

24/03/17

**Supplement to the Chair's non-paper on elements of a draft text of 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**

**PSIDS Submission to the  
Second Meeting of the Preparatory Committee for the Development of 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 (BBNJ PrepCom)  
August 2016**

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The Pacific Small Island Developing States (PSIDS) at the United Nations have the honour to refer to annex 2 of the BBNJ PrepCom Chair's overview of the first session of the Preparatory Committee encouraging Member States to submit contributions.

## **1. OVERALL OBJECTIVE**

The objective of UNCLOS is to establish a legal order for the oceans and seas, including to promote the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment. The PSIDS have championed the **protection and restoration of the health, productivity and resilience of the ocean and the marine environment as a whole**. This overarching objective has motivated the strong involvement of the PSIDS group on ocean-related issues, including in negotiations of The Future We Want, the SIDS Accelerated Modalities Of Action (SAMOA) Pathway, and through their role in the design and adoption of a dedicated sustainable development goal (SDG) on oceans and seas in the 2030 Agenda for Sustainable Development.

The PSIDS support the position that the new implementing agreement (IA) should provide a comprehensive global regime to better address the **conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction**, in accordance with UNGA resolution 69/292.

As such, the new implementing agreement would strengthen the implementation of the UNCLOS, including through resolving legal gaps and improving cooperation and coordination among States and relevant organizations and mechanisms. This requires adopting an integrated approach in the conservation of marine resources as well as the management of maritime activities. UNCLOS recognizes that all problems of ocean spaces are interrelated and need to be considered as a whole, as expressed in the preamble. Our discussions aim to enrich the UNCLOS package by reflecting the evolution of international law and scientific knowledge on our oceans.

In order to achieve these objectives, universal participation in the future agreement will be crucial. It is important that all States and relevant actors be part of the discussions and decision-making.

## **2. RELATIONSHIP TO OTHER INSTRUMENTS AND FRAMEWORK**

### **2.1. Relationship to UNCLOS**

The PSIDS reaffirm that UNCLOS is the legal framework for all activities in the oceans and seas and that the Convention aims to contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in

particular, the special interests and needs of developing countries.<sup>1</sup> Consequently, the new international legally binding instrument should be an implementing agreement of UNCLOS.

## 2.2. Relationship to other instruments and frameworks

The new internationally legally binding instrument should contribute to improving the cooperation and coordination among States and relevant and competent organizations. The new instrument should, therefore, complement the existing patchwork of instruments and frameworks and aim to facilitate coordination and cooperation among the many different actors that operate through specific and sectoral objectives.

Consistent with resolution 69/292, PSIDS support that the new instrument should not undermine existing instruments and frameworks.

Of particular interest for the PSIDS is the issue of fisheries. In that regard, the PSIDS suggest:

- Complementary arrangements could focus on gaps in the current regime, such as general biodiversity protection. For instance, this new instrument could provide agreed general biodiversity protection guidelines or methodology to take into account the impact on fish stocks of emerging issues such as the adverse impacts of climate change, pollution, or ocean acidification. This could help improve the implementation of the precautionary approach under which RFMOs are to operate.
- The new instrument should not compromise the significant advances and interests of the Pacific region, including fisheries-related gains in existing frameworks. Standards applied in ABNJ should not be lower than those from EEZs.

## 3. GUIDING APPROACHES AND PRINCIPLES:

### 3.1. Instruments

- UNCLOS principles
- Rio principles
- General principles under (Art. 5) of the UN Fish Stocks Agreement (FSA)

### 3.2. Specific principles

- **Protect and preserve marine environment:** At the start of the negotiations at UNCLOS III, it was agreed that the Convention should establish general rules to serve as the legal framework for specific global or regional agreements. This coordinating role of the Convention as the basic universal legal instrument, with respect to obligations arising out of different international instruments dealing with specific sources of marine pollution or applicable to various maritime zones, is substantiated in article 237. This is a fundamental principle and obligation of UNCLOS, as provided for in the preamble and in particular article 192. The importance of protecting and preserving the marine environment constitutes a building block of UNCLOS and is developed in Part XII. This principle has been well established and is now enshrined in international customary law.
- **Maintain the rights and obligations of States:** UNCLOS strikes a careful balance between the rights, freedoms and obligations of States through the various regimes provided. This balance should be respected and upheld in order to continue contributing to the realization of a just and equitable economic order<sup>2</sup>. Furthermore, other international legal

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<sup>1</sup> UNCLOS, para 5 preamble

<sup>2</sup> UNCLOS, preamble, para 5

frameworks or instruments also confer particular rights and obligations to these States, and these should be given due regard.

- **Cooperation and coordination:** UNCLOS provides for the obligation for States to cooperate on a global basis, and regional basis when appropriate, for the protection and preservation of the marine environment (Article 197), which is further reiterated in Principle 7 of the Rio Declaration and which has been recognized by both the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS). In addition, UNCLOS extends the duty to cooperate to the management of living resources, marine research, and transfer of marine technology among others. This cooperation extends also to non-State actors, including international organizations. Cooperation should not therefore be restricted to States. While UNCLOS only provides coordination among international organizations for the conduct of international programs on the conduct of transfer of marine technology, the current situation in ABNJ requires that coordination be extended to all sectors. Therefore, this instrument would operationalize the cooperation and coordination of all relevant actors while not undermining existing frameworks and instruments.
- **Common Heritage of Mankind** in accordance with UNCLOS and in the spirit of UNGA resolution **2749** of 17 December 1970.
- **Intra and intergenerational equity:** Equity in this context implies first equity between nations and people. It aims to improve fairness among those relevant actors in consideration. The special case of SIDS, for instance, is directly related to this principle.
  - Equity is also applied across generations, in particular to take into account the interests and wellbeing of future generations. The intergenerational equity is directly related to sustainable development and further supports the obligation to protect the marine environment and its resources for future generations' rights to benefit from them; the underlying objective is to not leave future generations worse off by the choices made by the present generation.
- **Special case of SIDS:** Related to the above principle of equity, the special case of SIDS needs to be recognized as a principle in this instrument. The international community has repeatedly recognized the special case of SIDS for environment, development and sustainable development, and their intrinsic relationship with the oceans and seas. For a group of countries whose economic, social, and cultural dependence on oceans and their resources has been recognized and whose limited capacity and financial constraints have been repeatedly identified as impediments to their sustainable development, it is critical that the special case of SIDS in the context of the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction is recognized.
  - The application of this principle will be elaborated in the subsequent sections of this submission.
- **Adjacency:** This principle speaks to the rights and obligations in terms of cooperation between coastal States adjacent to the high seas and to those States including entities using the adjacent high seas. This in turn, also relates to the issue of compatibility, as addressed in Article 7 of FSA, which states that measures established in the high seas and those in national jurisdiction of adjacent coastal states should be compatible. In particular, it provides that measures implemented in the high seas not undermine the effectiveness of those implemented by coastal states within their national jurisdiction.
  - As it relates to the special case of SIDS, PSIDS proposes that specific consideration be accorded to adjacent coastal states in the management, conservation and conduct of activities in ABNJ. The new implementing agreement could establish a cooperation regime, as described in the ITLOS case no 21 (Para 199). Such provisions would be consistent with Article 197 of UNCLOS, which provides for the

consideration of regional characteristics related to cooperation for the protection and preservation of the marine environment.

- **Precautionary principle/approach:**
  - Principle 15 of the Rio Declaration 1992 states that: "in order to protect the environment, the **precautionary approach** shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall be not used as a reason for postponing cost-effective measures to prevent environmental degradation."
  - The precautionary approach is now widely accepted in international law. Article 6 of FSA provides for the application of this approach in the context of straddling fish stocks and highly migratory fish stocks. Furthermore, international courts and tribunals, including ITLOS (cases 3 and 4) have taken its implementation into account as a duty for States.
- **Polluter pays principle:** Principle 16 for the Rio Declaration states that national authorities should endeavor 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.
- **Transparency:** While respecting adequately-defined and agreed confidential information, BBNJ related processes and decision making need to be done in a transparent manner, with full participation by the public and other relevant stakeholders, including local and indigenous populations with historical links to BBNJ. This is in accordance with the good governance principle, which should be an underpinning principle of the new instrument.
- **Peaceful purposes:** The high seas and the Area are to be reserved for peaceful purposes (Articles 88 and 141 of UNCLOS).
- **Reciprocal principle of duty not to transfer damage or hazards or transform one type of pollution into another** (Article 195 UNCLOS and Principle 21 of the Stockholm Declaration)
  - each state has responsibility of activities under their control not to cause damage to environment;
  - activities undertaken within the limits of the national jurisdiction do not cause damage to the environment in ABNJ

### 3.3. Approaches

- **Ecosystem-based approach:** Decision V/6 of the COP 5 of CBD provides for the definition and description of the ecosystem approach.
  - The ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way (...)(CBD, V/6; A1a).
  - An ecosystem approach is based on the application of appropriate scientific methodologies focused on levels of biological organization, which encompass the essential structure, processes, functions and interactions among organisms and their environment. It recognizes that humans, with their cultural diversity, are an integral component of many ecosystems (CBD, V/6; A1b).
  - Decision CBD V/6 further emphasizes that the ecosystem approach requires adaptive management (CBD, V/6; A4) and provides for a list of 12 principles attached to this approach (CBD V/6; B).
  - Related to the ecosystem approach is taking into account the ecological connectivity among different ecosystems, including when establishing MPAs (thus the Aichi target for networks of well-connected MPAs).

- **Adaptive management:** Adaptive management is linked to the use of the ecosystem approach. "(...) Ecosystem processes are often non-linear, and the outcome of such processes often shows time-lags. Management must be adaptive in order to be able to respond to such uncertainties and contain elements of "learning-by-doing" or research feedback. Measures may need to be taken even when some cause-and-effect relationships are not yet fully established scientifically" (CBD; V/6; A4). This principle requires that robust monitoring be put in place and regular assessments of management measures of activities or mechanisms are in place.
- **Flexibility:** This concept relates to the special case of SIDS to ensure that the challenges faced by SIDS as well as our needs and development priorities are duly taken in consideration in the design of the future international regime for the conservation and sustainable use of marine biodiversity of ABNJ. In the context of the development of a new legally binding agreement for the conservation and sustainable use of marine biodiversity of ABNJ under UNCLOS, flexibility of the regime is seen as a means to manage the many uncertainties from insufficient information and the potential adverse impacts of activities that may be undertaken, the equitable sharing of benefits for developing States – and notably for SIDS – how this new regime may be effectively implemented for the common good.
- **Decision based on best available scientific information and technical information:** This is linked to the precautionary principle, recognizing that scientific information and knowledge of ABNJ biodiversity is incomplete but the most accurate, reliable and relevant available science at the time should be used in decision making.
  - The PSIDS recognize the importance of including traditional knowledge as well as relevant social and economic information into decision-making. For this reason, our preference is that decision making processes are based on best available scientific and technical information and the traditional, scientific, technical, and technological knowledge of indigenous Peoples and local communities (CBD, decision IX/20). Should there not be sufficient information, the precautionary approach should prevail.
- **Avoiding disproportionate transfer of burden of conservation to SIDS:** the disproportionate burden of conservation action is a concept recorded in Article 24 (2) (c) of UNFSA and recognizes the special requirements of developing states. SIDS face particular circumstances that have been recognized internationally. The SAMOA Pathway, SIDS' blueprint of sustainable development, recognizes the importance to ensure that the burden of conservation and management of ocean resources is not disproportionately transferred to them (SAMOA Pathway, 58I).

#### 4. SCOPE

##### ***Personal scope***

The PSIDS support that the new legally binding instrument under UNCLOS that should aim for universal participation. Consistent with resolution 69/292, the group further supports that it should be open to both States Parties and States non-Parties to UNCLOS.

##### ***Geographical scope***

The scope of implementation of the new instrument is areas beyond national jurisdiction as defined by UNCLOS. Precisely, it must encompass the seabed, the ocean floor, and the subsoil thereof beyond the limits of national jurisdiction, as well as the water column beyond the limits of national jurisdiction.

The new instrument must not regulate a Continental Shelf, including an Extended Continental Shelf, where a coastal state has sovereign rights for the exploration and exploitation of its natural resources. Furthermore, the instrument should not prejudice the rights of coastal States

in their claims for extended continental shelf.

**Material scope:** The future implementing agreement applies to any activity or development that has the potential to impact on BBNJ, including on ocean processes (e.g. physical, chemical, biological) relating to the health and viability of BBNJ. Adequate conservation and sustainable use of marine biodiversity requires an integrated and inclusive approach; therefore, it is important to have effective consultations in the decision-making process regarding the management of ABNJ.

## 5. MARINE GENETIC RESOURCES, INCLUDING QUESTIONS ON THE SHARING OF BENEFITS

### *Introduction*

The PSIDS supports the common heritage of mankind as the main guiding principle to govern marine genetic resources (MGRs) under this regime. The following section focuses on the regime of access and benefit sharing.

On access

- Regulate activities
  - The implementing agreement should provide for a mechanism to regulate *in-situ* access to MGRs in ABNJ, which would enable equitable conditions for subsequent access and use. The importance of the distinction between marine scientific research (MSR) and bioprospecting will influence the regulation of such activities.
  - A global and universal system should be designed, developed and implemented so as to enable identification of the origins for resources used in the development of products.
- *Equitable access:* Developing countries, in particular SIDS, have limited capacity and capability to engage in MGR research and exploitation. This is inhibiting the achievement of the realization of a just and equitable economic order. Therefore, special consideration for developing countries, in particular SIDS, in the access to MGRs activities is important. This requires capacity to undertake such research and prospecting activity or research *ex-situ*. It also requires appropriate technology. Furthermore, access to the data gathered from accessing these resources should also be provided. This requires capacity to understand and use the data. Therefore, the concepts of transparency and traceability of MGRs are important.

On benefit sharing:

In line with the internationally recognized special case of SIDS, the PSIDS suggest the following elements for benefit sharing could be considered in the new implementing agreement:

- *Monetary:*
- A trust fund could be created to fund capacity building initiatives for developing countries, in particular SIDS. Given our special circumstances, this trust fund could provide a special allocation to SIDS.
- This trust fund could be funded by both:
  - Royalties or milestones payments from the exploitation of MGRs could be transferred to a trust fund. Not all MGR-related research lead to lucrative outcomes. Therefore, a system focusing solely on royalties or milestones payments will not suffice.
  - Mandatory fees: Proponents of MGR related activities could be required to financially contribute to a trust fund.



- *Non-monetary:*
- *Technology transfer* refers to instruments, equipment, vessels, processes and methodologies to produce and use knowledge to improve study and understanding of ocean/coastal nature/resources
  - Proponents of MGR related activities could be required to transfer specific technology.
  - In the SAMOA Pathway it was agreed that Marine technology transfer should consist of appropriate, reliable, affordable, modern and environmentally sound technologies (including software and equipment) and know-how (based on SAMOA Pathway, para 111).
- *Knowledge sharing and access to information:* Possible consideration for a clearinghouse mechanism.
- *Capacity building:* Proponents of MGR related activities could be required to provide capacity building to SIDS. Elements of capacity building could include as an initial matter:
  - the provision of education/training in science and technologies, policy and governance, including through joint research efforts supported through the establishment of a global scholarship fund, and enhanced through collaboration in research and development on marine genetic resources;
  - support for and development of regional centres of excellence (such as the University of South Pacific) to address regional needs and provide long-term education and training.

Marine scientific research (MSR) to be promoted for the benefit of humankind. MSR is regulated under UNCLOS, in particular stating that all States and competent international organizations have the right to conduct MSR subject to the rights and duties of other States as provided for in UNCLOS. This right extends in the High Seas and the Area. Furthermore, the Convention also provides that States and competent IGOs are responsible and liable for damage caused by pollution of the marine environment arising out of MSR. The Convention also provides for the obligation of States and competent international organizations to promote the flow of scientific data and information and the transfer of knowledge resulting from MSR, especially to developing States. This obligation includes “strengthening the autonomous MSR capabilities of developing States”.

## **6. MEASURES SUCH AS AREA-BASED MANAGEMENT TOOLS, INCLUDING MARINE PROTECTED AREAS**

ABNJ are characterized by a patchwork of sectoral management with limited coordination and cooperation. This is one of the major gaps that has been identified. Area-based management measures developed and coordinated under this agreement would therefore resolve this lack of coordination and reduce the possible conflicts of uses among various sectors as well as ensuring that commitments to intergenerational equity are upheld. To do so, the new implementing agreement could develop international standards and a framework for integrated measures in ABNJ.

Area-based management tools (ABMTs) identify the ecological, biological, cultural, economic, and social values of a particular area and ecosystem, as well as its vulnerability to adverse



impacts of activities or global changes. ABMTs also identify the relevant stressors or threats that jeopardize the integrity of a given ecosystem.

Existing tools include ecologically and biologically significant areas (EBSAs), vulnerable marine ecosystems (VMEs), particularly sensitive sea areas (PSSAs), EIAs and SEAs. Each of these tools contains a specific set of criteria that are relevant to the particular sector they are developed under. In addition, EIAs and SEAs can also be considered ABMTs in so far as they could identify the values as well as threats/stressors of an activity in a given geographical area. EIAs/SEAs will be discussed in more detail in the following section.

Once values and threats are assessed, appropriate response measures are identified to address a set objective. While the overall objective would be the conservation and sustainable use of biodiversity, a given measure should balance the need for sustainable use with the importance of conservation depending on the level of threat and/or the objective to achieve.

Current sectoral area-based management measures are limited in scope by being only applicable to their sector. They do not adopt an integrated approach. They only focus on the threats caused by activities of their sector without considering activities from other sectors or cumulative impacts.

Marine protected areas (MPAs) are measures that aim to achieve a conservation objective. There are different sub-categories of MPAs with varied protection levels. The sub-category of an MPA aims to respond to specific pre-agreed conservation objectives. These objectives can vary from regulating a specific activity all the way to closing the area to all human activities and establishing therefore a marine reserve or sanctuary. An MPA based on best available scientific information, and implement the ecosystem, precautionary and integrated approaches. It needs to take into account, therefore, all activities that can have an impact on the ecosystem considered, as well as the need to plan for the adverse effects of climate change and ocean acidification on ocean resilience. While UNCLOS requires States to cooperate for the protection and preservation of the marine environment and for the conservation and management of living resources, the Convention is silent on the establishment of MPAs in ABNJ.

Another category of measures can be considered “sustainable use focused” in the sense that they may not be conservation focused. This category includes existing sectoral area-based management measures as well as other types, such as managed areas. Note that while some of these do not have specific conservation objectives, they can lead to conservation outcomes, such as in the case of the locally managed marine areas (LMMAs), whose management models could be further considered in the context of the future implementing agreement.

The new implementing agreement should establish a regime for area based management measures. Each area-based management measure should have clear objective(s) and/or address identified threat(s) and stressor(s). The agreement would enable in particular the creation and implementation of representative and well-connected MPAs in ABNJ, including reserves. The proposal here is not to advocate for the closure of all high seas; rather it is to enable the international community to be equipped with an adequate set of tools to respond efficiently and in a timely manner to BBNJ degradation and fill the legal and governance gaps that are a threat to the conservation and sustainable use of BBNJ.

A possible way forward could be Marine Spatial Planning (MSP), which aims to bring coherence in the allocation of a set marine area so as to meet collective pre-agreed objectives. It does so by involving all sectors both in the decision making process (where zones are established) as

well as the implementation (management of certain areas). Therefore, the new agreement could set an MSP governance structure to orchestrate, in an inclusive manner, marine zoning and provide for the designation of protected and managed areas. In addition, this agreement could further aim to mainstream standards on the implementation of the precautionary approach as well as conservation considerations in existing sectoral instruments.

### ***Criteria and considerations***

A set of international criteria could be agreed to identify the values of ecosystems, their vulnerability and threats/stressors. The new instrument could consider criteria from existing mechanisms, such as EBSAs, VMEs, PSSAs. In particular, key criteria and factors to consider are as follows:

- Uniqueness
- Special importance for species
- Importance for threatened, endangered or declining species or habitat
- Vulnerability, fragility or sensitivity
- Biological productivity and/or diversity
- Cumulative and trans-boundary impacts
- Adverse impacts of climate change and ocean acidification

### ***Process***

The selection of the particular measure to adopt should be based on the following considerations:

- **Identify the objective:** Understand the value of the ecosystem, its vulnerability and the threats.
- **Integrated:**
  - ABMTs, should be considered in the broader marine ecosystem context. Where conservation measures have been put in place by coastal states in their EEZ, it should complement and not undermine their national efforts. Furthermore, efforts should promote the establishment of a connected and representative network of MPA in line with commitments made by Leaders.
  - All relevant stakeholders should be consulted in the process.
- **Cumulative and transboundary impacts:** EIAs, SEAs and TEIAs could contribute to the identification of measures to adopt for particular areas to address such impacts.
- **Adaptive management:** ABMTs, including MPAs should be responsive to evaluation outcomes of the effectiveness of measures in achieving their objectives.
- **Enforceable:** Measures will be effective if they are enforced.
- **Achievable and cost-effective:** Measures should not be developed in isolation of supporting governance arrangements and consideration of implementation requirements including sustainable financing. Indeed, financing, monitoring and compliance need to be considered as essential aspects for the measure to be effective. Models need to be cost-effective and take into account special circumstances of SIDS in order to avoid transfer of disproportionate burden.

The role of relevant actors in this regime is important to identifying their activities as well as their responsibilities.

### ***Role of States***

States to have a central role in the decision-making process.

- Special consideration of coastal States:

- Measures to be taken in ABNJ should not prejudice the rights of coastal States. Therefore, measures taken by coastal States for the conservation and sustainable use of marine biodiversity within their national jurisdiction should be taken into account.
- Adjacent States should be given particular consideration so that measures taken do not undermine their sustainable development.
- The consideration of the special circumstances of SIDS, in particular their limited capacity in mobilizing necessary means for the design and implementation of ABMTs, in particular MPAs, should be taken into account. Provisions to avoid the transfer of disproportionate conservation burden on these countries are needed.

## 7. ENVIRONMENTAL IMPACT ASSESSMENTS

The conduct of environmental impact assessments is an obligation under UNCLOS and international customary law (a.204-206 UNCLOS; ITLOS, report 2011, para 145) to ensure that any project, activity, planning or policy with the potential to have significant adverse impacts on the marine environment is evaluated to address or avoid such impacts.

### ***Threshold for EIAs, TEIAs, SEAs***

EIAs/SEAs for high seas activities should follow internationally accepted standards, processes and protocols. The CBD voluntary guidelines, the ISA guidelines, or FAO guidelines for deep sea fisheries could provide further insights.

PSIDS consider these options towards developing a robust international standard:

- Listing of activities: possibly to include in the instrument an annex defining or listing specific activities that trigger the need for an EIA or on the contrary, the list of activities that do not require EIAs. The option should provide for flexibility to consider, in a timely manner, new and emerging activities.
- Listing of areas: Based on internationally agreed areas of interests, such as for instance EBSAs, VMEs, PSSAs, or existing protected areas... any projects of activity to be undertaken could trigger an EIAs.
- Defining threshold values: The current thresholds vary among States. However, it generally constitutes a level of significant harm to the environment, or a quantifiable area/volume of impact/removal of resources. This would necessitate "an expert judgment".

Abiding by the precautionary, ecosystem and integrated approach, EIAs as well as SEAs ought to adopt a broader view, beyond the activity or policy considered so as to take into account cumulative impacts as well as transboundary impacts that such activity might have. The process should, therefore, not necessarily focus on the specific area in question but should, when relevant, take into account possible impacts in adjacent areas.

### ***Assessment reports***

The PSIDS suggest that assessment reports should present, at a minimum, the following common elements:

- description of the proposed activity
- location of proposed activity
- description of the natural environment where the said activity will take place
- assessment of possible environmental consequences of the said activity

- possible steps to address or minimize those consequences

### **Process**

An effective EIA and SEA process should be grounded on a good governance mechanism that clearly outlines the:

- Roles, authority and responsibilities of States, proponents, related bodies and stakeholders and must be linked to a decision making process.
- A clear scope of terms of reference that will define the content of assessment and the standards that need to be met throughout the EIA/SEA process, especially in the preparation of the reports.
- Timelines that need to be followed for different stages of the EIA/SEA process to ensure decisions are delivered within a reasonable timeframe.
- Enforcement and compliance provisions.

Further elements for consideration in the process:

- A Panel or committee of experts<sup>3</sup> could provide comments and advice to the appropriate entity/body.
- An effective process must be participatory and engage all stakeholders.
- IA/SEA legislation and regulations should be transparent and publically-available, in easily-accessible formats, so that proponents, CSOs and other stakeholders are fully aware of how to participate in, and contribute to the process.
- Consideration should be given to the role and interlinkages between EIAs and SEAs and ABMTs, especially in the context of limited information in some areas of ABNJ.
- EIA/SEA can be an expensive process: It is useful to have formal policies that specify who is responsible for bearing different costs, particularly costs associated with public notifications, hiring consultants and undertaking environmental monitoring, etc. The PSIDS suggest that the proponent should bear the cost. The ISA could serve as a model.
- Creation of a central repository to capture information gathered by EIA processes is needed, with due regard to confidential information.
- In developing a new regime, the special circumstances of small island developing states who have limited resources to engage in new processes or governing bodies have to be adequately addressed. Consequently, developing countries could be given an opportunity to submit joint EIAs.
- Adjacent States should be given due attention in the conduct of a project planning and EIA, in particular with regard to activities with transboundary impacts.
- Consideration for the establishment of a rehabilitation fund could be further explored.

### Consequently, a possible process could be as follows:

- Screening of activities based on set thresholds.
- Scoping: development of project/activity-specific terms of reference for all EIA reports
- Impact assessment and EIA report preparation:
  - A proponent of a proposal for an activity is sponsored by a State. The proponent is responsible for the cost of the EIA process (including consultation)
  - The sponsoring State notifies a/the panel of experts
  - The panel of experts appoints an independent consultant to review the EIA report
- Adjacent States are consulted, as well as the general public, regional and international

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<sup>3</sup> This panel or committee of experts could also be technical and/or scientific committee

organizations.

- The proponent submits the EIA report for review by the independent consultant/panel of experts.
- The independent consultant provides recommendations to the panel of experts.
- The panel of experts makes a recommendation. Review of the EIA report could require alternative measures be implemented or that the initial project be modified. The proponent could be given an opportunity to submit an updated project proposal to take into account the recommendations.
- An Environmental management plan is prepared and implemented. Note: the sponsoring state has the obligation to report on the implementation periodically

## 8. CAPACITY-BUILDING AND TRANSFER OF MARINE TECHNOLOGY

The objective is to operationalize article 266 of UNCLOS. It aims to provide adequate means for developing countries, in particular SIDS, to implement their obligations under UNCLOS and to achieve UNCLOS objectives, including that of a just and equitable international economic order.

As recognized by the international community, financing from all sources, domestic and international, public and private, the development and transfer of reliable, affordable, modern technology on mutually agreed terms, capacity-building assistance and enabling institutional and policy environments at all levels are critically important means of advancing sustainable development in SIDS (SAMOA Pathway, para 102). Therefore, recognition of the special case of SIDS needs to be promoted and specific measures provided for SIDS in the new agreement.

Therefore, the new implementing agreement should:

- Take into account priorities set by States
- Support the long term institutional strengthening of an administration, agency or organization, including with regards to their reporting requirements
- Facilitate transfer from regional to national levels
- Coordinate different capacity building and transfer of technology mechanisms in place: the instrument could set general guidelines to be mainstreamed in all relevant capacity building mechanisms. The underpinning idea is to make capacity building initiatives coherent and efficient

### **Capacity building:**

Capacity building measures should be open to all stakeholders, not just governments. They could, for instance, include civil society organizations. Furthermore, private sector and other stakeholders should be encouraged to contribute to the capacity development of SIDS.

Some possible provisions include:

- The provision of education/training in science and technologies, policy and governance, including through joint research efforts supported through the establishment of a global scholarship fund, and enhanced through collaboration in research and development on marine genetic resources
- Support for and development of regional centres of excellence (such as the University of South Pacific) to address regional needs and provide long-term education and training
- Sharing information and technologies through a central repository or clearinghouse of ABNJ information, capacity building and research collaboration opportunities, and opportunities for facilitated access to technologies, knowledge and funding

- Increasing cooperative links between regional institutions, for example North-South, South-South collaboration, and collaboration between Regional Seas organizations and RFMOs; and
- Designating/creating a financial mechanism to support implementation of activities
- Open access and wide dissemination of environmental (including biological) information collected by research conducted in ABNJ as well as in the Area (collected by all companies during prospecting and exploration activities conducted in the Area) is critical for establishing regional and global baselines that can be used to inform appropriate development of conservation priorities
- Participation of PSIDS nationals in MSR projects conducted in ABNJ would provide cost-effective access to MSR in ABNJ. Maximizing benefit in the context of needs for management and MSR within EEZs will be important so as not to overburden already stretched administrations.

Funding for capacity building initiatives could be from mandatory sources (including through royalties from MGR exploitation, percentage of EIA processing fees), stakeholder contribution to the use of ABNJ, or from voluntary sources (including States or private sector contribution). Non-monetary capacity building from the ABS regime should be implemented to enable developing countries to fully engage in all relevant activities in the context of this instrument.

### **Transfer of marine technology**

The new implementing agreement should support the efforts of SIDS to gain access, on mutually agreed terms, to appropriate, reliable, affordable, modern and environmentally sound technologies and know-how (SAMOA Pathway, para 111).

In addition to MGR-related technologies, this agreement should provide for relevant technologies for SIDS to implement their obligations under UNCLOS and this agreement in particular in relation to area-based management measures, including the establishment, monitoring, surveillance and enforcement of marine protected areas and other measures, as well as the conduct, review and reporting on EIAs/SEAs/TEIAs.

# 中华人民共和国常驻联合国代表团

PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UNITED NATIONS

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350 East 35th Street, New York, NY 10016

TEL.: (212) 655-6100

CML/24/2017

The Permanent Mission of the People's Republic of China to the United Nations presents its compliments to the Division for Ocean Affairs and the Law of the Sea of Office of Legal Affairs of the United Nations (DOALOS), and has the honor to transmit herewith, in Chinese and English versions, the Written Submission of the Chinese Government on Elements of a Draft Text of 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.

It will be appreciated if DOALOS could make this Written Submission be transmitted to the Chair of the Preparatory Committee established by General Assembly resolution 69/292, circulated to all the Permanent Missions of the Member States to the United Nations and made available on the website of DOALOS.

The Permanent Mission of the People's Republic of China to the United Nations avails itself of this opportunity to renew to the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs of the United Nations the assurances of its highest consideration.

New York, 23 March 2017



Division for Ocean Affairs and the Law of the Sea,  
Office of Legal Affairs, United Nations  
New York



**Written Submission of the Chinese Government on Elements of a Draft Text of 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**

(March 7, 2017)

1. The Chinese Government attaches great importance to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). China actively participated in all the previous meetings of the Ad Hoc Open-ended Informal Working Group of BBNJ and the previous two sessions of the BBNJ Preparatory Committee (PrepCom). China is willing to continue playing a constructive role in the future BBNJ consultations and make contributions for the international community to better address the conservation and sustainable use of BBNJ.
2. The Chinese Government supports the statements made by the Group of 77 and China during the previous two BBNJ PrepCom sessions and the views expressed by the Group and China in its written submission relating to BBNJ issues. Besides the aforementioned views, the Chinese Government would like to make some additional comments in its own capacity. It is noted that this Submission should be without prejudice for the Chinese Government to make further comments or proposals in future discussions.

## **I. GENERAL POSITION**

3. China supports Resolution 69/292 entitled “ Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (the new international instrument) ” as adopted by the General Assembly of the United Nations, highlighting that the mandate of the PrepCom is to “make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument under the Convention ”. The relevant work should be carried out by parties concerned strictly in accordance with the authorization of the Resolution. The final substantive recommendations to be made by the PrepCom should, with the greatest efforts, be based on consensus and reflect the common understanding of all parties. Meanwhile, the Chinese Government supports the PrepCom in addressing the topics identified in the 2011 package, namely marine genetic resources, including 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, together and as a whole.
4. Firstly, the new international instrument, as a legally binding document under the framework of the UNCLOS, should be consistent with the objectives and purposes of the UNCLOS, playing a supplementary and complementary role. It should not deviate from the principles and spirits of the UNCLOS or undermine its existing framework. Nor should it impair the integrity and delicate balance of the UNCLOS. The freedoms and rights in respect of navigation, scientific research and fishing enjoyed by States under UNCLOS should not be derogated. The provisions of the UNCLOS concerning the rights and obligations of the coastal States, including the rights and obligations over the outer continental shelf beyond 200 nautical miles, should not be affected.

5. Secondly, the new international instrument should not contravene with current international law and global, regional or sectoral marine mechanisms. Nor should it undermine existing relevant legal instruments or frameworks as well as the relevant global, regional and sectoral bodies. In particular it should refrain from interfering with the mandates of the Food and Agriculture Organization of the United Nations, Regional Fisheries Management Organizations, the International Maritime Organization and the International Seabed Authority. The new international instrument should facilitate cooperation and coordination with existing relevant international bodies, and avoid duplication or conflict of functions.
6. Thirdly, the relevant institutional arrangements of the new international instrument should have sound legal bases and solid scientific evidences and maintain a reasonable balance between marine environmental protection and sustainable use.
7. Fourthly, the new international instrument should accommodate the interests and concerns of all sides. It should also base itself on the interests and needs of the international community as a whole and the absolute majority of States, especially those of the developing States. It should not overburden States particularly developing States by adding obligations and responsibilities beyond their capacity.

## **II. MARINE GENETIC RESOURCES, INCLUDING QUESTIONS ON THE SHARING OF BENEFITS**

8. Marine genetic resources in areas beyond national jurisdiction are of tremendous actual or potential value for human beings. The institutional arrangements of the new international instrument should be conducive to promote scientific research, encourage innovation, facilitate fair and equitable share of the benefits from conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, with a view to advancing the common well-being of humankind.

## **A. Definition**

9. The Chinese Government considers that the definitions of genetic resource contained in the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) could serve as references for discussion on the definition of marine genetic resources (MGRs) in the new international instrument. The definition in the new instrument should include the following four elements: (1) the animal, plant, microbial or other origin derived from oceans and seas; (2) genetic materials containing functional units of heredity; (3) the resources of actual or potential value; (4) the resources derived from areas beyond national jurisdiction. The Chinese Government noticed that the definitions of genetic resources contained in the CBD and ITPGRFA do not encompass derivative, which is the product of biochemical synthesis without functional units of heredity.

## **B. Access**

10. During the meetings of the PrepCom, some States argued that access to the MGRs consists of three types, namely *in situ* collection, *ex situ* collection and *in silico* analysis. The *in situ* collection means obtaining or collecting MGRs in natural environments in areas beyond national jurisdiction. The *ex situ* collection and the *in silico* analysis refer to the collection of useful resources, information, materials and data resulted from the laboratory separation, identification, selection, cultivation and computer-based simulation analysis of the MGRs samples obtained from *in situ* collection. The Chinese government is of the view that the *in situ* collection in essence falls within the scope of scientific research in areas beyond national jurisdiction as stipulated by the UNCLOS, therefore free Access arrangements should be applied so as to facilitate the exploitation and sustainable use of MGRs.

### **C. Benefit sharing**

11. Collection of samples of MGRs in areas beyond national jurisdiction, subsequent research and development, and further commercialization of useful products, are characterized by demands for high technology, long period of time, large investments and uncertain outcomes, etc. The benefit sharing arrangement of MGRs should in general promote the conservation and sustainable use of BBNJ, encourage marine scientific research, and facilitate benefit sharing of MGRs for all humankind. The Chinese Government is of the opinion that on the premise of fully accommodating the concerns and needs of developing States, the PrepCom should give priority to non-monetary benefit sharing mechanism such as easy access to samples, information exchange, transfer of technology and capability building. Meanwhile, The Chinese Government is open to discuss and explore the establishment of a monetary benefit sharing mechanism.

### **III. AREA-BASED MANAGEMENT TOOLS, INCLUDING MARINE PROTECTED AREAS**

12. The Chinese Government supports the promotion of the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction and attaches great importance to area-based management tools, including marine protected areas.

#### **A. Definition**

13. Area-based management tools include different management forms and approaches besides marine protected areas. The Chinese Government maintains that the definition of area-based management tools to be regulated by the new international instrument should include but not limited to the following three basic elements: (1) The objective element. The area-based management tools should be aimed at the conservation and sustainable use of marine biological diversity. (2) The geographic

scope element. The area-based management tools should be applied only to areas in the high seas and the international seabed area. (3) The function elements. The area-based management tools should include different functions and management approaches.

## **B. Principles and approaches of establishing marine protected areas**

14. The preamble of the UNCLOS clearly stipulates that: “Conscious that the problems of ocean space are closely interrelated and needs to be considered as a whole.” In compliance with this spirit, when it comes to the principles and approaches of establishing marine protected areas, the integrated marine management approach could be taken into account in order to fill the gaps among the current regional or sectoral management approaches.
15. With regard to the specific guiding principles of establishing marine protected areas to be developed in the new international instrument, the Chinese Government in general associates itself with the statements on this issue made by G77 and China at the Second Session of the PrepCom and additionally emphasizes the following principles: (1) The principle of necessity. Marine protected areas are tools rather than objectives, so marine protected areas should be established on the premise of necessity. (2) The principle of proportionality. Conservation measures must be proportional to the objectives and effects of conservation and should be applied in a cost-benefit manner. (3) The principle of scientific evidence. The establishment of marine protected areas needs solid scientific evidence, evaluating the potential threats and risks to the ecosystems, habitats and populations to be protected. (4) The principle of different levels of protection. Different management tools should be applied according to the respective characteristics of different sea waters, ecosystems, habitats and populations. (5) The principle of international cooperation. All countries and international organizations

are obliged to collaborate with each other in the establishment of marine protected areas.

16. The establishment of marine protected areas should have clear conservation objectives, certain conservation targets, specific protection scope, appropriate protection measures and reasonable time limit etc. The establishment of marine protected areas should follow specific procedures, including submission, consultation, review, decision-making, management, monitoring and surveillance.

#### **IV. ENVIRONMENTAL IMPACT ASSESSMENTS**

17. The Chinese Government attaches great importance to marine environmental impact assessments, and believes that the institutional arrangements in respect of environmental impact assessments in the new international instrument should comply with the basic legal framework and the procedural elements provided by the UNCLOS. It should also take into account the provisions in respect of environmental impact assessments in other international instruments.
18. Article 206 of the UNCLOS provides that: “When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment.” In accordance with this Article, the Chinese Government submits that the subject of environmental impact assessments under the new international instrument should be States planning to undertake marine activities. The object of environmental impact assessments should be the planned “activities” under the jurisdiction or control of States, according to which strategic environmental impact assessment is not appropriate. The threshold to trigger environmental impact assessments is to “have reasonable ground for believing” that such activities “may cause substantial pollution of or significant and harmful



changes to the marine environment”. In addition, in light of the factors such as scientific information, technical methods, cost and capability, it should be carefully deliberated to ascertain whether assessment of cumulative impacts is “as far as practicable”.

19. Article 194 of the UNCLOS specifies that States shall ensure that “pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.” The Chinese Government believes that since the UNCLOS has made provisions for trans-boundary impact of activities within the areas of national jurisdiction, the scope of environmental impact assessments under the new international instrument should be limited to activities in the areas beyond national jurisdiction, including activities that may cause significant environmental impacts to the areas under the jurisdiction of the coastal States, but excluding activities that take place in the areas within national jurisdiction.

## **V. CAPACITY-BUILDING AND THE TRANSFER OF MARINE TECHNOLOGY**

20. Capacity building and the transfer of marine technology are among the important means to improve the capacity of developing countries in the conservation and sustainable use of BBNJ, and remain indispensable for realizing the overall objective of marine environmental protection and sustainable development. The Chinese Government is supportive of the general position of the Group of 77 and China on capacity building and the transfer of marine technology, and wishes to make the following additional points of views:
21. Firstly, the new international instrument should follow the principles of pertinence, effectiveness, equality and mutual benefit, win-win cooperation.

22. Secondly, the new international instrument should take full account of the needs and interests of developing countries, in particular small islands developing countries, the least developed countries, landlocked and geographically disadvantaged countries as well as countries with special interests.
23. Thirdly, the new international instrument should encourage various forms of international cooperation, including the installation of international cooperation platform, the establishment of information sharing mechanism as well as the utilization of the Intergovernmental Oceanographic Commission and other relevant international organizations, with a view to strengthening capacity-building of and the transfer of marine technology to the developing countries.
24. Fourthly, the Chinese Government concurs with the African Group for its proposal that capacity-building should be "meaningful". The Chinese Government advocates not only "to give fish", but more importantly to "teach how to fish", which means that through approaches such as education, technical training and joint research, the endogenous capacity of developing countries in the conservation and sustainable use of BBNJ could be conscientiously improved.

## **VI. Cross-cutting issues**

25. The Chinese Government is of the view that the key for discussing cross-cutting issues is to follow the provisions and spirits of the UNCLOS, upholding the established international maritime legal order and maintaining a reasonable balance between the rights and obligations conferred by the UNCLOS.
26. Article 4 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks stipulates that "Nothing in this

Agreement should prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement should be interpreted and applied in the context of and in a manner consistent with the Convention." It is the view of the Chinese Government that this Article does provide some guidance to address the relationship between the new international instrument and the UNCLOS.

## Options for Legal Text on a process for the designation and implementation of a representative network of Marine Protected Areas, including Marine Reserves in Areas Beyond National Jurisdiction under the new Instrument

### Greenpeace's rolling submission to the Third Session of the Preparatory Process (PrepCom 3)

March 2017

#### Introduction

This document is part of Greenpeace's **rolling submission** to the Preparatory Process on the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (ABNJ). Building upon Greenpeace's previous **submissions**<sup>1</sup> and **best practices under existing international instruments** (see footnotes), as well as proposals submitted by delegations as **reflected in the Chair non-paper**, we suggest options for legal text on a process for the identification, designation and management of a representative network of Marine Protected Areas (MPAs), including marine reserves, in ABNJ.

Importantly, Greenpeace believes that the rich exchange of information and views during the previous meetings of the Preparatory Committee have offered States enough elements to advance the discussion on Area Based Management Tools, including MPAs, into an **intergovernmental conference** setting, to be convened **as soon as possible in 2018** in line with the timeline set by General Assembly resolution 69/292.

#### Step 1: Starting Point

##### Definition of Marine Protected Areas (MPAs)

*Suggested text:*

"A designated geographically defined marine area [in areas beyond national jurisdiction] where human activities are **regulated, managed or prohibited** in order to achieve specific conservation objectives including the long-term conservation and resilience of nature."<sup>2</sup>

##### General Duties

*Suggested text:*

1. *State Parties*<sup>3</sup> shall co-operate to protect and preserve the marine environment and maintain and restore the health, productivity and resilience of marine habitats,

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<sup>1</sup> For Greenpeace's suggested process see our submission to PrepCom 2 ([http://www.un.org/depts/los/biodiversity/prepcom\\_files/greenpeace2.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/greenpeace2.pdf)) and views submitted to Chair H.E. Mr. Eden Charles following PrepCom2 ([http://www.un.org/depts/los/biodiversity/prepcom\\_files/rolling\\_comp/Greenpeace-marine\\_protected\\_areas.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Greenpeace-marine_protected_areas.pdf)).

<sup>2</sup> See Convention on Biological Diversity, Art. 2 and IUCN definition at [https://cmsdata.iucn.org/downloads/iucn\\_categoriesamp\\_eng.pdf](https://cmsdata.iucn.org/downloads/iucn_categoriesamp_eng.pdf).

<sup>3</sup> For simplicity sake this document refers to "State Parties", which means "States and other entities".

*ecosystems and biodiversity in areas beyond national jurisdiction.*<sup>4</sup>

2. State Parties *shall pursue co-operation in relation to marine biodiversity beyond national jurisdiction through the processes established under this Instrument to ensure the conservation and sustainable use of such biodiversity.*<sup>5</sup> *In particular: State Parties shall co-operate under the terms of this Instrument in the establishment of effectively and equitably managed, ecologically representative and well-connected systems of Marine Protected Areas, including marine reserves, and other effective area-based conservation measures in the view to meet global conservation targets.*<sup>6</sup>
3. Competent international organizations, whether subregional, regional or global shall co-operate and take all appropriate measures to ensure the effective discharge of their functions and responsibilities to achieve the objectives of this Instrument.<sup>7</sup>

## Step 2: Identification

*Suggested text:*

1. Marine Protected Areas shall be identified according to the procedures in this Article based on scientific criteria already developed under existing global frameworks, including in particular the criteria for the description of Ecologically or Biologically Significant Areas (EBSAs) adopted under the Convention of Biological Diversity.
2. Marine Protected Areas shall be identified as part of an ecologically representative and well-connected global network of Marine Protected Areas including marine reserves and shall contribute to the achievement of one of the following objectives:
  - a. the protection of representative marine ecosystems, biodiversity and habitats at an appropriate scale to maintain their viability and integrity in the long term;
  - b. the protection of key ecosystem processes, habitats and species, including populations and life-history stages;
  - c. the establishment of scientific reference areas for monitoring natural variability and long-term change
  - d. the protection of areas vulnerable to impact by human activities, including unique, rare or highly biodiverse habitats and features;
  - e. the protection of features critical to the function of local ecosystems;
  - f. the protection of areas to maintain resilience or the ability to adapt to the effects of climate change.<sup>8</sup>
3. The Scientific Committee established under the new Instrument shall undertake a regular global review to identify candidate sites for Marine Protected Areas.

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<sup>4</sup> UNCLOS Art 192; 117 and 118. Restoration in [Future We Want](#), UNGA Res. 66/288, Para 158.

<sup>5</sup> Article 8(1) of UN Fish Stocks Agreement (UNFSA).

<sup>6</sup> E.g., [Plan of Implementation](#) of the World Summit on Sustainable Development (WSSD), CBD Aichi Target 11, Sustainable Development Goal 14 (5), and OSPAR 2003/03.

<sup>7</sup> Article 278 UNCLOS on cooperation among international organisations under Part XIV.

<sup>8</sup> E.g., CCAMLR, [Conservation Measure 91-04](#), Para 2 and SPA Protocol, Art. 4.

### Step 3: Proposal

*Suggested text:*

1. A proposal for a Marine Protected Area in ABNJ may be submitted by State Parties, competent international organisations, the Scientific Committee established under the new Instrument, or accredited observers;
2. Proponents listed in subparagraph 1 may submit a proposal for recognition of existing Marine Protected Areas designated under regional or global international agreements and frameworks;
3. Proposals for Marine Protected Areas in ABNJ shall be formulated on the basis of the best available scientific information, follow an ecosystem approach and the precautionary principle and should at a minimum include the following elements:
  - a. spatial boundaries of the proposed area;
  - b. description of the characteristics and biodiversity values of the area and the sensitivity of the species/habitats concerned;
  - c. description of current or future activities that are causing or may be expected to cause damage to the proposed area, either individually or in combination with other threats;<sup>9</sup>
  - d. the specific conservation objective(s) of the area and the necessary level of protection to achieve such objective(s,) including the designation of no-take areas;
  - e. priority elements of a proposed management plan to achieve the conservation objectives, including activities that are restricted, prohibited or managed in the MPA or parts thereof;<sup>10</sup> and
  - f. a plan for the continuous monitoring and research of ecological processes, habitats, population dynamics as well as impact of human activities.
4. Before submission, proponents shall, as far as practicable, undertake consultations with relevant competent organisations and stakeholders.<sup>11</sup>

### Step 4: Consultation

*Suggested text:*

1. A proposal properly submitted under Article [XY] shall be referred to the Scientific Committee, which shall assess the proposal consistently with the ecosystem approach and precautionary principle and the scientific criteria referred to in Article [XY] and make recommendations to the Conference of the Parties.
2. State Parties, competent international organisations and accredited observers shall be invited to submit their views in a timely manner to the Scientific Committee, which shall take them into account.

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<sup>9</sup> E.g., IMO's Revised Guidelines for the identification and Designation of Particularly Sensitive Sea Areas ([PSSA Guidelines](#)) Para 7.5.1(3)

<sup>10</sup> E.g., CCAMLR, CM 91-04, Para 3 (iii)

<sup>11</sup> E.g., UNFSA, Art 8(6)

3. During the consultation period, State Parties should refrain from authorising or permitting activities under their jurisdiction or control that might undermine the conservation objectives of the proposed area.

## Emergency Measures

*Suggested text:*

1. If a proposed site is under a significant threat of serious harm, the Conference of the Parties, acting upon recommendations from the Scientific Committee or in case of imminent threat, acting intersessionally, shall adopt a measure, based on the best scientific evidence and the precautionary principle, to be applied on an emergency basis.<sup>12</sup>
2. Such measures shall be temporary and must be reconsidered for decision at the next Conference of the Parties following their adoption.

## Step 5: Designation<sup>13</sup>

*Suggested text:*

1. Following the recommendation of the Scientific Committee, a proposed area shall be transmitted to the Conference of the Parties for consideration. The Conference of the Parties shall consider designation of the proposed area, including:
  - a. spatial boundaries;
  - b. conservation objectives and the necessary level of protection to achieve such objectives, including the designation of no-take areas;
  - c. a management plan that specifies the measures applicable;<sup>14</sup> and
  - d. a research and monitoring plan.
2. The designation of the Marine Protected Area should be for an indefinite period. However, its management measures shall be reviewed every 10 years or upon advice by the Scientific Committee, in accordance with Article [XY] to evaluate if the specific objectives of the protected area are being achieved and to evaluate the management and research and monitoring plan.<sup>15</sup>

## Step 6: Implementation

*Suggested text:*

1. Upon designation of a new Marine Protected Area under this Instrument, the Secretariat shall publish information, including its boundaries, objectives, management measures, monitoring and research plan.

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<sup>12</sup> E.g., South Pacific Regional Fisheries Management Organisation's [Convention on the Conservation and Management of High Seas Fisheries Resources in the South Pacific Ocean](#) (SPRFMO Convention), Art 20(5).

<sup>13</sup> In order to streamline the decision making process under the new Instrument, we suggest that a voting system should be introduced under its general provisions. Suggested text, building on SPRFMO Convention, Art. 16: "If the Chairperson considers that all efforts to reach a decision by consensus have been exhausted: (a) decisions on questions of procedure shall be taken by a majority of contracting Parties present and voting; and (b) decisions on questions of substance shall be taken by a three-fourths majority of contracting Parties present and voting".

<sup>14</sup> E.g., Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean ([SPA Protocol](#)), Art 7(2)(a).

<sup>15</sup> CCAMLR- CM 91-04, Para 8.



2. State Parties shall take measures and cooperate to ensure compliance by their nationals and vessels beneficially owned, operated or controlled by their nationals, with the provisions of this Instrument and with any measures adopted under the Instrument, and immediately investigate any alleged violation of such provisions and measures by their vessels, nationals and activities under their jurisdiction and control.
3. State Parties shall use their best efforts to ensure the adoption of any measures necessary to further the objectives of a Marine Protected Area designated under this Instrument and to implement any measures applicable to it in accordance with international law by the relevant international and regional organisations to which they are Parties.
4. State Parties shall request non-Parties to this Instrument whose activities, flagged vessels or nationals operate in the Marine Protected Area designated under this Instrument to become Parties or to agree to cooperate fully in the implementation of measures adopted by the Instrument.<sup>16</sup>
5. State Parties shall take measures consistent with this Instrument and international law to deter the activities of vessels flying the flag of non-Parties, which undermine the effective implementation of this Instrument.<sup>17</sup>
6. Nothing in this Instrument shall affect the rights of State Parties to apply additional or more stringent conservation measures to their vessels, nationals or activities under their jurisdiction or control.

## Step 7: Monitoring, Control and Surveillance

### *Suggested text:*

1. The Conference of the Parties shall within a year of this Instrument entering into force establish appropriate procedures for:
  - a. effective monitoring, control and surveillance of activities taking place in ABNJ which may affect this Instrument, including vessel monitoring systems, to ensure compliance with this Instrument and the measures adopted therein.
  - b. information sharing and joint operations between existing MCS systems operated by other international and regional agreements.
2. States Parties shall adopt monitoring, control and surveillance measures and compliance and enforcement schemes in order to provide an appropriate framework for promoting compliance with measures adopted under this Instrument, identify and report to the Conference of the Parties violations by vessels and nationals as well as cases of non-compliance.

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<sup>16</sup> E.g., SPRFMO Convention Art. 32(3), UNFSA Art. 33.

<sup>17</sup> E.g., UNFSA Art. 33.

## Step 8: Reporting

*Suggested text:*

1. State Parties shall regularly report to the Conference of the Parties and shall encourage international organisations, whether subregional, regional or global, with competence over activities taking place in the Marine Protected Areas proposed or adopted under this Instrument to report the Conference of the Parties on matters including:
  - a. actions and measures that have been undertaken pursuant to Article [XY];
  - b. monitoring, control and surveillance undertaken pursuant to Article [XY] and the data obtained under the research and monitoring plan;
  - c. threats, issues and other matters relevant to the conservation and management of marine biodiversity in areas beyond national jurisdiction.Such reports shall be made publicly available.<sup>18</sup>
2. Other international organisations and interested stakeholders shall be encouraged to communicate and cooperate with the Conference of the Parties on matters relevant to this Instrument.
3. The Conference of the Parties shall establish reporting mechanisms and procedures within a year of the entry into force of this Instrument.

## Step 9: Review

*Suggested text:*

1. Every 10 years or more frequently upon advice by the Scientific Committee, the Conference of the Parties shall review the effectiveness of the measures adopted pursuant to Article [XY] in meeting the objective of the area. The Scientific Committee shall make recommendations prior to each review.
2. The Conference of the Parties shall review the effectiveness of the provisions and operation of the Instrument, assess and, if necessary, propose means of strengthening the substance and methods of implementation of those provisions and operation in order better to address any continuing problems in the conservation and management of marine biodiversity beyond national jurisdiction. The review shall be undertaken at least every five years.<sup>19</sup>

## Step 10: Compliance

*Suggested text:*

1. A Technical and Compliance Committee shall be established, which shall:
  - a. monitor and review the implementation of, and compliance with measures adopted under this Instrument and provide advice and recommendations to the Conference of the Parties;
  - b. provide such other information, technical advice and recommendations as it considers appropriate or as may be requested by the Conference of the

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<sup>18</sup> E.g., SPRFMO Convention, Ar. 24(2) and Protocol on Environmental Protection to the Antarctic Treaty ([Madrid Protocol](#)) Art. 17.

<sup>19</sup> E.g., UNFSA Art. 36 and SPRFMO Convention, Art. 30(1).

- Parties relating to the implementation of and compliance with the provisions of this Instrument and the measures adopted under this Instrument; and
- c. review the implementation of cooperative measures for monitoring, control, and surveillance and enforcement adopted under this Instrument and provide advice and recommendations to the Conference of the Parties.<sup>20</sup>

2. A submission may be made to the Technical and Compliance Committee by a State Party, by an international organization, whether subregional, regional or global, with competence in areas relevant to the Instrument or by an accredited observer.

3. Based on the review of all information provided in the submissions under paragraph [2] or any other relevant information, the Technical and Compliance Committee each year shall issue a report identifying non-Contracting Parties that have failed to discharge their obligations under international law to co-operate with this Instrument, in particular, by not taking measures or exercising effective control to ensure that their vessels or nationals do not engage in any activity that undermines the effectiveness the Instrument, including the conservation objective of MPAs established under this Instrument.<sup>21</sup>

4. Based on the recommendations from the Technical and Compliance Committee, the Conference of the Parties should decide upon one of the following measures:<sup>22</sup>

- a. Provide advice and facilitate assistance to individual States, including non-Parties, or international or regional organizations regarding the implementation of this Instrument and the measures adopted under the Instrument;
- b. Make recommendations to a State, including non-Parties, or international or regional organizations about appropriate measures to bring about full compliance with this Instrument, including the measures adopted under the Instrument;
- c. Request the State concerned to submit an action plan, including a time schedule, to the Technical and Compliance Committee regarding the achievement of compliance with this Instrument, including the conservation objectives of MPAs adopted under this Instrument and to report on the implementation of this action plan;
- d. Issue a declaration of non-compliance; or
- e. Take such other non-judicial, consultative or other responsive measures designed to achieve full compliance with this Instrument.

5. The Technical and Compliance Committee may also submit a report to the Conference of the Parties on relevant developments between the sessions of the Conference of the Parties.

6. Where exceptional circumstances so warrant or where available information clearly shows that the Party or non-Party concerned continues to diminish the effectiveness of measures adopted pursuant to this Instrument, and/or the ecosystem or any of its components under protection is under serious threat, the Conference of the Parties may

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<sup>20</sup> E.g., SPRFMO Convention, Art 11.

<sup>21</sup> E.g., International Commission for the Conservation of Atlantic Tuna (ICCAT), [resolution 03-15](#) concerning trade measures, Para 2.

<sup>22</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), Decision I/7 on Review of Compliance, Para 37.

immediately decide on action, including, as appropriate, the imposition of trade-restrictive measures consistent with their international obligations. Before making such a decision, the Conference of the Parties should request the Party or non-Party concerned to discontinue its wrongful conduct and should provide them with a reasonable opportunity to respond.<sup>23</sup>

7. The compliance procedure described in this Article shall be without prejudice to Article [XY] of the Agreement on the settlement of disputes.

8. In order to enhance synergies between this compliance procedure and compliance procedures of other international organizations, whether subregional, regional or global, relevant to the functioning of this Instrument, the Technical and Compliance Committee may communicate with the relevant bodies of those organizations, including with recommendations as appropriate.

**For more information, contact:**

Sofia Tsenikli, Senior Political Strategist  
[Sofia.Tsenikli@greenpeace.org](mailto:Sofia.Tsenikli@greenpeace.org)  
+30 6979443306

Veronica Frank, Political Advisor  
[veronica.frank@greenpeace.org](mailto:veronica.frank@greenpeace.org)  
+351 935371683

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<sup>23</sup> ICCAT Rec. 03-15, Para 7 and 10. Non-discriminatory trade restrictive measures should be taken as a last resort where other measures have proven unsuccessful to prevent, deter and eliminate any act or omission that diminishes the effectiveness of conservation and management measures under the Instrument



# **Giving effect to holistic integrated ocean management through regional delivery of global standards, obligations and commitments**

*WWF second iteration of rolling submission to  
the BBNJ PrepCom Chair and to DOALOS for PrepCom3*

**14 March 2017**

## **Introduction**

This brief submission is a second iteration of a WWF rolling submission<sup>1</sup> to DOALOS and delegations attending the third session of the BBNJ Preparatory Committee (PrepCom3) established by General Assembly resolution 69/292 on the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). A third implementing agreement (IA) to UNCLOS on this matter would be the best format for such an instrument.

In particular, we suggest that giving effect to the ‘ecosystem approach’ principle by establishing regional integrated, ecosystem-based oceans management committees (or other arrangements) is the most appropriate way to give effect to States’ expressed desire for holistic oceans management.<sup>2</sup>

Such an approach addresses **four key considerations facing the PrepCom:**

*Firstly*, a legally binding agreement ‘under UNCLOS’ that does ‘not undermine’ existing bodies and arrangements will necessarily be limited to an oversight and coordination role – best done by giving

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<sup>1</sup> See previous WWF rolling submission to PrepCom Chair, Dec 2016 (available at [http://www.un.org/depts/los/biodiversity/prepcom\\_files/rolling\\_comp/World\\_Wildlife\\_Fund.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/World_Wildlife_Fund.pdf)); and WWF submissions to PrepCom1 on Enhanced Cooperation and Dispute Settlement and on Marine Genetic Resources (both available at [http://www.un.org/depts/los/biodiversity/prepcom\\_files/WWF\\_BBNJ\\_Prep\\_Com1\\_2016.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com1_2016.pdf)), and for PrepCom2 on Strategic Environmental Assessments and Environmental Impact Assessments (available at [http://www.un.org/depts/los/biodiversity/prepcom\\_files/WWF\\_BBNJ\\_Prep\\_Com2\\_2016.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com2_2016.pdf))

<sup>2</sup> As per UNCLOS, 3rd preambular paragraph, and UNGA Resolution 69/292, 5<sup>th</sup> preambular paragraph.

practical effect to the UNCLOS general duty to cooperate<sup>3</sup>. With the best will in the world, competent sectoral bodies committed to the 'ecosystem approach' cannot be expected to deliver desired outcomes on their own because cross-sectoral arrangements (and/including cooperation & collaboration) and other actions beyond their competency are generally required.

*Secondly*, the nature and scale of ocean ecosystems means that effective outcomes require cross-jurisdictional management arrangements covering waters both within and beyond national jurisdiction – which similarly requires regional bodies or arrangements limited to oversight and coordination roles in deference to the competencies of the States involved as well as the sectoral bodies. Likewise, with the best will in the world, individual States cannot deliver holistic management on their own and, importantly, a coherent framework is needed to facilitate discussions around often contentious matters of compatibility and adjacency.

*Thirdly*, regional coordination committees (or other arrangements) have the potential to capture synergies available, and so save time and money, by centralising biodiversity-related decision-making arrangements. States need to make, either acting alone within their own jurisdiction or collectively through competent bodies, to meet obligations and commitments set out in the provisions of other relevant agreements and decisions of other relevant bodies. Decisions that only need making once should only be made once.

*Fourthly*, effective holistic integrated ecosystem-based management requires a lot of investment in information management (e.g. with regards to marine spatial planning, cumulative impact management, marine research, baseline studies, impact assessments, use/activity monitoring, etc.). This, in turn, generates ongoing demand for capacity building in support of informed decision-making. This is a key rationale for strong capacity building and technology transfer commitments to be included in the IA. Good management of cross-sectoral and cumulative impacts through ecosystem-based management requires greater levels of scientific and information support than that customarily relied upon by sectoral bodies.

This submission thus briefly describes the first of three principal building blocks required of an effective BBNJ UNCLOS IA: (i) regional delivery of global standards, obligations and commitments through regional oversight committees (or other arrangements); (ii) an access and benefit sharing regime for marine genetic resources that is integrated into a broader capacity building and technology transfer framework; and (iii) environmental impact assessment and the value of strategic environmental assessment to support both EIA and regional management. Additional contributions to the WWF rolling submission covering the second and third building blocks will be forthcoming.

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<sup>3</sup> [http://www.un.org/depts/los/biodiversity/prepcom\\_files/WWF\\_BBNJ\\_Prep\\_Com1\\_2016.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com1_2016.pdf)

## ***Regional Scale Delivery key to meeting Global Obligations, Standards and Commitments***

In the WWF Submission of 5 December 2016, we argue that, the IA should integrate the ecosystem approach among its governing principles. In this regard, WWF recommends that an Annex to the IA (forming an integral part of the Agreement) be adopted guiding its implementation through ecosystem-based management (EBM) in the same fashion as Annex II of the United Nations Fish Stocks Agreement (UNFSA) guides the operationalization of the precautionary approach to fisheries.

That Submission goes on to note that, ‘the IA should also explicitly call for the implementation of ecosystem-based management as a means to ensure governance coherence’. In this connection, it should be made clear in the Agreement and/or the Annex that such operationalization requires the management of the entire ecosystem (at appropriate biogeographical scales) by taking into account all human activities and other pressures/stressors that directly or indirectly affect the ecosystem in question for the long-term conservation and sustainable use of marine biodiversity. In order to do this, EBM should be based on biogeographical units that should be defined by the IA Subsidiary Body for Scientific and Technical Advice that WWF recommends to be established by form of the Agreement.

Another key aspect of EBM is that it is best organised at the regional scale. This is the scale at which ecological and political realities best align and, in WWF’s view, one of the key achievements for this new IA would be to create a global framework within which States can establish regional oversight bodies or other cooperation arrangements by negotiation between those with a real interest in the conservation and sustainable use of the biodiversity of each region.

WWF has been very supportive of States in organising around the concept of ‘Large Marine Ecosystems’ (LME) because of exactly the same ecological and political realities and resultant commitment to EBM. LMEs, however, are largely confined to coastal current systems and other waters over continental shelves, mainly in areas within national jurisdiction. States now have the opportunity to adapt the LME concept to cover BBNJ – and the much broader range of interested States that goes with it.

## ***Regional Oversight Committees as Subsidiary Bodies to the IA COP***

WWF envisages that such regional oversight committees (or other arrangements) would be established by decision of the BBNJ IA Conference of the Parties (COP) as subsidiary bodies with delegated roles and responsibilities as specified in that decision. This would allow regional arrangements to be flexibly tailored to each region depending on the aspirations, ambitions and expectations of those States with a ‘real interest’ in the conservation and sustainable use of the biodiversity of that region. This has the potential to maximise the political will to make requisite management decisions by those responsible for doing so. While standards, commitments and expectations might be set by the wider international community, it would be up to regionally interested States to implement them.



It was WWF's original ambition for this new BBNJ IA that it would establish ROMOs – regional oceans management organisations with requisite competency to adopt management measures capable of delivering integrated, ecosystem-based oceans management. In adopting UNGA Resolution 69/292, however, States have decided to proceed (i) on the basis of 'not undermining' existing sectoral bodies with competency to adopt management measures for sectoral activities in areas beyond national jurisdiction and (ii) to adopt a 'binding arrangement under UNCLOS'.

WWF therefore accepts that any regional cross-sectoral oversight regional arrangements to be established need to have their oversight competencies carefully described – while being given a clear mandate: to ensure delivery of integrated, ecosystem-based ocean management of a region.

Holistic ocean management that delivers both integrated ocean management (IOM) and ecosystem-based management (EBM) will, of necessity, be more complex than the sum of current arrangements. Significant institution building is thus warranted – and required. This requires that a Conference of the Parties (COP) and requisite subsidiary bodies (scientific and technical body, compliance committee, admin/finance committee) be established.

Additionally, the COP needs to have the authority to devolve its decision-making powers, to the extent it deems prudent, to regional committees or other arrangements established as subsidiary bodies to the COP. WWF considers it appropriate to leave this issue for subsequent COP deliberation because the extent of devolution of powers and the extent of regional institution building is best worked out on a region-specific case-by-case basis. WWF also hopes that such deferral will facilitate building consensus among delegations for inclusion of this approach in the recommendation to be developed and adopted by PrepCom4 in July 2017.

### ***Enhanced Cooperation and Flag State Responsibility***

In essence, WWF sees the COP as having the responsibility for setting and maintaining global standards and associated guidelines while the subsidiary regional committees or other arrangements would be responsible for overseeing implementation through 'enhanced cooperation and effective dispute resolution'<sup>4</sup>.

'Enhanced cooperation' would be an elaboration of the UNCLOS general duty to cooperate to ensure that States, acting either alone within their own jurisdiction and control or collectively through bodies with ABNJ management competencies, help each other to meet their respective obligations and commitments. A key aspect of such 'enhanced cooperation' is that it would extend beyond simply ensuring States meet their obligations as set out in the provisions of the IA to include ensuring that States, acting alone or through competent bodies, (i) meet their obligations to implement relevant commitments set out in the provisions of the full array of other relevant agreements, including UNCLOS; and (ii) give effect to the decisions of bodies established by those agreements.

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<sup>4</sup> [http://www.un.org/depts/los/biodiversity/prepcom\\_files/WWF\\_BBNJ\\_Prep\\_Com1\\_2016.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com1_2016.pdf)

Maintaining COP standards and guidelines gives practical effect to such enhanced cooperation. These standards and guidelines would be based on the advice of the COP's Subsidiary Body for Scientific and Technical Advice (SBSTA) and best available science, with SBSTA also being expected to maintain close collaboration with bodies from other relevant agreements such as the Convention on Biological Diversity (CBD), the Convention on the Conservation of Migratory Species (CMS) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Crucially, the UNCLOS general duty to cooperate needs to be interpreted and elaborated to oblige States that may not yet be party to an agreement to act in a manner that supports the efforts of other States to meet their obligations. Or, put another way, States that are not prepared to take on such a responsibility to be cooperative should not allow vessels under their control to engage in relevant activities. Encouragingly, this is the approach agreed by States in adopting UNGA Resolution 61/105 on Sustainable Fisheries (viz. Part X, esp. operative para. 83)<sup>5</sup>. This approach is also consistent with UNCLOS Part XII (section V) obligations, which incorporates by reference minimum standards adopted by competent organisations such as IMO.

Another key aspect of 'enhanced cooperation' is that States and competent bodies would have significant reporting obligations to ensure they did so in a manner consistent with meeting their obligations and commitments to the wider international community and helping other States to do likewise.

Having an oversight role with an integrated, ecosystem-based ocean management mandate means that the proposed subsidiary regional committees or other arrangements can help States meet their aspirations, ambitions and responsibilities not only with respect to control of activities in ABNJ but also within the national jurisdiction of adjacent coastal States. I.e., these committees or other arrangements can provide the framework for genuine regional management that recognises the need for cross-jurisdictional management while respecting all existing competencies and sovereign rights. WWF is very much aware of the conflictive nature of the compatibility and adjacency issues but a commitment to holistic management provides an opportunity to establish fora where they can be discussed.

In particular, the concepts of compatibility and adjacency need to be clearly elaborated to encompass the full suite of circumstances where management arrangements might need to be taken both within and beyond national jurisdiction if effective management of components of biodiversity is to be achieved.

Of particular concern to WWF are the jurisdictional and competency complexities of managing to effectively conserve migratory species. Interestingly, we note that this is the critical issue that gives many indigenous peoples and local communities around the world a stake in management of BBNJ.

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<sup>5</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/500/73/PDF/N0650073.pdf?OpenElement>

## ***Marine Spatial Planning – the Key to Regional Implementation and MPA Roll-out***

Marine spatial planning (MSP) is the critical cross-sectoral area-based management tool (ABMT) tool for facilitating, securing and maintaining comprehensive and holistic regional management arrangements. It can provide the framework for effectively addressing cross-sectoral conflicts and cumulative impacts both within and between sectors. MSP can help sectors to optimally manage themselves and their interactions with other sectors.

Importantly, however, MSP also serves as a crucial tool to deliver conservation objectives wherever such conflicts and impacts occur, especially through the development of effectively managed networks of inter-connected, representative marine protected areas (MPAs).

Effectively managed MPAs, including highly protected marine reserves, are central to achieving biodiversity conservation commitments and it is important that the envisaged IA establishes an obligation to establish ecologically representative networks of MPAs in a timely and effective manner and at a scale and in locations designed for maximum effectiveness.

The IA needs to set out roles, responsibilities and procedures for all stages of the process for establishing and maintaining MPAs, especially maintaining global standards, criteria and guidelines for locating, delineating and designating MPAs and for developing, implementing and ensuring compliance with management plans and associated measures.

While adoption of some management measures might need to be left to competent bodies to keep faith with the commitment to ‘not undermine’ them, failure to adopt appropriate measures by such competent bodies is not an option. ‘Not undermining’ works both ways – States with obligations are entitled to expect bodies with relevant competencies to act properly and appropriately to allow those States to meet their obligations. For WWF, this is one of the key areas where reporting obligations are important – competent bodies should be made directly accountable to the COP, and any appropriately constituted regional subsidiary committees or arrangement, for the decisions they make in seeking to give effect to the decisions of the COP (or any other relevant bodies).

A key part of the IA framework necessary to ensure competent bodies act properly and appropriately is to adopt and adapt the UNCLOS dispute resolution provisions so that the COP has a full suite of options available to it, especially cheap and accessible ‘user-friendly’ options short of judicial action<sup>6</sup>. For bodies to merely note that ‘we are working on it’ is not enough – timely and effective action is required and expected.

## ***Building on Existing Arrangements, Programmes and Initiatives***

Improvements in the management of the open ocean have been underway for many years. The new IA provides an historic opportunity for consolidation of such improvements through development of

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<sup>6</sup> [http://www.un.org/depts/los/biodiversity/prepcom\\_files/WWF\\_BBNJ\\_Prep\\_Com1\\_2016.pdf](http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com1_2016.pdf)

a comprehensive, holistic management framework within which gaps can be identified and addressed.

In this regard, the process conducted under the auspices of the Convention on Biological Diversity (CBD) to describe and identify “ecologically or biologically significant marine areas (EBSAs)” offers a crucial underpinning for this management framework<sup>7</sup>. A first round of CBD evaluation and adoption of reports from regional CBD workshops on the description of marine areas meeting the EBSA criteria is largely complete and it is now up to relevant competent bodies and coastal States to develop appropriate management responses to ensure the values within EBSAs are protected.

There is a suite of existing bodies with limited sectoral and/or geographical competencies, mandates and scopes which are already active. Of particular note are:

- RFMOs with sectoral high seas fisheries management competency; IMO with broader vessel design and operation responsibilities; and ISA with UNCLOS Area seabed mining management responsibilities;
- UNEP’s Regional Seas Programmes and Action Plans (RSCAPs);
- Large marine ecosystem programmes; and
- Various other independent regional arrangements, viz. CCAMLR, the Arctic Council, OSPAR and HELCOM.

Any new IA has the potential to provide an oversight framework within which all these existing bodies, programmes and initiatives can coordinate their contributions towards regional arrangements to deliver the UNGA’s ambition for holistic management that includes BBNJ. While RSCAPs are generally focused on activities within national jurisdiction yet have EBM ambitions, sectoral bodies have ABNJ responsibilities but limited mandates. Both types of bodies have great potential to make substantial contributions, under the oversight of BBNJ IA COP subsidiary regional committees or other arrangements, to getting the job done.

At the moment, many global, sectoral, regional and sub-regional bodies have overlapping responsibilities, missions, mandates and ambitions, especially regarding environmental protection and biodiversity conservation. By introducing an overarching oversight framework, significant opportunities arise to capture synergies – by cooperating as UNCLOS intended.

### ***Bringing it All Together through Sustainable Development Goals***

In this regard, WWF would like to commend the CBD, in collaboration with others, for launching a dialogue between Regional Fisheries Bodies (RFBs) and Regional Seas Organizations (RSOs), at a recent meeting in 2016 hosted and generously supported by the Government of the Republic of

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<sup>7</sup> Dunstan P.K. et al (2016) Using ecologically or biologically significant marine areas (EBSAs) to implement marine spatial planning. <http://www.sciencedirect.com/science/article/pii/S0964569115300703>

Korea, to explore opportunities to cooperate in accelerating progress towards implementing the CBD Aichi Biodiversity Targets and associated targets of relevant SDG Goals.

This connection to SDG implementation is important and consistent with the recent CBD Decision XIII/3 on mainstreaming biodiversity into the SDGs and productive sectors. The IA regional committees or other arrangements we envisage being established by the COP would explicitly integrate SDG targets into their oversight frameworks. There are significant opportunities to capture synergies in many regards, especially in States' SDG reporting commitments.

### ***States with a Real Interest in the Conservation and Sustainable Use of the Biodiversity of a Region and Universalisation of State Obligations and State Responsibilities***

A key part of the IA regional framework WWF envisages is that membership of a regional subsidiary committee or other arrangement would be open to any States and entities with a real interest in the conservation and sustainable use of the biodiversity of that region. States party to the IA would be full members while non-parties would be associate members creating incentives for universal participation in the IA.

Most importantly, the emphasis WWF has put on regional committees and other arrangements as a key part of IA institutions and implementation is because of the importance we attach to universalisation. That is to say, WWF seeks to help build arrangements where States feel that their interests are best served by participating and that they feel comfortable in urging others that have not yet become party to relevant agreements, to do so. Additionally, the IA can create enabling conditions for the implementation of such other agreements.

In essence, implementation of any BBNJ IA will be significantly facilitated by States becoming party to relevant agreements and, conversely, will be frustrated by continued failure of some States to do so. WWF hopes that establishment of regional committees or other arrangements under a BBNJ IA will contribute to building the political will of States to encourage each other to become more responsible by becoming party to relevant agreements and then to help each other implement the resulting obligations.

WWF is conscious that, every year, the UNGA adopts an Oceans and the law of the sea resolution and a Sustainable Fisheries resolution that both urge States to become party to key international agreements. It is time that much greater focus was given to this part of these resolutions – and to broadening the list to include the full suite of agreements with relevant obligations.

#### **Contacts:**

Jessica Battle, Global Ocean Policy Manager, WWF International [jbattle@wwfint.org](mailto:jbattle@wwfint.org)

Tim Packeiser, Policy Advisor Ocean Governance, WWF Germany [tim.packeiser@wwf.de](mailto:tim.packeiser@wwf.de)