



**WWF's AMBITION FOR AN INTERNATIONAL
LEGALLY BINDING INSTRUMENT**
on the Conservation and Sustainable Use
of Biodiversity in Areas Beyond National Jurisdiction

**BRIEF FOR GOVERNMENTS
MARCH 2018**

TABLE OF CONTENT

INTRODUCTION	3
The increasingly pressured status of the oceans	3
How we got where we are today.....	4
UNIVERSAL PARTICIPATION NEEDED	5
THE OCEANS BELONG TO EVERYONE	6
ENHANCED COOPERATION	6
EFFECTIVE DISPUTE RESOLUTION	7
A VOICE FOR THE OCEANS – BBNJ ILBI INSTITUTION BUILDING	8
MARINE SPATIAL PLANNING, ECOSYSTEM-BASED MANAGEMENT AND STRATEGIC ENVIRONMENTAL ASSESSMENT	10
CAPACITY BUILDING AND TRANSFER OF MARINE TECHNOLOGY – AN OPPORTUNITY TO CONTRIBUTE TO IMPLEMENTATION OF THE SDGs	11
IOC’s Vision.....	12
BEST PRACTICE	13
MPAS – ESTABLISHING BIODIVERSITY CONSERVATION AS A USE OF OCEAN SPACE	13
EIA – POOLING FLAG STATE RESPONSIBILITY TO ASSESS LIKELY SIGNIFICANT THREATS	15
MARINE GENETIC RESOURCES INCLUDING ACCESS AND BENEFIT SHARING	17

For more information: Jessica Battle, Senior Global Ocean Governance and Policy Expert, WWF jessica.battle@wwf.se, +41 78 891 48 44

Our Library of Background Information on BBNJ ILBI can be found [here](#). It will be updated continuously.



Why we are here

To stop the degradation of the planet’s natural environment and to build a future in which humans live in harmony with nature.

www.panda.org

INTRODUCTION

In a historic decision, the United Nations General Assembly (UNGA) has decided to convene an Intergovernmental Conference to negotiate a new legally binding instrument (ILBI) under the UN Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (BBNJ). States have recognised the problem of fragmentation and gaps in existing ocean space and marine resource management arrangements and have embraced the need for a holistic approach while asserting that maintaining the status quo is not an option.

This paper sets out WWF's ambition for the scope and content of the BBNJ ILBI – an ambition that:

1. reflects what science is telling us about the parlous and worsening state of the world's oceans;
2. identifies the need for the international community to create a body that can become a strong voice for the oceans given the myriad threats they face; and
3. recognises the need to drive enhanced cooperation between states and between sectoral management bodies to improve outcomes for biodiversity.

Above all, WWF recognises the importance of ensuring that a BBNJ ILBI substantially and effectively contributes to achieving all relevant Sustainable Development Goal (SDG) targets, not only Ocean Goal 14 targets but also relevant targets for several other SDGs. In this regard, capacity building and technology transfer commitments need to be a central consideration in negotiating and implementing this new instrument.

The increasingly pressured status of the oceans

The world's oceans are under increasing pressure as human maritime activities in areas beyond national jurisdiction (ABNJ) become more widespread, more hazardous and more intense. Shipping is forecast to grow sharply as more trade facilitates efficient growth of the world economy; wild-capture marine fisheries are largely fully exploited and often overexploited but under increasing pressure to feed an expanding population; while seabed mining is poised to grow from the exploration phase to large-scale commercial mining as new 'exploitation' regulations are developed. Meanwhile, biodiversity conservation remains a neglected ocean use. Ocean space is becoming increasingly crowded such that cross-sectoral and cumulative impacts proliferate. New arrangements are needed to ensure that the international community's existing commitments to conservation and sustainability can be met by ensuring the sectoral management of maritime activities is more coordinated in being more mindful of ocean and seabed biodiversity.

As well as impacts directly attributable to maritime activities, there are impacts from land-based activities. Most notable is a suite of profound changes being driven by greenhouse gas pollution: oceans are acidifying as more carbon dioxide in the atmosphere causes more to be absorbed into the oceans; a warming atmosphere causes the oceans to heat up too, lowering oxygen content of the water; and current systems are shifting, disrupting ecosystems and shifting species distribution which complicates fish stock management. Meanwhile, plastic pollution from both macro-plastics and micro plastics is becoming dangerously pervasive and nutrient pollution from agricultural runoff and erosion is having a widening impact.

The resulting serious decline in the status of ocean health, marine ecosystems and marine biodiversity has become increasingly clear in recent years, as have the negative consequences for ocean biodiversity-based economies, especially for coastal communities that are heavily dependent upon fish resources for livelihoods and food security.

HOW WE GOT WHERE WE ARE TODAY¹

It has been a long journey since the negotiators of the Convention on Biological Diversity (CBD), in the lead-up to the original Rio Earth Summit in 1992, decided to limit the CBD's scope to areas within national jurisdiction while reiterating the UNCLOS general duty to cooperate beyond national jurisdiction (see CBD Articles 3-5²), thus opening up the gap which the BBNJ ILBI now seeks to fill.

In 2002, Rio+10, the World Summit on Sustainable Development (WSSD), adopted a Johannesburg Plan of Implementation (JPOI)³ with a substantive marine component, including commitments to enhanced regional cooperation and a global roll-out of networks of marine protected areas (MPAs), including in areas beyond national jurisdiction (ABNJ).

In 2004, the UNGA then set up a Working Group to study issues relating to BBNJ and, in 2011, the Working Group mandate was upgraded to a request for advice on how to progress things, including a package of four elements: area-based management tools (ABMT), including marine protected areas; environmental impact assessment (EIA); marine genetic resources (MGRs) including access and benefit sharing (ABS) considerations; and capacity building and transfer of marine technology.

At Rio+20 in 2012, 'The Future We Want' Declaration⁴ included a substantial ocean section with a commitment to negotiate a new 'legally binding instrument' 'under UNCLOS' which led to the UNGA, in Resolution 69/292⁵, ending the Working Group and initiating a series of Preparatory Committee (PrepCom) meetings to formulate advice on how and when to begin negotiations for a BBNJ ILBI that included the 2011 'package', with an admonition to 'not undermine' existing arrangements.

In Resolution 72/249⁶, adopted on 24th December 2017, the UNGA finally decided to convene an Intergovernmental Conference to negotiate a BBNJ ILBI and has provided for four meetings in its biennial budget. The first meeting is scheduled for 4-17 September 2018, with two more in 2019 and a fourth in early 2020. Only time will tell whether this is enough time to negotiate an agreed text.

¹ WWF's evolving online Library of Background Information on BBNJ ILBI can be found [here](#)

² <https://drive.google.com/file/d/1dfs6Fqva9NTzSU28dse9d6iR5U-tx3E/view?usp=sharing>

³ <https://drive.google.com/file/d/1IbNWOSp-JwQY-CLGewMceJaVxLbj9ZR9/view?usp=sharing>

⁴ <https://drive.google.com/file/d/1cTWTGn69r0Y66btfpPLGdnIQIH3Clio/view?usp=sharing>

⁵ <https://drive.google.com/file/d/1OAC4UJi8JAvzmX7a6W3TFkp-j8pB4exb/view?usp=sharing>

⁶ <https://drive.google.com/file/d/1xCrOrQNxut1dhLZSZ7giuxV7zAPFNisb/view?usp=sharing>

Universal participation needed

Giving effect to the international community's recognition of the need to take a holistic approach to improving cooperation to secure the conservation and sustainable use of biodiversity in ABNJ means that we need a BBNJ ILBI that all states can support and one that creates strong institutions that all interested states can participate in.

To achieve this goal of 'universality', whereby every state becomes party to the BBNJ ILBI, it is important that the negotiation and adoption of the text of the agreement is by consensus. UNGA Resolution 72/249 requires that all reasonable effort be made to achieve consensus. WWF will give priority to encouraging all states to contribute to negotiations in that spirit, not only in what they propose but also in how they propose. It will be important that all states' ambitions, aspirations and apprehensions are appropriately addressed and that no states are left behind.

Limited membership of competent sectoral management bodies, especially Regional Fisheries Management Organisations (RFMOs), and limited competency mandates of those sectoral bodies to deal with the range of biodiversity conservation and sustainability issues, frustrates coordination and cooperation efforts. This is because different states have different obligations resulting in incoherent, 'lowest common denominator' outcomes to decision-making in sectoral 'silos' where habitual treatment of biodiversity issues as secondary considerations usually results in poor outcomes for biodiversity. Even when sectoral bodies do have the mandate to act to conserve biodiversity, sectoral interests often diminish the political will to take appropriate and timely action at the sectoral level.

WWF is keen to see the BBNJ ILBI establish a Conference of the Parties (COP) capable of exercising strong and effective oversight of these sectoral body 'silos' to ensure wider global conservation and sustainability obligations and commitments are met in practice. Universal participation is vital to this ambition as any failure by states party to such sectoral bodies to become party to the BBNJ ILBI will risk undermining its effectiveness.

As ocean space becomes more crowded and uses more intensive, the need to address cross-sectoral and cumulative impacts is more pressing than it used to be. WWF is looking to the development of this new agreement with a COP to drive implementation of provisions that reflect a strengthened determination on the part of the international community to drive effective cross-sectoral cooperation to address such concerns. The time has come when benign neglect of BBNJ is no longer acceptable.

The BBNJ ILBI COP also needs to be able to ensure full and effective cooperation with adjacent coastal states. Marine ecosystems generally operate across huge distances with disconcerting levels of variability in space and time – everything is connected to everything else is a truism for oceans. This means that cross-jurisdictional cooperation is important if shared values, impacts and resources are to be effectively addressed. Having a strong body with a clear mandate to ensure that activities in ABNJ do not undermine efforts of coastal states to conserve and sustainably use biodiversity – and vice versa – is important.

The oceans belong to everyone

States have decided to negotiate the BBNJ ILBI ‘under UNCLOS’. WWF takes this to mean:

1. that the UNCLOS general duty to cooperate to achieve desired outcomes remains fundamental;
2. that the exercise of flag state responsibility remains an important part of any approach;
3. that existing competent sectoral bodies will continue to be expected to make appropriate decisions to implement the expressed will of the international community; and
4. that this is best done by negotiating the BBNJ ILBI as an UNCLOS protocol.

In the past, states have tended to cooperate in ABNJ by taking an ‘oceans belong to no-one’ approach. This approach, as elaborated by 17th Century Dutch lawyer, Hugo Grotius, in his seminal work, ‘Mare Liberum’, served the international community well when protection of maritime trade between ports was the key concern. When it comes to the *in situ* conservation and sustainable use of marine biodiversity in ABNJ, however, such a hands-off approach to cooperation is unhelpful. WWF is proposing that the BBNJ ILBI be based on a new ‘oceans belong to everyone’ approach to elaborating the UNCLOS general duty to cooperation.

It is time for the international community to exercise a sense of collective ownership of the oceans beyond national jurisdiction and the biodiversity to be found there. Their ongoing health is too important to the world to be left to indifferent solitary action by flag states implementing decisions by limited mandate management bodies in their sectoral silos. This does not require any changes to existing UNCLOS obligations – just a commitment to ‘enhanced cooperation’ by pooling responsibilities by creating new institutions that can act as the world’s ‘voice for the oceans’. There are potentially significant savings for states in such pooling of responsibilities.

Enhanced cooperation

UNCLOS-consistent management through cooperation, flag state responsibility and sectoral regulation can – and should – remain as fundamental elements, but the international community needs to build a new approach – a regime of ‘enhanced cooperation’ – that changes the way in which these traditional elements operate. WWF set out its ideas on what an UNCLOS ‘enhanced cooperation’ regime might look like in a paper submitted to DOALOS in early 2016 for the information of states participating in the PrepCom meetings entitled, ‘Enhanced Cooperation and Effective Dispute Resolution’⁷.

States customarily cooperate in two ways: bilaterally between individual states and multilaterally as members of international bodies. A third – and much neglected way – is through cooperation between those international bodies. UNCLOS has provisions which create what is rather vaguely referred to as ‘a general duty to cooperate’ such that, while it might be a binding obligation, it often does not happen in practice because details of how states should cooperate have not been clearly elaborated. Furthermore, the currently prevailing ‘*the oceans belong to no-one*’ attitude means that states do not readily seek to use the UNCLOS dispute resolution provisions to hold each other to account for their failures to cooperate. That sense of collective ownership is missing.

⁷ https://drive.google.com/file/d/1TSMF1hjdVBxDd8SIDR_RJkVetuAO4r8l/view?usp=sharing

WWF is keen to ensure that the BBNJ ILBI does contain various provisions that clearly elaborate, for each part of the instrument, how states should cooperate when it comes to the conservation and sustainable use of biodiversity in ABNJ and to being appropriately mindful of the interests and obligations of neighbouring adjacent coastal states. Central to this ambition for BBNJ is the need to establish the collective duty of states party to a competent sectoral body (e.g., the International Maritime Organization (IMO), the International Seabed Authority (ISA) or an RFMO) to ensure that such bodies make timely and effective decisions to give effect to the provisions of other agreements and to implement the relevant decisions of other bodies set up under those agreements.

Of particular interest to WWF in this regard, is the need for a clear obligation for such competent sectoral bodies to help implement decisions of bodies such as: the UNGA, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and Convention on the Conservation of Migratory Species of Wild Animals (CMS) bodies in listing species, the CBD – especially in identifying Ecologically or Biologically Significant Marine Areas (EBSAs), the International Whaling Commission (IWC) in recovering whale populations, or the IUCN in Red Listing threatened species. The full list of relevant agreements and their bodies would be much wider. WWF envisages that the scope of this obligation would be set by an ILBI Schedule of relevant agreements maintained by the COP.

In discussions to date, much has been made of the need to ensure BBNJ ILBI developments do ‘not undermine’ existing arrangements but it is important to appreciate that ‘not undermining’ is a two-way street. The UNCLOS general duty to cooperate means that competent sectoral bodies should not undermine the decisions of these other bodies in seeking to implement the provisions of the agreements establishing them.

This obligation for effective and timely cooperation between bodies needs to be established regardless of which states are members of such bodies and/or party to the agreements establishing such bodies. This is a key reason for giving top priority to negotiating a BBNJ ILBI that can become universal – so no state can justify blocking effective cooperation by a competent sectoral body on the grounds that it is not party to another international agreement or party to a relevant decision of an international body.

Effective dispute resolution

Given experience to date with implementing the existing UNCLOS general duty to cooperate, it is reasonable to expect that implementing a BBNJ ILBI ‘enhanced cooperation’ regime will take time and that a parallel ‘effective dispute resolution’ framework could greatly assist prompt implementation. WWF is proposing that the BBNJ ILBI incorporate and expand upon the existing UNCLOS dispute resolution framework to make it clear that both states and bodies can initiate disputes with each other in support of ‘enhanced cooperation’ and should be encouraged to do so.

WWF considers it important that attitudes to dispute resolution need to change. States that consider themselves to be responsibly doing the right thing should feel willing and able to readily initiate disputes with states that they feel are acting irresponsibly – in breach of their obligations as party to relevant agreements or of commitments in decisions of relevant bodies – including the ‘enhanced cooperation’ provisions of the BBNJ ILBI.

UNCLOS provides for a broad range of dispute resolution options from bilateral discussion, through mediation and arbitration to the more expensive and conflictive options of tribunals and courts. WWF wants to see much more emphasis given to using the cheap and easy preliminary options available. Too often, we have seen irresponsible states frustrate, disrupt and delay attempts to implement provisions of agreements and decisions of bodies. It is time for a new paradigm whereby responsible states that share the sense of collective ownership of ABNJ and responsibility for BBNJ can more readily seek to hold irresponsible states to account.

A voice for the oceans – BBNJ ILBI institution building

Central to WWF's ambition for an 'enhanced cooperation' regime for BBNJ is the establishment of a COP to the ILBI that can speak as a strong voice for the oceans. The international community currently lacks a body that is recognised as the principal forum where oceans issues are addressed. Myriad other bodies pick up aspects of oceans issues relevant to their mandates and competencies but none has that overall holistic perspective. The COP would be the embodiment of the intent of the international community to create an '*oceans belong to everyone*' regime.

The COP would have four general areas of competency:

1. to encourage pure and applied oceans science and marshal it in pursuit of informed decision-making in all relevant processes and fora, including informed public discussion;
2. to have oversight of decision-making by existing sectoral bodies to give effect to 'enhanced cooperation' obligations and commitments relevant to BBNJ;
3. to be a voice for the health of oceans in ABNJ for the full suite of threats they face – from both in situ maritime activities and terrestrial activities (where pollution from macro- and micro-plastics is an obvious example); and
4. to have reserve powers to fill procedural and competency gaps and to ensure obligations are met, including urging universal participation by states in relevant agreements.

In support of a COP with a science-led voice for the oceans and a sectoral management oversight role, it is important that the BBNJ ILBI establish a subsidiary body on scientific and technical advice (SBSTA) with a mandate to organise its own agenda as well as to respond to requests from the COP. The idea that such advice could be provided by those arrangements currently supporting existing sectoral management bodies, while initially attractive from a cost perspective, is unhelpful given the broad role and mandate envisaged for the COP. The BBNJ ILBI is about so much more than just not undermining existing bodies. Establishing other support bodies, such as a compliance committee or an administration and finance committee, can safely be left to the COP to establish once the scope of the BBNJ ILBI has been set.

Of particular importance for WWF is that the BBNJ ILBI should give the COP the option to establish 'Regional Committees' to which some of its responsibilities could be devolved. This is what WWF is calling a 'regional implementation of global standards' approach. The COP would retain its global leadership role while being able to delegate some of its implementation responsibilities where appropriate to do so.

WWF envisages that such Regional Committees would be established at oceanic scale – the scale at which ecosystem processes and political interests best align for holistic oversight purposes. Existing sub-regional arrangements at the scale of seas or large marine ecosystems (LMEs) are likely to become important parts of this new architecture for coordination of ocean management and use.

Such Regional Committees could be established on the suggestion of one or more interested states, much as the UN Fish Stocks Agreement, as another UNCLOS protocol, provides for the establishment of RFMOs. Importantly, regardless of which states might propose establishing a Regional Committee, membership would be open to any states party to the BBNJ ILBI with a real interest in the conservation and sustainable use of the biodiversity in that region. Establishing Regional Committees could be by establishing new arrangements or by endorsement of existing arrangements. The extent of devolution of responsibilities would be a matter for the COP to decide on a case-by-case basis. For regions where no such Regional Committees had been established, the COP would retain full responsibility.

The three principal roles for such Regional Committees would be:

1. to exercise effective oversight of management of activities in ABNJ by competent sectoral bodies and the control of activities in uses for which no such competent bodies currently exist;
2. to maintain an overarching planning framework within which cross-sectoral and cumulative impacts can be effectively managed; and
3. to provide a cross-jurisdictional coordination and cooperation framework that spans both ABNJ and coastal state waters.

Cross-jurisdictional coordination and cooperative management will be important, reflecting the scale of oceanic systems and the emerging interest among coastal states in the appropriate management and control of activities in adjacent parts of ABNJ. Additionally, it is important to remember that various life stages of many species are very mobile such that there are no clear distinctions between biodiversity in ABNJ and biodiversity within national jurisdiction. Effective conservation and sustainable use thus requires a cross-jurisdictional approach.

Central to WWF’s ambition for taking a ‘regional implementation of global standards’ approach to implementing the BBNJ ILBI is the opportunity to roll out integrated oceans management (IOM) as the appropriate framework for giving effect to states’ expressed desire to take a holistic approach to ocean management. Regional Committees would be expected to maintain strategic planning frameworks to guide any sub-regional arrangements, to provide oversight of sectoral bodies in the exercise of their management responsibilities, to resolve any conflicts that might arise and to ensure everyone meets their flag state responsibilities.

Currently, the Regional Seas Conventions and Action Plans within the Regional Seas Programme of UN-Environment have limited mandates and experience to engage on ABNJ issues, but their interest in exploring opportunities to expand into this area is to be encouraged. Their interest in pollution issues, ecosystem-based management and sub-regional coordination of neighbouring coastal states means that they have much to offer in the development and implementation of a BBNJ ILBI.

Marine spatial planning, ecosystem-based management and strategic environmental assessment

Marine spatial planning (MSP) is a critically important area-based management tool (ABMT) that WWF envisages would form a central part of such IOM frameworks, whereby potentially negative and positive interactions between uses can be proactively assessed, impacts minimised and synergies captured with a view to delivering optimised outcomes for all. With an ‘oceans belong to everyone’ paradigm, the old freedom to go about one’s business without interference from others is constrained by an obligation to do so in a way that is mindful of others going about their business. MSP is an effective ABMT for helping states meet this obligation to be cooperative and considerate of others.

WWF is also keen to ensure that ecosystem-based management (EBM) is the approach adopted by states with a real interest in BBNJ when implementing IOM. The key principles that underpin EBM were set out in the 2002 WWF paper ‘*Policy proposals and operational guidance for ecosystem-based management of marine capture fisheries*’⁸, and have been adapted, elaborated and implemented in numerous subsequent publications and initiatives.

The five principles are:

1. Maintaining the natural structure and function of ecosystems, including the biodiversity and productivity of natural systems and identified important species, is the focus of management.
2. Human use and values of ecosystems are central to establishing objectives for use and management of natural resources.
3. Ecosystems are dynamic; their attributes and boundaries are constantly changing and consequently interactions with human uses also are dynamic.
4. Natural resources are best managed within a management system based on a shared vision and set of objectives developed amongst stakeholders.
5. Successful management is adaptive and based on scientific knowledge, continual learning and embedded monitoring processes.

While originally developed for fisheries sectoral management, these principles are readily adaptable to holistic cross-sectoral management. Experience in doing so in ABNJ is limited but a number of coastal states have accumulated relevant experience within their own jurisdictions. Importantly, EBM includes taking the precautionary approach and the transparent and substantive engagement of all stakeholders in decision making.

Strategic environmental assessment (SEA) has a significant role to play in supporting many aspects of both sectoral and integrated management. SEA is an approach for looking at the characteristics and values of impacts of a set of species, or an ecosystem or region or looking at the common, cumulative or cross-sectoral impacts of an activity set or class of activities or uses. It involves looking at everything relating to a chosen area or activity.

⁸ Ward T, Tarte D, Hegerl E, Short K. ‘Policy proposals and operational guidance for ecosystem-based management of marine capture fisheries’, WWF, Australia, 2002, 80p
<https://drive.google.com/file/d/1xUCcHVqA2TsRyOAdo8s6fG3ds6dcsV-R/view?usp=sharing>

There are three important benefits from routine use of SEA:

1. it can improve the knowledge and understanding of the resources of a region to the benefit of all with an interest in such resources – such as baselines studies of the natural assets of an area;
2. it can capture synergies by looking at the implications of a category of use to the benefit of all users – such as the cumulative impacts of deploying a particular fisheries gear type; or
3. it can support activity-specific or user-specific environmental impact assessment (EIA) whereby collective investment in prior SEA can reduce the assessment burden for individual EIAs and potentially lower the level of assessment required for EIA.

Capacity building and transfer of marine technology – an opportunity to contribute to implementation of the SDGs

Capacity building and transfer of marine technology is an important part of the 2011 ‘package’ that forms the core of the scope and mandate for development of the BBNJ ILBI. This is also a core consideration for UN-ECOSOC in adopting SDGs, such that including appropriate provisions in the text of the BBNJ ILBI and implementing them has the potential to make a very significant contribution to meeting several SDG targets.

Importantly, relevant targets are to be found not only for SDG Oceans Goal 14 but also for a number of other goals – good oceans management is important to a lot of different people for a lot of different reasons. In this regard, it is important that the scope of relevant capacity building and technology transfer is defined broadly. Contributing to activities and initiatives that contribute to the conservation and sustainable use of marine biodiversity is the critical fundamental.

Note that this scope includes all marine biodiversity not just BBNJ to reflect not only the cross-jurisdictional movement of many elements of biodiversity but also the fundamental importance of helping developing coastal states, and flag states, meet their conservation and sustainable use obligations – obligations to be made all the greater by inclusion of appropriately ambitious commitments in the provisions of the BBNJ ILBI. Recognition of, and investment in, this virtuous circle of taking on and implementing obligations is important for both negotiating an ambitious BBNJ ILBI in the short term and for reaching SDG targets in the medium term.

Similarly, WWF feels it is important that the relevant scope of ‘marine technology’ is set equally broadly to include the full suite of technologies that contribute to work on the conservation and sustainable use of marine biodiversity. An obvious example is the inclusion of analytical equipment and associated support services that can be used for a wide range of purposes that include supporting such work.

At the request of PrepCom-3, the Intergovernmental Oceanographic Commission (IOC) prepared an excellent report for PrepCom-4 on ‘Strategy and Activities in Relation to Capacity Development and Transfer of Marine Technology (TMT)’⁹ (see Box on page 12) setting out how it might assist development and implementation of a BBNJ ILBI.

⁹ <https://drive.google.com/file/d/1-6rHr7nGoARtnF-SefpEhPpalV8Xs73T/view?usp=sharing>

IOC's VISION

Strong scientific understanding and systematic observations of the changing world ocean climate and ecosystems shall underpin sustainable development and global governance for a healthy ocean, and global, regional and national management of risks and opportunities from the ocean.

More specifically, through international cooperation, IOC aspires to help its Member States to collectively achieve the following four high-level objectives, with particular attention to ensuring that all Member States have the capacity to meet them:

1. Healthy ocean ecosystems and sustained ecosystem services.
2. Effective early warning systems and preparedness for tsunamis and other ocean-related hazards.
3. Increased resiliency to climate change and variability and enhanced safety, efficiency and effectiveness of all ocean-based activities through scientifically-founded services, adaptation and litigation strategies.
4. Enhanced knowledge of emerging ocean science issues.

When working towards the high-level objectives, IOC will focus on the broad areas of:

- strengthening scientific knowledge of the ocean and human impact on it,
- applying that knowledge for societal benefit, and
- building institutional capacities for sound management and governance.

The strategy is organized in a conceptual framework of six functions (in brackets below) required to advance towards the IOC Vision:

- A. Foster ocean research to strengthen knowledge of ocean and coastal processes and human impacts upon them [*Ocean research*].
- B. Maintain, strengthen and integrate global ocean observing, data and information systems [*Observing system/data management*].
- C. Develop early warning systems and preparedness to mitigate the risks of tsunamis and ocean-related hazards [*Early warning and services*].
- D. Support assessment and information to improve the science-policy interface [*Assessment and Information for policy*].
- E. Enhance ocean governance through a shared knowledge base and improved regional cooperation [*Sustainable management and governance*].
- F. Develop the institutional capacity in all of the functions above, as a cross-cutting function [*Capacity Development*].

Insofar as the IOC is already recognised by the international community as the lead organisation for pursuing these issues, the BBNJ ILBI can avoid duplication by simply including the IOC in the suite of bodies in need of some COP oversight. Most importantly, the IOC can further develop its existing arrangements to operationalising a BBNJ clearing house mechanism.

The BBNJ ILBI does not need to establish any new institutional arrangements for a clearing house mechanism. It just needs to make sure the IOC's operations meet its needs. WWF is particularly interested in the IOC's inclusion within its strategy of a function to 'enhance ocean governance through a shared knowledge base and improved regional cooperation'. WWF has suggested that BBNJ provide for establishing Regional Committees to do exactly this, among other things.

WWF is keen to see the BBNJ ILBI include provisions that establish strong commitments to building and expanding programmes to facilitate and accelerate relevant capacity building and technology transfer. A key part of these such commitments needs to be the development and application of a robust reporting framework. For WWF, a key element of such a framework is to get away from maintaining separate lists of 'financial' and 'non-financial' matters. They all cost money and it is important that a comparable value can be attributed to all matters if the reports are to be useful in evaluating progress towards commitments.

There is a lot already happening regarding relevant capacity building and technology transfer and WWF sees great value in states starting work immediately on developing a robust reporting framework within which each state can identify contributions both given and received. Experience with other similar processes indicates that it is often difficult to reconcile what states say they have contributed with what states say they have received. These start-up ‘wrinkles’ should be ironed out before the BBNJ ILBI is adopted so that expectations are equally clear to all and momentum-sapping arguments can be avoided.

Importantly, such a robust reporting framework can serve two purposes: not only to allow progress in implementing BBNJ commitments to be monitored and assessed but also to meet part of their existing SDG reporting obligations. Significant synergies could be captured in doing this.

Additionally, there will inevitably be a large degree of overlap between the scope of matters covered by general capacity building and technology transfer obligations that might be established by provisions of the BBNJ ILBI and specific expectations of an access and benefit sharing (ABS) regime for marine genetic resources in ABNJ (MGR). It is thus very much in the interests of negotiators to start now in fleshing out what a reporting framework would look like so that all can see what matters are included – and not included.

Best practice

In essence, WWF is keen to ensure that the BBNJ ILBI sets best practice standards for the conduct of maritime activities. A key contribution to best practice will be the inclusion of a ‘general standards and principles’ section up-front, at the very beginning of the ILBI. While we would expect to see each part of the ILBI have its own introductory ‘standards and principles’ section to guide implementation of that part, the up-front listing of ‘general standards and principles’ would ensure that they apply throughout all provisions of the ILBI.

Negotiation of this up-front section provides an opportunity to consolidate myriad initiatives over recent decades that have contributed to setting best practice norms not just directly in the conservation and sustainable use of biodiversity but indirectly in the governance, management and control of relevant maritime activities. To give effect to such standards and principles that might be agreed up-front and for each part, the COP would be expected to maintain a suite of best practice implementation guidelines.

MPAs – establishing biodiversity conservation as a use of ocean space

The BBNJ ILBI needs to have a dedicated part setting out a comprehensive process for establishing and managing marine protected areas (MPAs) in ABNJ, including setting out the role expected of competent sectoral management bodies. For WWF, this is an essential and critically important element of a BBNJ ILBI.

Clearly setting out a pathway to develop and maintain MPAs in ABNJ that give effect to commitments of states, scientific advice and community aspirations for biodiversity conservation is long overdue. It is more than fifteen years since WSSD (Rio+10) in 2002, when the international community committed to rolling out regional networks of representative MPAs as part of a broad package of conservation and sustainability commitments. In 2010, the CBD adopted the Aichi Targets which include a commitment to establishing at least 10% of coastal and marine areas ‘of particular importance for biodiversity and ecosystem services’ as MPAs or equivalent by 2020.

In 2014, the 6th IUCN World Parks Congress included in its ‘Promise of Sydney’ recommendations to:

‘Urgently increase the ocean area that is effectively and equitably managed in ecologically representative and well-connected systems of MPAs or other effective conservation measures. This network should target protection of both biodiversity and ecosystem services and should include at least 30% of each marine habitat. The ultimate aim is to create a fully sustainable ocean, at least 30% of which has no-extractive activities.’ and ‘Renew and expand our commitment to management effectiveness of all MPAs, based on best available scientific and other information and partnerships with stakeholders, including communities and resource users, to fulfil the potential of these areas.’

Establishing networks of MPAs on the basis of ‘ecological representativeness’ means that biodiversity conservation is established as a use of marine space in its own right. The current system of reliance on independent sectoral management bodies can theoretically manage uses to minimise their impacts on biodiversity or ecosystem services but these bodies have neither the mandate nor the expertise available to establish such value-driven representative MPA networks.

In ABNJ, the BBNJ ILBI needs to establish a two-stage process: firstly, the COP needs to identify, delineate and designate MPAs on the basis of protecting the identified natural values identified within them; and, secondly, the COP needs to develop a management plan that includes identifying and addressing threats to the protection of those values. Insofar as dealing with those threats involves regulatory action by a competent sectoral body, the COP needs to ask that body to adopt management measures to promptly and effectively mitigate those threats.

The MPA development process would be initiated by a proposal prepared and championed by one or more states party to the BBNJ ILBI and, once accepted by the COP, would be referred to the SBSTA for advice. Then, on the basis of that advice, MPAs would be formally designated by the COP.

In considering that SBSTA advice, the COP, either through its secretariat or through its members, would be expected to solicit and consider advice from relevant stakeholders in the wider community. Guidelines for proponents and the COP would be maintained by the COP, especially regarding the need for stakeholder and community consultation and for proposals to be based on the best available science. Nevertheless, it is obviously in the interests of proponents to submit well-prepared proposals and to facilitate the work of the COP and SBSTA as befits a champion.

In accepting the UNGA decision to negotiate a BBNJ ILBI ‘under UNCLOS’ that does ‘not undermine’ competent sectoral bodies, WWF is painfully aware that such bodies are left with a critical role to play in regulating the uses within their competency to deliver biodiversity conservation outcomes. On the basis of past performance by such rather single-minded sectoral bodies with their ‘silo’ mentalities, the risk of ‘paper parks’ is real – designated MPAs left with ineffective management of threats.

This is one of the critical reasons why WWF is proposing that the BBNJ ILBI develop an ‘enhanced cooperation’ approach whereby sectoral bodies would be subject to oversight in the exercise of the obligation to exercise their competencies to facilitate the decisions of other bodies – including the BBNJ ILBI in adopting management plans for designated MPAs that identify threats from sectoral uses and how those threats might best be addressed.

An additional weakness is that competent sectoral bodies have to be relied upon to adopt and implement management measures to protect values of designated MPAs and to have effective arrangements to ensure compliance with any such measures. Under an ‘enhanced cooperation’ regime, any failure to ensure compliance would be cause for dispute resolution. If such failures to act effectively by competent bodies were to eventuate in practice, it might justify establishing a BBNJ ILBI COP compliance committee to initiate and pursue such disputes. WWF is heartened in this regard by the implications of the ITLOS Case 21 Advisory Opinion¹⁰ establishing that flag states are liable for any failures of due diligence in controlling fishing vessels flying their flag involved in IUU fishing.

EIA – pooling flag state responsibility to assess likely significant threats

Including a dedicated part of the BBNJ ILBI that sets out how environmental impact assessment (EIA) should be conducted is another critically important commitment of states. In discussions to date, little attention has been given to the critical issue of the division of responsibility between flag states acting alone and bodies established by relevant agreements, including the BBNJ ILBI, acting collectively on behalf of the international community.

Crucially, WWF urges states to establish an EIA regime that applies to all activities in ABNJ and uses of BBNJ¹¹. If provision is made for exceptions for uses and activities deemed not to pose a significant threat to BBNJ, the regime will be constantly undermined by operators and proponents, and the flag states responsible for them, seeking to avail themselves of any exemption provisions.

WWF is suggesting that the EIA regime for BBNJ should be restricted to assessment of activities in ABNJ and not include impacts on BBNJ regardless of where the responsible activities might have occurred. In taking this approach, WWF wishes to emphasise the importance of establishing a framework for cooperation and coordination with coastal states operating their own EIA regimes in adjacent waters within their national jurisdiction.

This is one of the reasons why WWF is suggesting that the COP have the option of having Regional Committees reflecting a ‘regional implementation of global standards’ approach. Regional cooperation between the COP and one or more coastal states, coupled with substantive capacity building and technology transfer obligations and implementation arrangements has the potential to deliver much more effective and appropriate assessment of activities and their impacts regardless of where they occur.

This is also one of the reasons why WWF is suggesting that the BBNJ ILBI establish a COP as a strong voice for the oceans – not only to be able to engage with adjacent coastal states in respect of impacts attributable to maritime activities within their jurisdiction and control but also to engage with states regarding mitigation of impacts on BBNJ attributable to terrestrial activities. Beyond climate change impacts, this would include plastic pollution, agricultural runoff, persistent organic pollutants, etc.

¹⁰ <https://www.itlos.org/en/cases/list-of-cases/case-no-21/>

¹¹ See WWF’s EIA-SEA Summary paper: <https://drive.google.com/file/d/1MVbaGTewCghF99rv33bm8It5XDbulu7q/view?usp=sharing>

Should the BBNJ ILBI establish an ‘oceans belong to everyone’ approach in preference to the old ‘oceans belong to no-one’ approach, then it follows that, where significant impacts are deemed likely, the responsibility for EIA would pass from a flag state acting alone to a relevant body acting collectively on behalf of the international community. WWF is concerned that, if responsibility for assessing significant threats is not collectivised in this way, substantial assessment loopholes could arise as unscrupulous operators seek out irresponsible ‘flags of non-compliance’ (FONCs) prepared to tick off on token assessments.

WWF would like to suggest that a robust process should involve:

1. the COP developing and maintaining general EIA guidelines consistent with the Espoo Convention (especially regarding stakeholder and community consultation) to cover proposals for or activities in ABNJ (WWF is suggesting that the guidelines apply to activities be confined to
2. relevant competent bodies would be expected to maintain their own guidelines consistent with the BBNJ ILBI guidelines and further elaborated to address specific characteristics of activities in the sectors for which they have management competency;
3. those guidelines would include reference to any relevant SEAs and other data and information that might be relevant (where the clearing house mechanism would be expected to facilitate access to and use of such information for EIA purposes);
4. an obligation for flag states and relevant bodies to maintain a regular programme of EIA for vessels within their control and activities within their competency (regular does not mean frequent and WWF would suggest a range of three to ten years would be appropriate depending on circumstances);
5. an obligation for flag states to be responsible for the conduct the initial phase of EIA for activities in ABNJ (while states would have the responsibility, it would be up to individual state practice to establish which entity actually conducts the initial assessment);
6. should the initial assessment indicate to the flag state the likelihood of significant impacts, further assessment would be referred to the relevant sectoral management body – this is the critical development flowing from taking an ‘oceans belong to everyone’ approach as assessing significant impacts should not be left to individual states;
7. if the impacts are likely to be significantly cross-sectoral, cross-jurisdictional, complex or otherwise warranting a broader assessment than a sectoral body is competent to conduct, further assessment would be referred to the BBNJ ILBI COP;
8. the relevant body would be responsible for choosing the subsequent level of assessment of the proposal/activity, or referring it on to the BBNJ ILBI COP, based on its assessment of the scale and scope of likely impacts;
9. at any stage the relevant body, or the BBNJ ILBI COP, could ‘call in’ the assessment from the flag state, or the relevant body, if the body or COP were to decide that the flag state, or body, had chosen an inappropriate level of assessment or inappropriately failed to refer on the assessment given the likely scale and scope of impacts.

WWF is keen to point out that many activities are likely to be assessed by the flag state as not posing a significant threat to BBNJ while many of those referred to relevant bodies as likely to be significant are likely to only warrant a relatively low level of assessment – especially if relevant SEAs have already been conducted. It is likely to be a relatively infrequent occurrence that assessment by the BBNJ ILBI COP is warranted or that assessment by environmental impact assessment (EIS) is required.

Marine genetic resources, including access and benefit sharing

WWF is proposing that a new '*sui generis*' regime be developed for dealing with marine genetic resources (MGR) and access and benefit sharing (ABS) considerations in ABNJ. The intention is that this new regime can draw on the principles that underpin both the 'common heritage of mankind' regime used by the ISA and championed by G77 developing countries and the 'high seas freedoms' codified in other UNCLOS provisions and championed by the US. It would elaborate existing UNCLOS benefit sharing obligations.

That so many species have early life stages that float in the water column, and thus arguably subject to the 'high seas freedoms' regime, and later life stages that are fixed to the seafloor, and thus arguably subject to the ISA's common heritage of mankind regime, makes taking such a '*sui generis*' approach sensible. The need for a new, comprehensive regime that covers the collection in ABNJ and subsequent use of MGRs, regardless of which life history stage the MGR was collected from, seems inescapable. WWF is mindful that, in the preamble of the Convention on Biological Diversity, states agreed to '[affirm] that the conservation of biological diversity is a common concern of humankind,' and urges states to explore the potential usefulness of this principle in underpinning a *sui generis* MGR ABS regime in the BBNJ ILBI.

States have agreed that MGR ABS is an integral part of the 2011 package agreed by the UNGA as a core element of any BBNJ ILBI and a way must be found to accommodate divergent perspectives. WWF is supportive of the ambitions and aspirations of developing countries but keen to avoid taking sides in what seems to be an entrenched 'north-south' stand-off.

To this end, WWF would like to suggest four considerations to states:

1. Many of the MGR-related activities that could deliver benefits to developing countries are also covered by the general capacity building and technology transfer commitment that also forms a key part of the 2011 package, such that it needs not be necessary to rely on an MGR ABS regime for such benefits to flow. This is one reason why WWF is proposing that states move quickly to develop a reporting framework for capacity building and technology transfer – so that early commitments in this area can serve as confidence building measures for BBNJ ILBI negotiations.
2. The UNCLOS provisions relating to the freedom to conduct marine scientific research (MSR) make it inappropriate to seek to develop an MGR ABS regime like that administered by the ISA whereby controls over access to resources can be used to leverage benefit sharing arrangements. Nowadays, it is not possible to separate out collection for research from bioprospecting – biotech companies finance research expeditions while academic institutions do their own commercialisation. In such circumstances, benefit sharing arrangements need to be developed further along value and supply chains.

3. Many potential elements of an MGR ABS regime thus require commitments by states, academic institutions and companies that need to be made in other fora. The crucial element of an ABS regime that therefore needs to be established in provisions of the BBNJ ILBI is to be able to reliably and transparently track and trace genetic material from its point and moment of collection in ABNJ through whatever institutions and transformations it might be subject to as it contributes to academic work and commercial development.
4. In order to give effect to the common heritage of mankind principle, the BBNJ ILBI should establish a Benefit Sharing Trust Fund. This Trust Fund would be the recipient of any financial contributions flowing from any monetary benefit sharing arrangements embedded in value and supply chains through which relevant material was being tracked and traced. It would complement and not substitute for other myriad capacity building and technology transfer arrangements subject to the reporting requirements WWF envisages being established by the BBNJ ILBI. It would be able to receive financial contributions from any source including voluntary contributions from commercial users, states and the wider community. Disbursements from the Trust Fund would then be based on guidelines maintained by the COP on how to operationalise the common heritage of mankind principle in the context of BBNJ.

The IOC is well placed to include such considerations in the information handling systems it might be asked to develop to meet the needs of a clearing house mechanism for the BBNJ ILBI. Insofar as all such genetic material is already logged at point and time of collection and appropriately tracked through time, institutions and transformations, these existing information systems merely need to be modified slightly to serve this additional purpose.

Once such a secure and transparent track and trace system is in place, it can be left to other fora to discuss and develop benefit sharing opportunities, based on existing UNCLOS benefit sharing provisions and any elaboration that might be included in BBNJ ILBI provisions. WWF envisages that the BBNJ ILBI would establish a general obligation on states to enter into benefit-sharing arrangements in good faith and to ensure that nationals under their jurisdiction and control are similarly obliged. For instance, *in silico* derived information would be tracked but exactly how it was subject to a benefit sharing arrangement would be a matter for another day.

WWF was particularly appreciative of an intervention by the Holy See at PrepCom-3 reassuring states that the customary use of 'earn-out' provisions in contractual arrangements enables benefit-sharing obligations to be readily maintained throughout multiple stages of supply and value chains. The Holy See's intervention also served to remind states that existing UNCLOS provisions already establish applicable benefit-sharing obligations, albeit in need of some modernisation.

In particular, WWF considers that the World Intellectual Property Organisation (WIPO) is the forum that states should use for discussing intellectual property (IP) matters relating to MGRs collected from ABNJ. WWF is particularly encouraged by the work currently being done within WIPO on developing an instrument to effectively protect Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions that seeks to complement the CBD and its Nagoya Protocol and the FAO's International Treaty on Genetic Resources for Food and Agriculture. Whether this instrument should extend to cover material collected from either states' exclusive economic zone or ABNJ currently remains bracketed, such that it is likely that there will be clear scope for the development of a parallel regime to complement the BBNJ ILBI, should states wish to raise the matter at WIPO.