objectives, we would not support the “no text” option. We also, in response to the question posed, are open to considering having all the general objectives in one section of the document but recognise that there might be specific objectives that merit reference under the different elements of the package in the Implementing Agreement.

- (1) The objective of this instrument is to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction through effective implementation of the Convention.
- (2) **OPTION I:** To ensure the achievement of this overall objective, this instrument also aims to further international cooperation and coordination.

OPTION II: *No text*

4. Relationship to the Convention and other instruments and frameworks and relevant global, regional and sectoral bodies

CARICOM regards the issue of relationship as a very important feature of the Implementing Agreement, warranting treatment in one section of the document. For that reason, we read paragraph number 2 with a view to ensuring that any narrative purported fully and effectively conveys the importance of this relationship. To this end, we would support Option I. CARICOM has always maintained that at the core of this Implementing Agreement is the issue of coherence. We found that some of the terminology in Option III, for example, raised questions with respect to their interpretation. For example, how would we define the word “useful” in reference to ongoing work or practices?

- (1) Nothing in this instrument shall prejudice the rights, jurisdiction and duties of States under the Convention. This instrument shall be interpreted and applied in the context of and in a manner consistent with the Convention.
- (2) **OPTION I:** This instrument shall promote greater coherence with and shall complement existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies. This instrument shall be interpreted and applied in a manner that does not undermine those instruments, frameworks and bodies.

~~**OPTION II:** The implementation of this instrument shall not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.~~

~~**OPTION III:** This instrument shall be implemented in a mutually supportive manner with other international instruments relevant to it. Due regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this instrument.~~

- (3) **OPTION I:** The legal status of non-parties to the Convention or any other related agreements with regard to those instruments is not affected by this instrument.

OPTION II: *No text*

III. Conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

1. General principles and approaches²

CARICOM sees merit in the need to have a coherent approach with respect to general principles and approaches in the different elements. To this end, it might be more prudent to have one list of principles in one section of the Implementing Agreement. We continue to review in order to assess the specific principles better suited to address specific elements of the package. Ultimately, we are keen to ensure that we are able to operationalise core principles and approaches in the Implementing Agreement.

We also want to ensure that suggestions in the list provided under general principles and approaches e.g. the common concern of mankind, are not intended to be substitutes for or to dilute fundamental principles such as the Common

² Suggestions were made that some of these principles and approaches would be included in a separate article and some in the preamble.

Heritage of Mankind, which CARICOM strongly supports. We have also heard references to *connectivity, due diligence, due regard* and would want to be able to further reflect on these ideas. CARICOM is keen to know that whatever we agree does not prejudice the rights that currently exist under UNCLOS.

It is noted that options are provided in this section for the precautionary principle or the precautionary approach. CARICOM would support the inclusion of the precautionary principle, which is more encompassing.

We have already addressed the issue of consultations and adjacency in the context of our discussions on ABMTs and EIAs and would, therefore, not repeat those observations here.

CARICOM also welcomes references to SIDS, and would encourage that the special circumstances of SIDS are reflected in keeping with each element of the Implementing Agreement.

Finally, we feel that the duty to cooperate should be specifically stated and would support its inclusion.

- (1) In order to conserve and sustainably use marine biological diversity of areas beyond national jurisdiction, States parties shall:
 - (a) Respect the balance of rights, obligations and interests enshrined in the Convention;
 - (b) Have due regard to the rights, duties and interests of other States as reflected in relevant provisions of the Convention;
 - (c) Respect the rights and jurisdiction of coastal States over all areas under their national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone;
 - (d) Respect the sovereignty and territorial integrity of all States;
 - (e) Use marine biological diversity of areas beyond national jurisdiction for peaceful purposes only;
 - (f) Promote both the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction;
 - (g) Promote sustainable development;

- (h) Promote international cooperation and coordination, at all levels, including North-South, South-South and triangular cooperation;
- (i) Promote relevant stakeholders' engagement;
- (j) Apply an ecosystem approach;
- (k) Apply a precautionary approach;
- (l) Apply an integrated approach;
- (m) Apply a science-based approach, using the best available scientific information and knowledge, including traditional knowledge;
- (n) Adopt measures to ensure an adaptive management of marine biological diversity of areas beyond national jurisdiction;
- (o) Adopt measures to build resilience to the effects of climate change;
- (p) Act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another;
- (q) 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;
- (r) Promote and facilitate public participation in addressing the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and developing adequate responses;
- (s) Ensure transparency and availability of information;
- (t) Take into account the special requirements of small islands developing States and least developed countries, including by ensuring that measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing countries;
- (u) Fulfil in good faith the obligations assumed under this instrument and exercise the rights recognized in this instrument in a manner that would not constitute an abuse of right;
- (v) Take into account adjacency.

[General principles and approaches raised in relation to marine genetic resources, including questions on the sharing of benefits]

- (2) The following general principles and approaches apply to marine genetic resources of areas beyond national jurisdiction, including questions on the sharing of benefits:
 - (a) **OPTION I:** Common heritage of mankind
~~**OPTION II:** No text;~~
 - (b) **OPTION I:** ~~Freedom of the high seas~~
~~**OPTION II:** The freedom of the high seas shall govern the provisions for access to marine genetic resources of areas beyond~~

~~national jurisdiction, while the common heritage of mankind shall govern their exploitation;~~

- (c) Recognition of the special case of small island developing States;
- (d) Duty to protect and preserve the marine environment;
- (e) Marine scientific research shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole;
- (f) Equity/equitable sharing of benefits;
- (g) Intra- and intergenerational equity;
- (h) Non-appropriation;
- (i) Best available scientific information;
- (j) Traditional knowledge;
- (k) Common concern of humankind
- (l) Duty to share information and knowledge;
- (m) **OPTION I:** Precautionary approach
OPTION II: Precautionary principle;
- (n) Adjacency;
- (o) Compatibility;
- (p) The right to conduct marine scientific research;
- (q) Promotion of marine scientific research and technological innovation;
- (r) Common but differentiated responsibilities;
- (s) Sustainable development;
- (t) Transparency;
- (u) Accountability;

[General principles and approaches raised in relation to area-based management tools, including marine protected areas]

- (3) The following general principles and approaches apply to measures such as area-based management tools, including marine protected areas:
 - (a) Transparency;
 - (b) **OPTION I:** Precautionary approach;
OPTION II: Precautionary principle;
 - (c) Science-based approach;
 - (d) Integrated management approach;
 - (e) Ecosystem approach;
 - (f) Protection and preservation of the marine environment;
 - (g) Sustainable and equitable use, which also relates to the principle of common heritage of mankind;
 - (h) Adaptive management;

- (i) Accountability;
- (j) Liability;
- (k) International cooperation and coordination;
- (l) Use of the best available science;
- (m) Intergenerational equity;
- (n) Special case of small island developing States;
- (o) No disproportionate burden of conservation on small island developing States;
- (p) Regional characteristics;
- (q) **OPTION I:** Adjacency
OPTION II: *No text*;
- (r) Compatibility;
- (s) Due regard;
- (t) Inclusivity;
- (u) Differentiated protection;
- (v) Balance between conservation and sustainable use;
- (w) Necessity and proportionality;
- (x) Restoration of integrity of ecosystems;
- (y) Good environmental governance.

[General principles and approaches raised in relation to environmental impact assessments]

- (4) The following general principles and approaches apply to environmental impact assessments:
 - (a) Responsibility to protect and preserve the marine environment;
 - (b) Due diligence;
 - (c) **OPTION I:** Precautionary approach
OPTION II: Precautionary principle;
 - (d) Common heritage of mankind;
 - (e) Universal participation;
 - (f) Public participation;
 - (g) Respect for traditional knowledge and practices;
 - (h) The special circumstances of small island developing States shall be taken into account;
 - (i) Ecosystem-based approach;
 - (j) Science-based approach;
 - (k) Transparency in decision-making;
 - (l) Intra- and intergenerational equity;

- (m) Non-regression;
- (n) Compliance;
- (o) Polluter-pays principle;
- (p) Liability;
- (q) Connectivity;
- (r) Adjacency;
- (s) Compatibility;
- (t) Peaceful purposes;
- (u) Non-constitution of marine scientific research activities as a the legal basis for any claim to any part of the marine environment or its resources.

[General principles and approaches raised in relation to capacity-building and the transfer of marine technology]

- (5) The following general principles and approaches apply to capacity-building and the transfer of marine technology:
 - (a) Responsiveness to the objective of this instrument;
 - (b) Responsiveness to the needs of developing countries, including
 - (i) Small island developing States;
 - (ii) Least developed countries;
 - (iii) Landlocked developing countries;
 - (iv) Geographically disadvantaged developing States;
 - (v) Coastal African States;
 - (vi) Developing middle income countries;
 - (vii) Environmentally challenged and vulnerable States;
 - (c) Recognition of the special circumstances of developing countries;
 - (d) Full recognition of the special case of small island developing States/special circumstances and needs of small island developing States;
 - (e) Needs-based and country driven;
 - (f) **OPTION I:** Duty to provide preferential treatment to developing countries
OPTION II: *No text;*
 - (g) Involvement of relevant stakeholders;
 - (h) Duty to cooperate/collaborate;
 - (i) Duty to promote the development of marine scientific and technological capacity of States;
 - (j) Duty to share information/provide data;
 - (k) Recognition and sharing of traditional knowledge;

- (l) Best available science;
- (m) Inter- and intra-generational equity;
- (n) Equitable access;
- (o) Empowerment;
- (p) Transparency;
- (q) Accountability;
- (r) Flexibility;
- (s) Pertinence;
- (t) Effectiveness;
- (u) Inclusiveness;
- (v) Good governance and best practices;
- (w) Sector-specific and multidisciplinary;
- (x) Transfer of marine technology for peaceful purposes.

2. International cooperation

States parties shall cooperate for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. **CARICOM has previously stated that cooperation should go beyond conservation and sustainable use, to include cooperation on MSR (UNCLOS Articles 242-244) and the transfer of marine technology (UNCLOS Articles 270-274). We would recommend that this reflected in this section of the Implementing Agreement.**

VI. Review

On the question of the Review, CARICOM believes that what is provided in this section reflects standard text. We recognise that the language here reflects UNFSA Article 36, which is useful but CARICOM would also be open to a formulation of this Option that would allow for the Conference of Parties (COP) to undertake the first review at a set time after entry into force, as for example, is the case under Article 31 of the Nagoya Protocol – “The Conference of the Parties serving as the meeting of the parties to this Protocol shall undertake, four years after the entry into force of this Protocol and thereafter at intervals determined by the Conference of Parties serving as the meeting of the Parties to this Protocol, an evaluation of the effectiveness of this Protocol.” We would be open to look at periodic reviews as others have said.

In light of the material scope of this instrument, CARICOM would be open to language that allows all States Parties and those States and entities which are entitled to become parties to this Agreement, as well as those IGOs and NGOs entitled to participate as observers.

OPTION I: [...] years after the date of entry into force of this instrument, the Secretary-General of the United Nations shall convene a conference with a view to assessing the effectiveness of this instrument in securing the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

OPTION II: *No text*

Finally, CARICOM would wish to recall the comments made by the Group in other interventions on related cross-cutting issues that would speak to financing, compliance as well as the special circumstances of SIDS.

OTHER CROSS-CUTTING ISSUES NOT SPECIFICALLY ADDRESSED IN THE PRESIDENT'S AID

CARICOM believes that the UN Fish Stocks Agreement provides a useful template with respect to the following:

(a) Responsibility and Liability

- UNFSA Art 35 – States Parties are liable in accordance with international law for damage or loss attributable to them.

(b) Dispute Settlement

- The starting point should be the dispute settlement provisions of UNFSA, in particular Articles 27 – 32; these provisions would have to be modified to cover the objectives of the IA.
- Disputes are first to be settled by peaceful means; regional organisations are to be utilized (Art. 28), technical disputes can be resolved by special expert panels (Art. 29); all disputes can be resolved by using Part XV of UNCLOS – even for states not party to UNCLOS; provisional measures (interim relief) are contemplated (Art. 31).
- Art. 1 (2 &3) could also be useful since it defines the states parties to the Agreement.
- Advisory opinions would be a useful mechanism to resolve potential disputes before they arise. Regional organisations should be expressly authorized to request advisory opinions.
- Art. 30 (5) also allows a tribunal created under UNFSA to apply the rules of the regional arrangement to decide the dispute. This would allow respect for the rules of

the regional arrangement even if one did not use the regional arrangement's dispute settlement mechanism, and instead use the IA's mechanism.

- In terms of the possible establishment of a special chamber of ITLOS, it could be contemplated only if these types of disputes could not be handled by existing chambers or existing configurations of ITLOS.

(c) Final Clauses

- UNFSA would again be a useful reference tool. It strikes a balance by allowing its entry into force with a relatively small number of states parties (Art. 40 – 30), and yet is open to signature, accession and ratification by a wide range of entities:
 - States
 - Self-governing associated states
 - Non-self-governing territories with competence to enter into treaties
 - International and regional organisations
- Articles 1 (2) and 37-39 are equally instructive
- UNFSA also allows provisional application under Art. 41. Provisional application allows states to bind themselves to comply with the norms of the Agreement even before it enters into force.
- Art. 42 also prohibits reservations and exceptions and this should be emulated in the IA
- Art. 44 also preserves existing arrangements and allows full participation in agreements so long as they are compatible with the IA and UNCLOS.

(d) Preambular Elements

- Preambular elements should go beyond conservation and sustainable use to reflect the idea about joint stewardship, equity and common property.
- As an implementing convention under UNCLOS, we see merit in drawing on the language of the Convention, which refers to the equitable and efficient utilization of the resources of seas and oceans.
- The new IA should assure intergenerational equity. Accordingly conservation and sustainable use should be for the benefit of present and future generations.
- There could be an affirmation that the new instrument furthers the objectives of UNCLOS. Reference could be made to preambular paragraph 4 of UNCLOS.
- Given the advances in marine scientific research and marine technology which are directly relevant to how we conserve/utilize marine resources, the preamble could emphasize the importance of benefit sharing and the need to close the marine science and technology gap in order to facilitate such benefit sharing.