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Modalities for Advancing Cross-Sectoral Cooperation in Managing Marine Areas Beyond National Jurisdiction

Draft for Discussion

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Modalities for advancing cross-sectoral cooperation in managing marine areas beyond national jurisdiction

Draft for discussion at the 12th Global Meeting of the Regional Seas Conventions and Action Plans¹

I. <u>Introduction</u>

- This report provides information and advice to the Secretariats and Member States of Regional Seas Conventions & Action Plans (RSCAPs) on modalities for advancing crosssectoral cooperation to progress internationally agreed conservation and sustainable use goals in marine areas beyond national jurisdiction.
- 2. Never has the need or opportunity for cross-sectoral regional seas cooperation been greater. As ocean pressures mount, States have called for new tools and integrated approaches to help fulfill their duties to protect the marine environment and to conserve living marine resources in areas beyond national jurisdiction consistent with international law, based on science and precaution.
- 3. As a result, regional fisheries management organisations (RFMOs) are working to fully implement the call from the United Nations General Assembly to identify and protect vulnerable seabed features from significant harm caused by high sea bottom fishing activities. Similarly, Parties to the Convention on Biological Diversity (CBD) have called for action to more broadly protect ecologically or biologically significant areas in the open ocean and deep seabed.
- 4. For these purposes, the CBD and the UN Food and Agricultural Organization (FAO) have adopted similar criteria by which to identify ecologically significant and vulnerable areas. At the same time, the CBD, FAO and the United Nations General Assembly are also putting a renewed emphasis on environmental impact assessments and the need to consider cumulative impacts. These and other international developments provide a platform for RSCAPs, RFMOs, and others to strengthen their cooperative work such that progress is coordinated, and unnecessary duplication is minimised.
- 5. To enable the Secretariats and Member States of RSCAPs to asses potential avenues for engagement with other sectors and organizations, the report summarizes some recent global and regional developments relevant to biodiversity conservation and highlights a few of the challenges, opportunities and modalities for moving ahead.
- 6. While the report's focus is primarily on areas beyond national jurisdiction, the authors hope it may also serve to inform regionally-based efforts to conserve and integrate management

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of the vast open ocean and deep sea areas under national jurisdiction and control, including the outer continental shelf.

II. Policy background

- 7. Covering sixty-four percent of the surface of the ocean, and providing nearly 95% of its volume, marine areas beyond national jurisdiction (ABNJ) are home to an important part of the world's biodiversity, support significant fisheries, and play a critical role in stabilizing global climate. These ecosystem services are increasingly threatened by overfishing, habitat degradation and alteration, pollution, climate change, ocean acidification, which act in concert to seriously undermine ecosystem health and resilience.
- 8. Though much of the open ocean and deep sea lies beyond national jurisdiction, changes in these systems will impact associated regions and nations directly or indirectly. Associated regions and nations therefore need to be engaged in managing these areas if an integrated ecosystem approach is to be effective.
- 9. It is well known that the ecosystems of the ocean are interrelated and do not respect political boundaries. Yet, international law as reflected in the UN Convention on the Law of the Sea (UNCLOS) divides ocean space between areas within national jurisdiction (e.g. the territorial sea and exclusive economic zone (EEZ)) and areas beyond: the "high seas" and seabed "Area". While many nations are now adopting a more integrated approach to managing ocean space and uses within their EEZs, existing international mechanisms for managing the high seas and the Area provide primarily sectoral approaches, and focus on shipping, fishing, waste dumping and minerals mining.
- 10. At the 2002 World Summit on Sustainable Development (WSSD), governments committed to improving ocean conservation and management through actions at all levels, giving due regard to the relevant international instruments. In specific, they committed to:

"32.(c) Develop and facilitate the use of diverse approaches and tools, including the ecosystem approach, the elimination of destructive fishing practices, the establishment of marine protected areas consistent with international law and based on scientific information, including representative networks by 2012 and time/area closures for the protection of nursery grounds and periods, proper coastal land use and watershed planning and the integration of marine and coastal areas management into key sectors."²

11. In 2002 the UN General Assembly (UNGA) welcomed the WSSD commitments and called upon States and relevant international organizations at all levels urgently to consider ways of integrating and improving, on a scientific basis, the management of risks to vulnerable marine biodiversity within the framework of the UNCLOS, consistent with international law and the principles of integrated ecosystem-based management.³ A special ad-hoc open

² WSSD, 2002, Agenda 21 Plan of Implementation.

³ UNGA resolution 57/141 (issued 21 February 2003)

ended Working Group to study issues related to the conservation and sustainable use of marine biodiversity beyond the areas of national jurisdiction (UN Working Group on ABNJ) was established in 2005 to help accelerate progress in the high seas and seabed Area.⁴

12. While there has been some progress since 2005 towards addressing risks to marine biodiversity and integrating management, few mechanisms or policies are in place to foster cross-sectoral cooperation necessary to achieve the WSSD commitments beyond national jurisdiction. Similarly, there are few policies or incentives to coordinate between areas within and beyond national jurisdiction.⁵ This report highlights some options to redress this gap.

Definitions for key terms used in this paper:

Areas beyond national jurisdiction (ABNJ): includes the High Seas and the Area.

The Area: legal term for the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, as defined in the United Nations Convention on the Law of the Sea Article1(1)(1). Generally starts at 200 nm from coastal baselines, but may start 350 nm or beyond in certain circumstances.

Cross-sectoral: a collaborative activity that is developed and carried out through involvement of several economic and social sectors at the same time.

Deep Sea: ocean waters and seafloor beyond the depth where photosynthesis can occur, generally below 200 m.

EBSA: ecologically or biologically significant areas in need of protection in open-ocean waters and deep-sea habitats (CBD decision IX/20, Annex I).

High seas: legal term for waters beyond the zones of national jurisdiction: parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State (UNCLOS Article 86).

Marine Protected Area (MPA). The CBD defines a protected area as "a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives" (Convention on Biological Diversity 1993). In MPAs, regulation levels vary greatly, ranging from managed multiple use areas to scientific or wilderness reserves with strictly limited taking or access. This paper does NOT use the term MPA to mean a no-take reserve.

Open Ocean: ocean waters above and beyond the physical continental shelf. Often thought of as remote, in many places such as the western side of continents, or at heads of submarine canyons, or off volcanic islands, the open ocean begins just beyond the coastal zone.

⁴ UNGA resolution 60/30 (issued 8 March 2006). As recognized in the Convention on Biological Diversity Article 3, Principles, "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

⁵ Golytsyn, V. 2010. Major Challenges of Globalisation for Seas and Oceans: Legal Aspects. (in Vidas, D. (ed.)) LAW, TECHNOLOGY AND SCIENCE FOR OCEANS IN GLOBALISATION. Martinus Nijhoff, Leiden, Boston, p. 68.

III. Conservation and management in areas beyond national jurisdiction

Ecologically or biologically significant areas

- 13. In accordance with the WSSD goals to protect biodiversity, promote ecosystem approaches and establish marine protected areas, the Parties to the Convention on Biological Diversity (CBD) in 2008 adopted scientific criteria for the identification of ecologically or biologically significant areas (EBSAs) in need of protection in open-ocean waters and deep-sea habitats.⁶
- 14. The seven CBD EBSA criteria are:
 - uniqueness or rarity (areas containing either unique, rare or endemic species, rare or distinct habitats, or unique or unusual features);
 - special importance for life history of species (areas that are required for a population to survive and thrive);
 - importance for threatened, endangered or declining species and/or habitats;
 - vulnerability, fragility, sensitivity, slow recovery;
 - biological productivity (areas containing species, populations or communities with comparatively higher natural biological productivity);
 - biological diversity (an area contains comparatively higher diversity of ecosystems, habitats, communities or species, or has higher genetic diversity); and
 - naturalness (comparatively higher degree of naturalness).
- 15. When adopting these criteria, the Ninth CBD Conference of Parties (COP) urged Parties and invited other governments and relevant organizations to apply these criteria and to take action to protect such areas.⁷ It is envisaged that such action will be taken within the UNCLOS framework, and that protection may be achieved through a variety of conservation and management tools across the various sectors and user groups. Such measures are explored in section III below.

Vulnerable marine ecosystems

16. The CBD EBSA criteria are similar to criteria developed around the same time by the UN Food and Agriculture Organization (FAO) for identifying vulnerable marine ecosystems (VMEs) at risk from high seas bottom fishing. However, the VME criteria differ in having an internationally agreed process for their identification and a required management response.

⁶ CBD Decision IX/20, Annex I. For background on the criteria, their definition, rational and considerations in application, see: Azores Scientific Criteria and Guidance for identifying ecologically or biologically significant marine areas and designing representative networks of marine protected areas in open ocean waters and deep sea habitats. http://www.cbd.int/marine/doc/azores-brochure-en.pdf.

⁷ CBD Decision IX/20, paragraphs 14-19. Draft Guidelines to assist in EBSA identification have been submitted to CBD COP 10 for adoption, based on the recommendation of the 14th Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA 14). REPORT OF THE EXPERT WORKSHOP ON SCIENTIFIC AND TECHNICAL GUIDANCE ON THE USE OF BIOGEOGRAPHIC CLASSIFICATION SYSTEMS AND IDENTIFICATION OF MARINE AREAS BEYOND NATIONAL JURISDICTION IN NEED OF PROTECTION UNEP/CBD/SBSTTA/14/INF/4. (http://www.cbd.int/doc/meetings/sbstta/sbstta-14/information/sbstta-14-inf-04-en.pdf) Annex VI.

- 17. In 2006, responding to global concern over the impacts of unregulated high seas bottom fishing on fragile deep sea ecosystems, the United Nations General Assembly (UNGA)⁸, called for three important new requirements for VMEs in the context of high seas bottom fisheries. It called for flag States and regional fisheries management organizations (RFMOs): 1) to conduct environmental assessments prior to authorizing bottom-contact fishing activities (including the identification of known or likely VMEs); 2) to manage such fisheries so as to prevent significant adverse impacts to VMEs; and 3) not to allow the activities to proceed until steps one and two had been taken.⁹
- 18. "Vulnerable marine ecosystems" were not defined in the UNGA resolution, but were defined in later Guidelines developed by the FAO and its members to help States and RFMOs implement the UNGA resolution.¹⁰ These FAO Guidelines identify five criteria:
 - uniqueness or rarity;
 - functional significance of the habitat;
 - fragility;
 - life-history traits of component species that make recovery difficult; and
 - structural complexity.

Differences between CBD EBSA criteria and FAO VME criteria

- 19. The three main technical differences between the CBD EBSA criteria and the FAO VME criteria are that the FAO VME criteria: i) lack explicit mention of areas of relatively higher "biological productivity", "biological diversity" or "naturalness", ii) include "structural complexity"; and iii) apply specifically to high seas bottom fisheries.
- 20. However, the FAO Expert Consultation that provided the scientific basis for the FAO criteria agreed that two important aspects of the "functional significance of habitats" were their ability to support productivity and diversity. Consequently areas documented to have high productivity and diversity relative to adjacent areas will be excellent candidates as VMEs in FAO/UNGA terminology as well as EBSAs in CBD terminology. Similarly, structurally complex areas are likely to have higher relative biodiversity and perhaps also productivity compared to adjacent areas.
- 21. The main functional differences at present remain:

⁸ UNGA Res. 61/105 (paragraphs 80-93)

⁹ "83. To assess, on the basis of the best available scientific information, whether individual bottom fishing activities would have significant adverse impacts on vulnerable marine ecosystems, and to ensure that if it is assessed that these activities would have significant adverse impacts, they are managed to prevent such impacts, or not authorized to proceed; (b) To identify vulnerable marine ecosystems and determine whether bottom fishing activities would cause significant adverse impacts to such ecosystems and the long-term sustainability of deep sea fish stocks, inter alia, by improving scientific research and data collection and sharing, and through new and exploratory fisheries;"

¹⁰ FAO, 2009. International Guidelines for the Management Of Deep-Sea Fisheries in the High Seas (adopted August 2008), para. 42. There is also an annex with examples of potentially vulnerable species groups, communities and habitats, as well as features that potentially support them. <u>http://www.fao.org/fileadmin/user_upload/newsroom/docs/i0816t.pdf</u>

- If an area meets or is likely to meet the VME criteria under the UNGA resolutions and the FAO Guidelines, this necessarily triggers a management response: the State or relevant RFMO is either to manage deep sea fishing activities to prevent significant adverse impacts or not authorize them to proceed.
- If an area meets the CBD EBSA criteria, Parties, other governments and relevant organizations are "encouraged" to cooperate to adopt management measures to protect them, but the identification of an EBSA is a scientific and technical step only, and has no direct function in determining the policy and management response.¹¹
- Currently the body who decides whether an area is a VME is the State or RFMO responsible for regulating the deep sea fishery while there is no single specific body or mechanism responsible for identifying EBSAs or adopting management measures.

Cooperation in implementing the CBD EBSA criteria and FAO VME criteria

- 22. The CBD EBSA criteria thus provide an entry point for Regional Seas Conventions and Action Plans to seek closer collaboration with various sectoral bodies to initiate a process to identify EBSAs and to develop compatible measures such as fisheries or shipping restrictions for their protection consistent with international law.
- 23. As recognized in UNCLOS, States have a duty to protect and preserve the marine environment, including through measures to protect rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life,¹² and to cooperate at the global and regional level, as appropriate, to develop rules, regulations and guidelines to protect and preserve the marine environment, taking into account regional conditions.¹³ International law also recognizes a duty to cooperate in the conservation and management of high seas living resources and areas¹⁴, the need to avoid or minimize "significant adverse impacts", to protect biodiversity, and to apply precaution.¹⁵
- 24. Such cooperation could ideally lead to more general spatial planning to enhance conservation and sustainable use. For example, the criteria could be used to identify areas important for fisheries productivity or areas where bycatch of vulnerable species or ship collisions with large cetaceans are less likely to occur. These are explored further in sections III and IV below.

¹¹ UNEP/CBD/EW-BCS&IMA/1/2 CBD Report of the Expert Workshop on Ecological Criteria and Biogeographic Classification Systems for Marine Areas in Need of Protection Annex VI, Scientific guidance on the identification of marine areas beyond national jurisdiction, which meet the scientific criteria in annex I to decision IX/20

¹² UNCLOS, article 192, UNCLOS article 194.5.

¹³ UNCLOS article 197.

¹⁴ UNCLOS articles 117-119.

¹⁵ As applied to fisheries under article 5 of the *United Nations Fish Stocks Agreement* on highly migratory fish stocks and straddling fish stocks, States are to "protect biodiversity in the marine environment", "assess the impacts of fishing..." and "minimise ... impacts on associated and dependant species, in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost effective fishing gear and techniques." And under Article 6 States are to "apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment." See also the London Convention and Protocol, CBD preamble and article 14.

25. Examples of work underway to apply the CBD EBSA or comparable criteria at the national, regional and global levels, including in areas beyond national jurisdiction, is provided in the report from the CBD expert workshop on scientific and technical guidance on the use of biogeographic classification systems and identification of marine areas beyond national jurisdiction in need of protection.¹⁶ Examples provided are from Canada, Mexico, Norway, the Mediterranean Action Plan, the North East Atlantic OSPAR Commission, the North West Atlantic Fisheries Organization, the FAO, the International Seabed Authority, among many others.

Biogeographic Classification Systems

- 26. A new global biogeographic classification—the Global Open Ocean and Deep Seabed (GOODS) Biogeographic Classification¹⁷-- may provide a useful frame of reference for marine spatial approaches beyond national jurisdiction. Biogeographic classification systems delineate ecologically based management units with similar biological and physical characteristics.
- 27. The GOODS biogeographic classification provides a broad-scale global biogeographic classification system for open oceans and the deep seabed. It divides the ocean beyond the continental shelf into 78 large-scale benthic and pelagic biogeographic provinces based on both environmental variables and biological information. Such units can be subdivided if or when more detailed information is available.
- 28. Biogeographic classification systems are already used nationally and regionally in many different management applications. As explored in the draft CBD Guidelines on the use and further development of biogeographic classification systems¹⁸, examples include (i) ecological assessment, monitoring and scientific research; (ii) application of the ecosystem approach; (iii) planning and implementation of representative networks of marine protected areas; and (iv) undertaking environmental impact assessment, threat assessment and ecological modeling.
- 29. For example, the GOODS biogeographic classification in combination with the CBD EBSA criteria could assist in identifying potential components of a representative network of marine protected areas as called for by the WSSD. The CBD scientific guidance on representative network design (CBD Decision IX/20. Annex II) includes EBSAs as one of four

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