WWF statement on 5.7 Strategic Environmental Assessments

Mister Facilitator,

Thank you for giving us the floor.

Having listened to many States being in favour of including Strategic Environmental Assessments, in particular the helpful statement by Australia but also to some States who are less clear as to how they they could be of use for BBNJ, WWF would like to emphasize the manifold benefits of conducting Strategic Environmental Assessments.

SEAs have a wide application as a tool for marshalling information to support integrated ocean management and bringing ecosystem considerations into the management framework. The regular use of SEAs would contribute towards several important objectives of the agreement, including in facilitating enhanced cooperation. For instance,

- SEAs can provide a broad information framework within which individual EIAs could be conducted quicker, cheaper and easier.
- SEAs can contribute to identifying and mitigating or preventing possible cross-sectoral and/or cross-jurisdictional transboundary impacts.
- Further, SEAs could directly contribute to determining which area-based management tools and other conservation and management measures would be appropriate for each circumstance.
- Conducting SEAs is capacity building and technology transfer in practice, engaging all actors across all issues.

Investment in prior SEA is therefore in the interests of all owners, operators and managers of oceans activities.

EIAs are generally a reactive assessment of proposed activities and rely on the existing information base. SEAs, meanwhile, can be proactive in conducting studies for a variety of purposes but which can serve to relieve the information burden on those who are responsible for EIA processes. Current practice by the ISA usefully illustrates this benefit for other purposes of proactive investment in SEAs.

Further, also competent sectoral bodies can benefit from conducting SEAs on a regular basis. Regional fisheries management organisations (RFMO) could institute assessments for different gear types and configurations, for instance. This would assist with the implementation of Article 5 (d) of the UN Fish Stocks Agreement on impact assessments.

In addition, SEAs can also be very useful in easing tensions between coastal States and sectoral bodies in informing cross-jurisdictional cooperation discussions aimed at ensuring that

activities in one jurisdiction do not have actionable impacts in other jurisdictions – one of the obligations flowing from provisions set out by the CBD.

Hence, in our mind, the agreement should establish the framework needed to ensure that **Strategic Environmental Assessments are identified as a crucial process and planning tools for cross-sectoral and cross-jurisdictional consultations and cooperative arrangements** needed to deliver integrated ecosystem based ocean management.

We elaborate on SEA, and EIA, in our brief produced for IGC1, and I will append this brief to this statement when uploading it to Papersmart.

Thank you Mr Facilitator.

Appended: WWF brief to Governments on EIA and SEA for IGC1, August 2018

August 2018

Environmental Impact Assessment (and Strategic Environmental Assessment)

WWF's Ambition for part of the Package for an International Legally Binding Instrument (ILBI) on the Conservation and Sustainable Use of Biodiversity in Areas Beyond National Jurisdiction (BBNJ)

WWF Brief to governments

This briefing paper describes WWF's proposed Environmental Impact Assessment (EIA) regime for assessing impacts on biodiversity beyond national jurisdiction (BBNJ), supplementing our previous submissions to BBNJ PrepCom2 and PrepCom3.[1] It focuses on the applicable regime for any and all activities taking place in ABNJ but also sets out our expectations of coastal states to ensure equivalent EIA regimes operate within national jurisdiction, such that the international community's ambitions for holistic ocean management referred to in UNGA Resolution 69/292 can be achieved.

For WWF, harmonious cooperation between parallel regimes within and beyond national jurisdiction is an important building block of the overarching enhanced cooperation regime required if the international community's ambitions for sustainable development (SDGs), ecosystem-based management (EBM) and integrated ocean management (IOM) are to be met.

Annex I to this briefing paper provides further details regarding: (i) the proposed environmental impact assessment (EIA) threshold and decision-making process; and (ii) the role of Strategic Environmental Assessments (SEAs) in the context of a new international legally binding instrument (ILBI) under the UN Convention on the Law of the Sea (UNCLOS).

Annex II consolidates relevant information and further elaborates on existing international EIA standards, especially those included in the UNEP Guidelines (2002) and the CBD Voluntary EIA Guidelines (UNEP/CBD/COP/11/23), including the scope and content of Environmental Impact Statements (EIS).

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[1] WWF ILBI Library: https://drive.google.com/drive/folders/17JuVLELQIyOCc7ag09i-PHHLaWb0PyWY
WWF PrepCom submissions:
http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com2_2016.pdf;
http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/World_Wildlife_Fund.pdf;

I. Proposed process for assessing environmental impacts and respective decision-making procedures

As noted in WWF's previous submissions, all activities should be subject to an EIA regime. I.e., there should be no exemptions. The EIA requirements for different users/activities/places/situations, however, would differ depending on the potential/likelihood of impacts by the respective activity as determined by threshold testing. This flexibility in choice of assessment procedure needs to be codified in relevant guidelines developed by the ILBI subsidiary body for scientific and technical advice (SBSTA) and adopted by the Conference of Parties to the ILBI (COP). We would expect such guidance to be adopted as an Annex to the Agreement.

To determine the level of assessment required for any assessment, WWF proposes that all activities in ABNJ are to be assessed against a threshold-based approach**.** This would be based on the likelihood of significant adverse impacts (individually or combined) to occur on marine ecosystems, marine biodiversity and ecosystem services and on other users/uses. The geographical area (and ecological relevance, considering presence of for instance ecologically or biologically significant marine areas (EBSA)[2], vulnerable marine ecosystems (VME)), where the effects of the proposed activity are likely to occur, should also play a role in determining the appropriate level of assessment. The vulnerability of specific ecological/biological features in these areas to the activity in question should be given due consideration in the threshold test in determining the level of assessment, as well as in assessing the risk of impacts.

The Convention on Biological Diversity's (CBD) Revised Voluntary Guidelines for the consideration of Biodiversity in Environmental Impact Assessments and Strategic Environmental Assessments in Marine and Coastal Areas[3] could be incorporated by reference into the Agreement. It would be worth considering whether there are any other generally accepted minimum standards and EIA criteria that might be similarly referred to.[4] Any ILBI guidelines annexed to the Agreement would thence be expected to be consistent with such specified guidance.

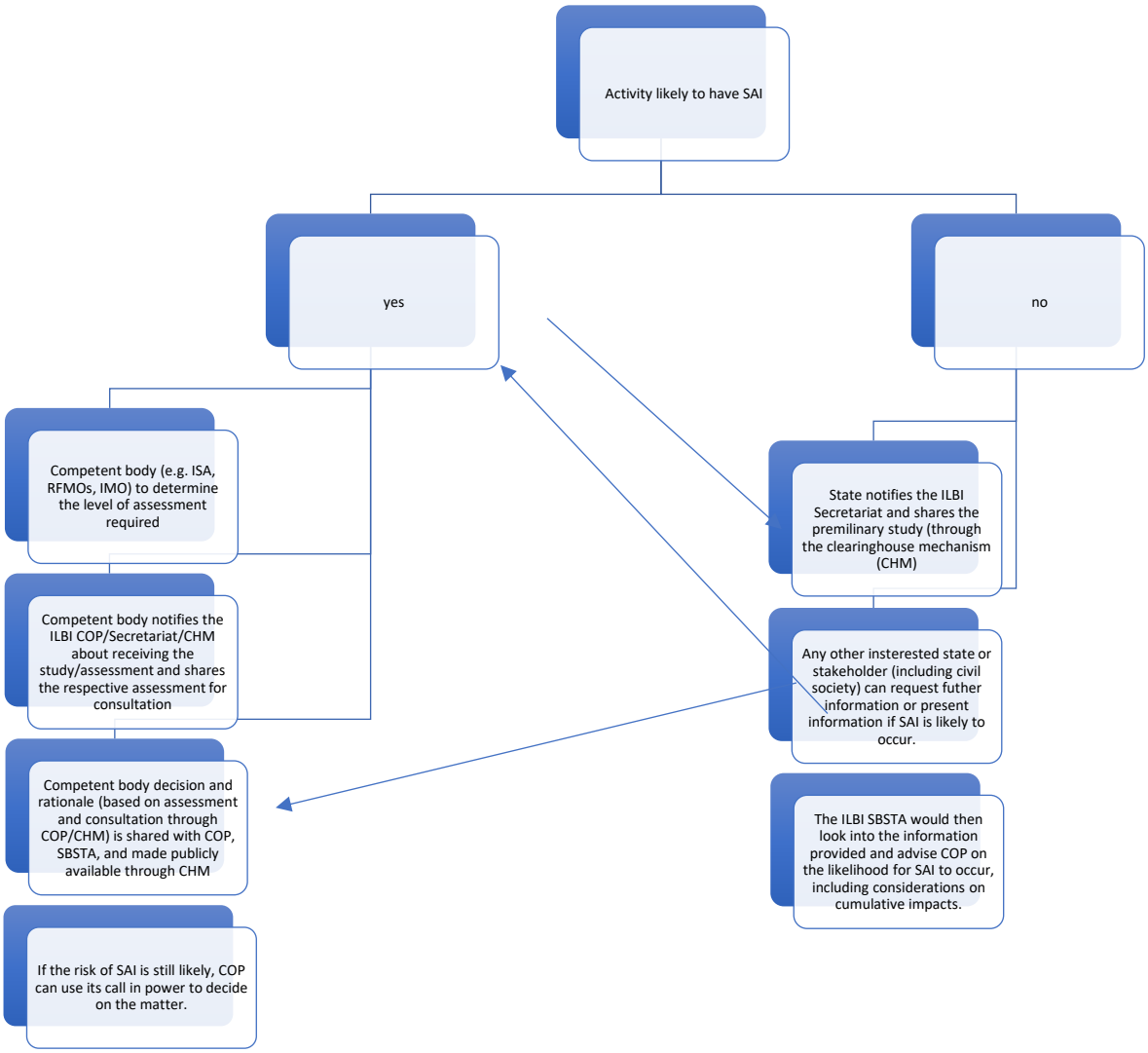
In light of the above, the following steps are proposed for determining the appropriate level of assessment required to determine whether a significant adverse impact is likely to occur on BBNJ (see also schematic diagram in Figure 1 below) and respective decision-making process:

1. Responsible State(s) with the jurisdiction or control over a certain activity conducts a preliminary assessment (screening) to determine whether the respective activity is likely to cause significant adverse impact on BBNJ.[5] In all likelihood, however, there would be more than one responsible state with nationals, either vessels, companies or persons, involved and it would be up to relevant responsible states to arrange among themselves how to conduct that preliminary assessment.
2. Responsible State notifies the relevant competent sectoral body and the Secretariat/COP and shares, through the ILBI's clearinghouse mechanism (CHM): (i) its preliminary assessment; (ii) its decision on whether the activity may cause significant adverse impact; and (iii) the decision's rationale.

[2] Risks to specific EBSA features would then be considered on a case by case basis.
[3] UNEP/CBD/COP/11/23.
[4] E.g. FAO International Guidelines for the Management of Deep-Sea Fisheries in the High Seas (2009), among others.
[5] The State is responsible for ensuring that an EIA is conducted under Art. 206 of UNCLOS. Therefore, even if the activity/project proponent conducts the assessment, the state party to the Agreement should be the one responsible for notifying the COP, the ILBI Secretariat and making the respective documents publically available at the CHM as a first step of the EIA procedure. See also ITLOS Case 17, *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011, paras. 141-150.

3. If the activity is deemed not likely to cause significant adverse impact, a consultation period should then start for objections by any State, relevant organisations and relevant stakeholders with provision for that decision to be reviewed if warranted.
4. If the activity is likely to cause significant adverse impact, the State also submits the preliminary study to the competent sectoral body, if there is one. This body would determine the appropriate level of assessment required to make a corresponding decision. The competent body may challenge the preliminary findings from the responsible State if it finds that significant adverse impact either is or is not likely to occur should it form a contrary view.
5. The competent sectoral body notifies the ILBI Secretariat: (i) that it has received the preliminary assessment; (ii) the level of assessment it has decided is required to make a decision; and (iii) the rationale (scientific basis) for such a decision.
6. Any state, relevant organisation/body or stakeholder can provide relevant information to the CHM to assist the competent sectoral body in reaching its decision.
7. The competent sectoral body, advised by its respective scientific body, makes a decision on the level of assessment required, and shares the respective decision and its rationale with the ILBI Secretariat, CHM, and COP.
8. Based on the information and documentation provided through the process described above, and advice from SBSTA, the COP can use its 'call-in' power if it deems that a higher level of assessment is warranted (especially in light of possible cumulative impacts/cross-sectoral considerations). This 'call-in' power could be exercised when either the responsible state or the competent sectoral body was deciding on the level of assessment.
9. After evaluating the assessment, the competent sectoral body would decide on: (i) whether to approve, not approve or to suggest modifications and/or mitigation measures, including alternative means or location for the activity to take place and (ii) a monitoring plan.
10. Competent sectoral body shares its decision, its rationale and monitoring plan with the ILBI COP/Secretariat and CHM for further oversight.
11. In case of disagreement with the decision (based on best available scientific information), COP can again 'call-in' the decision. In other words, the COP should have the ultimate power to authorise or not authorise an activity or project, including setting additional conditions if not enough has been done or reasonably can be done to modify the activity or mitigate impacts below the 'significant' threshold.

Figure 1: Schematic chart of EIA threshold decision-making process. (Note: SAI = significant adverse impact)



A) Absence of competent body

In cases where there is no competent sectoral body responsible for regulating or managing an activity in ABNJ, by default, the COP (assisted by its subsidiary body for scientific and technical advice) would play this role, or the COP could choose to decide to establish subsidiary regional committees to which COP could delegate this responsibility[6].

B) Competent body with stricter threshold rules

In cases where the competent sectoral body has adopted stricter (more precautionary) rules and standards regarding the thresholds and EIA procedures in general adopted by the COP, these stricter arrangements should prevail. The steps suggested above would then be adapted accordingly as experience is gained. Nevertheless, the interactive relationship between the ILBI COP, SBSTA (and subsidiary regional committees, if established by COP, where appropriate) with the competent sectoral bodies would remain.

II. The role of Strategic Environmental Assessments

SEAs can provide a broad information framework within which individual EIAs could be conducted quicker, cheaper and easier. SEAs could also contribute to identifying and mitigating or preventing possible cross sectoral and/or cross-jurisdictional transboundary impacts. SEAs could also directly contribute to determining which area-based management tools and other conservation and management measures would be appropriate for each circumstance. Thus, while an EIA regime can operate without SEA, investment in prior SEA is in the interests of all owners, operators and managers of oceans activities.

Competent sectoral bodies can benefit from conducting SEAs on a regular basis. Regional fisheries management organisations (RFMO) could institute assessments for different gear types and configurations, for instance. This would assist with the implementation of Article 5 (d) of the UN Fish Stocks Agreement on impact assessments. It would thence become easier and cheaper to conduct environmental impact assessments, probably at lower levels of assessment, as more relevant SEAs are conducted.

The Northwest Atlantic Fisheries Organization's (NAFO) 2016 reassessment[7] of bottom fishing conducted by its Scientific Council provides an example of such an SEA by a competent sectoral body – where all bottom fishing activities within its area of competency were assessed and potential risks to vulnerable marine ecosystems (VME) were then identified.

[6] As noted in our submission to PrepCom3, these regional committees could be established by COP, as subsidiary bodies, if parties agree to do so. The ILBI would contain provisions for establishment of such subsidiary regional committee by COP to ensure this power is included in the powers of the COP. Proposals to establish such bodies would be made by one or more states party to the ILBI with a 'real interest' in the conservation and sustainable use of BBNJ in the region and membership would be open to all parties with such an interest. See also WWF's Brief to Governments, March 2018, for more detail on subsidiary committees or bodies. https://drive.google.com/drive/folders/1rHBH3mfbAxOqTIm7iZtwZIlNJWlg2B0C

[7] See NAFO SC Working Group on Ecosystem Science and Assessment, Report of the 8th Meeting of the NAFO Scientific Council Working Group on Ecosystem Science and Assessment, 17 November 2015, NAFO SCS Doc 15/19.

Annex I:

Proposed Environmental Impact Assessment and Strategic Environmental Assessment processes under the new UNCLOS ILBI on the Conservation and Sustainable Use of Biodiversity of Areas beyond National Jurisdiction

States have an obligation under UNCLOS and under international customary law to conduct EIAs for activities that are likely to cause significant adverse impacts in areas **within and beyond national jurisdiction**.[8] With respect to ABNJ, a global comprehensive procedure[9] is still needed to enable that general obligation to be implemented. This Annex aims at further elaborating[10] how SEA and EIA mechanisms could be set out in the provisions of a new UNCLOS BBNJ ILBI as well as in its implementation arrangements, particularly with respect to thresholds, competent authorities and decision-making.

It also seeks to elaborate on the relationship between SEA, EIA and marine spatial planning (MSP) as crucial, interacting building blocks of a comprehensive governance regime in ABNJ capable of delivering holistic management and all other matters covered by UNGA Resolution 69/292.

A. Introduction and general considerations

States have an *erga omnes* obligation to preserve the marine environment in ABNJ.[11] One of the ways to fulfil this obligation is through having coherent and comprehensive EIA regimes. States already have a due diligence obligation under international law to have EIA rules and regulations and administrative measures in place, as well as to enforce these in order to avoid and mitigate transboundary significant adverse impacts. In this connection, WWF recommends that an ABNJ EIA regime builds upon (and adapts) the language used by UNCLOS, Articles 139, 153 and Article 4 (4) of UNCLOS Annex III, as follows:

> "State Parties shall have the responsibility to ensure, within their legal systems, that activities in ABNJ, whether carried out by State Parties, enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Agreement, including through the adoption of laws and regulations and administrative measures for preventing significant adverse impacts to marine biodiversity and securing compliance by persons under its jurisdiction."

The corresponding national legal framework should also be consistent with UNCLOS, Art. 235 (2), under which "States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused to marine biodiversity in ABNJ by natural or juridical persons under their jurisdiction." In the context of the EIA provisions of a BBNJ ILBI, damage could be defined to include significant adverse impact not prevented by the project/activity proponent.

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[8] ICJ, *Pulp Mills on the River Uruguay case* (2006), para. 204; ITLOS Advisory Opinion on the Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area (2011), paras. 145 and 148.

[9] Beyond sectoral ones such as the ISA's, London Protocol, and UNGA Resolution 61/105.

[10] See also WWF previous rolling submissions:
http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com2_2016.pdf;
http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/World_Wildlife_Fund.pdf

[11] ITLOS, *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011 (2011), para. 180; see also ILC Articles on State Responsibility, Art. 48.

Furthermore, like the provisions of the ISA Sulphides Regulation, the ILBI could also have a similar (but adapted) provision stating that "The proponent of the project/activity shall take all necessary measures to prevent, minimize and control any potential damage or other hazards to marine biodiversity in ABNJ arising from its activities applying the precautionary approach and the ecosystem approach and generally agreed global, regional or national minimum standards, and best environmental practices."

Capacity building, including technology transfer, for developing countries will be required in accordance with UNCLOS and related instruments, and could be facilitated through the proactive conduct of Strategic Environmental Assessments, especially when conducted in a regional or sub-regional context, with the participation of experts from both developed and developing states with a 'real interest' in the conservation and sustainable use of BBNJ of that region or sub-region.

The following section will describe in further detail WWF's proposed EIA processes for determining assessment thresholds and decision-making under a BBNJ ILBI.

B. Assessment Thresholds and Decision-Making Procedures

With the concept of significant adverse impact being widely acknowledged under international law as an EIA threshold for conducting assessments,[12] States have a unique opportunity to further elaborate on global EIA standards, criteria and guidelines for determining significant adverse impact and subsequent levels of assessment. For instance, the Madrid Protocol to the Antarctic Treaty on Environmental Protection requires an assessment for all activities that have at least a "minor or transitory impact".[13] This is consistent with the International Law Commission's interpretation. As noted by Craik "The ILC also adopts 'significance' as the threshold for harm prevention obligations, defining 'significant' as something more than detectable but need not be at the level of 'serious' or 'substantial'."[14]

In practical terms, to determine the likelihood of impact that would trigger an assessment, a 'threshold test' should be required on a case-by-case basis by the competent authority, consistent with applicable global standards adopted by the BBNJ COP on advice from its SBSTA. The COP could delegate this function to subsidiary regional committees if it so decides. Any other applicable standards (e.g. regional, sectoral) should also be observed, when applicable.

In addition to considering the nature and potential impacts of proposed activities in isolation, significant adverse impact and level of assessment thresholds should also depend upon:

1. the biological or ecological characteristics of the area to be affected by the proposed activity/project (as some areas may require lower thresholds);
2. the capacity of the respective ecosystem(s) to support cumulative impacts without losing its functions and resilience (and ability to provide ecosystem services); and
3. the purposes of any ABMTs, including MPAs, especially marine reserves.

In light of this, the SBSTA should be expressly tasked by the COP, as a matter of priority, to develop general guidelines for determining ecologically safe thresholds considering, at a minimum, the above-mentioned characteristics and any cumulative or cross-sectoral or cross-jurisdictional impacts. States with jurisdiction or control over activities either within or beyond national jurisdiction with the likelihood to significantly impact BBNJ should then follow these guidelines in

[12] UNCLOS, Art. 206; CBD Art. 14.
[13] Madrid Protocol to the Antarctic Treaty on Environmental Protection, Art. 8 (1).
[14] N Craik, "Principle 17: Environmental Impact Assessment", in JE Vinuales (ed.) *The Rio declaration on environment and development: a commentary*. OUP Oxford, 2015, at 457.

conducting the threshold tests or, if within, national jurisdiction, follow procedures consistent with applicable COP guidelines.

To determine if the proposed project or activity meets the initial significant adverse impact threshold, there is a need for the competent **authority** of the responsible state with jurisdiction or control over the activity to evaluate the initial assessment conducted by the proponent. This could be achieved through a blended system (with **referral modalities**) whereby competent sectoral bodies and the new global agreement (through its COP and/or subsidiary regional committees[15]) play pre-determined interactive roles (see Figure 1 above). Note that the responsible state will be the one responsible for controlling is nationals, either its flagged vessels, its registered companies or its citizens. Given the complex mix of national potentially involved in different circumstances, states may have to arrange among themselves to formally identify which among them are the responsible state or states in each circumstance.

Should the responsible state decide that the significant adverse impact threshold has been met, further assessment would then be the responsibility of the relevant competent sectoral body (ISA, IMO, RFMOs) to determine the level of assessment required, based on the preliminary assessment presented by that state with jurisdiction or control over the activity in question. Where no competent sectoral body existed, the COP would have a default responsibility to make that decision. Similarly, the responsible state might refer the activity directly to the COP for further assessment because of the severity or complex cross-jurisdictional or of the cross-sectoral nature of the potential impacts.

The COP would also have the power to 'call in' an activity/project being assessed by a responsible state or by a competent body if (i) it considered that referral to a competent sectoral body was warranted; or (ii) it considered that an activity referred to a competent sectoral body involved significant considerations involving matters beyond the competency of the referral body.

Secondly, the body receiving the referral (or calling it in) from the responsible state must decide whether they accept the referring state's decision that the proposed activity/project is likely to have a significant impact and thus be subject to further assessment. This is the key 'significance test' that is confirming the initial 'threshold test' made by the responsible state. In order to conduct such a test, an initial assessment would be required. The referral body could be either the COP (or a subsidiary regional committee if so delegated) or a competent sectoral body (recognised in an ILBI schedule/annex).

If the competent sectoral body is the selected choice of forum, a 'scientific expert focal point' to the ILBI should be designated to participate in the respective sectoral body assessment processes, including relevant meeting, where the key significance test is being conducted. This is a suggestion from WWF aimed at facilitate exchange of scientific and technical information, and pooling EIA experience to ensure consistency with applicable ILBI standards, criteria and guidelines. It would also serve to help implement transparency commitments.

The referral body has the option to decide that a proposed activity/project need not be subject to further assessment if it is conducted 'in a particular manner' that does not pose threats to marine biodiversity and ecosystems.

If the activity/project is considered to potentially or likely to have significantly complex impacts on values, uses or activities beyond the sectoral body's competency, the competent sectoral body would be obliged to refer the proposed activity to the COP. The COP/subsidiary regional committee would have a parallel obligation to 'call in' such a proposed action if it deemed this to be the situation, regardless of any decision of a sectoral body.

[15] Subsidiary regional committees, if established by COP decision, would always work closely with SBSTA to ensure that best available scientific and technical information and methodologies are applied.

Thirdly, the referral body must decide what level of assessment is appropriate. This is the second threshold test. There are two significance tests to be made: (i) does the responsible state consider that any impact is likely to be 'significant'? If so further assessment by the relevant body is warranted – and; (ii) if significant, how 'serious' is/are the likely impact(s) – i.e., what level of further assessment is warranted.

It is important to note that the choice of appropriate level of assessment will be significantly dependent upon the extent of prior contributory work. Any **strategic environmental assessments (SEAs),** whether as baseline studies, sectoral studies and plans, or regional cross-sectoral plans, are highly likely to result in lower levels of assessment being required for any subsequent assessments of individual actions.

These proactive SEAs can provide critical capacity building by developing relevant scientific expertise, technical knowledge and environmental/ecological understanding, especially at the regional or sub-regional levels. These could be conducted by the proposed subsidiary regional committees working closely with relevant states and competent sectoral bodies, SBSTA, and drawing on global experts (e.g. from Global Ocean Assessment, IPBES, etc).

Fourthly, in case of disagreement with the decision, the COP, based on advice from its SBSTA, can call in the decision in both instances, namely: (i) disagreement with the 'significance test' applied by the responsible state; and (ii) disagreement with the competent body's decision in choice of level of assessment. In other words, the COP should have the ultimate power to not authorise the activity or project if not enough has been done or reasonably can be done to mitigate impacts below the 'significant' threshold.

In this connection, State responsibility and operator/project/activity proponent liability should still be addressed by the ILBI in case States (or proponents under their jurisdiction or control) fail to conduct the assessment or to apply relevant standards, criteria and guidelines (formulated on the basis of SBSTA advice, as well as recognised existing global guidance (e.g. CBD, FAO, ISA, IMO, etc) or any relevant regionally specific guidance. This would be the case even if the responsible state or competent organisation has approved such activities, as this would not constitute a case of undermining their respective mandates,[16] but ensuring that States are exercising due diligence to ensure that they are fully complying with their EIA obligations under international law.

An important element when considering the competent authority responsible for authorising the activity to proceed relates to the EIA obligations to issues of common concern of humankind such as biodiversity conservation and climate. As noted by Craik (2016), "like global commons issues there will be a need for international institutions, such as treaty bodies, to oversee these obligations, but the absence (or under-development) of such mechanisms does not derogate from the international legal character of the obligation."[17]

For this reason, WWF suggests that the BBNJ ILBI COP (or delegated subsidiary regional committee), on advice from SBSTA, could play a relevant oversight role for ensuring consistency and coherence in supplementing existing bodies in ensuring these obligations and adopted EIA standards, criteria and guidelines[18] are followed through and complied with. If procedural[19] or substantive obligations[20]

[16] As per UNGA resolution 69/292.

[17] N Craik "Principle 17: Environmental Impact Assessment", in JE Vinuales (ed.) *The Rio declaration on environment and development: a commentary*. OUP Oxford, 2015, at 459.

[18] Minimum standards should include those adopted by the BBNJ ILBI SBSTA, as well as the CBD for the incorporation of biodiversity considerations in EIA/SEA processes (UNEP/CBD/COP/11/23), among others. See also WWF submission to DOALOS of 5 December 2016 (http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/World_Wildlife_Fund.pdf).

[19] Regarding notification, consultation (not only States but also members of the public (such as in the Espoo Convention) should be consulted in issues related to the commons or common concern), and decision-making.

[20] Including those regarding cumulative impacts.

regarding EIA are not fulfilled, the COP or delegated subsidiary regional committee (working closely with SBSTA and scientific bodies of competent organisations) would have the authority to supersede an authorisation by another body or national authority in exercise of its oversight powers.[21]

(C) The Role of Strategic Environmental Assessments (SEAs) in the Conservation and Sustainable Use of BBNJ

The role of SEAs as a risk aversion tool under the BBNJ ILBI has been addressed by WWF in previous submissions.[22] This section aims to complement the previous submissions by further elaborating on the relationship between SEAs and EIAs, as well as area-based management tools such as MSP.

EIAs are well-known tools to assess the impact of a particular activity or project, while SEAs are better-known (and increasingly used) tools for assessment of policies, plans and programmes or of categories of activities (e.g., a minerals province, a shipping route, a fishery) – complementing EIAs by "likely to influenc[ing] the choice of activities undertaken and limit[ing] the range of alternatives considered, and thus have important environmental consequences that cannot be fully captured at the project level."[23]

It is important to note that even though cumulative impacts by different activities are best assessed by SEAs, project/activity proponents need to assess the cumulative and cross-sectoral impacts of their proposed activities to avoid circumvention of a significant adverse impact threshold. Obviously, any relevant prior SEAs make any EIA quicker, cheaper and easier but they need to be done regardless. This is consistent with existing EIA requirements for assessing cumulative impacts with regards to bottom fishing[24] activities, UNEP's Goals and Principles and the Antarctic Treaty's Madrid Protocol.

As noted by the International Association for Impact Assessment (IAIA) SEA Performance Criteria:

> "A good-quality Strategic Environmental Assessment (SEA) process informs planners, decision makers and affected public on the sustainability of strategic decisions, facilitates the search for the best alternative and ensures a democratic decision making process. This enhances the credibility of decisions and leads to more cost- and time-effective EA at the project level."[25]

Despite their positive effects in promoting sustainable development, SEAs in ABNJ are not yet a wide-spread practice outside the mining sector. WWF therefore suggests that SEAs be included as a clear and explicit component of the BBNJ ILBI text, helping bridge other elements of the Agreement, especially regarding meeting conservation and sustainability goals, contributing to EIAs and the use of ABMTs, as well as providing important cost-effective capacity building and technology transfer opportunities.

SEAs also seek to integrate environmental considerations with economic and social issues. WWF proposes that the SEAs should be developed by subsidiary regional committees, where they have been established by the COP. In this regional context, a key purpose for SEA is to inform and facilitate development of marine spatial plans. The scope of a Strategic Environmental Assessment should be chosen bearing in mind bio-geographical classifications relevant to the area[26].

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[21] In accordance with the *erga omnes* obligation to protect and preserve the marine environment in ABNJ.

[22] See http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com2_2016.pdf; http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/World_Wildlife_Fund.pdf

[23] N Craik, "Principle 17: Environmental Impact Assessment", in JE Vinuales (ed.) *The Rio declaration on environment and development: a commentary*. OUP Oxford, 2015, at 456.

[24] See UNGA Resolution 71/123, para 180 (b).

[25] IAIA, Strategic Environmental Assessment Performance Criteria (2002).

[26] See for instance, the GOODs biogeographical classification for areas of open oceans: EE Briones, J Rice, and J Ardron, *Global open oceans and deep seabed (GOODS) biogeographic classification* (*UNESCO, IOC*, 2009) p.54.

This choice of scope and scale is a key factor in identifying relevant interests and stakeholders that need to be included in the process as well as to understanding the respective ecosystem carrying capacity.

Whereas EIA is project-based, SEA aims to provide a broader, overarching, view of the potential impact of activities in relation to the full suite of social, economic and environmental impacts, including special consideration of cumulative and cross-sectoral impacts on biodiversity and ecosystem services. In conducting SEAs, the subsidiary regional committees should provide for the preparation of a report that includes identifying strategic-level alternatives. SEAs would then provide a backdrop against which individual EIAs can be more effectively conducted, always remembering that the existence of SEAs should not be a pre-condition for the obligation to conduct EIAs at the appropriate threshold level. Crucially, however, the prior existence of pertinent SEAs is likely to result in choosing a lower level of threshold for EIA than would be the case in the absence of any such SEAs.

WWF recommends that any SEAs conducted by a subsidiary regional committee be conducted under the guidance of the ILBI COP SBSTA, in close collaboration with competent bodies (e.g. ISA, IMO, RFMOs). The mandates of existing groups of experts such as identified by the Regular Process and the IPBES could usefully be adapted and aligned to support such SEAs to maximise results and make efficient use of resources. A SEA should be based on the ecosystem approach and therefore contributing to ecosystem-based management in relevant regions or sub-regions.

In conducting an SEA contributing to EBM or IOM, any subsidiary regional committee would be expected to provide a holistic overview of the area, not only including natural assets, values and resources but also including current, past and potential activities that might take place in the area while also taking into account activities that might negatively impact biodiversity. Furthermore, the subsidiary regional committee should also take into account social and economic impacts. In this way, information concerning marine ecosystem services can be identified and integrated whenever possible.[27]

Under the WWF proposed SEA/EIA procedures,[28] subsidiary regional committees jointly with the SEA/EIA oversight committee and SBSTA would be responsible for elaborating SEAs in close cooperation with competent organizations. When a proponent is interested in a project in ABNJ, even when a SEA is not yet in place for the area, the subsidiary regional committee should still be able to determine whether the project is in line with the set threshold, cumulative impacts, principles of international law, the ILBI and other relevant instruments and standards. A project proposal should always require a check by the subsidiary regional committee.

Strategic Environmental Assessment & Marine Spatial Planning

SEAs[29] (especially when conducted as a contribution to regional planning) can also assist in the operationalization of the ecosystem approach by contributing to ecosystem-based **marine spatial plans.** SEAs have also been defined as "the process that pro-actively presses forward a sustainability perspective in the policy or planning process, or re-actively assesses the policy or plan against such

[27] See UNEP/CBD/COP/11/23.

[28] See WWF rolling submission of 5 December 2016 (http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/World_Wildlife_Fund.pdf).

[29] Usually defined as "the formalized, systematic and comprehensive process of identifying and evaluating the environmental consequences of proposed policies, plans or programmes to ensure that they are fully included and appropriately addressed at the earliest possible stage of decision-making on a par with economic and social considerations" (UNEP/CBD/COP/11/23, part II, para 7). The CBD Guidelines note that SEA practices have been evolving and its application can include an entire sector or a region.

perspective."[30] SEAs can also incorporate resilience thinking in the development of scenarios and plans for preventing dangerous ecosystems thresholds being reached and for ensuring conservation and sustainable use of biodiversity.[31]

CBD SEA/EIA Guidelines recognise that good practice for SEAs should ensure they are fully integrated into the planning process.[32] While noting that SEAs can be conducted in a parallel process to planning, the CBD Guidelines underscore that SEAs are more effective (and efficient) when integrated into planning processes.[33]

Furthermore, SEAs are sound instruments for enhancing decision-making transparency, integrating ecosystem services considerations (including by maximising benefits when assessing trade-offs between alternatives), assessing cumulative and cross-sectoral impacts on biodiversity, identifying and enhancing adaptation opportunities (including by "maintaining the genetic base of evolution"[34]), and helping with the conservation and sustainable use of important ecological/biological values and features (e.g. such as those found in areas that meet the EBSA criteria, vulnerable marine ecosystems (VMEs), among others).[35]

In the context of BBNJ, SEAs, including regional SEAs, could provide improved information and knowledge-base about ecosystems, improved information regarding cumulative and cross-sectoral effects of a range of different activities. SEAs can also identify broader environmental stressors such as climate change effects, ocean warming and ocean acidification. For instance, as highlighted in the CBD Guidelines, "[t]he SEA must develop a mechanism to avoid, mitigate or compensate potential negative impacts on these ecosystems, including the identification of less damaging alternatives."[36] Such information is important for individual EIAs and would make the EIA process simpler and less onerous, especially for developing states in the light of limited financial resources.

In the same vein, assessing cumulative and cross-sectoral effects through individual EIAs can be a challenging undertaking for a proponent, which can be more easily overcome if pertinent regional SEAs have already been undertaken. In this connection, CBD Decision XIII/3 on mainstreaming, invited parties and other governments to "take measures to improve the effectiveness of environmental impact assessments and strategic environmental assessments, including by strengthening the application of strategic environmental assessment methodologies, by using tools to evaluate potential impacts on biodiversity and ecosystem functions and services, including on resilience".[37]

In addition, regional cross-sectoral SEAs could also directly contribute to holistic and integrated ecosystem-based marine spatial plans. MSP can be a cross-sectoral area-based management tool that enables the operationalisation of UNCLOS's obligation to protect the marine environment, as well as helping States meet their obligation to exercise the conditional[38] freedom of the high seas with 'due regard' for the interests of other States.[39] In this connection, in conducting an ecosystem

[30] Roel Slootweg and Mike Jones (2011) "Resilience thinking improves SEA: a discussion paper", 29 (4) Impact Assessment and Project Appraisal 263-276, at 267
[31] See Slootweg and Jones (2011) (Ibid)
[32] UNEP/CBD/COP/11/23, Part II, para. 3.
[33] UNEP/CBD/COP/11/23, Part II, para. 11.
[34] UNEP/CBD/COP/11/23, Part II, para. 16 (g).
[35] UNEP/CBD/COP/11/23, para 16.
[36] UNEP/CBD/COP/11/23, para Para 32 (c) (ii).
[37] CBD Decision XIII/3, para. 18 (c).
[38] UNCLOS, Art. 87 (1).
[39] UNCLOS, Art. 87 (2).

service trade-off analysis White et al (2012) found that MSP can be a valuable tool for managing multiple ocean uses.[40]

Therefore, SEAs and MSP can not only contribute to the operationalisation of UNCLOS due regard obligations on the high seas, but also help avoid conflicts between uses and users, potentially maximising win-win situations through a transparent and well-informed trade-off analysis. In this regard, CBD parties have already recognised that "**marine spatial planning is a participatory tool to facilitate the application of the ecosystem approach**, expedite progress towards achieving the Aichi Biodiversity Targets in marine and coastal areas and support mainstreaming of biodiversity into public policies related to human and economic development, and that long-term investment in the development of human and institutional capacity for marine spatial planning-related activities is essential for success" (emphasis added).[41]

Therefore, SEAs, conducted by the proposed subsidiary regional committees, under advice from the ILBI COP SBSTA and in close collaboration with competent organisations, could constitute powerful **capacity building** tools, since information, knowledge and expertise from both developed and developing states would be involved in these assessments. SEAs and regional marine spatial plans could draw from existing national, sectoral or global assessments, such as the World Ocean Assessment, IPBES marine regional assessments, as well as data and information from competent organisations and international organisations and processes such as the CBD EBSA process, UNESCO-IOC, and involve experts from all states with a real interest in the conservation and sustainable use of BBNJ in the region. Specific needs of developing States could then be better assessed for meaningful technology transfer.

[40] White, Halpern et al "Ecosystem service tradeoff analysis reveals the value of marine spatial planning for multiple ocean uses" (2012) 109 (12) PNAS 4696-4701
[41] CBD Decision XIII/9, para. 2.

Annex II:

Proposed General Guidance for EIA, especially the conduct of Environmental Impact Statements (EIS)

Content of an EIS report

The initial steps to be undertaken in the SEA and EIA processes are similar. Both processes require screening and scoping. However, whereas the SEA process is proactively focussed on providing a holistic overview and strategy for future developments, the EIA is reactively done at project level, therefore only applying to the project and its potential environmental impacts. WWF supports integration by reference of two generally agreed sets of minimum standards regarding the conduct of both EIA and SEA, such as the UNEP and the CBD guidelines, to provide guidance on establishing the process for an EIA in ABNJ and the content of any documentation required.

Screening:[42] Screening should occur as early as possible in the development of the proposal so that the proponent and other participants are aware of their EIA participation obligations.

The screening procedures employed can be classified into two broad, overlapping approaches. Both prescriptive and discretionary approaches have a place and their specific procedures can be combined into a comprehensive procedure:

- prescriptive or standardised approach: proposals subject to or exempt from EIA are defined or listed in legislation and regulations (i.e. list-based approach as Annex in IA);
- discretionary or customised approach: proposals are screened on an individual or case by case basis, using indicative threshold guidance.

Consistent with all activities being subject to an EIA framework, WWF suggests that all activities be screened by the responsible State to decide whether or not the 'likely significant impact' threshold has been crossed, in which case, further assessment of the activity would be referred to the relevant competent body or IA, depending on the nature and extent of potentially significant impacts identified.

WWF is strongly opposed to the idea of having a prescriptive 'positive' list of activities that should be subject to assessment. Such an approach will inevitable precipitate an unseemly scramble for 'exempt' status.

Non-exhaustive, indicative lists could have some value as part of guidelines to help private operators, responsible states and competent bodies make appropriate decisions about whether, and what level of, assessment is warranted. The important issue that needs to be covered in the guidelines in this context, however, is what weight should be given to considerations other than the nature of the activity, such as potential impacts on MPAs, cross-jurisdictional considerations, cumulative impacts, sensitivities of the particular area where the activity is to take place, etc.

Any of these considerations might warrant an activity being subject to a higher level of assessment than would otherwise be the case. Such indicative lists of both activities and issues could **also** be provided as an Annex to any guidelines adopted by the ILBI COP to guide decision-making as to whether an EIA is required for a specific activity or situation. In case an activity or situation is not listed in the guidelines, the default approach should come into effect, starting with a case-by-case screening by the respective state with the jurisdiction or control over the activity in question to determine whether further assessment is warranted and, if so, by which relevant body.

[42] See Hussein Abaza, Ron Bisset, Barry Sadler, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (UNEP, 2004).

This decision and rationale would then be shared with ILBI COP/Secretariat/CHM and addressed by the relevant competent body (if existent). In case no competent sectoral body is responsible for regulating the activity in question, the COP (or delegated regional committees if in place) would assume this role.

The screening process of an activity deemed likely to have a significant impact could then subject the activity to a second threshold test to determine the appropriate level of assessment based on the seriousness of the potential impacts. WWF suggests four levels of assessment might be warranted:

1. a full and comprehensive EIS is required by a sectoral body;
2. a limited EIA is required by a sectoral body for smaller scale/impact activities and if pre-defined environmental standards can be met (as discussed in the Summary supra and in Annex I, Section B);
3. a cross-sectoral and/or cross-jurisdictional EIA conducted by the COP is required for major activities with likely significant activities beyond the competency of the sectoral body initially involved; and
4. further study is necessary to determine the level of EIA required (see Summary supra, and Annex I, Section B).

According to the CBD guidelines screening process, the following questions should be considered:

Level of diversity	**Conservation of biodiversity**	**Sustainable use of biodiversity**
Ecosystem diversity	Would the intended activity lead, either directly or indirectly, to serious damage or total loss of (an) ecosystem(s), or land-use type(s), thus leading to a loss of ecosystem services of scientific/ecological value, or of cultural value?	Does the intended activity affect the sustainable human exploitation of (an) ecosystem(s) or land-use type(s) in such manner that the exploitation becomes destructive or non-sustainable (i.e. the loss of ecosystem services of social and/or economic value)?
Species diversity	Would the intended activity cause a direct or indirect loss of a population of a species?	Would the intended activity affect sustainable use of a population of a species?
Genetic diversity	Would the intended activity result in extinction of a population of a localized endemic species of scientific, ecological, or cultural value?	Does the intended activity cause a local loss of varieties/cultivars/breeds of cultivated plants and/or domesticated animals and their relatives, genes or genomes of social, scientific and economic importance?

As the CBD EIA guidelines are widely accepted among states, WWF proposes that the CBD screening guidelines serve as a framework for the BBNJ EIA screening process in addition to the UNEP guidelines. Furthermore, an additional question related to how the project would contribute to cumulative impacts in a respective ecosystem should also be considered.

Scoping

The purpose of scoping is to identify:

- the important issues to be considered in making threshold decisions and thence choosing levels of assessment and determining information needs of such assessments;
- the appropriate time and space boundaries of any studies required, especially baseline studies and consideration of other uses and users and of cumulative impacts;
- the information necessary for decision-making at each point along the assessment process; and
- the significant effects and factors to be studied in detail.

The scoping should be done by the proponent of a project subject to assessment procedures of the relevant competent body, including activity-specific guidelines consistent with any relevant general guidelines. It should entail substantial consideration of alternatives and ensure conformity and compatibility with any MSP arrangements in place, especially MPAs, including marine reserves.

Impact analysis pursuant to an EIS

As seen above, the level of assessment may vary depending on how serious the potential significant adverse impact may be and what the likelihood of occurrence might be. The greater the risks, the higher the level of assessment. The aim, in the case where an EIS is required, is to take account of all of the important environmental/project impacts and interactions, making sure that indirect and cumulative effects, which may be potentially significant, are not inadvertently omitted, this already starts in the initial screening phase, and can be elaborated in greater detail in the impact analysis phase.

- Identification: to specify the impacts associated with each phase of the project and the activities undertaken;
- Prediction: to forecast the nature, magnitude, extent and duration of the main impacts;
- Evaluation: to determine the significance of residual impacts i.e. after taking into account how mitigation will reduce a predicted impact.

Impact predictions are made against a ‘baseline’ established by the existing environment (or by its future state). When establishing a baseline, information should be gathered on:

- current environmental conditions;
- current and expected trends;
- effects of proposals already being implemented; and
- effects of other foreseeable proposals.

Criteria to evaluate whether or not adverse impacts should significant include:

- environmental loss and deterioration;
- social impacts resulting directly or indirectly from environmental change;
- non-conformity with environmental standards, objectives and guidelines; and
- likelihood and acceptability of risk.

Criteria to evaluate adverse impacts on natural resources, ecological functions or designated areas should include:

- reductions in species diversity;
- depletion or fragmentation on plant and animal habitat;
- loss of threatened, rare or endangered species; and
- impairment of ecological integrity, resilience or health e.g.:
    - disruption of food chains;
    - decline in species population;
    - alterations in predator-prey relationships.

EIS review and approval

As mentioned above, WWF suggests an interactive approach under which the COP (with SBSTA and regional committees, where appropriate) and the competent bodies play a significant role in reviewing and approving the activity (see steps contained in the Summary supra and in Annex I, Section B). The proposed process would allow for the greatest possible transparency of the EIA process. The outcome of the decision may require the proponent to rework the EIS. SBSTA may also advise COP that the project cannot commence due to reasonable concerns about the project impact on marine environment in which case the COP would have the discretion to decline approval of the proposal.

Mitigation and impact management

Impact management must incorporate not only actions to mitigate adverse effects of a project on the surrounding environment, but also measures to compensate fully for residual damage. These may need to take place at locations that, in some cases, are distant from a development site. The requirements relating to mitigation, impact management, monitoring and other follow-up measures could be described in an environmental management plan as part of the EIA.

Monitoring

WWF suggests that the review and monitoring of the EIS conditions could be undertaken by the competent bodies, which should report back to COP (or regional committees, if established by COP, where appropriate) on a regular basis. Due to the technical expertise available at SBSTA the project monitoring and auditing, at all stages, SBSTA should also be involved in this review process. Project related documents, including EIAs, SEAs, monitoring documents, and related information would be kept in a clearing house mechanism open to all state parties. At COP meetings, the regional committees, if established, would provide information concerning the MSP and SEA in place and SBSTA would provide summaries of projects, as well as lessons learned and best practices, and would have the opportunity to provide the COP with improvement suggestions and required adaptations.

Public participation

Public participation should be allowed at all stages of the EIA process. Specific time-frames for stakeholder input could be set up-front to ensure transparency and predictability of the process. Entry points for public participation including by providing relevant information has been highlighted in Figure 1 schematic representation (above).