



DEVELOPMENT OF AN UNCLOS IMPLEMENTING AGREEMENT ON THE CONSERVATION AND SUSTAINABLE USE OF MARINE BIOLOGICAL DIVERSITY OF AREAS BEYOND NATIONAL JURISDICTION (BBNJ)

ICS¹, ECSA² ASA³ POSITION PAPER

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Introduction

The global shipping industry has been participating in the discussions for the development of a legally binding instrument under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) on the conservation and sustainable use of marine Biological diversity of areas Beyond National Jurisdiction (BBNJ).

Following three sessions of the Intergovernmental Conference (IGC) in which diverse views have been put forward by governments and observer organisations on the scope of the proposed instrument, the international shipping industry welcomes the progress that has been made towards the further protection of the world's oceans with the publication of a revised draft text in November 2019. The international shipping industry has carefully reviewed the revised draft text and submits the following comments.

Recalling that almost 90% of international trade is seaborne, it is again emphasised that it is imperative for the new instrument to fully respect the rights of navigation and freedom of the high seas enshrined in articles 87 and 90 of UNCLOS. These principles are essential to the smooth operation of shipping and therefore to the safe and efficient delivery of food, energy, vital raw materials and goods needed to support the world economy and the smooth functioning of society.

UNCLOS carefully balances the rights and obligations of flag states, coastal states and port states. While UNCLOS provides the basic legal framework for ocean governance, detailed regulation of the shipping industry is carried out by member states at the International Maritime Organization (IMO), operating under delegated authority from the UN.

¹ **The International Chamber of Shipping (ICS)** is the principal global trade association for the shipping industry engaged in international trade, representing shipowners and operators in all sectors and trades. Its membership comprises national shipowners' associations in Asia, Europe and the Americas whose member shipping companies operate over 80% of the world's merchant tonnage. Its primary role is to represent shipowners with the various international regulatory bodies that impact on shipping, including and most especially the International Maritime Organization and the International Labour Organization.

² **The European Community Shipowners' Associations (ECSA)** is a trade association whose membership comprises the national shipowner associations of the European Union and Norway and whose focus is representation at the EU regulatory institutions. Many of the members of ECSA are also members of the International Chamber of Shipping.

³ **The Asian Shipowners' Association** is a trade association whose membership comprises eight national shipowner associations from the Asia-Pacific Region.

The international shipping industry strongly believes that IMO's global mandate to regulate the international shipping industry on matters that may be the subject of the new agreement on BBNJ, should be duly recognised in the new agreement.

The IMO, which pre-dates UNCLOS, is recognised in UNCLOS as having authority and competence to make effective regulation for the protection of the marine environment, including its biodiversity, from the impacts of international commercial shipping activity including in the high seas. IMO's global mandate is shown by provisions in the Convention referring to the "competent international organization" - by which is meant IMO - in connection with the adoption of international rules and standards in matters concerning maritime safety, efficiency of navigation, and the prevention and control of pollution from vessels and by dumping. IMO's rules and standards are implemented by flag states and enforced globally by port states via port state control. This means that a ship is never really beyond national jurisdiction. IMO also upholds a principle of "no more favourable treatment" by which port states party to a Convention must apply it to any ship that voluntarily enters their ports, whether or not the flag state of the ship has ratified that Convention. This ensures that regulations adopted apply to all ships equally and that economic advantage is not gained by those countries that choose not to adopt, ultimately ensuring that regulation of ships is effective.

In order to successfully achieve its goals, the new agreement must be absolutely clear on the intended relationship between any bodies that it may establish, and relevant legal instruments and international bodies. The industry therefore fully supports proposals for the inclusion of legally clear provisions on conflict of laws. Clarity is especially important with regard to arrangements under the new instrument for the implementation of Area-Based Management Tools (ABMTs) and Environmental Impact Assessments (EIAs). With regard to shipping activity, overall competence for designating ABMTs and taking due account of EIAs is vested in the IMO and this responsibility should continue to remain with the IMO. Despite some improvements in this respect, there remain options within the revised draft text of the agreement that could result in conflict or duplication with the mandate of IMO. To avoid this, it should be made clear that this new Agreement will only regulate activity that is not within the mandate of another international body or relevant instrument.

The new instrument and any new organisation or body that may be established should coordinate and promote coherence and complementarity and not undermine the present system of ocean governance.

The co-sponsors trust that the information above will assist consideration of the draft text of the agreement and the discussions at IGC4 and stand ready to provide clarification of any aspects of the position of the shipping industry.