

WIOMSA/UNEP NAIROBI CONVENTION

**PROTOCOL CONCERNING PROTECTED AREAS AND WILD FLORA AND
FAUNA IN THE EASTERN AFRICA REGION (SPAW PROTOCOL).**

JUSTIFICATION FOR REVIEW OF AND AMENDMENTS TO THE PROTOCOL

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Part I. Background and Authority for the Review and Amendments

1. Introduction and Authority

The Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (as amended 2010), and its Protocol concerning Protected Areas and Wild Fauna and Flora (SPAW Protocol) in the Eastern African Region and the Protocol concerning Co-operation in combating Marine Pollution in Cases of Emergency (Emergency Protocol) in the Eastern African Region were enacted in Nairobi on 21 June 1985. In 2010 a Protocol for the Protection of the Marine and Coastal Environment of the Western Indian Ocean (LBSA Protocol) was adopted alongside the Amended Nairobi Convention. Together these instruments constitute the regional legal framework for the protection and conservation of the marine and coastal environment of the Western Indian Ocean (WIO) region. Moreover, the Contracting Parties are currently negotiating a Protocol on Integrated Coastal Zone Management in the Western Indian Ocean (ICZM Protocol).

The Nairobi Convention framework covers the mainland countries of Somalia, Kenya, Tanzania, Mozambique and South Africa and the island states of Seychelles, France (Reunion), Madagascar, the Comoros and Mauritius. The Convention and its SPAW and Emergency protocols came into force in 1996 and each of the countries has ratified or acceded to it. Since 1999 subsequent Conference of Parties (COPs) called for the review of the Convention and its protocols to bring them up to date as modern and dynamic legal instruments better suited for the protection and conservation of the marine and coastal environment of the region. For example, COP 3 (Maputo, 2001) and COP4 (Antananarivo, 2004) called upon the Executive Director of UNEP to expedite the process of revision of the Nairobi Convention and its protocols as well as the development of a new protocol on land-based activities (C.P. 3/6; CP.4/7).

The Convention and its protocols were also expected to respond to developments in relevant international law, including multilateral environmental agreements (MEAs) and other Regional Seas Programmes.

The Protocol seeks to enhance the conservation and preservation of wild flora and fauna in the marine and coastal environment of the WIO region. It also seeks to enhance the cooperation of states in this endeavour in order to achieve conservation objectives propagated under the Nairobi Convention.¹

However, the most recent call for review of the SPAW Protocol was made at the Eighth Conference of Part (COP8) where it was decided as follows:

¹ See SPAW Protocol, Preamble

Decision CP8/4: Review of the Protocol Concerning Protected Areas and Wild Fauna and Flora Eastern African Region

“1. To request the Contracting Parties in collaboration with the Secretariat and implementing partners to finalize the review of the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region and its annexes; and report back on the progress at the Ninth Conference of Parties.”²

2. Justifications for the Review of the SPAW Protocol

The SPAW Protocol recognises the “danger from increasing human activities” and stresses the importance of protecting and improving the state of the wild fauna and flora and natural habitats of the WIO region “among other means by the establishment of specially protected areas in the marine and coastal environment.” However, the protocol fails to elaborate in detail on the dangers and threats to marine and coastal areas and biological diversity in the region, and the interconnectedness of the habitats, ecosystems and species. The protocol also fails to acknowledge existing international and regional legal and policy instruments, some of which were developed after the protocol was adopted. It was then recommended that this protocol be revised.

The need to review and amend the SPAW Protocol emanated from three main reasons, namely: the need to align it with the 1985 Nairobi Convention as amended in 2010³; to entrench within it ecosystem approaches to management of marine and coastal resources; and to strengthen further the legal and policy basis for the protection of marine and coastal biodiversity in the WIO region. These reasons are discussed hereunder.

2.1 Revision of the Nairobi Convention 2010

In the period leading to the year 2010, it was found necessary to amend the Nairobi Convention in order to align it with ecosystem approaches to natural resource conservation. The use of ecosystem based management approaches to natural resources was emphasised in the Fifth Conference of Parties (COP 5) to the Nairobi Convention in 2007. *Decision two* of COP 5 stated as follows:

“CP 5/2. Protection of ecosystems and endangered species:

² The Eighth Conference of the Parties to the Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (Nairobi Convention) Mahe, Seychelles, 22-24 June 2015

³ Final Act of the Conference of the Amended Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, Adopted in Nairobi, Kenya on 31 March 2010

10. *To endorse and support the use of the eco-system based management approach, including the involvement of upstream countries, for the conservation of the coastal and marine areas of the Region.*⁴

The revisions of the Nairobi Convention included expanding its geographical scope; providing clearer provisions for compliance and enforcement of its provisions including ecosystem approaches; urging the contracting parties to establish national laws and institutions; and providing for exchange of information, assistance and cooperation among themselves and with relevant international, regional and sub regional organizations.⁵

This was meant to bring about not only more effective implementation of ecosystem approaches, but also to increase integration between national and regional institutions in the development and management of projects and programmes. This is especially crucial to those having cross sectoral and trans boundary aspects.

The Amended Nairobi Convention was adopted in March/April 2010.

2.2 Entrenching ecosystem based management approaches

The SPAW Protocol has been recognised as the most important protocol to the Nairobi Convention with regard to ecosystem approaches. This is because it deals with the thematic areas of wild flora and fauna in the marine and coastal areas.⁶ The provisions touching on ecosystem-friendly approaches include those dealing with the general obligation of the contracting parties to ‘... endeavour to protect and preserve rare or fragile ecosystems as well as rare, depleted, threatened or endangered species...’;⁷ the prohibition of the intentional or accidental introduction of alien, new or genetically modified species which may cause significant or harmful changes to the Eastern African region;⁸ establishment of protected areas including representative samples of all types of ecosystems in the Region;⁹ with particular regard, among others, to rare or fragile ecosystems.

As currently drafted however, the SPAW Protocol appears to adopt a largely species approach as demonstrated by the annexes forming part of the Protocol. These annexes list species of fauna and flora requiring protection, and are characterized as endangered or threatened. This aspect of the SPAW Protocol limits the scope for protection of entire ecosystems in the Western Indian Ocean Region.¹⁰

⁴ UNEP(DEPI)/EAF/CP.5/10 ‘Report of the fifth meeting of the Contracting Parties to the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region’ at 86

⁵ For a comparison, see the original 1985 Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern Africa Region and Related Protocol and Final text of the Amended Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean adopted in Nairobi, Kenya on 31 March 2010.

⁶ AkungaMomanyi ‘Focus on Ecosystems Based Management in Eastern Africa: Institutional and Legislative Frameworks for an EA at the Regional Level, including cross sectoral and transboundary aspects-Presentation at UNEP: TRAINING WORKSHOP ON ECOSYSTEM APPROACHES TO COASTAL AND OCEAN MANAGEMENT’ (2008) at 17

⁷ Article 2 (1) SPAW Protocol

⁸ Ibid, article 7 (1)

⁹ Article 8 (2)

¹⁰ AkungaMomanyiop cit note 7

The proposed revisions to the SPAW Protocol seek to re-model it more towards the ecosystem approach. The amendments to the Protocol will range from a revision of the current title that refers to fauna and flora, to “biological diversity”. The provisions will then be amended or added to, in order to explicitly provide for the ecosystem approach based.

2.3 Strengthening further the legal and policy framework for protection of marine and coastal environment of the WIO

The WIO region is recognized as global biodiversity hotspot for a wide variety of organisms such as coral reefs, mangroves, marine mammals, sea turtles, and birds, among others, and one of the least ecologically disturbed areas of the world.¹¹ However, the high biodiversity in the WIO region and its broad array of habitats are under increasing pressure from both anthropogenic and natural factors.¹²

It is therefore necessary to review and amend the SPAW Protocol, and accompanying policy and institutional frameworks, in order to strengthen and re-model it to meet new and emerging challenges to the rich biodiversity of the WIO region. The Protocol is more than 30 years since adoption. Since then, several multi lateral environmental agreements (MEAs), regional and sub-regional legal and policy instruments have come into being, and the SPAW Protocol needs to be aligned accordingly. The legal and policy instruments include the 1992 Convention on Biological Diversity (CBD); 1992 Agenda 21, 1997 Jakarta Mandate, 2012 Rio+20, the 1995 Amended Barcelona Convention and its SPAW Protocol, and the Amended Nairobi Convention, among others.

Part II. Justification for Each Amendment

As mentioned above, the amendments to the SPAW Protocol are largely intended to bring the Protocol in consonance with the 1985 Nairobi Convention as amended in 2010 and to provide for ecosystem based approaches to management of marine and coastal biological diversity in the Western Indian Ocean(WIO).

It is anticipated that the revisions would broaden the scope of the Protocol from a species to an ecosystem-based Protocol that comprehensively focuses on ecosystems. The review would also allow for new definitions and be more representative of marine protected areas and other ecosystems rather than just protection of species.

- a. Title of the Protocol: Proposed title amendment: “PROTOCOL CONCERNING PROTECTED AREAS AND WILD FLORA AND FAUNA [BIOLOGICAL DIVERSITY] IN THE EASTERN AFRICA REGION [WESTERN INDIAN OCEAN REGION].”**

The proposed amendment to the Protocol commences with its title, which will henceforth not only refer to wild flora and fauna, but also include biological diversity. This revision aims at reflecting the all-encompassing ecosystem approach to protection of marine resources, as opposed to the largely species approach currently adopted in the Protocol. Further, the title is

¹¹ UNEP/Birdlife International (2015): Status of Birds in the Marine and Coastal Environment of the Nairobi Area: Regional Synthesis Report.

¹² Ibid.

to refer specifically to the Western Indian Ocean (WIO) region as opposed to “Eastern Africa”. This is because the WIO region extends beyond the Eastern African region to the Southern region including all the Island States that are contracting parties to the Nairobi Convention and its Protocols. In any case, the Contracting Parties have since the adoption in 2010 of the Amended Nairobi Convention and the LBSA Protocol re-named the sub-region as the “WIO” region as opposed to “Eastern Africa” region.

b. Preamble

The Preamble starts by introducing the spirit and tenor of the amendments to the Protocol. It expresses the concerns of threats to marine and coastal biological diversity, specifically in WIO, caused by factors including physical alteration, destruction and degradation of habitats, pollution, invasion of alien species, and over exploitation of living marine and coastal resources.

It then recognises the need for contracting parties to cooperate to protect ecosystems under the relevant conventions such as the 1982 United Nations Law of the Sea Convention; 1992 Convention on Biological Diversity; 1992 Agenda 21; and the 2002 revised African Convention on the Conservation of Nature and Natural Resources (Algiers Convention).

The Preamble therefore sets the stage for the provision for ecosystem based approaches to conservation of the biological resources by emphasizing the ecosystem approaches, including the use of terms such as “ecosystems”, “biodiversity” or “biological resources” in lieu of “fauna” and “flora.”

c. Article 1: Definitions

Article 1 adds definitions in line with the various relevant international conventions. For instance, since the Protocol now extends to biological diversity in general, the definition of ‘biological diversity’ in the 1992 Convention on Biological Diversity has been adopted. Several other definitions have been added in this article, reflecting the new dynamism introduced in the Protocol, which include ecosystem based approaches and terminologies.

d. Article 2: General Obligations

Article 2 imposes general responsibilities on parties for the protection, conservation and sustainable utilisation of biological diversity in the WIO. Article 2 (4) recognises the transboundary nature of oceans, which requires states to cooperate in conservation. An additional paragraph -5- has been added to require states to regulate and put in place measures to combat activities having an adverse effect on the biological diversity.

Article 2A encapsulates the geographical scope provided for in article 1 and 2 of the Nairobi Convention. These articles were amended in 2010 to provide for coverage of the entire WIO which includes the Southern part of Africa and island states.

e. Article 3: National measures for the protection and conservation of biological diversity

Article 3 has been amended to include national measures for protection of biological diversity. It merges article 3 and 4, with paragraph 1 providing for Annex 1-wild flora species, and paragraph 2 providing for Annex II-endangered wild animal species. Article 3 then adds the need for states to formulate measures to regulate ex-situ reproduction. Further,

where protected species are exported or held illegally, states are now to make laws for their return and re-introduction into their natural habitats. This article also emphasises on the importance of parties to consult and cooperate with each other.

Article 3B, which was previously article 7, deals at length with the introduction of alien, new or genetically modified species.

In the WIO, one hundred and four introduced alien species and 45 cryptogenic species have been identified in multiple marine habitats within the region, with about 5 of them being considered invasive.¹³ Apparently, information on marine alien invasive species is fairly limited since there have only been a few assessments targeting alien species. A study conducted in Port Victoria in 2005 found four non-native species out of about one hundred identified. This study provided a sound baseline from which future monitoring could be undertaken.¹⁴ The majority of these alien species have been identified either as resulting from bio-fouling on ships or deliberate introductions for mariculture purposes.¹⁵

Even with limited information, the precautionary principle dictates that measures be taken before-hand to prevent the threat presented by these species. A regional approach is called for in the prevention and control of alien and invasive species.¹⁶ This article is therefore a regional step towards the control and eradication of the marine invasive species.

f. Article 5: Exploitable biological species

Article 5 seeks to maintain sustainable levels of endangered, threatened or protected (ETP) species including marine mammals, sea turtles, and sea birds among others in Annex III.

Laipson and Pandya in 2009 noted that at an ecosystem level, trophic balance is affected by the destruction of key species. They noted the cascading effect observed after overfishing of triggerfish in Kenya allowed their prey (sea urchins) to multiply and overgraze seagrass beds, eventually leading to the erosion of coral reefs.¹⁷

Paragraph 1 and 2 have therefore been amended to emphasize on the need for restoration of exploitable harvestable species which are capable of regeneration and to maintain sustainable levels to maintain wild populations.

g. Article 6: Migratory species

This article has been amended to include the definition of migratory species, in tandem with relevant international legal instruments such as the Convention on Migratory Species (CMS), the International Maritime Organization (IMO) Ballast Water Convention, among others.

Migratory marine species (MMS) include many of the world's most charismatic organisms such as marine mammals, seabirds, turtles, sharks, and tuna. Many are now among the most threatened due to the diverse range of pressures they encounter during their extensive movements. It is estimated that 21% of MMS are classified as threatened (i.e. categorized as

¹³Jose Paula (ed) *Regional State of Coasts Report, Western Indian Ocean* (2015) at 74

¹⁴Ibid at.332

¹⁵Ibid at 516

¹⁶ Ibid

¹⁷Laipson, E. and Pandya, A. *The Indian Ocean-Resource and Governance Challenges*(2009)

Critically Endangered, Endangered or Vulnerable).¹⁸ Sea turtles are the most threatened group (85%), followed by seabirds (27%), cartilaginous fish (26%), marine mammals (15%) and bony fish (11%). Taken together 48% of MMS are threatened, Near Threatened or Data Deficient.¹⁹

As well as being threatened they share in common being wide-ranging animals, travelling through the waters of multiple nations as well as in Areas Beyond National Jurisdiction (ABNJ) during different times of the year. This makes their conservation a challenge, requiring coordinated action by many nations, international organizations, Multilateral Environmental Agreements (MEAs) and other stakeholders if their populations are to recover to healthy levels and be safeguarded into the future.²⁰

The provisions in this article, including the definitions, are intended to strengthen understanding and response to the challenges and threats to marine migratory species, and enable the WIO region to play its rightful part in this regard.

h. Article 6A: Cooperative measures

This article has been added to cater for the species listed in the Annexes. Where any species are listed in the Annexes, states are required to take cooperative measures in the conservation of such species. It is modelled on Article 12 of the 1995 Barcelona SPAW Protocol.

i. Article 7A: Protected areas

This article lists the objectives of protected areas to set the stage for article 8 and 10 which provide for establishment and management of protected areas. The objectives were not listed previously, hence lack of clarity as to the intention of establishing protected areas.

The main objective of establishing protected areas is to maintain biodiversity in the long term.²¹ Establishment of marine protected areas (MPAs) is one of the policy responses to environment and biodiversity degradation in the WIO. MPAs have been found effective in increasing fish stocks and diversity while at the same time allowing for environmental conservation. This is also essential for promoting tourism as coral reefs within MPAs are considered attractive sites for recreation such as SCUBA diving and other tourist activities, generating significant revenue. The protection of existing MPAs should be promoted *inter alia* by charging and or increasing fees and licenses where they exist, for increased revenue for the benefit of the tourism industry and local populations.²²

MPAs protect valuable marine resources against increased human pressure and other threats such as climate change, while supporting the livelihoods of the local population.

j. Article 10A, 10B, 10C and 10D: Protection Measures and Establishment and Management of Protected Areas

¹⁸ Ben Lascelles et al (2014): Migratory Marine Species: their status, threats and conservation management needs. Aquatic Conservation, marine and freshwater ecosystems, vol 24, Issue supplement S2, November 2014, pp 111-127

¹⁹ Ibid.

²⁰ Ibid

²¹ DLIST Agulas and Somali accessible online at <http://www.dlist-asclme.org/burning-issues/marine-protected-areas-the-western-indian-ocean-%E2%80%93-can-they-help-save-our-fish-and>

²² Report State of Coasts Report op cit note 12 at 380

The effectiveness of an MPA varies with many factors such as the basic design, the existence of management plans and the collaboration with the local communities.²³ Article 10A provides for states to adopt, planning, management, supervision and monitoring measure of the protected areas. The article requires states to develop, adopt and implement a management plan for protected areas in order to derive maximum benefits from them while conserving natural resources.

Article 10B provides for states to establish the list of Protected Areas of Western Indian Ocean Importance (PAWIOI) which has previously not been provided for.

Article 10C provides the states with the procedure of establishment and listing PAWIOIs while Article 10D deals with changing the delimitation or legal status of PAWIOIs.

The proposed articles 10A, 10B, 10C and 10D are also closely modelled on the 1995 Barcelona SPAW Protocol, as the latter is considered the most innovative and progressive of all regional seas SPAW protocols.

k. Article 11: Buffer Areas and Frontier Protected Areas.

Buffer areas around or next to the protected areas are important for ecosystem restoration; education and training; carefully designed tourism and recreation activities; and research for sustainable use of natural resources.²⁴ While activity is allowed here, it must be restricted and regulated. The maintenance of buffer areas and protected areas especially in trans-frontier areas requires collaboration between states.

Article 11 incorporates current Articles 13 and 20, and elaborates regulations requiring consultation between states and conformity with provisions of international law. Without achieving such harmony between states it is not possible to efficiently protect trans-frontier marine resources.

l. Article 9: Provisions Common to Protected Areas and Species

This article flows from the previous articles 10 and 11. Protected areas management requires contracting parties to cooperate with each other and with international organisations to formulate common guidelines, standards and common criteria for the establishment of buffer zones, protected areas; and inclusion of additional species in the Annexes.

Due to the nature of marine resources, no one state can successfully manage the marine resources alone. Pollution by one coastal state is likely to affect the next state and *vice versa*, while cooperation in development and implementation of standards, guidelines and policies will ensure success. This is more so for the protection of the proposed PAWIOIs which by their nature will require collective effort of concerned states.

m. Article 15: Public information and education

Paragraph 2 of this article requires state cooperation in developing education and public awareness in programmes in conservation and sustainable use of biodiversity, in order to enhance the role of public information and education across the region.

²³ DLIST Agulas and Somali accessible online at <http://www.dlist-asclme.org/burning-issues/marine-protected-areas-the-western-indian-ocean-%E2%80%93-can-they-help-save-our-fish-and> accessed on 26 September 2016

²⁴ Adrian Phillips (ed) 'Guidelines for Marine Protected Areas World Commission on Protected Areas (WCPA)' (1998)

n. Article 16: Regional cooperation and Mutual Assistance

This article has incorporated article 19 as they are related. Further it adds articles on cooperation between states and international organisations. For instance, there is a requirement to communicate any situation that may endanger ecosystems, and for states and international organizations to engage in mutual assistance programmes.

o. Article 17: Scientific, technical and management research

There is need for increased research in the WIO in the area of sustainable use of marine biodiversity. States are therefore encouraged to develop scientific, technical and management research in this area.

p. Article 20A: Environmental impact assessment/Environmental assessment.

Before any development or constructions are approved or undertaken which will likely have impact on marine and coastal environment and biodiversity, it is important that environmental and social impact assessments are undertaken as appropriate. This is necessary to determine the likely impacts of development, or of any activities and advise on mitigation measures, or seek less harmful alternatives.

q. Article 21 A: National Focal Points and Coordination

This article establishes National Focal Points for the Protocol to deal with technical and scientific aspects of the protocol at national level. It also provides for the regional coordination mechanism through the Organization, and defines the roles of the Organization in coordination matters. These arrangements are of course linked to the Nairobi Convention coordination mechanism which integrates the other protocols under the Convention.

r. Article 22A and 22B-General provisions

These provisions are common to the Convention and its other protocols. They define the relationship between the protocol, domestic legislation, and third parties, as well as ratification, accession, amendments and entry into force.

s. Annexes- General Note on Annexes to the Protocol

There should be review and amendment of the annexes to the Protocol, including additional annexes as necessary, and a clear infusion of ecosystem approaches. This should be done under an agreed framework of consultation among Contracting Parties and other stakeholders.