



ESTABLISHING MARINE PROTECTED AREAS IN AREAS BEYOND NATIONAL JURISDICTION

A WWF BRIEF FOR GOVERNMENTS AHEAD OF IGC 4

January 2022

*This Brief sets out recommendations for text to resolve marine protected area related issues in Parts I & III of the Revised Draft Text of an **International Legally Binding Instrument under UNCLOS on the Conservation and Sustainable Use of Biodiversity of Areas Beyond National Jurisdiction (BBNJ ILBI)**.*

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INTRODUCTION AND KEY POINTS

Establishing the ocean governance arrangements needed to facilitate the international community's commitments to the timely establishment of networks of marine protected areas (MPAs), including in areas beyond national jurisdiction (ABNJ), remains a top priority for WWF in contributing to the universal adoption and prompt implementation of a BBNJ agreement as an international legally binding instrument under UNCLOS (ILBI).

It also remains a priority for WWF that the BBNJ ILBI should be adopted by consensus and readily ratified by all States so that it promptly enters into force and eventually becomes universally implemented. This ambition is for global application of a new multilateral environmental agreement (MEA) on conservation and sustainability for half the planet (ABNJ). This commitment to consensus and universality significantly informs WWF's suggestions and recommendations.

WWF remains concerned that, in organising discussions and negotiations around the four key issues originally identified by the UNGA in the 2011 'package', insufficient attention has yet been given to cross-cutting issues, especially the need to create an overarching, 'enhanced cooperation' framework. Such a framework is needed to allow States to realise their ambitions for holistic ocean management (including establishment of networks of MPAs), consistent with scientific advice on ecological connectivity and with ecological and political realities.

One of the important purposes for an 'enhanced cooperation' regime is to allow alignment of management arrangements with scientific understanding of the ecological connectivity of oceanic systems at every level. Current systems move heat, nutrients, biological material and pollutants over great distances and depths; ecosystems, habitats and species are interconnected to a much greater degree than terrestrial systems with which we are more familiar; migratory species are distributed over great distances. MPAs – and all other management arrangements – need to be established within a broader ocean connectivity management framework that embraces all sectoral uses and all jurisdictions, if they are to be most effective.

This is what WWF means by 'enhanced cooperation'. Effective protection of migratory great whales is a good case in point, requiring a coherent and coordinated mix of spatial and operational management controls of different activities to keep whales safe as they move between their feeding and breeding areas, often moving in and out of areas both within and beyond national jurisdiction. More than whales, however, there are many 'adjacency' issues where conservation, cultural, commercial and livelihood concerns need cross-sectoral and trans-jurisdictional 'enhanced cooperation' arrangements to deliver fair, effective and equitable management outcomes to the satisfaction of all.

This Brief therefore includes recommendations for strengthening **Part I - General Provisions**, as well as for resolving issues in **Part III - Measures such as Area-based Management Tools, including Marine Protected Areas**. In other words, without establishing an appropriate

‘enhanced cooperation’ framework in Part I, effective MPA establishment in ABNJ risks being undermined.

In proposing a significant simplification of Part III on Area-based Management Tools (ABMTs), the critical issue is the **need to separate out a process for MPA establishment that includes a clear and unambiguous power and mandate for the BBNJ COP to designate MPAs in ABNJ**, consistent with current IUCN Guidelines, especially in having six categories of MPA offering a range of protection levels.¹

Other ABMTs, while valuable and important, would be treated as matters for enhanced cooperation and not for designation by the BBNJ COP.

➔ **In seeking to have the BBNJ ILBI set out the entire process for the establishment of MPAs, WWF continues to support appropriate involvement of competent sectoral bodies in the regulation of relevant activities to the extent to which such bodies are willing and able to take timely and effective action** in support of MPA Management Plans adopted by the BBNJ COP.

In 2021, WWF reached out to experts in a range of disciplines relevant to MPA establishment as part of a review of our approach to supporting States in negotiating a BBNJ ILBI. The WWF MPA Update Report 2021² on the outcome of these consultations and our subsequent deliberations can be accessed from WWF’s BBNJ library³. WWF is deeply grateful to these experts for having given freely of their time and, while their thoughts may be reflected in the Report and in this Brief, these recommendations are entirely ours.

While we have refined, and hopefully clarified, aspects of our suggested approach to MPA establishment in ABNJ, WWF’s strategic approach and ambition remain unchanged while giving more emphasis to the scientific importance of ecological connectivity in designing networks of MPAs and complementary management arrangements.

Three of **WWF’s key ambitions for a BBNJ agreement, as a legally binding instrument under UNCLOS, relevant to MPA establishment in ABNJ**, remain that:

- i. It should facilitate ‘enhanced cooperation’ to effectively operationalise the UNCLOS general duty to cooperate by ensuring **the timely and effective implementation of the provisions not only of UNCLOS but also of the provisions of other applicable international law (not just UNCLOS) and of the decisions of all relevant international bodies** (not just sectoral bodies with ‘management’ competencies in ABNJ) – see (i)

¹ Day, J. et al. (eds.) (2019). Guidelines for applying the IUCN protected area management categories to marine protected areas. Second edition. Gland, Switzerland: IUCN.

² High Seas Marine Protected Areas and Other Spatial Measures - Operationalising Realistic Mechanisms Within the International Legally Binding Instrument Under the United Nations Law of the Sea Convention on the Conservation and Sustainable Use of Biodiversity of Areas Beyond National Jurisdiction. WWF 2021.

<https://drive.google.com/file/d/1ePEJN0o56imVNLpzRKTl6RJ2keZZfo0N/view?usp=sharing>

³ <https://drive.google.com/drive/folders/17JuVLELQlyOCc7ag09i-PHHLaWb0PyWY?usp=sharing>

WWF's *Not Undermining is a Two-Way Street* Brief⁴ and (ii) WWF's 2016 *Enhanced Cooperation and Effective Dispute Settlement* Brief⁵;

- ii. It should clearly set out a process for the establishment and maintenance of networks of MPAs, based on a 'designate by values, manage by threats' approach, particularly in **creating a BBNJ COP with the competency and mandate to designate MPAs in ABNJ based on their biodiversity values**, thus filling one of the key legal gaps as intended by the UNGA and establishing MPAs as a legitimate use of ABNJ and thence entitled to be given due regard by others – see WWF MPA Review Report 2021⁶; and
- iii. It should do so in a way that **gives effect to three inter-related principles of international law: the principle of 'due regard'; the principle of 'due diligence'; and the principle of good faith**, along with several other principles and approaches that need to be agreed for inclusion in Article 5.

In WWF's earlier Brief, '*Not Undermining is a Two-Way Street*', we set out our ambition for the UNGA's somewhat negatively framed political commitment to 'not undermining' existing arrangements to be given positive legal effect through the BBNJ ILBI by establishing an 'enhanced cooperation' regime based on the principles of due regard and due diligence.

Such an enhanced cooperation regime can be established and operationalised through adopting criteria, priorities, guidelines and mechanisms, including new decision-making and cooperation arrangements (at global, regional and sub-regional levels). In so doing, adopting and implementing a BBNJ ILBI, as an UNCLOS Implementing Agreement, States would be making a significant contribution to giving operational effect to the UNCLOS general duty to cooperate.

Recommendations for Part III are arranged around seven key issues critical not only to the effective establishment of MPAs in ABNJ but also to the effective implementation of the BBNJ ILBI more broadly. While some of this text might be better placed in Part I, it is included in the Part III section to reflect current organisation of the Revised Draft Text for the convenience of negotiators.

These seven key issues are:

- i. **Separation of establishment of MPAs from treatment of other ABMTs;**
- ii. **Establishing criteria for the identification of potential MPAs;**
- iii. **Creating a process for establishing MPAs based on a 'designate by values, manage by threats' approach;**
- iv. **Including other ABMTs;**

⁴ <https://drive.google.com/file/d/1mnFFyIJBYA-CcOXU5KiMGJpx0Nv953Zj/view?usp=sharing>

⁵ https://drive.google.com/file/d/1TSMF1hjdVBxDd8SIDR_RJkVetuAO4r8l/view?usp=sharing

⁶ <https://drive.google.com/file/d/1ePEJN0o56imVNLpzRkTL6RJ2keZZfo0N/view?usp=sharing>

- v. Including ecological connectivity in all aspects of work to implement the BBNJ ILBI;
- vi. Maintaining a biogeographical classification of the ocean to aid all managers of ocean space and resources; and
- vii. Developing a collaborative relationship with the CBD.

Overall, WWF's suggestions are aimed at simplifying, clarifying and shortening the text of Part III, especially in suggesting, where appropriate, that matters be addressed by subsequent decisions of the BBNJ COP, particularly in adopting guidelines.

We have, however, proposed a significant alteration and expansion of Article 19 – Decision-making, to clarify the various stages in establishing an MPA in response to a proposal (pursuant to our proposed Article 18): (i) designation of an MPA; (ii) adoption of a management plan; (iii) adoption of regulatory measures, particularly by competent sectoral bodies; (iv) monitoring and reporting; and (v) review.

RECOMMENDATIONS

This Brief sets out WWF’s proposals for text for Parts I and III that we consider appropriate to ensure that the BBNJ ILBI creates a coherent and comprehensive regime for the establishment of MPAs in ABNJ that is capable of earning the respect and support of the international community as a whole.

PART I - GENERAL PROVISIONS

Article 1 - Definitions

Recommendation 1.1:

Consistent with WWF’s suggestion that MPAs and other ABMTs should be separated out into two different Sections in Part III, the MPA definition needs some consequential amendment. We suggest it read:

10. “Marine protected area” means a geographically defined marine area that is designated and managed to achieve specific ~~long-term biodiversity conservation and sustainable use objectives~~ through affording and that affords higher protection to identified values than surrounding areas (while recognising that managing for conservation objectives does not axiomatically exclude other uses, including marine scientific research, if conducted consistent with or in furtherance of those objectives and consistent with protection of values).

- ➔ We have suggested removing ‘long-term biodiversity’ so that ‘conservation’ can be interpreted as widely as may be deemed appropriate in the circumstances. Likewise, we have suggested removing ‘sustainable use’ as an objective of management and inserting a bracketed phrase making it clear that not having sustainable use as an MPA objective does not necessarily mean that other uses are always and automatically excluded, consistent with the 2019 IUCN Guidelines⁷.

WWF is aware that the fishing industry sector is particularly sensitive on this point and we want to be clear *about the purpose for having MPAs – for conservation*. Other ABMTs can, and do, focus more directly on supporting sustainable fisheries management, among other uses, but they need to be addressed differently by a BBNJ ILBI, as a matter of enhanced cooperation. Hence our suggestion to deal with them in a separate Section of Part III.

- ➔ An early task that could be given to the BBNJ COP is to consider endorsing the current version of IUCN’s MPA guidelines for use by the BBNJ COP Member States in establishing MPAs.

⁷ <https://portals.iucn.org/library/node/48887>

Article 2 – General Objective

Recommendation 2.1:

Article 2 – General Objective needs to reflect the due diligence obligation of States Parties to the BBNJ ILBI to seek to implement all relevant obligations and commitments under international law, not just UNCLOS.

We suggest the text uses a standard phrase such as: ‘... the relevant provisions of applicable international law, including UNCLOS.’ wherever appropriate throughout the text.

Recommendation 2.2:

[‘long-term’] should be deleted from the general objective so that it reads: ‘... To ensure the conservation and sustainable use of’. Inclusion of ‘long term’ is open to abuse insofar as it can be – and is - interpreted by some to allow adoption of strategies that allow short-term failures to conserve or to act sustainably on the promise of future recovery.

→ The clarity and simplicity of just saying ‘... to ensure the conservation and sustainable use ...’ allows implementation to focus on the importance of the principles of due diligence and due regard to actually ‘ensure’ those shared – and highly complementary - policy outcomes are achieved.

Recommendation 2.3:

The title of Article 2, ‘General objective’ should be retained. For as long as discussions continue as to whether individual Parts of the ILBI might have their own objectives, it is sensible to retain the concept of a ‘general’ objective in Part I that would apply to all Parts of the ILBI regardless of what might be included in other Parts. Should negotiators decide that no objectives should be included in any other Parts of the ILBI, then it would be appropriate to delete ‘General’.

Recommendation 2.4:

The text of Objective 14.1(c) in the current Revised Draft Text of ‘promoting a holistic and cross-sectoral approach to ocean management’ should be retained. WWF has proposed that it be deleted from its current location in Article 14 of the Revised Draft Text and retained as part of the General objective in Article 2. States have been very clear and persistent in saying that the ‘status quo is not acceptable’ in reference to the isolated ‘silos’ of the current sectoral approach to management. WWF shares this concern, born of frustrated experience.

→ It is important, however, that it should be positively expressed in the overarching statement of purpose for the BBNJ ILBI as an ‘instrument under UNCLOS’. While a holistic approach and cross-sectoral management may be easy to say but hard to get, stating that as an overarching ambition is a good start.

Recommendation 2.5:

Use of the word ‘further’ should be replaced by ‘enhance’. While the extent of the ambition to ‘enhance’ cooperation and coordination may not yet be as clear as some would like, the commitment to do better is clear – again, the phrase, ‘the status quo is not an option’ has been oft repeated in BBNJ related discussions. ‘Enhanced cooperation’ is thus a worthy notion to include in the overall objective for the BBNJ ILBI such that it can safely be left to the international community to elaborate what might be done – and not done – in fulfilling that element of the objective in the years ahead.

Article 2 would then read:

“General objective

The objective of this Agreement is to ensure the ~~[long-term]~~ conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction through effective implementation of the relevant provisions of applicable international law, including UNCLOS, and to enhance international cooperation and coordination, including by promoting a holistic and cross-sectoral approach to ocean management.”

Article 4 - Relationship between this Agreement and the Convention and ~~other [existing]~~ relevant legal instruments and frameworks and relevant global, regional, sub-regional and sectoral bodies

Article 4 should be appropriately amended to reflect the due diligence, due regard and good faith obligations on States to properly respect both the provisions of relevant international agreements and the decisions of relevant international bodies. This is the proper, positive perspective from which to approach the UNGA’s admonition that States should ‘not undermine’ each other’s efforts. To this end:

Recommendation 4.1:

WWF supports the addition of ‘sub-regional’ to the list of bodies referenced in the title to Article 4 (and elsewhere in the revised draft text) especially insofar as it includes those sub-regional regional seas conventions and action plans (RSCAPs) serviced and supported by UNEP’s Regional Seas Programme and equivalent bodies.

➔ Indeed, WWF would like to encourage States parties to such sub-regional bodies to review and revise the geographic scopes, mandates and competencies of such bodies to allow them to play a more substantive role in facilitating enhanced cooperation between relevant States and bodies in implementing the BBNJ ILBI within their areas of interest.

Additionally, WWF would like to see enhancement of the role of RSCAPs identified as a priority for capacity building and technology transfer support under Part V for those States interested

in deepening their commitment to strengthening the role of RSCAPs. Note that eligibility for such support would not be confined to States parties to the BBNJ ILBI but to all States wishing to strengthen their participation in relevant sub-regional and regional arrangements.

Recommendation 4.2:

As per Recommendation 2.1, above, Article 4.1 should be amended by inserting ‘... **the relevant provisions of applicable international law, including UNCLOS.**’ to replace [the Convention.] at the end of both sentences.

Article 4.1 would then read:

“1. Nothing in this Agreement shall prejudice the rights, jurisdictions and duties of States under the relevant provisions of applicable international law, including UNCLOS. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the relevant provisions of applicable international law, including UNCLOS.”

The commitments from Rio+20 and the UNGA to negotiate a legally binding instrument ‘under UNCLOS’ means that the BBNJ ILBI and its implementation has to be consistent with – but need not be limited to – UNCLOS provisions. If States are to meet their commitment to not undermining other arrangements and to introducing an ‘enhanced cooperation’ regime, pertinent provisions of, and relevant bodies of, other applicable instruments need to be appropriately recognised.

While some may consider this to be no more than a mere acknowledgement of the legal status quo, WWF suggests that, for the purposes of implementing an UNCLOS Implementing Agreement, it would be helpful to explicitly identify those obligations and commitments of States that States party to the BBNJ ILBI regard as pertinent and applicable, such that:

Recommendation 4.3:

A sub-paragraph 4.1A should be inserted requiring the BBNJ COP to maintain an ‘enhanced cooperation’ list of relevant agreements with provisions creating pertinent obligations and of bodies making pertinent decisions established by those agreements. Whether this list is best maintained by simple decision of the COP or by amendment to a schedule to the ILBI is a matter for negotiators.

WWF’s preference would be to make the list easy to maintain as a COP decision but it is important that the BBNJ COP is seen as the forum where perceived failings of decision-making in one body to give effect either to the decisions of another body or to implement the provisions of another instrument are discussed as part of the BBNJ COP’s mandate.

Such a sub-paragraph 4.1A might read:

“1A. The BBNJ COP shall establish and maintain a list of international agreements, and a list of any deliberative or decision-making bodies established pursuant to those agreements,

that the COP deems to be part of applicable international law referred to in sub-paragraph 1.”

It is WWF’s hope and expectation that any differences arising from such discussions would lead to use of the dispute prevention and settlement provisions of the BBNJ ILBI, including BBNJ COP deliberations. In the current absence of such a process and forum, the UNGA finds itself, by default, having to negotiate and adopt paragraphs in its Oceans and/or Fisheries Resolutions to deal with highly politicised conflicts over issues such as driftnets or bottom trawling. BBNJ COP deliberations and BBNJ ILBI dispute prevention and settlement processes and procedures could – and should be expected to - address and resolve such matters in a timely and cooperative manner without recourse to the UNGA and UNGA resolutions. WWF has previously circulated a Brief on ‘Dispute Prevention and Settlement’ elaborating our thinking on this issue⁸.

WWF appreciates that mere reference to the dispute resolutions arrangements in UNCLOS is problematic for non-Parties, but we urge States to negotiate an acceptable mechanism to ensure that Parties to the BBNJ ILBI, as an UNCLOS implementing agreement, have access to an equivalent suite of options and opportunities that includes those set out in UNCLOS much as was done in negotiating the UN Fish Stocks Agreement as an UNCLOS implementing agreement.

Additionally, WWF urges States to develop BBNJ ILBI text that elaborates and expands upon the non-judicial forms of dispute avoidance and settlement, especially expert inquiry and mediation.

→ This emphasis on non-judicial opportunities is what WWF hopes would lead to more ‘accessible’ dispute management arrangements where concerns can be raised and resolved quickly and cheaply with little diplomatic fanfare or expensive recourse to tribunals and courts.

Article 5 - General Principles and Approaches

It is important that an appropriately comprehensive list of applicable principles and approaches is included in Article 5 in Part I – General Provisions, so that they apply to all other Parts. It may be appropriate to confine a particular principle or approach to a particular Part but, for the sake of clarity and brevity, this should be discouraged.

Recommendation 5.1:

The brackets should be removed from the title of Article 5 so that it reads: ‘General Principles and Approaches’. While there are important discussions to be had as to whether a particular concept is or should be recognised as a ‘principle’ or as an ‘approach’, negotiating

⁸ <https://drive.google.com/file/d/1a6S5HQfesEUi5PQ882ng511xW9Db-UxC/view?usp=sharing>

agreed text of the BBNJ ILBI is not the place to resolve such issues unless particularly critical to the implementation of particular provisions of the agreed text.

Recommendation 5.2:

The three principles of due diligence, due regard and good faith should be explicitly included in the list of principles and approaches in Article 5 of the BBNJ ILBI. Those principles and approaches would thence apply to all subsequent Parts of the ILBI, especially Parts III, IV & V.

→ Note, in particular, that helping developing countries meet their due diligence, due regard and good faith commitments would then become a priority for capacity building and transfer of marine technology to be addressed in Part V.

Insofar as inclusion of other principles and approaches, or elaboration of any of those in Article 5, might be warranted for other Parts, an opening article in those parts could include additional guidance specific to that Part. **Overarching principles, however, need to be included in Article 5, including by inserting:**

“(k) the principle of due diligence”;

“(l) the principle of due regard; and

“(m) the principle of good faith.”

While these three principles are already well established under international law, WWF considers it useful to explicitly include them in article 5 because of their importance in framing a BBNJ ‘enhanced cooperation’ regime. Without wishing to offer definitions, for the sake of clarity, WWF understands these principles to mean:

- (i) the due diligence principle obliges States to control activities under its jurisdiction or control to meet their obligations and responsibilities (including having adequate means, exercising best efforts and doing its utmost to achieve that control);
- (ii) the due regard principle obliges States to ensure coexistence between equally legitimate activities in a given maritime area; and
- (iii) the principle of good faith mandates a higher level of cooperation, and requires Parties to treaties to, inter alia: perform in good faith so as to not frustrate the object and purposes of the instrument; to interpret the treaty and to exercise their rights in good faith, preventing abuse of rights; and to negotiate (including in this case COP decisions under the Agreement) in a meaningful way.

→ In establishing the BBNJ COP with the power and mandate to designate MPAs in ABNJ, the international community would be recognising biodiversity conservation as a legitimate activity coexisting alongside more established uses and equally worthy of being shown such due regard.

Recommendation 5.3:

Paragraph 5(i) should be split into two to read:

“(i) Decisions shall be based on best available science.”

“(i)(bis) Traditional Knowledge deemed relevant by indigenous peoples and local communities shall be incorporated into all deliberations and decisions.”

WWF is suggesting that these two issues be addressed in separate paragraphs because the issues to be resolved are very different and the mechanisms for applying and implementing them are equally different. Most importantly, in suggesting traditional knowledge be dealt with in its own paragraph, WWF is seeking to give the issue the prominence and importance that it deserves.

It is essential that basing decisions on best available science remains as an important principle to guide all deliberations and decision-making in implementing the BBNJ ILBI. WWF is concerned that some interests have been promoting the idea of ‘sufficient science’ as a threshold for decision-making, especially where MPA designation is concerned. Such an approach is obviously at variance with the precautionary principle and, if applied to assessment methodologies for international wild capture fisheries for instance, many of those fisheries would fail assessment.

Recommendation 5.4:

A new approach should be added to the list identified in Article 5: ‘(n) maintaining or restoring ecological connectivity’.

This was a key element of the advice of experts consulted by WWF in 2021 on establishing MPAs in ABNJ⁹. Importantly, their advice was specific in recommending that this commitment to maintaining or restoring ecological connectivity be included in Article 5 in Part I so as to be applicable to the whole BBNJ ILBI and not just Part III.

Recommendation 5.5:

WWF considers that it would be useful to include ‘common concern of humankind’ as a principle under the ILBI.

A new paragraph (o), based on the preamble of the Convention on Biological Diversity, might then be: “(o) the conservation and sustainability of use of biological diversity is a matter of common concern of humankind.”

This notion is already contained in the CBD and applies to areas beyond national jurisdiction, reflecting the global responsibility of States towards the conservation and sustainability of biodiversity. Therefore, the ILBI could benefit from the incorporation of this concept explicitly among its principles or approaches to guide its interpretation and application through enhanced cooperation.

⁹ <https://drive.google.com/file/d/1ePEJN0o56imVNLpzRKTL6RJ2keZZfo0N/view?usp=sharing>

Article 6 - International Cooperation

Recommendation 6.1:

Article 6 - International Cooperation should include a specific paragraph allowing the BBNJ COP to delegate some of its powers and responsibilities to a regional arrangement that it deems appropriate to facilitate implementation of specified parts of the BBNJ ILBI and the exercise of specified competencies of the BBNJ COP. Any such delegation would be as a result of consideration of a proposal from one or more States with an interest in taking this approach in a particular region. **To this end, WWF suggests the insertion of two new paragraphs, 6.4 & 6.5:**

“6.4. In giving effect to subparagraphs 6.1, 6.2 & 6.3, one or more States may propose to the BBNJ COP that some of its roles, powers and responsibilities be delegated to a regional arrangement (either an existing arrangement or one developed by the proponents for that purpose) to facilitate implementation of the BBNJ ILBI.

“6.5. In deciding to exercise its power to delegate any of its roles, powers and responsibilities to a regional arrangement the BBNJ COP must ensure that:

- i. the proposed arrangement has the requisite legal competencies to discharge the delegations sought;**
- ii. effective oversight, monitoring and reporting arrangements are included;**
- iii. participation in any such arrangement remains open to any State declaring an interest in the conservation and sustainable use of the biodiversity of that region; and**
- iv. provisions allowing the BBNJ COP to withdraw any delegations are clearly established.”**

Note that, under 5.iii, participation would be open to all States, not just States party to the BBNJ ILBI. Note also that such regions would be geographically defined to include seas and exclusive economic zones (EEZs) adjacent to ABNJ. This is to allow ‘enhanced cooperation’ among all States with rights, duties, interests and responsibilities in a region, especially adjacent coastal States. **Given the interconnected mobility of components of marine biodiversity across jurisdictional boundaries, effective outcomes require such a broad embrace.**

While scale is a matter for interested States, WWF’s preference is that the ‘regional’ scale at which such arrangements should be established is at the scale of the seven ocean basins (Arctic, North Pacific, South Pacific, Southern Ocean, Indian Ocean, South Atlantic, North Atlantic). While any regionalisation – or lack of it - is ultimately arbitrary, this is the scale at which ecological and political realities can best align.

In coming to this view, WWF is mindful of the importance of bolstering the interests of developing coastal states and small island developing states in contributing to pertinent

Targets for relevant Sustainable Development Goals. If the organising scale is sub-regional, the scale is too small to be diplomatically effective, if global, the scale is too large for their interests to be properly heard

While all such regions have some arrangements that could contribute to implementation of the BBNJ ILBI, further strengthening and development of such arrangements is clearly warranted in most situations. To this end, WWF urges States to identify ‘development of, participation in and implementation of regional arrangements’ as a priority for capacity building and technology transfer support pursuant to Part V, especially with respect to the operation of a clearing house mechanism.

→ Importantly, eligibility for such assistance should include activities both within and beyond national jurisdiction insofar as biodiversity ‘of ABNJ’ may also be found within national waters and may also rely on populations, habitats and ecosystems within, or partly within, national waters.

Recommendation 6.2:

An additional paragraph needs to be added to Article 6 to **strengthen the reporting requirements under the BBNJ ILBI**. WWF remains concerned that the current Revised Draft Text does not include an obligation to report and we have set out our concerns and suggestions in a short Brief, ‘Reporting Requirements – brief for Governments ahead of IGC-4’¹⁰.

States customarily give great importance to flag state jurisdiction in ensuring compliance with applicable international law, including UNCLOS. It is important, therefore, that States not only report to each other on the due diligence steps they have taken to effectively control their vessels, but also report on progress in ensuring compliance with the provisions of relevant agreements and the decisions of bodies established under those agreements. See Recommendation 4.3, above, for WWF’s suggested additional para. 4.1A to identify such agreements and bodies.

Drawing on language from the Convention on Biological Diversity, such a paragraph might be:

“6.6. Each State Party shall, at intervals to be determined by the Conference of the Parties, present to the Conference of the Parties, summary reports on relevant activities of its nationals (vessels, companies and people) in ABNJ and reports on measures which it has taken for the implementation of the provisions of this Convention and their effectiveness in meeting the objectives of this Convention.

6(i) The COP may maintain guidelines for the preparation of summary reports, including identification of relevant activities and summarising them for reporting purposes.

¹⁰ https://drive.google.com/file/d/1SBAD42lqM_zx_7xmw5Tt-4oYQ-YN9gmE/view?usp=sharing

6(ii) The COP may maintain guidelines for reporting on implementation measures and on evaluating the effectiveness of those measures.

6(iii) The COP may, from time to time, invite Parties to report in detail on particular categories of activities to assist deliberations of the COP on a matter on its agenda.

6(iv) Any Party may identify any matter included in any Party's report or summary report as an issue of compliance and may then [refer the issue to the Compliance Committee][raise the issue through compliance arrangements established by the COP]."

A consequential amendment should then be made to Article 47:

(47.) "5. In supporting the monitoring and review of capacity-building and the transfer of marine technology, States Parties ... [~~may~~] shall submit [~~on a voluntary basis~~] reports"

→ The establishment of networks of MPAs is just one of the areas of work to be undertaken in implementing the BBNJ ILBI that would give rise to substantial capacity building and technology transfer opportunities. It is important, therefore, that a reporting mechanism is established that allows States to monitor progress in meeting whatever obligations might be created by the ILBI.

Recommendation 6.3:

A new Article 6A should be introduced to pick up on the material from Article 20 which WWF has suggested be deleted from Part III. WWF appreciates the sensitivities of States around designating and managing MPAs but it is important to maintain perspective. Proper control of activities in ABNJ is a matter for all States and for all activities – it is not just a concern for MPAs and fishing. To that end, we have attempted to generalise the text from Article 20 relating just to ABMTs into a new Article 6A relating to all activities:

Article 6A. Implementation of Decisions

1. States Parties shall ensure that activities under their jurisdiction or control that take place in ABNJ are conducted consistent with COP decisions adopted in implementing this Agreement.

2. Consistent with international law, nothing in this Agreement shall prevent a State Party from adopting more stringent measures with respect to its nationals (including vessels, companies and people) or with regard to activities under its jurisdiction or control in addition to those adopted under this Agreement.

3. The implementation of the measures adopted in implementation of this Agreement shall not impose a disproportionate burden on small island developing States Parties, directly or indirectly other than with commensurate capacity building and technology transfer assistance sufficient to ensure fairness and equity.

4. States Parties shall promote the implementation of COP decisions within relevant global, regional, sub-regional and sectoral bodies of which they are members, especially in promoting the timely adoption and effective implementation of relevant regulatory measures by competent sectoral bodies.

5. States Parties shall encourage those States that are entitled to become Parties to this Agreement, in particular those whose activities, vessels or nationals operate in ABNJ, to promptly adopt effective measures to give effect to COP decisions and with related implementation decisions taken under relevant frameworks, instruments and bodies.

6. A State Party that is not a participant in a relevant legal instrument or framework, or a member of a relevant global, regional, sub-regional or sectoral body, and that does not otherwise agree to implement COP decisions or related decisions taken under instruments, frameworks or bodies is not discharged from the obligation to cooperate, in accordance with applicable international law, including UNCLOS and this Agreement in the conservation and sustainable management of biodiversity in ABNJ. [Such State Party shall ensure that activities under its jurisdiction or control are conducted consistently with COP decisions and with related implementation decisions taken under relevant frameworks, instruments and bodies.]

WWF is, of course, strongly supportive of including text in the BBNJ ILBI to oblige and encourage all States to do what they can to implement MPA establishment decisions by the BBNJ COP. Insofar as such encouragement is based on meeting existing general duties to cooperate under international law, however, the material is more suitably included in Part I – General Provisions, than in Part III dealing only with ABMTs. Indeed, to infer that such duties are specific to, or particularly pertinent to, MPA implementation could cause interpretation problems.

➔ By shifting this text to Article 6A, it then becomes an integral part of the overall ‘enhanced cooperation’ approach that WWF is keen to see taken by the BBNJ ILBI.

Recommendation 6.4:

A new Article 6B should be introduced that mandates the BBNJ COP to maintain a global biogeographic classification system to support and inform the work of both States and other international bodies and the global scientific community in helping them to understand and managing users of the world’s oceans and its resources. WWF suggests this be done as a COP decision and not just the work of its SBSTA because the system deserves some formal status as it is intended to guide management decision-making by both States and global, regional and sub-regional bodies.

Biogeography describes the distribution of physical, chemical and biological attributes as the basis for setting ecological boundaries between areas. This classification can then be used to provide for spatial management for instance, in mapping out bioregions within which

representative networks of MPAs can be established in both pelagic and benthic realms. Bioregional classifications provide the fundamental building blocks to inform the most appropriate management tools for any geographic area. This is discussed further in WWF MPA Review Report 2021¹¹

Article 6B – Maintaining a Global Biogeographic Classification System

1. The COP **shall** maintain a Global Biogeographic Classification System to support both implementation of the BBNJ ILBI and States and international bodies in their work to conserve and sustainably use biodiversity of ABNJ.
2. The COP **shall** request the SBSTA to provide advice on the development, adoption and maintenance of a Global Biogeographic Classification System.
3. The SBSTA **may** adopt its own guidelines for providing advice pursuant to para.1 to the COP

WWF's intention is that the SBSTA would consult widely throughout the global scientific community with a view to ensuring that any Global Biogeographic Classification System that might be adopted by the BBNJ COP on the basis of its advice would get ready acceptance by all States and other international bodies in supporting their own work.

¹¹ <https://drive.google.com/file/d/1ePEJN0o56imVNLpzRKTl6RJ2keZZfo0N/view?usp=sharing>

PART III - MEASURES SUCH AS AREA-BASED MANAGEMENT TOOLS, INCLUDING MARINE PROTECTED AREAS

Recommendations in this section of the Brief are arranged around seven key issues critical not only to the effective establishment of MPAs in ABNJ but also to the effective implementation of the BBNJ ILBI more broadly. While some of this text might be better placed in Part I, it is included in Part III to reflect current organisation of the Revised Draft Text for the convenience of negotiations. These seven key issues are:

1. **Separation of establishment of MPAs from treatment of other ABMTs;**
2. **Establishing criteria for the identification of potential MPAs;**
3. **Creating a process for establishing MPAs based on a 'designate by values, manage by threats' approach;**
4. **Including other ABMTs;**
5. **Including ecological connectivity in all aspects of work to implement the BBNJ ILBI;**
6. **Maintaining a biogeographical classification of the oceans to aid all managers of ocean space and resources; and**
7. **Developing a collaborative relationship with the CBD.**

Overall, WWF's suggestions are aimed at simplifying, clarifying and shortening the text of Part III, especially in suggesting, where appropriate, that matters be addressed by subsequent decisions of the BBNJ COP, particularly in adopting guidelines.

1. Separation of establishment of MPAs from treatment of other ABMTs

The text of Part III of the Revised Draft Text suffers from two inherent problems that need to be addressed before attempting to negotiate agreed text for adoption.

Firstly, there is text in Part III on cooperation and coordination that would be better placed in Part I - General Provisions insofar as these are overarching considerations that apply throughout the ILBI and are not confined to Part III. As negotiations draw to a conclusion, it may be of assistance to negotiators to draw up a list of such overarching or cross-cutting issues warranting attention outside the current structure of negotiations based on the four issues singled out in the original 'package' adopted by the UNGA in 2011.

Secondly, and more importantly, it is irretrievably confusing to try and develop a single process to cover how the ILBI should address all kinds of ABMTs. **WWF is firmly of the view that negotiations would be significantly assisted if the issue of the establishment of MPAs, including designation by the BBNJ COP and the role of competent sectoral bodies in management, was separated out into a separate Section 1 of Part III.** Consideration of other ABMTs could then be dealt with as a matter of enhanced cooperation and coordination where, depending on how each kind of ABMT should be dealt with, relevant text could be included in a Section 2 of Part III or included in existing or new Articles in Part I.

Recommendation 14.1:

There needs to be a chapeau to Part III that clarifies that Part III is to be broken into two Sections. Section 1 would deal with *'Establishment of MPAs in ABNJ'* while Section 2 would deal with *'Other ABMTs' and broader cooperation and coordination considerations*. [That chapeau might read:](#)

“This Part III consists of two Sections. Section 1 sets out the process for establishing Marine Protected Areas (MPAs) in ABNJ, including the designation of MPAs by the BBNJ COP and the appropriate involvement of other relevant bodies, especially competent sectoral bodies in adopting regulating measures to implement management arrangements. Section 2 identifies other categories of Area-based Management Tools (ABMTs) capable of contributing to an enhanced cooperation framework for implementing the BBNJ ILBI, including provision for the BBNJ COP to identify additional categories of ABMTs.”

The chapeau does not need to say more than this but it is important to be clear that Articles 14 to 21, as drafted in the Revised Draft Text, should be simplified and redrafted in Section 1 so as to only apply to MPA establishment while proposed additional Articles would form Section 2 addressing other ABMTs. It would then be a matter for negotiators as to whether text relating to other ABMTs remains in Section 2 of Part III or is included in Part I insofar as those ABMTs relate to issues of broader international cooperation and coordination, such as Marine Spatial Planning.

Section 1 - Article 14 - Objectives (covering MPAs only)

Article 14 should be substantially rewritten and simplified to reflect the focus on MPA establishment only in Section 1.

Recommendation 14.2:

The objective might simply state:

“1. The objective of Section 1 is to set out the processes and procedures whereby Marine Protected Areas can be established in ABNJ, including by designating MPAs by the BBNJ COP and subsequent management plans adopted by the BBNJ COP and effectively implemented and reviewed through appropriate engagement with States and other relevant bodies.”

Recommendation 14.3:

A subsequent paragraph 14.2 would then include an open-ended list of purposes for which an MPA might be designated and managed:

“2. The purposes for which an MPA may be designated by the COP, and managed pursuant to a management plan adopted by the COP, include (but need not be limited to):

- a) Establishing a comprehensive and adequate system of ecologically representative and connected Marine Protected Areas;
- b) Protecting areas identified in applying [any][one or more] of the [indicative] criteria in Annex I;
- c) Contributing to a holistic and cross-sectoral approach to ocean management;
- d) Rehabilitating and restoring biodiversity and ecosystems, including with a view to enhancing their productivity and health and building resilience to stressors, including those related to climate change, ocean acidification and marine pollution;
- e) Ensuring adequate management arrangements are in place and effectively implemented to protect the values identified in designating an MPA from both current and emerging threats, pressures and stressors;
- f) Supporting food security and other socioeconomic purposes, including the protection of cultural values;
- g) Creating scientific reference areas, including for baseline research;
- h) Safeguarding aesthetic, natural or wilderness values”

Subparagraphs in the Revised Draft Text on enhancing cooperation, coordination, coherence and complementarity (14.1(a); 14.1(b); 14.1(i) and 14.1(l) can then be deleted. These broader notions and concepts can then be included in various Articles in Part 1 as part of an overarching ‘enhanced cooperation’ framework.

Recommendation 14.4

For the sake of clarity, a new paragraph 14.3 should be inserted making it clear that the list in paragraph 14.2 is open-ended:

“14.3 The BBNJ COP shall keep the purposes identified in paragraph 2 under review and may decide to include additional purposes consistent with the [general] objective of the ILBI and the purpose of this Section. The COP may adopt guidelines to assist Parties in interpreting and applying those purposes identified in paragraph 2 and any subsequently identified by the COP.”

Article 15 - International Cooperation and Coordination

Recommendation 15.1

This Article should be deleted from Section 1 of Part III and relevant provisions included in Article 6 of Part I and in Section 2 of this Part, as appropriate. The current text of the Revised Draft Text applies equally to various other Parts of the ILBI, not just to Part III applying only to ABMTs. That these provisions are currently included in an article in Part III is an artifact of the current working group structure of the negotiations.

➔ The concepts included in the paragraphs of Article 15 are globally important and should not be lost. In ensuring their appropriate inclusion in Part I – General

Provisions, their importance would be properly recognised. These provisions, however, do not contribute to setting out the processes for establishing MPAs. They do, however, have a lot to contribute to setting the overarching ‘enhanced cooperation’ framework for the BBNJ ILBI – to apply equally to all activities in ABNJ, including MPA establishment.

2. Establishing criteria for the identification of potential MPAs

Section I - Article 16 - Identification of areas (covering MPAs only)

Recommendation 16.1:

The bracketed phrase, ‘[requiring protection]’, should be deleted from the heading for this Article. This is not just a matter of grammatical style. It is a major issue of great strategic importance. As we noted in the Introduction (see para.ii), it is a matter of critical importance for WWF that MPAs are established on the basis of a ‘designate by values, manage by threats’ approach, particularly in creating a BBNJ COP with the competency and mandate to designate MPAs in ABNJ based on their biodiversity values.

Management can then be subsequently sorted out with appropriate involvement of competent sectoral bodies based on identification of current or emerging threats to the protection of those values. Whether or not a designated MPA needs protective management to remove or mitigate threats depends on which values are in need of what protection from which current or potential threats.

➔ In separating out the establishment of MPAs in Section I of Part III from how other ABMTs might be addressed, States can then negotiate text with clarity and confidence as to how MPAs should be established. If treatment of all ABMTs remains conflated into a single process, such clarity will not be possible.

Recommendation 16.2:

The title of this Article needs to reflect its purpose – to help proponents and those assessing proposals to identify potential MPA sites or candidate areas. For the sake of clarity, WWF suggests that it read: **‘16 Identification of [Proposed][Candidate] Areas for Designation as MPAs’** to make it clear that, at this stage of the process, geographical delineations are provisional until formally designated by the COP.

Recommendation 16.3:

Paragraph 16.1 should be deleted insofar as all of the principles and approaches included in the current text are already covered in Article 5 in Part I – General Provisions. Part I is the

proper place for these considerations as they are pertinent to all Parts of the BBNJ ILBI, not just Part III dealing with ABMTs.

If these principles and approaches are not properly included in Part I, it would be appropriate to revisit Article 16.1 to ensure they do guide MPA establishment at least.

Recommendation 16.4:

Paragraphs 16.2 & 16.3 just need minor amendment consistent with Section 1 applying only to MPA establishment:

“2. Indicative criteria for the identification of ~~areas requiring protection through the establishment of area-based management tools, including Marine Protected Areas~~ may are included in Annex 1.”

This simply identifies the role and status of the Annex, which is all it has to do.

“3. The BBNJ COP may decide to adopt additional criteria.”

Again, this is all that is required of treaty text. It is appropriate that a Subsidiary Body on Scientific and Technical Advice (SBSTA) should have the autonomy to make its own recommendations to the COP without being invited to do so but it is also important that individual States Party to the BBNJ ILBI should be free to make their own recommendations. This is a discretionary power of the COP such that ‘may’ is appropriate, not ‘shall’.

The principles and approaches to guide such deliberations and decisions are those set out in Article 5 and need no repeating here.

Recommendation 16.5:

WWF would like to suggest that a new paragraph be introduced: **16. “3A The BBNJ COP may adopt guidelines to assist States in the understanding and application of the criteria in the development of MPA proposals”.**

It is important that ‘may’ be used rather than ‘shall’ so that the COP has discretion and the absence of COP guidance cannot be used as a justification for blocking any steps in the establishment of MPAs.

Recommendation 16.6:

Paragraph 16.4 should be deleted. The use of the list of criteria is a matter for other Articles.

The question of the relationship between a list of criteria to be maintained by the BBNJ COP and those lists maintained by other bodies and coastal States for similar and related purposes is important but it is not a matter for treaty text. The issue needs to be addressed under Article 6 – International Cooperation and regarded as just one of many issues to be addressed through an ‘enhanced cooperation’ framework.

Annex 1 (covering MPAs only)

Annex 1 needs to be regarded as an integral part of Article 16. WWF is concerned that negotiations to date have resulted in myriad proposals to bracket or delete individual criteria in the Revised Draft Text without recourse to informed expert advice as to why particular criteria have been included in the earlier draft text and as to what difficulties might arise in seeking to coordinate activities with other international bodies and with neighbouring coastal States.

WWF is hopeful that, in suggesting that Part III be split into two Sections covering MPA establishment and other ABMTs, some clarity can be achieved as to the purpose and value of including an indicative list of criteria for MPA establishment as treaty text. If it can be agreed that this list is solely for the purpose of identification of potential MPAs as conservation tools consistent with the definition WWF has suggested for Article 1.10 in Recommendation 1.2 above, we hope that agreement on an appropriate list can be comfortably achieved.

Recommendation Annex.1:

An annex of indicative criteria for identifying candidate areas for MPA designation should be included in the BBNJ ILBI and brackets removed from the current text in the Revised Draft Text.

While it is important that the BBNJ COP should have the power to add to the list of criteria from time to time, it would be most inappropriate to leave it to the COP to adopt such a list in its own good time. **Without such an indicative list, two significant problems would arise:**

- ➔ Firstly, preparatory work in the development of MPA proposals in the interim period following adoption of the BBNJ ILBI and before its entry into force would be frustrated because the basis for developing proposals would not yet exist.
- ➔ Secondly, it would be too tempting for less than enthusiastic States Party to block establishment of MPAs by simply blocking the adoption of such a list by the COP.

Recommendation Annex.2:

The title for Annex 1 should read: “Indicative Criteria for the Identification of Areas for Designation as Marine Protected Areas in ABNJ” reflecting its purpose as WWF has suggested.

The list of issues identified has the potential to be useful for the application of other ABMTs covered by our proposed Section 2 for Part III but, as an annex to a treaty, the list is there to support the work of the COP in establishing MPAs.

- ➔ Similarly, in suggesting that paragraph 16.4 be deleted, WWF is keen to ensure that the BBNJ ILBI treaty text does not inappropriately constrain States in exercising their responsibilities as parties to other agreements and as members of other bodies.

Recommendation Annex.3:

A new criterion should be added to the list: contributing to ecological and biological connectivity. WWF's expert advice identifies this as an important missing element of the current list in the Draft Revised Text. Inclusion of this criterion would significantly facilitate the establishment of representative networks of MPAs. The CBD currently has guidance for designing such networks and this should be one of the matters to be addressed in developing a cooperative relationship between the BBNJ and the CBD.

Recommendation Annex.4:

Brackets should be removed from '(a) Uniqueness', '(b) Rarity', '(j) Representativeness', '(l) Exceptional naturalness', '(m) Ecological naturalness', '(m) Ecological connectivity', '(n) Important ecological processes', '(s) Adequacy and viability' and '(t) replication' by removing the brackets in the Revised Draft Text.

Note that the list of criteria includes considerations for MPA network design as well as for individual MPAs. We have not suggested separating out these two kinds of criteria for the sake of ease of application. It is important that the list of criteria in Annex 1 is based on generally accepted scientific norms for identifying areas of conservation significance, in both terrestrial and marine environments. Of particular relevance in this situation is the need to avoid frustrating the development of a collaborative relationship with the CBD, especially in ensuring compatibility between criteria for EBSA identification by the CBD COP and Annex 1. We return to this need for CBD collaboration in Section 5 below.

This is why the principle of 'best available science' is so important. The phrase is not just a few words to be bandied about. It is a fundamental commitment by decision-makers to base their work on science and the advice of scientists – and that includes negotiators of the BBNJ ILBI.

→ Insofar as States are committed to establishing networks of MPAs, 'CAR' criteria (comprehensive, adequate and representative) are particularly important. These or equivalent concepts are included in the current list if brackets and deletions are appropriately removed and reversed, as WWF has suggested.

Recommendation Annex.5:

The proposed deletion of '(i) Biological productivity' should be reversed. Such 'hot spot' areas of high biological productivity are likely to be of high value for both conservation and sustainable use purposes. This is exactly why MPA designation should remain as a potential basis for management arrangements because the broadly accepted IUCN guidance for marine MPAs provides for a range of principal purposes and degrees of protection, only some of which exclude extractive uses.

→ In suggesting a definition of ‘MPA’ for Article 1 (see Recommendation 1.2 above), WWF hopes to make it clear that other uses are not automatically excluded from a designated MPA – as long as they are conducted in a way that is consistent with or in furtherance of, the objectives of the MPA and its Management Plan. In this regard, WWF is aware that some States are worried that ‘MPA’ is synonymous with ‘marine reserve’ or ‘no-take zone’. Awareness of and respect for IUCN guidance should do much to allay such fears.

Recommendation Annex.6:

The proposed inclusion of ‘(p) cultural factors’ should be accepted, with wording tied to however traditional knowledge of indigenous peoples and local communities might get included in Article 5 – General Principles and Approaches.

Recommendation Annex.7:

All other criteria included in the current text in the Revised Draft Text should be deleted. This leaves those criteria that identify conservation ‘values’, one or more of which can form the basis of an MPA proposal.

→ The considerations in criteria WWF has proposed for deletion are important in the assessment of proposals and in the development of management arrangements for designated MPAs – but they are not ‘values’ upon which an MPA might be designated. These considerations are picked up in subsequent Articles dealing with management, reporting, monitoring and review.

3. Creating a process for establishing MPAs based on a ‘designate by values, manage by threats’ approach

Section 1 - Article 17 - Proposals (covering MPAs only)

Recommendation 17.1

The current text of Article 17 should be deleted and replaced by a simple invitation to submit proposals:

1. Any one or more States Party may submit proposals to the BBNJ COP for the designation of an area as an MPA. A proposal may include multiple areas, including networks and systems of MPAs. A proposal may also include suggested management arrangements.
2. A proposal should identify one or more of the criteria in Annex 1 relied upon by the proponents in developing the proposal.
3. The BBNJ COP may develop and maintain guidelines to assist States in preparing and submitting such proposals.

The eligibility of a proposal for further consideration by the COP is then simply established by identifying one or more ‘values’ related to criteria set out in Annex 1, pursuant to paragraph 17.2. This is sufficient to create the ‘designate by values’ approach that WWF considers so important to a realistic MPA establishment process.

All of the substantive matters included in the current text of Article 17 in the Revised Draft Text are relevant and worth including in the scope of the guidance that the COP might develop for proponents. It is inappropriate, however, that binding treaty text should be so prescriptive. It is also imprudent to include such procedural detail in treaty text as an obvious invitation for wary States to block proposals. Likewise, it is unwise to require the COP to adopt guidelines.

Such guidance should also include consultation arrangements.

Importantly, it is largely a matter of prudent common sense that a proponent State or group of States is going to be mindful of these matters in developing and submitting a proposal. This is the approach that CCAMLR Members took in adopting their 2011 CM 91-04 General framework for the establishment of CCAMLR Marine Protected Areas.

→ **Importantly, WWF is proposing that a proposal be made to the BBNJ COP in the first instance.** It is then the responsibility of the COP to accept and progress any such proposal on behalf of the international community pursuant to commitments made by the international community. It is not appropriate that the Secretariat should

be asked to contribute to progressing a proposal other than in response to a COP decision to do so.

Likewise, the involvement of the SBSTA should be in response to an invitation from the COP to assess a proposal and provide advice on progressing it to the COP. There is no reason why the COP and its SBSTA should not develop a process that allows SBSTA to facilitate provision of expert advice to help proponent States in developing their proposals but, insofar as SBSTA will be asked to provide advice on a proposal, it would be inappropriate for SBSTA to be formally involved in the development of any such proposal.

Section 1 - Article 18 - Consultation on and assessment of proposals (covering MPAs only)

Recommendation 18.1:

Further to Recommendation 17.1, above, **existing text for Article 18 should also be deleted and replaced with a simple COP procedural acceptance of proposals from States Party** and then: (i) refer them to SBSTA for relevant advice, especially on being based on best available science, consistent with application of the precautionary principle and implementation of the ecosystem approach; (ii) invite States Party to contribute to the assessment of proposals, including conducting consultations with their nationals (consistent with any guidance that the COP may develop and adopt); and (iii) invite international bodies, including competent sectoral bodies, to contribute:

Article 18

1. On receipt of an MPA proposal from one or more States Party, the COP shall refer the proposal to the SBSTA with a timebound request for advice on whether the proposal is based on best available science, application of the precautionary principle and implementation of the ecosystem approach (and how the proposal could be improved to be consistent with these considerations).
2. The COP may include any other considerations in its request to the SBSTA which it deems pertinent and appropriate, including any other principles and approaches in Article 5 or criteria in Annex 1, including any additional criteria that might be identified by the COP pursuant to Article 16.3 (see Recommendation 16.4, above).
3. The SBSTA may adopt its own guidelines for the assessment of MPA proposals referred to it by the COP.
4. The COP shall extend a timebound invitation to Members and Observers to provide comments and suggestions on the proposal and on the COP's request to SBSTA, including any proposals for management arrangements.
5. The COP may adopt guidelines for Members and Observers on the provision of comments and suggestions pursuant to para 3., including guidance on consultation with their nationals.

6. The COP shall extend a timebound invitation to those international bodies making pertinent decisions pursuant to Article 4.1A (see WWF Recommendation 4.3) to provide comments and suggestions on the proposal and the COP's request to SBSTA, including any proposals for management arrangements.
7. The COP shall make all documentation received through these consultation processes publicly and promptly available through a website to be maintained by the COP.

➔ There are three significant variations in this approach suggested by WWF compared to the Revised Draft Text:

- i. In being referred to SBSTA, members and observers and other bodies by the COP, **assessment of a proposal from one or more States becomes a responsibility of the COP on behalf of the international community as a whole.** Responsibility for advancing a proposal passes from the original proponent(s) to the COP. This is consistent with WWF's ambition that the BBNJ ILBI should drive a shift from the historical notion that 'the oceans belong to no-one' to a modern approach that 'the oceans belong to everyone'.
- ii. **Consultation beyond government becomes the responsibility of each COP member State with respect to its own nationals, rather than being the global obligation of the proponent State(s).** This is not only practical but sensible. Additionally, such matters are best left to COP guidance rather than being included in binding treaty text.
- iii. **Arrangements for engaging the SBSTA, members and observers, and international bodies are clearly separated and are conducted in parallel.** There is no step involving the proponent incorporating SBSTA advice before conducting further consultation. Addressing SBSTA advice is a matter for the COP as is feedback from Members, Observers and other bodies.

Note that there is no text proposed for developing guidelines to assist other bodies in responding to an invitation from the BBNJ COP. It would be inappropriate for the BBNJ ILBI text to offer such guidance, this being a matter for the member States of each body.

Section I - Article 19 - Decision-making (covering MPAs only)

Recommendation 19.1

The current text of Article 19 in the Revised Draft Text should be deleted and replaced with expanded text that clearly sets out the decision-making expected of the BBNJ COP and of

competent sectoral bodies at each stage of the MPA establishment process (including appropriate consultation at each stage). WWF is using ‘establishment’ to describe the whole process: (i) a proposal by one or more States Party; (ii) a COP decision to designate an MPA; (iii) a COP decision to adopt a Management Plan; (iv) implementation measures by identified competent sectoral bodies; (v) implementation reporting and monitoring; and (vi) review of effectiveness.

As in previous briefs, a key part of WWF’s approach to decision-making for MPA establishment is to recognise that an appropriate role must be found for competent sectoral bodies. What this role should be, however, deserves greater attention than it has been given, to date. **Through the following recommendations below, WWF hopes to demonstrate a pragmatic and workable way of addressing this underlying political issue that delivers a practical and generally acceptable process for establishing MPAs.**

For the sake of clarity, WWF uses the phrase ‘competent sectoral body’ to include the International Maritime Organization (IMO) with respect to shipping, the International Seabed Authority (ISA) with respect to seabed mining and most Regional Fisheries Bodies (RFBs, including RFMOs) with respect to fishing.

With a commercial whaling moratorium in place, we do not include the IWC. Indeed, the IWC now becomes one of those other bodies with relevant expertise whose decisions deserve respect by competent sectoral bodies in regulating uses.

We use ‘competent’ to mean that the agreements establishing these sectoral bodies confer upon them some capacity to make decisions to regulate activities within their competencies that are legally binding upon the Members of those bodies and the Parties to those agreements.

➔ How these bodies exercise this capacity is peculiar to each body. One of the key reasons why WWF is proposing multiple decision-making stages for Article 19 is to allow such peculiarities to be identified, discussed and understood as decisions are being made.

For WWF, there are four key considerations in setting out an appropriate role for competent sectoral bodies:

- 1. To be effective, an established MPA needs to be respected by all those controlling and conducting activities making use of ocean space, not just those uses over which existing competent sectoral bodies may be able to exercise some regulatory control.** Arrangements also need to be able to deal with new and emerging uses (such as geoenvironmental in these days of urgent climate change mitigation). The BBNJ therefore needs to set out the entire MPA establishment process as a cross-sectoral process embracing all uses, both existing and foreseeable, regardless of which uses are or are not covered by competent sectoral bodies. **Pathway choices in the establishment process can then deliver the appropriate role for relevant bodies, competent or otherwise.** IUCN Guidelines are crucially instructive on these issues.

2. **Different competent bodies exercise their competencies in different ways and each body will need to develop its own processes and procedures not only for recognising an MPA designation by the BBNJ COP but also for ensuring activities over which it has competency are effectively managed and controlled in practice.** The due diligence principle applies to these bodies as much as it does to their members – can they regulate spatial management sufficient to respect a COP MPA designation and effectively implement a management plan; do they have the monitoring, control and surveillance (MCS) arrangements to ensure compliance; can they report effectively to the BBNJ COP; can they do all this in a timely manner?
3. **WWF is proposing that the BBNJ COP develop and adopt a Management Plan for each MPA [or [group][network][system] of MPAs] that it designates.** This is to clarify three aspects of the relationship between the COP and competent sectoral bodies:
 - i. **It is the job of each competent sectoral body to exercise its competencies to give regulatory effect to management arrangements deemed necessary by the BBNJ COP** to implement the Plan it has adopted for achieving the goals set for the MPA it has designated. It is a matter for each competent sectoral body to decide what package of regulatory measures is needed to give effect to those management arrangements but not to second guess the COP as to what the plan is or what arrangements are needed. Such competent sectoral bodies will be properly consulted in the development of the Management Plan and it is at this stage that discussions on appropriate management need to be encouraged and hopefully resolved.
 - ii. **The Management Plan needs to set out the arrangements for monitoring its implementation and effectiveness.** Insofar as competent sectoral bodies are involved, this will involve those bodies taking on appropriate reporting commitments as part of those monitoring arrangements. This is one of the reasons why WWF has been emphasising the importance of including reporting obligations in the text of the BBNJ ILBI – we are looking for an unprecedented level of substantive reporting between bodies.
 - iii. **At regular but infrequent intervals, the COP will need to review the effectiveness of arrangements for all stages of the process for the establishment of the MPAs it has designated.** Are the MPAs still in the right place? Do management arrangements need changing? And, of crucial importance for competent sectoral bodies, are regulatory and control measures effective and are they being effectively implemented. This issue of oversight by the BBNJ COP of areas of responsibility of other bodies is something that needs to be discussed and resolved in the process of developing the Management Plan.

4. **All decisions to be taken by the BBNJ COP need to be based on ‘UN rules’ – all reasonable efforts are to be made to reach agreement by consensus** but, in the end, voting can be used to prevent *de facto* vetoing of decisions by abuse of consensus norms. WWF remains committed to seeing decisions taken by consensus as a key part of getting the BBNJ ILBI adopted, entered into force and universally supported as a major new part of the governance architecture for those engaging in maritime activities and for those responsible for ocean health.

➔ With these considerations in mind, in summary, the following recommendations set out a simple structure for decision-making at each stage in the MPA establishment process:

- (i) Having received a proposal, circulated it for advice from the SBSTA and comment from Members, Observers and other bodies (including competent sectoral bodies) and analysed all responses, the BBNJ COP needs to prepare and decide upon a proposal to designate an MPA, including the adoption of a Draft Management Plan for that MPA, once designated.
- (ii) Having designated an MPA, the COP then needs to circulate the Draft Management Plan (to the same broad spectrum of interests) and analyse all responses, so it can prepare and adopt a Management Plan.
- (iii) Insofar as the adopted Management Plan sets out a role for any competent sectoral bodies, those bodies need to be formally notified and requested to adopt regulatory measures as identified in the Plan as their contribution to its implementation.
- (iv) The COP needs to prepare regular – annual – implementation monitoring reports based on reports from Members and identified competent sectoral bodies.
- (v) The COP needs to conduct effectiveness reviews of designated MPAs and their Management Plans – from time to time – based on SBSTA advice on progress with ongoing science programmes designed to support such reviews).

Recommendation 19.2:

Insert a new Article 19 - Designation of an MPA by the BBNJ COP

19.1. The COP shall assess and analyse the advice, comments and suggestions received pursuant to Article 18 and prepare a report setting out that assessment and analysis.

- a) The report shall be completed in a timely manner and circulated to Members and Observers on its completion.**
- b) At the same time, the report shall be made publicly available through a website to be maintained by the COP along with copies of all the documentation received through these consultation processes along with any other material the COP deems appropriate.**

- c) The report shall contain two principal parts: (i) a proposal to designate an area as an MPA; and (ii) a proposal to adopt a Draft Management Plan for that MPA.
- d) The proposed Draft Management Plan should include, *inter alia*:
 - i. an identification of current and foreseeable threats, pressures and stressors likely to pose a threat to the conservation values identified in the designation process;
 - ii. an identification of the activities responsible for such threats;
 - iii. an identification of those particular States and competent regulatory bodies responsible for managing particular existing or foreseeable threats;
 - iv. for each competent regulatory body identified pursuant to para. d)(iii), suggested measures, or matters for measures, to be recommended to that body for adoption, or for modification of existing measures to ensure adequate mitigation of identified threats;
 - v. arrangements for reporting and monitoring of implementation of the Plan; and
 - vi. arrangements for review of all aspects of MPA designation and management arrangements.
- e) The COP may establish a sub-committee to be convened by the proponents of the MPA and open to the participation of all interested States Party to work with the Secretariat in preparing and publishing the report.
- f) If established, the sub-committee convenors shall invite other Members, Observers and other bodies to contribute to its work.
- g) The COP may adopt comprehensive guidelines to assist in the preparation and publication of the report, including in the development of a designation proposal and of a draft management plan.

19.2. The COP shall decide whether or not to designate an MPA based on the proposal contained in the report prepared pursuant to Article 19.1.

- a) If the COP decides to designate an MPA, that designation and supporting documentation contained in and relied upon by the proposal shall be included in a register of MPAs to be established and maintained by the COP.
- b) If the COP decides not to designate an MPA, it shall give its reasons and devise a process for review and revision of the proposal with a view to encouraging the resubmission of a modified proposal at a later date.

19.3. The COP shall decide whether or not to adopt a Draft Management Plan based on the proposal contained in the report prepared pursuant to Article 19.1.

If the COP decides to adopt a Draft Management Plan, it shall circulate a timebound request to SBSTA, Members, Observers and other bodies, inviting advice, comments and suggestions on the adopted Draft.

1. In referring the Draft Management Plan to SBSTA, the COP should identify the range of issues raised in earlier consultations on which it is seeking advice. The COP may include any other issues in its request for advice that it deems pertinent and appropriate.
2. The SBSTA may adopt its own guidelines for the assessment of Draft Management Plans.
3. The COP may adopt guidelines for Members and Observers on the provision of comments and suggestions, including guidance on consultation with their nationals.
4. The COP shall extend a timebound invitation to those international bodies making pertinent decisions pursuant to Article 4.1A (see WWF Recommendation 4.3) to provide comments and suggestions on the proposal.
5. In referring the adopted Draft Management Plan to international bodies identified pursuant to Article 4.1A, the COP shall invite each body to provide comments and suggestions pertinent to the mandates and responsibilities of that body. The COP may also invite such bodies to include comments and suggestions on general matters relating to their experience and competencies.
6. In referring the adopted Draft Management Plan to those international bodies that are also competent sectoral bodies identified pursuant to para. 19.1.(d)(iv), the COP shall draw their attention to the threats identified and to the proposed regulatory measures to mitigate those threats that are pertinent to their competencies and shall invite those competent sectoral bodies to provide proposals on the timely adoption and effective implementation of the proposed measures, including suggestions for alternative ways of achieving equivalent mitigation of those threats.
7. The COP may adopt guidelines for States parties that are members of international bodies identified pursuant to Article 4.1A to assist them in securing appropriate responses by those bodies to invitations to provide timely comment and suggestions to the COP.
8. The COP shall make all documentation received through these consultation processes publicly and promptly available through a website to be maintained by the COP.
9. If the COP decides not to adopt the Management Plan, it shall give its reasons and devise a process for review and revision of the Draft Management Plan with a view to encouraging the resubmission of a modified proposal at a later date.

19.4. The COP shall decide whether or not to adopt a Management Plan for the designated MPA.

1. The COP shall assess and analyse the advice, comments and suggestions received pursuant to Article 19.3 and prepare a report, including as an annex, a proposed Management Plan, as soon as practicable.
2. The COP shall make the report prepared pursuant to para.1, and all documentation received through the consultation process pursuant to Article 19.3, promptly available to Members, Observers and other bodies and publicly available through a website to be maintained by the COP.
3. If the COP decides to adopt a Management Plan, that Plan and supporting documentation contained in and relied upon by the proposal shall be included in the register of MPAs maintained by the COP pursuant to Article 19.2(a).
4. Once adopted, the Management Plan shall be referred to Members and other bodies urging their prompt attention to implementation arrangements, including regulatory measures. Such measures shall be binding on activities not falling within the regulatory competency of sectoral bodies or conducted by vessels not flagged to States that are members of such bodies.
5. In referring the adopted Management Plan to those international bodies that are also competent sectoral bodies identified pursuant to para. 19.1.(d)(iv), the COP shall draw their attention to the relevant threats identified and the proposed regulatory measures pertinent to their competencies intended to mitigate those threats and shall invite those bodies to promptly adopt the proposed measures or their equivalent.
6. The COP shall also send copies of the Management Plan to any other States not Members of the COP or parties to the BBNJ ILBI inviting them to cooperate by adopting appropriate arrangements to ensure that their nationals (vessels, companies and people) contribute effectively to the implementation of the Plan and to consider becoming a party to the ILBI. [Note that this paragraph can replace Article 20, para.5 in the Draft Revised Text (see recommendation 20.1, below).]
7. If the COP decides not to adopt the Management Plan, it shall give its reasons and devise a process for review and revision of the proposed Management Plan with a view to encouraging the resubmission of a modified proposal at a later date.

Article 20 – Implementation

Recommendation 20.1:

WWF considers that Article 20 should be deleted from Part III dealing with ABMTs and transferred to Part I – General Provisions as a new Article 6A and the text generalised accordingly. We have retained the obligation to engage non-party States in para.5 as our proposed para. 19.4.6.

→ The provisions of Article 20 should be regarded as an elaboration of the UNCLOS general duty to cooperate and of existing broader principles of international law such that Part I is the more appropriate place for such material.

Section I - Article 21 - Monitoring and Review (covering MPAs only)

Recommendation 21.1:

WWF suggests that Article 21 be split into two parts: one to deal with routine monitoring of current plans (including associated research programmes); and the other to deal with review potentially covering much broader issues (such as whether the MPA should be shifted, whether its effectiveness can justify its continuance, whether future plans should be changed to improve effectiveness).

→ For WWF, monitoring and review are two very different concepts and arrangements. Monitoring is a routine, ongoing, integral part of a Management Plan and is designed to facilitate its implementation and effectiveness. Review is a broader assessment, undertaken from time to time, of those reports and of other relevant material available to see whether changes to any management arrangements should be made.

The text proposals below seek to clarify this difference. No substantive changes to concepts and procedures are suggested. We have clarified that the intent is for mandatory annual reporting as part of monitoring arrangements. We have also suggested that all relevant stakeholders, including competent sectoral bodies shall be invited to report to the BBNJ COP on what action they have taken. While the BBNJ ILBI may not be able to command a response from another body, it can certainly request one.

Recommendation 21.2:

Article 21 should be restricted to focusing on monitoring and reporting. Helping States work together to meet these reporting obligations should be a priority for capacity building and technology transfer arrangements in Part V. The inevitable emphasis on flag state responsibility and sectoral management for controlling activities in ABNJ means that implementation responsibilities are spread far and wide such that substantial reporting arrangements are necessary if monitoring is to be effective.

A monitoring plan, as part of a Management Plan, will customarily include one or more scientific research programmes aimed at addressing issues and questions identified in the Management Plan. It is important to separate out this scientific research in support of monitoring from the compatible use of the MPA for general scientific research purposes to the extent that the Management Plan provides for it.

Article 21 – Monitoring and Reporting (covering MPAs only)

1. Further to Article 19.1(d)(v), each MPA Management Plan shall include a monitoring plan which should include one or more research programmes in support of that monitoring plan. That plan should have three principal components:

- i. A COP assessment of annual monitoring reports from States and bodies pursuant to para.2;
- ii. A SBSTA assessment of the research programmes and subsequent provision of advice to the COP; and
- iii. A COP deliberation and decision based on these assessments.

2. States Parties shall report annually to the COP on steps taken to implement MPA Management Plans and the effectiveness of those steps. Such monitoring reports shall be required to be submitted by a deadline set by the COP and shall be made publicly available by the COP immediately following that deadline.

- i. 2. States Parties are encouraged to cooperate with other States, including through participation in global, regional, sub-regional and sectoral bodies, with a view to developing collective reporting arrangements that can meet BBNJ COP requirements and, as appropriate the reporting requirements of other bodies and processes.
- ii. Regardless of any arrangements entered into pursuant to para.2., the COP shall invite those competent sectoral bodies identified pursuant to para. 19.1.(d)(iv) to provide implementation reports to the COP by the same deadline and shall make them publicly available immediately following that deadline.
- iii. As soon as practicable following the deadline, the COP shall prepare and publish a summary of the monitoring reports received and may refer the summary report to SBSTA with a request for advice on any matters the COP deems appropriate.
- iv. The SBSTA may, on its own initiative, provide advice to the COP on any matters derived from its consideration of monitoring reports from Members and bodies, and of summary reports from the COP.
- v. The COP may refer the summary report [to its Compliance Committee] [to compliance procedures set out in the ILBI] should any compliance considerations warranting such a referral be identified by the COP.
- vi. The COP may produce guidelines for States and relevant bodies to facilitate and assist with their implementation reporting requirements.

➔ Paragraph 3, establishing the reporting relationship between the COP and competent sectoral bodies is a critical part of the overall MPA establishment process. Insofar as the BBNJ ILBI may give particular competent sectoral bodies some formal regulatory role in the MPA establishment process, it is necessary to have sufficient feedback reporting arrangements in place so that the COP knows what regulatory arrangements are in operation, whether they are being complied with and whether they are effective in achieving the COP's management intent.

Recommendation 21.3:

A new Article 21A. should be included that deals only with review of an MPA. Having a dedicated review process, separate from routine monitoring, is important to all stakeholders not only in the initial MPA establishment process but also in the long term, cost-effective management of MPA networks and systems.

Given the dynamic nature of oceanic systems, there may be reasons to shift the location or boundaries of an MPA, changes in underlying values may mean that some criteria in Annex 1 no longer apply while new ones may arise. This is likely to be particularly true under conditions of climate change. Being able to be flexible in response to changing circumstances is important.

For whatever reason, it is prudent and proper that MPAs and their management arrangements should be reviewed for effectiveness – and whatever other purposes the COP may deem appropriate.

Article 21A – Review of MPA Establishment (covering MPAs only)

1. Every [ten] years following designation, the COP shall review the management arrangements for each MPA in the register established pursuant to Article 19.2(a).

- i. The terms of reference and other necessary arrangements for that review shall be set by the COP at least a year before the review is initiated;
- ii. The review shall include assessment of the effectiveness of arrangements, including regulatory measures, taken by States and competent sectoral bodies to implement the Management Plan;
- iii. Those arrangements shall provide for the participation of SBSTA, States Parties, Observers, other States and relevant international bodies, including competent sectoral bodies, in the review;
- iv. The COP shall seek advice from the SBSTA on draft review arrangements and shall consider that advice before deciding to initiate a review;
- v. The SBSTA may initiate its own review of an MPA and its management arrangements at any time and shall provide any subsequent advice to the COP;
- vi. The COP may initiate the review within ten years if it deems that current or emerging circumstances warrant an earlier review.

2. The review shall produce a report based on its deliberations, including consultations pursuant to para. 19.2(a)(iii) and provide the report and any advice to the COP and make it publicly available at the same time;

3. The COP shall decide whether or not to accept the review report and what action, if any, to take in response to any advice and recommendations provided by the review.

3. The COP may produce guidelines to assist SBSTA, States Parties, Observers, other States and relevant bodies, including competent sectoral bodies, in preparing for and participating in such reviews.

4. Including other ABMTs

For the sake of clarity, we have repeated the introductory section of Chapter 1, including Recommendation 14.1, here at the start of Chapter 4:

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The text of Part III of the Revised Draft Text suffers from two inherent problems that need to be addressed before attempting to negotiate agreed text for adoption.

Firstly, there is text in Part III on cooperation and coordination that would be better placed in Part I - General Provisions insofar as these are overarching considerations that apply throughout the ILBI and are not confined to Part III. As negotiations draw to a conclusion, it may be of assistance to negotiators to draw up a list of such overarching or cross-cutting issues warranting attention outside the current structure of negotiations based on the four issues singled out in the original 'package' adopted by the UNGA in 2011.

*Secondly, and more importantly, it is irretrievably confusing to try and develop a single process to cover how the ILBI should address all kinds of ABMTs. **WWF is firmly of the view that negotiations would be significantly assisted if the issue of the establishment of MPAs, including designation by the BBNJ COP and the role of competent sectoral bodies in management, was separated out into a separate Section 1 of Part III.***

Consideration of other ABMTs could then be dealt with as a matter of enhanced cooperation and coordination where, depending on how each kind of ABMT should be dealt with, relevant text could be included in a Section 2 of Part III or included in existing or new Articles in Part I.

Recommendation 14.1:

There needs to be a chapeau to Part III that clarifies that Part III is broken into two Sections. Section 1 would deal with 'Establishment of MPAs in ABNJ' while Section 2 would deal with 'Other ABMTs' and broader cooperation and coordination considerations. That chapeau might read:

"This Part III consists of two Sections. Section 1 sets out the process for establishing Marine Protected Areas (MPAs) in ABNJ, including the designation of MPAs by the BBNJ COP and the appropriate involvement of other relevant bodies in regulating management arrangements. Section 2 identifies other categories of Area-based Management Tools (ABMTs) capable of contributing to an enhanced cooperation framework for implementing

the BBNJ ILBI, including provision for the BBNJ COP to identify additional categories of ABMTs.”

The chapeau does not need to say more than this but it is important to be clear that Articles 14 to 21, as drafted in the Revised Draft Text, should be simplified and redrafted in Section 1 so as to only apply to MPA establishment while proposed additional Articles would form Section 2 addressing other ABMTs. It would then be a matter for negotiators as to whether text relating to other ABMTs remains in Section 2 of Part III or is included in Part I insofar as those ABMTs relate to issues of broader international cooperation and coordination, such as Marine Spatial Planning.

End of repeated text from Chapter 1 ----- // -----

WWF has identified two categories of ABMTS, other than MPAs, that warrant recognition in the text of the BBNJ ILBI: Designation of spatial management arrangements by a competent sectoral body; and Marine Spatial Planning. These two ABMTs are very different concepts and WWF is suggesting that they be addressed separately. Both are

- i. **Designation of spatial management arrangements by a competent sectoral body** as identified pursuant to WWF’s proposed para. 19.1.(d)(iv) (see Recommendation 19.2, above). In essence, this includes the International Seabed Authority (ISA), the International Maritime Organisation (IMO) and most Regional Fisheries Bodies (RFBs, including RFMOs).

➔ Note that OECMs (other effective area-based conservation measures) is a term developed by the CBD which has adopted criteria to assist member States in identifying those area-based conservation measures within their own national jurisdiction that can be regarded as ‘OECMs’. This information is then provided to WCMC (the World Conservation Monitoring Centre) for, inter alia, including in reports as contributing to national and CBD targets for establishing protected and conserved areas.

This is discussed further in Chapter 6 below as an element of the relationship that needs to be developed between the BBNJ ILBI and the CBD. **Crucially, however, WWF is not proposing that the BBNJ COP should make any such judgements as to the conservation efficacy of the spatial management decisions of other bodies.**

Nevertheless, it would be prudent for any proponents of MPAs/MPA networks to consider the applicability of the CBD OECM criteria in evaluating the usefulness of spatial management arrangements established by competent sectoral bodies when developing their own proposals. There are obvious potential efficiencies and synergies to be gained by incorporating the conservation work of others into one’s own proposals as much as possible. This is not only scientifically efficient but politically sensible.

Competent sectoral bodies have very different approaches to spatial management reflecting their very different mandates, structures and cultures as well as the very different activities for which they have regulatory responsibilities. All have considerable flexibility to develop spatial management measures not only to facilitate the safe and orderly conduct of their sectoral activities but also to contribute to biodiversity conservation and sustainability ambitions of others.

Competent sectoral bodies and spatial management measures for conservation

- **The ISA, established by Part XI of UNCLOS, has a regulatory regime, much as States do within their own national jurisdiction,** for controlling mining activities on the seabed within the Area (the seafloor beyond national jurisdiction) although it remains unclear how this regime applies to shipping activities in support of mining activities. The ISA has the regulatory power to establish areas protected from seabed mining activities but has yet to create a proactive process for establishing networks of MPAs independent of setting conditions on exploration or mining licences. Given that impacts of mining, from sediment plumes for example, can affect multiple other uses not only on either the high seas or the seabed but also in adjacent or related areas within national jurisdiction, an ‘enhanced cooperation’ regime established by a BBNJ ILBI could offer significant assistance to the ISA in fulfilling its mandate to protect the marine environment.
- **The IMO,** as a specialized agency of the United Nations, is the global standard-setting authority for the safety, security and environmental performance of international shipping. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented. It acts as **a global forum for managing the activities of all kinds of vessels (not just merchant ships)** throughout the world, and has the breadth of mandate and flexibility to pick up on and address any issues brought to its attention. It acts mainly by adopting or amending Resolutions to be implemented by Members or by facilitating the negotiation of the adoption or amendment of issue-specific international agreements. It has a number of options, including a variety of spatial management arrangements for controlling shipping such as designating shipping routes, and can encourage voluntary action as well as adopt binding instruments.
- **RFBs, each established by their own agreements for their own purposes,** including management of fisheries requiring cooperation between States with interests in those fisheries, are a somewhat variable group of organisations. Creating the relationship between any one RFB and the BBNJ for MPA management purposes will take considerable care and analysis, especially when it comes to making legally binding spatial management rules and in ensuring compliance with those rules.
To be accepted as competent bodies for the purpose of managing an MPA in ABNJ, some RFBs may have to upgrade their mandates, procedures and policies: (i) to provide for adoption and implementation of binding management measures; (ii) to

create comprehensive and effective MCS (monitoring, control and surveillance) and compliance and enforcement regimes; and (iii) and/or to create adequate arrangements for reporting on MPA management plan implementation to other bodies, including the BBNJ COP.

- ii. **Marine Spatial Planning (MSP) involving the development and adoption of a Marine Spatial Plan** that involves adoption of spatial management arrangements by States with jurisdiction or control of various different activities within a defined area. Generally, MSP is a useful ABMT in situations where shared use of ocean space is dangerously crowded or where it is important to separate or control potentially incompatible or conflicting uses where cross-sectoral cooperation is needed to secure best practice outcomes.

MSP, as a planning exercise, provides a good framework for conducting **strategic environmental assessments (SEAs)** and for ensuring deliberations are based on best available science. Note that there are also strong overlaps with the information requirements for **environmental impact assessment (EIA)** such that proactive investment in SEAs and the use of MSP can allow synergies and efficiencies to be captured in conducting EIAs, especially in choosing the appropriate level of assessment.

In essence, MSP is a practical application of the principle of due regard. All users within a use and all uses need to be managed in a way which is appropriately accommodating of each other – as well as being mindful of conservation and sustainability commitments. Importantly, MSP does not need to be for conservation or sustainability purposes – keeping fishing vessels out of crowded shipping lanes or preventing ships from anchoring in areas where pipes or cables have been laid being two examples.

While a growing number of coastal States have experience in MSP within their own jurisdictions, there is little experience of how the concept might usefully be applied in ABNJ. WWF is keen to see MSP identified as an ABMT in the BBNJ ILBI because of its potential to contribute to matters of ‘adjacency’. This is one of the reasons why WWF has stressed the need for the BBNJ COP to be able to delegate powers to regional arrangements than can be both cross-sectoral and trans-jurisdictional.

MSP, as a BBNJ ABMT, can allow the wider international community to contribute to the efforts of coastal States to control conflicting uses both within their jurisdiction and in neighbourly cooperation with other coastal States by providing for complementary control of activities in ABNJ.

As discussed in the introduction to Chapter 1 and repeated above, both Articles could readily be included in Part I – General Provisions or absorbed into previously proposed text for Articles in Part I.

They have been included here for the convenience of negotiators but, for the sake of clarity, **WWF would like to reiterate that only our proposed Section 1 of Part III, relating to MPAs, would confer powers of ‘designation’ upon the BBNJ COP. Section 2 deals only with the facilitation of ‘enhanced cooperation’ among relevant States and bodies.**

Recommendation 21.3:

That an Article be introduced that seeks to identify those spatial management decisions of competent sectoral bodies contributing to the objective of the BBNJ ILBI and to the implementation of decisions of the BBNJ ILBI with a view to encouraging action by States Parties aimed at maximising that contribution.

A new Section 2 be created at the end of Part III and that a new Article 21A be introduced:

Section 2 – Article 21B – International Cooperation and Coordination (for ABMTs other than MPAs)

1. The COP shall invite all international bodies identified pursuant to Article 4.1A (see Recommendation 4.3, above) to report annually to the BBNJ COP on any decisions taken that they consider to contribute to the conservation and sustainable use of biodiversity in ABNJ.
2. The COP shall prepare a report analysing the reports received from these bodies and make it available to States Parties and Observers and, at the same time, publish it on the COP website.
3. The COP may prepare advice for States Parties, based on these reports, identifying potential opportunities for the BBNJ COP, coastal States and international bodies to use the work of other international bodies to contribute to meeting their own objectives and complement their own initiatives.
4. The COP may adopt guidelines to assist it in preparing reports pursuant to para.2 and may make those guidelines available to these bodies for their information in preparing their annual reports.
5. The COP may request advice from the SBSTA on any matters raised in any of the reports from other bodies or in preparing its own reports.

It is unreasonable to seek to create BBNJ ILBI text that sets out how States might best cooperate. What WWF has set out to do with this suggested Article is encourage the

exchange of pertinent information to support, encourage and facilitate such cooperation. As the old adage says, you can lead a horse to water but you can't make it drink.

If this Article were to be moved to Part I – General Provisions, it would be improved by generalising the language to include all decisions of other international bodies pertinent to the conservation and sustainable use of biodiversity of ABNJ, not just those relating to ABMTs. This would then make an even greater practical contribution to meeting the UNCLOS general duty to cooperate.

Recommendation 21.4:

That an additional Article 21c be introduced that identifies Marine Spatial Planning (MSP) as an ABMT capable of contributing to the objective of the BBNJ ILBI with a view to encouraging its use, including the adoption and implementation of Marine Spatial Plans.

Section 2 - Article 21c - Marine Spatial Planning (for ABMTs other than MPAs) (and Strategic Environmental Assessments SEAs)

1. Where interactions within and between sectors, uses and values, including biodiversity conservation, might warrant it, States Parties should cooperate across sectors and across jurisdictions with a view to developing Marine Spatial Plans which can, in part, contribute to meeting the objectives of the BBNJ ILBI.
2. States Parties cooperating pursuant to para.1 in developing a Marine Spatial Plan should consider conducting one or more Strategic Environmental Assessments to ensure appropriate and timely information is available to those involved in developing and implementing any such Plan.
3. The BBNJ COP may adopt guidelines to assist Members in the development of Marine Spatial Plans and Strategic Environmental Assessments, including engagement of users, communities and stakeholders with interests in the issues and interactions identified.

WWF has included Strategic Environmental Assessment, in para.2 above, as an integral part of MSP but remains supportive of retaining Article 28 – Strategic Environmental Assessments in Part IV of the BBNJ ILBI.

Were such an Article as WWF has suggested be included in the BBNJ ILBI text, then contributing to and participating in the development and implementation of Marine Spatial Plans and Strategic Environmental Assessments would become a priority for capacity building and technology transfer pursuant to whatever commitments might be agreed in Part V and Annex II.

Again, consideration should be given to whether such an Article would be more appropriately included in Part I rather than Part III.

4. Including Ecological Connectivity in work to Implement the BBNJ ILBI

Many States have already been involved in mainstreaming the need to incorporate maintaining and restoring ecological connectivity through their participation in the work of CBD and CMS (Convention on Migratory Species) initiatives. This is reflected in the advice to WWF:

- The concept of maintaining or restoring ecological connectivity should be incorporated as a general principle of the Agreement under Article 5, to ensure its applicability to the entire treaty; and
- Ecological connectivity should be more clearly reflected in the objectives of Part III of the Agreement. The use of similar terms already adopted under the CBD and CMS on connectivity can help harmonise the implementation of these provisions.

We have reflected this advice in our Recommendation 5.4 and Recommendation Annex.3 above. See WWF MPA Review Report 2021¹² for further elaboration.

5. Maintaining a biogeographical classification of the oceans to aid managers of ocean space and resources

WWF is recommending that maintaining a global biogeographic classification of the world's oceans be identified as a BBNJ COP responsibility in the text of the BBNJ ILBI. See Recommendation 6.4, above, where we have suggested a new Article 6B be included in Part I – General Provisions. See WWF MPA Review Report 2021¹³ for further discussion on the importance and use of biogeographic classification.

In essence, biogeographical classification provides a framework for organising what we know and understand about the physical, chemical and biological characteristics of the ocean in a way and at a scale useful for managers of maritime activities and marine resources who have conservation and sustainability responsibilities. Such a framework is helpful in ensuring information provided to managers is based on best available science and, conversely, use of best available science is important in maintaining a best practice biogeographic classification.

Importantly, a global classification can be elaborated at finer scales for the convenience of particular managers in meeting their specific management obligations.

¹² <https://drive.google.com/file/d/1ePEJN0o56imVNLpzRKTl6RJ2keZZfo0N/view?usp=sharing>

¹³ ditto

6. Developing a collaborative relationship with the CBD

It is almost 30 years since the CBD was adopted and opened for signature at the first Rio Earth Summit and, over the years since its prompt entry into force at the end of 1993, the CBD has developed and progressed a growing range of marine initiatives that cover activities and effects both within and beyond national jurisdiction.

Articles 3-5 and Article 22 give the CBD considerable mandate and status to act in ABNJ. Rather than arguing the point, we have simply reproduced the text from those CBD Articles (WWF emphasis) (see box below).

CBD Article 3. Principle

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States **or of areas beyond the limits of national jurisdiction.**

CBD Article 4. Jurisdictional Scope

Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party:

- (a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and
- (b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction **or beyond the limits of national jurisdiction.**

CBD Article 5. Cooperation

Each Contracting Party shall, as far as possible and as appropriate, **cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction** and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

CBD Article 22. Relationship with Other International Conventions

1. The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, **except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.**

2. Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.

(WWF emphasis added)

- WWF suggests that the Preamble to the BBNJ ILBI include a paragraph in which the BBNJ Parties 'desire' to maintain a close collaborative relationship with the CBD and to facilitate and build upon the work it has done over the decades.

Of particular note, in this regard, is the CBD's work in developing and progressing its EBSA process – the identification of *Ecologically or Biologically Significant Marine Areas* to inform States and other international bodies in their management of maritime activities. It is also worth noting the CBD's Sustainable Oceans Initiative (SOI) aimed at facilitating stronger working relationships between secretariats of Regional Seas Organisations serviced and supported by UNEP and RFMOs serviced and supported by the FAO.

In this Brief, we have not sought to elaborate what the relationship between an established CBD COP and future BBNJ COP might be. **What is important is that States Parties to the BBNJ ILBI give priority to developing a comprehensive working relationship between the two COPs.**