



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

Suggested responses to questions on area based management tools (ABMTs), based on the document entitled, “Chair’s indicative suggestions of clusters of issues and questions to assist further discussions in the informal working groups at the second session of the Preparatory Committee”

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Introduction

The International Union for Conservation of Nature (IUCN) is submitting this paper to the Chair of the Preparatory Committee, H.E. Mr. Eden Charles of Trinidad and Tobago, in response to a letter dated 18 December 2015, inviting submissions of views on the elements of a draft text of an international legally binding instrument (Agreement) under the United Nations Convention on the Law of the Sea (UNCLOS) for the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (ABNJ).

It is IUCN's hope that the information contained herein will be useful not only for the on-going United Nations (UN) Preparatory Committee (PrepCom) meetings concerning the marine environment and marine biodiversity in ABNJ but for future PrepCom meetings as well.

This submission¹ provides responses to **questions on area based management tools (ABMTs)**, based on the document entitled, "Chair's indicative suggestions of clusters of issues and questions to assist further discussions in the informal working groups at the second session of the Preparatory Committee."² The topics addressed here are organized in the order of the Chair's list.

IUCN looks forward to continuing the dialogue on bilateral and multilateral basis on ABMTs and other elements of the 2011 Package. Please contact IUCN with any questions or inquiries you may have on ABMTs or any other issues.

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- IUCN Matrix of Suggestions (interactive version): www.marinebiodiversitymatrix.org; or alternatively at www.bbnjmatrix.org.
- Nippon Foundation Nereus Program Policy Briefs links: http://www.un.org/depts/los/biodiversity/prepcom_files/Nippon_Foundation_Nereus_Policy_briefs_links.pdf
- Considerations Regarding Deep-Sea Marine Scientific Research in Areas Beyond National Jurisdiction: http://www.un.org/depts/los/biodiversity/prepcom_files/DOSI.pdf
- Sargasso Sea Commission, Lessons from the Sargasso Sea: http://www.un.org/depts/los/biodiversity/prepcom_files/Sargasso_Sea_Commission_Lessons_Learned.pdf
- Bowling, Pierson and Ratté (2016), The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas: http://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf
- Cross-cutting issues: Institutional Arrangements, Responsibility and Liability, Final Clauses http://www.un.org/depts/los/biodiversity/prepcom_files/Prep_Com_webpage_views_submitted_by_delegations.pdf

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¹ IUCN's first and second submittals to the Chair is available at: http://www.un.org/depts/los/biodiversity/prepcom_files/IUCN.pdf

² http://www.un.org/depts/los/biodiversity/prepcom_files/IWGs_Indicative_Issues_and_Questions.pdf

1. Concepts and definitions

1.1 How might existing concepts and definitions of area-based management tools, including marine protected areas (MPAs), be used and adapted to the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction?

Existing concept and definitions could be adopted where appropriate and adapted where necessary.

Where concepts or definitions may need to be adapted for ABNJ, any changes could reflect clarifications or elaborations, and not be inconsistent with existing definitions.

Below we provide some suggestions for definitions and key concepts. It will be important to consider whether special care should be taken to ensure that critical terms are correctly translated to achieve consistency of legal and technical meaning.

Area Based Management Tools (ABMTs) could be defined as “regulations of human activity in a specified area to achieve conservation or sustainable resource management objectives.”

Sectoral ABMTs could be defined as “measures adopted by a competent international organization to achieve biodiversity conservation objectives for a specific area.”

- Examples of existing ABMTs would include IMO’s Particularly Sensitive Sea Areas (PSSAs), traffic routeing systems; MARPOL Special Areas; RFMO temporal or spatial closed areas such as “Vulnerable Marine Ecosystems” (VMEs), ISA’s Areas of Particular Environmental Interest and Preservation Reference Zones
- *Sectoral ABMTs* should be distinguished from MPAs: while sectoral ABMTs provide important protection, they generally are only targeted at one use, may be short term, and do not provide comprehensive protection for the full range of features in an area.³

Cross-sectoral ABMTs are those tools that at present require consultation, cooperation and coordination across multiple organizations and bodies, including MPAs and marine spatial planning.

Marine Protected Areas

IUCN defines a protected area as:

*A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.*⁴

This is further explained in IUCN Guidelines as: “MPAs are to aim to protect all the features of conservation importance within their boundaries, including the overall health and diversity of the ecosystem and have a stated primary aim to this effect.”⁵

³ IUCN Policy Paper V Understanding Area-based Management Tools and Marine Protected Areas https://cmsdata.iucn.org/downloads/paper_v_understanding_abmt_and_mpa.pdf

⁴ IUCN Matrix of Suggestions, 2016. available at: http://www.marinebiodiversitymatrix.org/c_1_1_2.html

⁵ Day J., et al. (2012). ‘Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas.’ Gland, Switzerland: IUCN. P. 12.

The Convention on Biological Diversity (CBD), Article 2, defines a protected area as:

*A geographically defined area which is designated, regulated and managed to achieve specific conservation objectives.*⁶

IUCN suggests that a definition for MPAs in ABNJ should build on the CBD definition but also explicitly include the general objective of the “primary aim of long term conservation of nature including biodiversity and associated ecosystem services.” This clause could serve to highlight the important distinction between MPAs and other types of area-based management tools, and avoid confusion.⁷

MPAs may have a variety of objectives and management approaches but to meet the IUCN definition of MPA they would need to aim to protect all the features of conservation importance within their boundaries, including the overall health and diversity of the ecosystem and have a stated primary aim to this effect.⁸

IUCN would further note that many of the accepted objectives for MPAs, such as in the CCAMLR General Framework for MPAs,⁹ may require strict levels of protection if their goals are to be achieved.

CCAMLR Marine Protected Area objectives include:

- (i) the protection of representative examples of marine ecosystems, biodiversity and habitats at an appropriate scale to maintain their viability and integrity in the long term;
- (ii) the protection of key ecosystem processes, habitats and species, including populations and life-history stages;
- (iii) the establishment of scientific reference areas for monitoring natural variability and long-term change or for monitoring the effects of harvesting and other human activities on Antarctic marine living resources and on the ecosystems of which they form part;
- (iv) the protection of areas vulnerable to impact by human activities, including unique, rare or highly biodiverse habitats and features;
- (v) the protection of features critical to the function of local ecosystems;
- (vi) the protection of areas to maintain resilience or the ability to adapt to the effects of climate change.

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2. Guiding principles and approaches

2.1 How might the various guiding principles and approaches mentioned at Prep Com1 apply in practice in the context of area-based management tools, including marine protected areas, in areas beyond national jurisdiction?

⁶ Convention on Biological Diversity, available at: <https://www.cbd.int/convention/articles/default.shtml?a=cbd-02>

⁷ Day et al., *Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas* https://cmsdata.iucn.org/downloads/iucn_categoriesmpa_eng.pdf

⁸ Day et al., *Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas* https://cmsdata.iucn.org/downloads/iucn_categoriesmpa_eng.pdf

⁹ CCAMLR CONSERVATION MEASURE 91-04 (2011) General framework for the establishment of CCAMLR Marine Protected Areas <https://www.ccamlr.org/en/measure-91-04-2011>

Guiding principles and approaches will be a crucial tool to maintain consistency and coherence in implementation of ABMTs, including MPAs, in ABNJ.

Guiding principles and approaches could be incorporated into the text of the instrument, and made as operational as possible by linking them to the operative clauses. This was one of the lessons learned in the Sargasso Sea project.¹⁰ For example, specific articles, annexes and guidelines (perhaps based on the approach of the 1995 UN Fish Stocks Agreement) can be developed for applying the ecosystem approach and the precautionary principle to make sure they guide actions on the implementation of the establishment of MPAs and other ABMTs. Other process-oriented principles and approaches are also important and could include: transparency, open processes, public and civil society participation, and public availability of information and research.¹¹ Regular reviews of progress are essential.

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3. Scope

3.1 Criteria for and identification of areas that may require area-based management tools, including marine protected areas

3.1.1 Who might define, review and update criteria to be used to identify areas that may require area-based management tools, including marine protected areas, based on best available science?

3.1.2 Who might make a decision on the identification of areas that may require area-based management tools, including marine protected areas?

Initial criteria to identify areas that may require ABMT, including MPAs, could be incorporated as an annex to an implementing agreement. An annex might be drafted so as to make it easier to update/amend than a specific article.

These criteria could be based on the CBD criteria to describe ecologically or biologically significant areas (EBSAs). The EBSA criteria have been developed with significant scientific input, were specifically designed to be compatible with a range of biodiversity criteria suites in use, and have the merit of overlapping with the objectives of the CBD and the new implementing agreement. There is already a significant amount of overlap between the EBSA criteria and criteria for areas adopted or designated under other instruments/bodies, such as the criteria for PSSAs. Hence the initial use of the EBSA criteria could help to avoid duplication of effort and avoid inconsistent results.¹²

¹⁰ *Lessons from the Sargasso Sea: Challenges to the conservation and sustainable use of marine biodiversity beyond national jurisdiction* available at: <http://www.sargassoseacommission.org/storage/SargassoBrochure.FIN.pdf>

¹¹ IUCN Policy Briefs, 2013. Paper IVP Governance Principles, available at: https://cmsdata.iucn.org/downloads/iucn_series_of_policy_briefs_on_scope_parameters_and_feasibility.pdf. See also High Seas Alliance, Ten Governance Principles for an International Legally Binding Instrument on Marine Biodiversity in Areas Beyond National Jurisdiction, available at: http://highseasalliance.org/sites/highseasalliance.org/files/HSA_10%20principles_English_web.pdf

¹² For further information on EBSAs see: <https://www.cbd.int/ebsa/about>

To review and update the criteria, a scientific expert advisory body could be established or designated pursuant to an implementing agreement to provide advice and recommendations to a decision-making body.

Decisions for the identification of areas that may require ABMT, including MPAs, could be based on the best available and independent scientific advice, ideally stemming from a scientific expert advisory body to an implementing agreement.

Such an expert body could initially draw upon the work on the CBD process for describing areas of ecological or biological significance. The CBD EBSA process of regional expert workshops has developed detailed descriptions of a number of important areas across the world's oceans, including in ABNJ, as meeting the EBSA criteria. These EBSAs could provide a first area of priority for considering ABMTs, including MPAs, in all or some of their parts.¹³

Note that the CBD EBSA process is also continuously evolving, and the CBD COP in December 2016 is being asked to approve further work to evolve and update the regional EBSA workshop descriptions.¹⁴

An implementing agreement could also provide for a further expert scientific review process or body, working in collaboration with other organizations, focused on providing the best available scientific information specific to ABNJ building on and updating the CBD process.

With respect to developing networks of MPAs, a scientific expert body could also play a significant role. This could include a role in reviewing progress towards the creation of a coherent network of MPAs, and gathering information on potential additional sites (or site characteristics) that may be needed. The evaluation and establishment of a network of ecologically representative and well-connected MPAs in ABNJ should be a science-driven process that takes both a global and a regional perspective. It could also take into account of the placement and values protected by MPAs established within national jurisdiction.

The CBD guidance for the design of networks of MPAs¹⁵ provides a solid basis for defining components of an ecologically representative and well-connected system of MPAs. Network characteristics laid out in CBD Decision IX/20 Annex II include: **EBSAs, Representativity, Connectivity, Replication, and Adequate and Viable Sites**. Such characteristics generally cannot be achieved by relying on a site by site approach as the real value in a network stems from what groups of MPAs can accomplish that a single site cannot.¹⁶

Representative networks of sites are required to ensure protection of all habitat types and range of ecosystem services. These need to be **connected** to ensure the integrity of functional linkages between sites, which is especially important for highly migratory species with life history stages hundreds or thousands of kilometres apart. **Replication** (more than one similar site) ensures continuity in case of

¹³ For further information on areas described see: <https://www.cbd.int/ebsa/>

¹⁴ See: SBSTTA Recommendation XX.3 Marine and Coastal biodiversity: ecologically or biologically significant areas, esp. paras 7-8: <https://www.cbd.int/doc/?meeting=sbstta-20>

¹⁵ CBD Decision IX/20 Annex II <https://www.cbd.int/decision/cop/default.shtml?id=11663>

¹⁶ See Vierros et al. 2016. Space for conservation and sustainable use: area-based management in areas beyond national jurisdiction," Nereus Scientific and Technical Briefs on ABNJ, available at: <http://www.nereusprogram.org/briefs>

extreme events. All sites within a network should be **adequate** and **viable**, meaning they have size and protection sufficient to ensure the ecological viability and integrity of the feature(s) for which they were selected. Adequacy and viability will therefore depend on size; shape; buffers; persistence of features; threats; surrounding environment (context); physical constraints; scale of features/processes; spillover/compactness.¹⁷

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3.1.3. How might an international instrument achieve a balance between conservation and sustainable use?

IUCN suggests that an implementing agreement should recognize that the conservation of marine biodiversity is a common concern of humankind. The Paris Agreement has raised global awareness of the accelerating impacts of climate change, and the need for global cooperation and action at all levels to confront a global problem. Marine ecosystems and biodiversity are being undermined not only by the multiple impacts of climate change (eg warming waters, ocean acidification and declining oxygen levels)¹⁸ but also from the cumulative impacts of ongoing activities,¹⁹ making their conservation a global challenge that can only be addressed through global cooperation. This principle is already included in the preamble of a number of major environmental treaties including the CBD and the UNFCCC.²⁰ It means that all States have a duty to cooperate to achieve this objective just as there is a duty to cooperate to protect and preserve the marine environment.

Conservation should be the priority objective of MPAs and may be the priority objective of sectoral ABMTs, complimented by wider measures to promote conservation and sustainable use. It is widely recognized that conservation is an essential insurance policy for sustainable use. This means that a significant amount of ocean space may need to be dedicated to conservation through MPAs and other effective conservation-focused sectoral ABMTs. The proposed secondary objectives for designating MPAs in ABNJ, such as protecting commercial species during critical life stages, can help ensure the stability of certain sectors that depend on the resources of the high seas, like fishing, as well as coastal States that also depend on highly migratory and straddling fish stocks.

With respect to the level of protection, to be effective, individual MPAs should contain the following three elements: 1) long term, 2) comprehensively protected; and 3) part of larger-scale networks. Such networks can help to protect species throughout their life-cycles, and to sustain known as well as yet unknown species and ecosystem functions. As noted in O’Leary et al: “While partially protected areas have been shown to provide some benefits to species’ density and biomass, highly protected MPAs, also

¹⁷ Id.

¹⁸ See “Climate Change in Oceans beyond national jurisdictions”, Nereus Scientific and Technical Briefs on ABNJ available at: <http://www.nereusprogram.org/briefs>.

¹⁹ [Ortuno and Dunn, 2016, “A review of the impacts of fisheries on open-ocean ecosystems” Nereus Scientific and Technical Briefs on ABNJ, available at: http://www.nereusprogram.org/briefs.](#)

²⁰ See Bowling, Pierson and Ratté,(2016) The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas, available at: http://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf.

known as “marine reserves” or “no-take zones,” have much greater benefits for habitats and species of conservation concern.”²¹

One way to achieve a balance between conservation and sustainable use could be for an implementing agreement to call for the development of **sectoral and regional biodiversity strategy and action plans** to enable existing organizations to better integrate the conservation and sustainable use of marine biodiversity in ABNJ into all levels of planning and decision-making. A sectoral/regional biodiversity strategy and action plan could identify key issues and threats and effective management responses, all while assessing cumulative impacts and considering global conditions, changes, and trends. This could make it easier for these bodies to respond with appropriate management measures.

Such sectoral and regional biodiversity strategies and action plans could complement, not replace, MPAs, sectoral ABMTs, MSP, environmental assessments and monitoring.

Sectoral and regional organizations could be required to provide regular updates and reports on their implementation of the plans. A scientific advisory body established pursuant to an implementing agreement could prepare/assist/collaborate in the preparation of sectoral and regional biodiversity strategies and action plans.

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3.2 Process of designation of area-based management tools, including marine protected areas

3.2.1 What might a process for the designation of area-based management tools, including marine protected areas, in areas beyond national jurisdiction look like?

3.2.2 Who might be entitled to make proposals?

3.2.3 What information might a proposal contain?

3.2.4 How might the best available science be taken into account?

3.2.5 Who might review proposals?

3.2.6 Who might make the decision on the designation of area-based management tools, including marine protected areas, in areas beyond national jurisdiction?

3.2.7 How might stakeholders be involved in the decision-making process?

IUCN suggests there should be separate designation processes for sectoral ABMTs and for cross-sectoral ABMTs such as MPAs and marine spatial planning (MSP).

With respect to sectoral ABMTs, the following steps could be considered:

1. **Duty to cooperate:** Contracting Parties to an implementing agreement that are also parties to the sectoral agreements and/or members of competent organizations could be required to exercise their duty of cooperation to:
 - Support through ABMTs the establishment of a system of ecologically representative and well-connected marine protected areas, including marine reserves, and adopt other area-based management measures where special measures need to be taken to conserve marine biological diversity in ABNJ;

²¹ O’Leary et al.(2016). Effective Coverage Targets for Ocean Protection, Conservation Letters available at: <http://onlinelibrary.wiley.com/doi/10.1111/conl.12247/epdf>.

- Apply internationally agreed scientific criteria and guidelines for the selection areas where special measures need to be taken to conserve biological diversity; and
 - Implement the criteria, guidelines, principles, approaches and overarching objectives of an implementing agreement in these other agreements and organizations.
2. **Designation process:** The process for designation of sectoral ABMTs could remain the function of the States Parties to existing competent organizations, and the process could unfold within that organization.
 - The designation process could be informed and guided by the criteria, guidelines, principles, approaches and overarching objectives of an implementing agreement.
 - To ensure consistency and coherence, the selection of areas for designation could also be informed by a scientific advisory body to an implementing agreement.
 - An implementing agreement could also call on/urge/invite sectoral organizations to directly implement the criteria, guidelines, principles, approaches and overarching objectives of an implementing agreement and to regularly report on progress.
 3. **Proposal submission:** Any State or accredited observer organization should be entitled to submit a formal proposal for a sectoral ABMT to the competent international organization. A scientific advisory body established pursuant to an implementing agreement could also be entitled to submit a proposal.
 4. **Proposal contents:**
 - The content for sectoral ABMTs should ideally be standardized.
 - Akin to a PSSA proposal, a proposal could describe the ecological or biological (or other) significance of an area, the threats or risks posed by the relevant sectoral activity, and how the proposed measure will help to reduce that threat or risk.
 5. **To ensure the application of the best available science:**
 - An implementing agreement could contain guidelines and principles to guide decision-making, such as those in Article 3 of the Madrid Protocol which provide guidance for national decision-making for EIAs, Article 6 of the UN Fish Stocks Agreement on application of the precautionary approach and its Annex II, which provides a methodology.
 - A scientific advisory body to an implementing agreement could be requested to review proposals to ensure they comply with the criteria and guidelines for ABMTs.
 6. **Proposal review:** The members of the relevant competent international organization such as IMO, ISA or RFMOs would review the proposal, and could be requested to make public the results of their review, describing their reasons for the decision.
 - A public consultation process for review of proposals for sectoral ABMTs should be provided to enable non-member States, other competent organizations, scientific experts, industry and other members of civil society to provide relevant scientific information and other additional input.²²

With respect to MPAs, the following steps could be considered:

1. **Duty to cooperate:** Again, the duty to cooperate should underpin an implementing agreement. Here, it would obligate Parties to cooperate to establish a system of ecologically representative and well-connected MPAs in ABNJ.

²² For more information, see: IUCN Matrix of Suggestions on ABMTs at: http://www.marinebiodiversitymatrix.org/c_1_1_1.html

2. Designation process: The process for designation should be the function of the States Parties to an implementing agreement:
 - The designation process could be informed and guided by the criteria, guidelines, principles, approaches and overarching objectives.
3. Proposal submission: Any State, competent international organization or accredited observer could be entitled to submit a proposal. A scientific advisory body established pursuant to an implementing agreement could also be entitled to submit a proposal. A consultation process could also be used to develop a proposal and proposed management measures.
4. Proposal contents:
 - Goals and objectives for the MPA
 - Spatial boundaries
 - Proposed management measures
 - A monitoring plan
 - A research plan
 - Performance criteria for evaluating progress toward goals and objectives, and effectiveness of specific management approaches
 - Basic cycle for review, revision and updating
5. To ensure the application of the best available science:
 - An implementing agreement could contain guidelines and principles to guide decision-making, such as those in Article 3 of the Madrid Protocol and Article 6 of the UN Fish Stocks Agreement.
 - A scientific advisory body to an implementing agreement could be requested to review proposals to ensure they comply with the criteria and guidelines.
6. Proposal review: The States Parties to an implementing agreement could review the proposal following a broad based consultation process and recommendations from a scientific advisory body. The decision-making body could be requested to make public the results of their review, describing their reasons for the decision.
 - The public consultation process for review of proposals could enable non-member States, other competent organizations, scientific experts, industry and other members of civil society to provide relevant scientific information and other additional input.
 - The consultative process for the designation of MPAs in areas beyond national jurisdiction could include consultation with States that have designated adjacent MPAs within national jurisdiction.²³

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3.2.8 How might an international instrument address areas straddling areas within and beyond national jurisdiction that may require area-based management tools, including marine protected areas?

3.2.9 How might the rights of coastal States over their continental shelf, including the continental shelf beyond 200 nautical miles where applicable, be respected?

²³ For additional information, please see IUCN Matrix of Suggestions on MPAs at: http://www.marinebiodiversitymatrix.org/c_1_1_2.html

Through a process of consultation and coordination to pursue compatible measures. Note that developing countries may require assistance to achieve compatible measures. Such assistance could be addressed through provisions similar to those under the UN Fish Stocks Agreement.

Under UNCLOS Article 77, the coastal state has sovereign rights for the purpose of exploring and exploiting its natural resources of the continental shelf beyond 200 nm. As set forth in UNCLOS Article 78, *these rights do not affect the legal status of superjacent waters or the airspace above.*²⁴ These duties and rights are complemented by the overarching obligations of UNCLOS Article 192 and 197 to cooperate to protect and preserve the marine environment.²⁵

Provisions similar to those in the UN Fish Stocks Agreement Article 7 on compatibility could be considered with a focus on the duty to cooperate in the situation where the exercise of a right by one state may affect the rights of other states. With respect to highly migratory and straddling fish stocks, UNFSA Article 7.3 provides that: “In giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.” UNFSA Article 7.4 further provides that “If no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII.”

In determining compatible conservation and management measures, under UNFSA Article 7.4. States are to, (in summary form):

- a. Not undermine the effectiveness of measures adopted for areas under national jurisdiction through measures adopted for the high seas;
- b. Take into account “measures established and applied in the high seas”;
- c. Take into account the biological unity and other biological characteristics of the stocks...;
- d. Take into account the respective dependence of the coastal States and States fishing on the high seas on the stocks concerned; and
- e. Ensure that measures do not result in harmful impact on the living marine resources as a whole.

Article 3 of the UNFSA could provide a useful model for language on respecting the rights of coastal States. This article specifies that the UNFSA applies only to ABNJ and is without prejudice to the sovereign rights of coastal states for the purpose of exploring and exploiting, conserving and managing, other than for three specific articles: Articles 5, 6 and 7.²⁶

- Article 5 on general principles is to be applied by coastal states with respect to exploring and exploiting, conserving and managing straddling and highly migratory fish stocks within areas under national jurisdiction. For the purpose of an implementing agreement, these articles could be modified to address straddling areas (and highly migratory and straddling species not directly managed by an RFMO).

²⁴ UNCLOS Articles 77 and 78 (Part VII), available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm

²⁵ See section on Continental Shelf

²⁶ UN Fish Stocks Agreement, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement>

- Article 6 on application of the precaution approach and Annex II are to be applied by both coastal States and fishing States. It could be modified to reflect other relevant conservation principles.
- Article 7 specifically focuses on compatibility of conservation and management measures. Article 7 elaborates on the obligation to cooperate to achieve compatible measures, as described above. For an implementing agreement, such concepts and principles would need to be modified to reflect broader ecosystem and biodiversity concerns.

Note also that Article 3 specifically makes Part VII (Requirements of Developing States) of the FSA applicable to assist developing States to apply articles 5, 6, and 7. This Part VII may provide a useful model also for an implementing agreement in terms of recognizing the special requirements of developing states, forms of cooperation, and special assistance in implementation.

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3.2.10 How might a decision to designate area-based management tools, including MPAs, in areas beyond national jurisdiction address the required management measures?

With respect to sectoral ABMTs, the competent international organization could be expected to directly implement through its members the required management measures. Input from a scientific expert body established pursuant to an implementing agreement could assist the international organization to consider cumulative impacts, global issues and concerns and provide the technical competence to apply concepts such as ecosystem based management, to inform the development of ABMTs.

With respect to MPAs, it could be the direct responsibility of the Parties to an implementing agreement to implement the required management measures with respect to processes and activities under their jurisdiction or control, including their nationals and flagged vessels. Parties to an implementing agreement could be required to cooperate in good faith to pursue the complementary measures through the relevant organizations.

At the same time, the Parties could urge/invite the competent international organizations to adopt complementary measures within a specific amount of time (e.g. 2 years). The consultation process prior to designation would have provided an opportunity for members of these other organizations to share their views and concerns.

Provisions for management, scientific monitoring, and monitoring, control and surveillance would also be needed.²⁷

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3.2.11 What might be the legal effect of a designation on parties to an international instrument and on third States?

An implementing agreement could create obligations on all Parties to adopt and comply with the relevant ABMTs and other management measures adopted pursuant to an implementing agreement.

²⁷ For further information on monitoring, compliance and enforcement, see Greenpeace's submission on MPAs - http://www.un.org/depts/los/biodiversity/prepcom_files/greenpeace2.pdf

For proposed MPAs pending adoption of management measures, Parties should refrain from permitting or expanding existing activities that may undermine the MPA.

With respect to third parties, they would remain responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They would be liable in accordance with international law.

An implementing agreement could build on the precedent of the UN Fish Stocks Agreement and call for Parties to, individually or collectively, **request non-Contracting Parties** whose activities, vessels or nationals operate in the protected areas **to become Parties** to the Agreement **or to cooperate fully** in the implementation of conservation and management measures adopted by the Agreement.

The PrepCom could also consider ways in which the final provisions of an implementing Agreement could attempt to capitalize on the fact that the “2011 Package” (UNGA resolution 69/292) strives for consensus. If the negotiated text of the agreement were endorsed by a strong UN GA Resolution – in the same way that the text of the 1994 Implementing Agreement was agreed by UNGA Res 48/263 – then that Resolution might provide (as do para 4 and 6 of Res 48/263 that “[§4.] ... the Agreement shall be interpreted and applied together with the [UNCLOS] as a single instrument.” And could call on “[§6.] ... States which consent to the adoption of the Agreement to refrain from any act which would defeat its object and purpose.” And urges [§11] “all States... to consent to its provisional application as from [date] and to establish their consent to be bound by the Agreement at the earliest possible date.”

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3.3 Management measures

3.3.1 Who might propose management measures?

Any Party could be able to propose management measures, but the lead responsibility could rest with the proponents of the measure or proposal, especially for an MPA. The consultation process could also develop suggestions for management measures. Others could also be entitled to propose management measures, building on the nomination process for CITES or World Heritage Convention petitions.²⁸

3.3.2 Who might decide on management measures?

For sectoral ABMTs, the competent international organization could retain primary decision-making authority for management measures.

A scientific advisory body to an implementing agreement could provide a one-stop source for scientific advice and input relevant to biodiversity issues. Competent international organizations could be required to take into account the advice of the scientific advisory body, and provide reasons and justifications for their decisions in writing.

For MPAs, primary decision making responsibility could rest with the parties to an implementing agreement regarding processes and activities under their jurisdiction or control, including with respect

²⁸ See Rules of Procedure of World Heritage Commission, Rules 6-8 on observers, advisors, consultations. <http://whc.unesco.org/document/125501>.

to their citizens and vessels. Competent international organizations could be required/urged/invited to adopt complementary measures.

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.3.3.3 Might management measures be time-bound?

For sectoral ABMTs, management measures could be time- and spatially dynamic (moving as the population or associated oceanographic feature moves) depending on the objectives for which they are established. An example of a sectoral ABMT could be a temporal closure to shipping during a whale migration. Another example could be a temporal closure during a breeding or spawning season. Essentially, if the objective is to facilitate migration, or protect certain habitats during critical life stages, then the measure would only need to be in effect during the critical time periods.

For MPAs, as they are to promote the long term conservation of nature, should not be time-bound, but should have built in time frames for review and adjustment to ensure the objectives are still being met.

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3.3.4 What might management measures encompass (e.g. sectoral measures? cross-sectoral measures? etc.)

For sectoral ABMTs, the management measures can only encompass measures within the competence of the relevant organization

Again, a sectoral or regional biodiversity strategy and action plan could help identify priorities for action within the competence of the relevant organization.²⁹

For MPAs, the value added is in the cross-sectoral nature of the process, and the ability to address all impacts/threats/activities including those not covered by an existing competent organization, as well as the cumulative impacts of activities and climate change and to adopt proactive, precautionary measures.³⁰

For MSP, an implementing agreement could provide for objectives, scientific criteria and minimum requirements for maritime spatial planning and plans to be developed by the decision making body or subsidiary body in consultation with the relevant competent organizations.³¹

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3.3 Monitoring, review and compliance

3.3.1 What monitoring and review measures might be included in an international instrument?

Provisions could be included for:

- Coordination between existing monitoring plans at regional/global levels;

²⁹ For further suggestions on ABMTs, see IUCN Matrix at: http://www.marinebiodiversitymatrix.org/c_1_2_1.html

³⁰ For further suggestions on MPA Management measures, see IUCN Matrix at: http://www.marinebiodiversitymatrix.org/c_1_3_7.html

³¹ For further suggestions on marine spatial planning, see IUCN Matrix at: http://www.marinebiodiversitymatrix.org/b_1_4.html

- Regular review of the effectiveness of adopted measures, progress towards a coherent system of MPAs, and the overall effectiveness of an implementing agreement on the marine biodiversity;
- Scientific advisory body to undertake monitoring and review, and to regularly report to the Parties; and
- Reporting by the Parties on their compliance with the agreement and decisions taken under it.

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3.3.2 Who might assess whether an area-based management tool, including a marine protected area, achieved its objective and is no longer required?

A scientific advisory body adopted pursuant to an implementing agreement could be designed to assess progress on ABMTs with respect to both overarching objectives and site specific objectives.

Provisions for mapping and a global data base of ABMTs could be included to support an assessment of progress. A global map and data base on ABMTs could be used to:

- Understand and map existing patterns of human use of and impacts on the marine environment in ABNJ;
- Map ecologically or biologically significant areas and other critical and sensitive areas and vulnerable marine areas in ABNJ, with reference to relevant international criteria;
- Establish a global database of area-based management measures adopted in ABNJ; and
- Collect and map other relevant information.³²

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3.3.4 What compliance and enforcement measures might be included in an international instrument?

The implementing agreement could establish a Compliance Committee or it could include a general mandate for the adoption of a compliance mechanism, without specifying its scope or function. The following language may be used as such mandate:

“The Parties, at their first meeting, shall consider and approve cooperative procedures and institutional mechanisms for determining non-compliance with the provisions of this Agreement and for treatment of Parties found to be in non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate.”

As Parties would be primarily responsible for enforcement of MPAs and other ABMTs with respect to vessels and nationals under their jurisdiction or control, an implementing agreement could include provisions specifying the duty of Parties to adopt the necessary national legislation and administrative requirements to enable them to secure compliance by their nationals and flag vessels.

³² For references and examples see IUCN Matrix at http://www.marinebiodiversitymatrix.org/d_1_5_3.html

New technologies such as Automatic Information Systems (AIS) and Vessel Monitoring Systems (VMS) will enhance the ability of coastal States to monitor and even enforce offshore ABMTs.³³ To reduce the cost and increase States' accessibility of such technologies, a mechanism could be developed to support international cooperation and collaboration.

Cooperative enforcement mechanism could be modeled based on the UNFSA with respect to boarding and inspection of vessels in the high seas: basic obligations could be specified in an implementing agreement which could be rendered unnecessary by specific agreed measures. Alternatively, greater emphasis could be put on port state control and inspection to avoid the costs of high seas enforcement.

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3.4 Institutional arrangements

3.4.1 What could be the role for a global mechanism for area-based management tools, including marine protected areas, in areas beyond national jurisdiction?

The most important functions for a global mechanism could be:

- Provide a global level perspective on priorities for area-based conservation and management, including MPA networks and reserves, and ensure an ecosystem-based and integrated approach to conservation than can be achieved at the regional or sectoral level;
- Define, review and update criteria to identify areas for area-based management, including MPA, functions that could be performed by external scientific bodies and coordinated through an internal scientific committee;
- Assess proposals for MPAs and other area-based management measures, ensuring expert review, public participation and global recognition;
- Designate (review and revise) MPAs, a function that could be based on a recommendation from an independent scientific committee to a political entity competent to represent States and other stakeholders (such as a conference of parties);
- Oversee the management of designated MPAs, where an appropriate regional entity with a conservation mandate does not exist;
- Identify and address cumulative impacts involving multiple sectors;
- Oversee activities and reporting to ensure that responsibilities are being met if the approach chosen relies primarily on States and existing entities;
- Support a funding mechanism for the establishment and operation of MPAs, including research and monitoring, data collection and storage to provide a common source of information for management in ABNJ;
- Administer relevant capacity building and technology transfer activities;
- Provide a global mechanism for reporting, monitoring, assessment of progress, and a framework for responsibility and accountability; and
- Support information exchange, monitoring and surveillance to inform enforcement processes.

³³ See Nereus Scientific and Technical Brief on Satellite Tracking of High Seas Fishing available at : <http://www.nereusprogram.org/briefs>

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3.4.2 What might be the role of existing global sectoral bodies and regional mechanisms?

Existing organizations could have many roles in, under and complementary to an implementing agreement in addition to continuing their role at regulating the sector under their competence. Such roles could build on those provided in CBD Articles 8 and 10 as well as the UNFSA. These could include:

- Participate and contribute to the consultation process for MPAs;
- Promote regional and sectoral monitoring and research;
- Regulate or manage marine activities or resources important for the conservation of marine biological diversity in ABNJ whether within or outside MPAs with a view to ensuring conservation and sustainable use;
- Promote the protection of ecosystems, natural habitats and maintenance of viable populations of species in natural surroundings;
- Integrate conservation and sustainable use of marine biological diversity into decision-making;
- Adopt measures to avoid or minimize adverse impacts on marine biological diversity in ABNJ;
- Integrate biodiversity concerns into their management and decision making processes;
- Develop biodiversity strategies and action plans to guide their internal processes;
- Adopt measures compatible with those adopted by coastal states for the purposes of biodiversity conservation and sustainable use;
- Facilitate cooperation and coordination with other institutions; and
- Regularly report on progress to the global mechanism, identify priorities for capacity building and technology transfer, and any additional responsibilities with respect to conservation of marine biodiversity in ABNJ.

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3.4.3 What could be the relationship between the various arrangements?

An implementing agreement could provide an overarching framework and unifying global vision, objectives, principles and approaches to drive progress in pursuit of long term conservation and sustainable use of marine biodiversity for the benefit of present and future generations.

A regular meeting of Parties or other institutional framework could serve to review progress at the global, regional and sectoral levels, facilitate ecosystem-based management, and promote integration of biodiversity conservation and sustainable use into the decision-making processes of other organizations. Through new sources of sustained finance, dedicated programs for marine conservation, scientific research, monitoring, spatial planning, capacity building and technology transfer could secure effective implementation by all arrangements.

Part XIV on UNCLOS on the Development and Transfer of Marine Technology provides an example of aligning the purposes and objectives of competent international organizations with those of an international agreement. Part XIV first sets forth the general goals and objectives—of promoting the development and transfer of marine technology (and recognizes the need to protect legitimate interests), then identifies measures to achieve the basic objectives. Article 271 calls for the establishment of guidelines, criteria and standards; Article 272 calls for States to endeavor to ensure that competent international organizations coordinate their activities; and Article 273 requires States to

cooperate actively with competent international organizations. Articles 275-277 sets forth commitments for the establishment and functions of national and regional marine scientific and technological centers. **UNCLOS Article 278 specifically calls on the competent international organizations to take all appropriate measures to discharge their functions and responsibilities delineated in UNCLOS Part XIV and XIII (on Marine Scientific Research).**³⁴

³⁴ UNCLOS Article 278 provides: “The competent international organizations referred to in this Part and in Part XIII shall take all appropriate measures to ensure, either directly or in close cooperation among themselves, the effective discharge of their functions and responsibilities under this Part.” UNCLOS Part XIV available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm