WWF welcomes the substantial progress towards adoption made at the fifth session (August 2022) of the Intergovernmental Conference to negotiate a new global legally binding agreement under UNCLOS on the Conservation and Sustainable Use of Biological Diversity of Areas Beyond National Jurisdiction (BBNJ).

WWF looks forward to supporting States when they meet for a further two weeks in February 2023 to finalise negotiations. As delegates prepare for the resumed fifth session (IGC-5bis), WWF is pleased to share our brief on the outstanding elements that warrant attention and resolution to ensure that this new ocean treaty is as ground breaking as it needs to be.

This is an opportunity to significantly improve the status quo and to create a framework for enhanced cooperation for the good of the ocean, its biodiversity and the ecosystem services that a Sustainable Blue Economy can provide that States cannot miss.
SUMMARY OF PROPOSALS

The following issues are of particular importance in finalising the treaty text to ensure that it is as ambitious as the state of the ocean warrants. WWF provides our suggestions for how these can be addressed in the treaty text below and in the following in-depth briefing.

1. **Enhanced cooperation** – giving practical effect to the UNCLOS general duty to cooperate, especially in areas beyond national jurisdiction
   - insert an additional sentence in Article 6.2 focusing on cooperation among international bodies; and
   - support proposed Article 19.3 on BBNJ Conference of the Parties (COP) facilitation of broad consultation and cooperation.

2. **Marine Protected Areas (MPA)**
   - accept the proposed compromise text for Article 19 to create a practical decision-making process for establishing MPAs in areas beyond national jurisdiction and to facilitate the cooperation needed to get all aspects and stages of MPA establishment fully operational.

3. **Environmental Impact Assessments (EIA)** – taking a tiered approach to assessment in areas beyond national jurisdiction
   - choose Option A.2 for para.1 of Article 24 on thresholds so that States can choose a level of assessment proportionate to the severity of likely impacts; and then
   - develop a complementary new Option C with cooperative sectoral decision-making in Article 38 if substantial/significant impacts are likely.

   - On **Strategic Environmental Assessments (SEA)** – combine both options for agreed text; there is no need to choose; and the use of ‘may’ is appropriate for encouraging use of a very useful tool.

4. **The big package** – key to getting BBNJ adopted is the need for developed States, in signing up to high ambition declarations including the SDGs, to be generous in committing to additional support for capacity building, technology transfer, BBNJ institutional development, financial contributions – and robust reporting of progress.

5. **Complementary issues**
   - Voting – with regret, WWF urges States to come to IGC-5bis prepared to vote to get generally agreed text finally adopted if there is a breakdown in good faith negotiations (WWF remains committed to consensus negotiation and universal implementation – but not at any cost).
   - Entry into force - Article 61 should require 40 ratifications – this is enough to be credible without unduly hindering prompt implementation or universal adoption.
   - Precautionary principle or approach – as a compromise, WWF feels that settling for the second best of ‘approach’ is to be preferred to a new term with no legal recognition.
   - Avoiding disputes is as important as settling them – having an Implementation and Compliance Committee plus inclusion of all the UNCLOS Part XV dispute settlement arrangements, *mutatis mutandis*, in a way that UNCLOS non-Parties are comfortable with is crucial.
KEY PRIORITIES

With finalisation in mind, WWF have limited our text suggestions to those few key issues where agreement remains outstanding, compromise text is available, negotiations are making positive progress and/or opportunities exist to find additional compromises while maintaining ambition. These priorities are detailed here below.

1. ENHANCED COOPERATION
   The importance of giving practical effect to the UNCLOS general duty to cooperate, especially in areas beyond national jurisdiction

States have repeatedly said that they want the BBNJ agreement to provide a framework for holistic, enhanced cooperation that moves on from the isolated silo approach of current reliance on uncoordinated sectoral management arrangements. At IGC-5, a number of States circulated a well-received proposal that a second sentence be added to para. 2 of Article 6 – International cooperation, along the lines of: ‘This will include, as appropriate, consideration of decisions under other instruments frameworks or bodies relevant to the conservation of marine biological diversity.’

States party to a BBNJ agreement would then be obliged, when deliberating as members of one body, to take prompt and effective steps to implement the provisions of other agreements and the decisions of other bodies relating to the BBNJ agreement’s objective. WWF urges States to include this additional sentence in Article 6.2. The rationale for such cooperation is elaborated in WWF’s 2016 Introductory Brief on ‘Enhanced Cooperation and Effective Dispute Settlement’. WWF is keen to ensure that competent sectoral management bodies and arrangements (RFMOs, IMO, ISA) take prompt and effective action to implement relevant decisions of competent biodiversity conservation bodies (such as CITES, CMS and its daughter taxa-specific agreements, CBD and IWC).

WWF is also pleased to note para. 19.3 in the proposed CANNZ compromise text for Article 19 on decision-making for ABMTs (see box in section 2 below) which obliges the BBNJ COP to ‘... make arrangements for regular consultations to enhance cooperation and coordination ...’. This is an excellent practical arrangement to give effect to the UNCLOS general duty to cooperate. WWF has recently produced a ‘Protecting Blue Corridors’ report marshalling available scientific information to show how great whales migrate across jurisdictional boundaries while facing multiple threats to their safety from various ocean uses.

The establishment of an Implementation and Compliance Committee (ICC) under Article 53 ter is a major breakthrough in negotiations. WWF warmly welcomes creation of such a subsidiary body, to be ‘expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive’. Effective cooperation means being able to discuss problems, disagreements and misunderstandings in a supportive environment. Insofar as this may be unwieldy

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1 Matters for inclusion into the new legally-binding instrument under UNCLOS: enhanced cooperation and dispute prevention. WWF International 2016
at the global level, it will be important to have the opportunity for the Committee to operate regionally on the request of interested States.

Similarly, it is encouraging to note that a new unbracketed para. 6 in Article 48, replacing Article 55 ter, provides for the BBNJ COP to formulate legal questions as the basis for it seeking Advisory Opinions from ITLOS. Such access to the Tribunal by the COP could particularly assist the work of the Implementation and Compliance Committee and, under the Tribunal’s Rules, it needs to be specifically provided for in the text of the BBNJ agreement if the COP is to have this option.

2. **MARINE PROTECTED AREAS**

   **Creating a practical ABMT decision-making process for establishing MPAs in areas beyond national jurisdiction**

At IGC-5 in August, breakthrough compromise text for Article 19 was introduced for Decision-making on ABMTs including MPAs. The proposal from a number of States (Canada, Australia, Norway, New Zealand – CANNZ) was well received and WWF urges States to accept this compromise text for Article 19. The text is a reasonable and realistic compromise with a practical mix of roles and responsibilities for BBNJ COP and other bodies and arrangements in all aspects of establishing MPAs. (See box for the text of the CANNZ proposal.) The compromise would be improved by toning down the conflictive isolated sectoral sentiment in para.2 to reflect the more progressive holistic cooperation approach in para.3.

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**CANNZ proposal for Article 19**

1. The Conference of the Parties, taking into account the contributions and scientific inputs received during the consultation process established under this Part:

   a) Shall take decisions on the establishment of area-based management tools, including marine protected areas, and related measures on the basis of the final proposal and, in particular, the draft management plan,

   b) May take decisions on measures complementary to those adopted under relevant legal instruments and frameworks, and global, regional, subregional or sectoral instruments, frameworks and bodies, and

   c) May, where proposed measures are within the competences of other global, regional, subregional or sectoral bodies, make recommendations to those bodies and members thereof, to promote the adoption of relevant measures through such bodies, in accordance with their respective mandates.

2. In taking decisions under this Article, the Conference of the Parties shall respect the competences of and not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.

3. The Conference of the Parties shall make arrangements for regular consultations to enhance cooperation and coordination with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, and members thereof, with regard to area-based management tools, including marine protected areas, as well as coordination with regard to related measures adopted under such instruments and frameworks and by such bodies.
In essence: the BBNJ COP would have the clear power to make decisions to designate MPAs and adopt Management Plans for them (Art.19.1(a)); while proposing to competent sectoral bodies that they adopt relevant measures (Art19.1(c)); while retaining the opportunity to adopt ‘complementary’ measures where warranted (Art.19.1(b)) to fill loopholes for activities without management bodies or where bodies have limited mandates. And the BBNJ COP has the responsibility to arrange for the cooperation and collaboration needed to make it all work (Art.19.3).

WWF also urges States to **retain para.1(b) of Article 17 – Identification of Areas and Annex I – Indicative List for the identification of ABMTs** including MPAs. This is crucial not only in maintaining the integrity of the agreement but also in facilitating interim scientific work in preparation for the first meeting of the BBNJ COP following entry into force. There is no time to waste for BBNJ signatory States in developing a provisional biogeographic classification of the world’s oceans, at an appropriate scale and based on best available science, that can then be used to identify candidate areas for the development of networks of MPAs for consideration by the BBNJ COP. This preparatory work is important for informing the work of MPA proponents, especially in a world of rapid climate change.

WWF also urges States to **agree to remove the brackets around the ‘naturalness’ indicative criterion in Annex I.** Naturalness is valuable in identifying places not only where other values can be expected to be best expressed but also where competing uses likely to compromise those values have minimal conflictive presence.

### 3. ENVIRONMENTAL IMPACT ASSESSMENTS

**Decision-making for a tiered approach to assessment in areas beyond national jurisdiction – with Strategic Environmental Assessments**

WWF urges States to **choose Option A.2 for para.1 of Article 24 on threshold[s] which takes a tiered approach** to selecting the level of assessment appropriate to the seriousness of potential impacts. In essence, the proposed para.1(a) requires ‘initial screening’ if likely impacts are deemed likely to exceed a ‘minor and transitory’ impact test while para.1(b) requires a full EIA if the impact might be result in ‘substantial pollution’ or ‘significant and harmful changes’.

In taking such a tiered approach in Article 24, **States would then need to develop a new complementary Option C for Article 38 on decision-making to support a tiered approach.** WWF would like to suggest that such an Option C involve: 1(a) the responsible/flag State unilaterally conducts an ‘initial screening’ if it deems that the ‘minor & transitory’ threshold is likely to be crossed; and 1(b) if the responsible/flag State expects ‘substantial/significant’ impacts, it would be obliged to seek to cooperate with other States in the same situation with a view to working together in conducting a joint EIA.

Conducting an EIA once for a whole group of similar proposed activities for which a number of States are responsible, would allow those States to pool their resources and so maximise the overall quality of the assessment while simultaneously minimising the cost to individual States. Such cooperation might best happen at the level of all planned fishing trips in an international fishery or of all planned ship voyages on an international shipping route. In response to the special environmental conditions of the areas of operation, chapter 11 of the Polar Code mandates voyage planning with significant
environmental protection requirements. The voyage planning requirements included provisions requiring consideration of marine mammal populations and migratory routes that may be encountered on a voyage and the identification of marine protected areas in the vicinity of a route. These requirements are new to voyage planning and provide a unique precedent in IMO regulations.

States would still retain responsibility for ultimately deciding how to proceed but, where impacts are likely to be substantial/significant, they would be expected to do so cooperatively, as they do already at the sectoral level for fishing (through RFMO decisions) and shipping (through IMO arrangements). Such an obligation to cooperate in the face of likely substantial/significant impacts would represent an appropriate elaboration of the UNCLOS general duty to cooperate, especially in areas beyond national jurisdiction, where flag/responsible States need to consider the interests of the international community as a whole.

Additionally, States and sectoral bodies should be able to refer a particularly complex or serious group of proposed activities to the BBNJ COP, which should therefore have a call-in power to cover such situations. The COP could then consult to set the scope of such an assessment to appropriately include cross-sectoral and trans-jurisdictional considerations as well as for sectoral cumulative impacts.

Option C has the additional value of acting as a compromise between the two irreconcilable Options A & B. The unqualified unilateral nature of Option A creates an open invitation to irresponsible ‘flag of convenience’ States to provide inadequate assessment of proposals from irresponsible owner/operators. Such irresponsibility is not only unfair to responsible States and owner/operators but exacerbates risks to oceans biodiversity. Meanwhile, Option B proposes a level of centralised assessment and decision-making which is not only widely unacceptable to States but also presumes too heavy an allocation of attention and resources not only from the BBNJ COP but also from its scientific advisory body.

COP decisions for the separate adoption of guidelines for the use of both mandatory minimum standards and desirable best practice guidance should help both individual States and cooperative joint processes to make responsible and realistic judgements as to likely impacts.

On Article 41 ter on Strategic Environmental Assessments (SEA), WWF was encouraged by discussions at IGC-5 leading towards including both Options A & B in the text. Both options reflect appropriate use of SEA and WWF therefore supports this approach. It is inappropriate, however, to seek to compel the use of SEA by saying, ‘shall’. Use of ‘may’ is sufficient - SEA is an important and valuable tool that States should be encouraged to use. Such uses might include: marshalling the information to support cooperative EIA; maintaining a biogeographical classification system to support integrated ocean management (IOM) and MPA network design; evaluating emerging or serious issues (like climate change uncertainties or noise pollution); or supporting the use of marine spatial planning (MSP) where management of particularly complex and crowded situations warrants it.

For Article 23 on the relationship with other arrangements with EIA responsibilities, WWF is keen to see clarification and separation of the way the text deals with ‘standards’ and ‘guidelines’. In order to allow the brackets to be removed from para.3 of Article 23, WWF suggests the para. be split in two: (i) one para. would relate to ‘global minimum standards’ where States party to the BBNJ treaty would be required to conduct assessments to a binding standard that would not undermine
the work of others; while (ii) a second para. would relate to ‘best practice guidelines’ where States party would be encouraged to reflect the best of current practice among the work of others in their BBNJ assessments. Both standards and guidelines would be maintained by separate decisions of the COP and, together, they would reflect the value of encouraging improvement over time.

There is a significant role for the Clearing House Mechanism (CHM) in making EIA and SEA documentation transparently and publicly available. It can also serve to facilitate consultation on proposals and the engagement of stakeholders, especially through regional nodes as proposed in the IOC Vision prepared at the request of an earlier IGC meeting. These regional nodes would consist of small teams of facilitators to pro-actively reach out to potential users, especially in conducting EIAs, to help them identify and use relevant information and engage with appropriate experts.

4. THE BIG PACKAGE

Developed States, signing up to high ambition declarations including the SDGs, need to be generous in committing to additional support for capacity building, technology transfer, BBNJ institutional development, financial contributions – and robust reporting of progress

WWF appreciates that, ultimately, getting the BBNJ agreement adopted will depend on resources: the scale of commitments States are prepared to make in taking on new obligations to improve marine biodiversity conservation and sustainability; and the scale of resources mainly developed countries are prepared to commit to helping mainly developing countries implement those new obligations.

An ambitious BBNJ agreement, that matches the high ambition oceans declarations that so many States have signed up to, will require developed States having signed these, to commit to making new and additional resources available – both immediately, to get the agreement adopted and, in the longer term, to get it universally ratified and fully implemented. These commitments – by all States – should include:

- Recognition that implementation of an ambitious BBNJ agreement can make substantial progress towards meeting numerous SDG Targets. This involves two key commitments:
  - Substantial financial commitments, both immediate and ongoing, from developed countries to the ‘special fund’ under para.3(b) of Article 52 as part of the financial mechanism; and
  - Robust, mandatory reporting of relevant activities already happening, including capacity building and technology transfer, involving allocations of all relevant resources (including expertise, equipment, information as well as money - everything) and the exchange of those resources between States involving all actors (States, corporations, philanthropic trusts – everyone).
- The ‘biodiversity of areas beyond national jurisdiction’ includes many migratory and widely distributed species such that coastal states share the burden of responsibility to ensure biodiversity is conserved and sustainably used such that implementation support needs to be extended to include coastal States as appropriate.
- Removal of brackets in Article 11 on benefit sharing so that monetary benefits are included in the mix. The separation between monetary and non-monetary benefits is an unhelpful dichotomy – all benefit sharing comes at a cost to someone.
• Article 11 bis, establishing a benefit-sharing mechanism, and para.8 of Article 52, establishing a financial mechanism working group are critically important in driving exploration of opportunities to mobilise the resources needed for implementation – and including sharing of monetary benefits in the scope of the mechanism is an important component.
• The scope of, and eligibility for, the voluntary trust fund under para.3(a) of Article 52 needs to include not only participation in all the institutional arrangements established by the BBNJ agreement and the COP but also participation in other arrangements relevant to the implementation of the objective of the BBNJ agreement.
• Establishing the Clearing House Mechanism (CHM) consistent with the IOC’s vision (as provided at the request of an earlier IGC meeting), especially in establishing regional nodes with small teams able to proactively support users in facilitating access to information and expertise.
• Establishing the Implementation and Compliance Committee (ICC), under Article 53 ter, is critical to operationalising the UNCLOS general duty to cooperate (this is discussed further under ‘complementary issues’, below).
• It is important that the Scientific and Technical Body, established under Article 49, be upgraded into a fully accountable and representative Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) if the BBNJ COP is to fulfil its responsibilities, especially in coordinating others and acting as the voice for the oceans on behalf of the international community and responding to the Regular Process monitoring the ocean on behalf of the UNGA.

WWF continues to support States in promoting a Sustainable Blue Economy and its potential. WWF has been particularly active in encouraging States to recognise and bolster the value of ecosystem services, including biodiversity conservation and sustainability, to ensure that the Blue Economy develops along a more sustainable path. An ambitious BBNJ agreement, especially the institutional arrangements it would create, can provide a significant part of the framework needed to both strengthen and direct financial investment for a truly Sustainable Blue Economy.

5. COMPLEMENTARY ISSUES

Voting
With regret, WWF urges States to come to IGC-5bis prepared to vote to get generally agreed text finally adopted if there is a breakdown in good faith negotiations. WWF remains committed to consensus negotiation and universal implementation – but not at any cost. Over the years since WSSD Rio+10 in 2002, the road to a BBNJ agreement has been long and much wariness and many misunderstandings have had to be addressed and resolved along the way. What we are now left with, however, is some uncertainty over whether all States have the political will to resolve identified problems. Thankfully, likely sticking points identified in negotiations so far, are such that calling for a vote would be a fair and proportionate response by those with an enduring commitment to a rules-based international order that an ambitious BBNJ agreement can make such an important contribution to.

Entry into force
Entry into force, under Article 61, should require 40 ratifications – this is enough to be credible without unduly hindering prompt implementation. As ever, with international arrangements, it is
important to ensure that those with significant interests at stake are ‘inside the tent’ and that there are enough developed countries on board to allow sufficient resources to be found to operate institutions and drive early implementation.

Precautionary principle or approach
As a compromise, WWF suggests that the term ‘precautionary approach’ be used, since the term is well understood under international law, with extensive literature and jurisprudence on the topic. ‘Applying precaution’ should not be used as this could create uncertainty since there is no specific definition of such term under international law, such that the application of this in practice would be unclear.

Dispute avoidance
Avoiding disputes is as important as settling them – having an Implementation and Compliance Committee (ICC) plus inclusion of all the UNCLOS Part XV dispute settlement arrangements, mutatis mutandis, in a way that UNCLOS non-Parties are comfortable with is crucial, much as was done for the UN Fish Stocks Agreement as an earlier UNCLOS Implementing Agreement. It is a critical breakthrough in the negotiations that Article 53 ter establishing the ICC is included in the refreshed text as unbracketed and generally agreed text on dispute settlement awaits inclusion in the next iteration of the text.

MORE INFORMATION:

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WWF BBNJ policy documents can be found here