



HSA BRIEFING

High Seas Alliance recommendations for cross-cutting issues under the new international legally binding instrument

August 2018

The High Seas Alliance (HSA) supports the establishment of a robust institutional framework to deliver the necessary functions for the international legally binding instrument (Instrument) under the UN Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (ABNJ), that includes the following elements.

1 Objective

The objective of the Instrument should be the conservation and sustainable use of marine biological diversity of ABNJ.

2. Guiding principles and approaches

The new Instrument should follow the approach utilized under the UN Fish Stocks Agreement (FSA), which provides a list of general principles (Art. 5) and a stand-alone provision on the precautionary approach (Art. 6). The FSA operationalizes the principles throughout the Agreement.

HSA recommends the inclusion of the following key principles¹ in the Instrument:

- Protection and restoration of the health, biodiversity, productivity and resilience of oceans and marine ecosystems in ABNJ.
- The sustainable and equitable use of marine life for the benefit of present and future generations.
- Promoting cooperation between and among States to achieve the purposes of the Agreement.
- Use of the best available scientific information.
- Stewardship of the global marine environment for present and future generations.
- The precautionary principle.
- Ecosystem-based management.
- Good environmental governance, including access to information, public participation and access to review procedures.
- The polluter pays principle.
- Respect for the Law of the Sea.

3. Relationship with other instruments and frameworks

There was convergence of views in the PrepCom Report that the Instrument “would promote greater coherence with and complement existing relevant legal Instruments and frameworks and relevant global, regional and sectoral bodies.” UNGA resolution 72/249 (para 7) provides that the Instrument should not

¹ See http://highseasalliance.org/sites/highseasalliance.org/files/HSA_10_principles_English_web.pdf

“undermine” existing legal Instruments and frameworks and global, regional and sectoral bodies. Measures agreed under the new Instrument should not and will not reduce the effectiveness of conservation and sustainable use measures adopted under existing legal Instruments and regional and sectoral bodies, but rather, can enhance, complement and supplement action taken by regional and sectoral organizations through the following by:

- Enhancing coordination and cooperation between different competent bodies, thus overcoming existing fragmentation and harmonizing their ocean conservation efforts;
- Providing expertise and scientific information to understand cumulative impacts of multiple activities as well as integrating biodiversity considerations into their work;
- Providing global guidance on how to effectively implement ecosystem-based management measures;
- Effectively addressing cumulative impacts, including from different activities and impacts, thus ensuring coherence and ensuring that the conservation efforts undertaken by one sector (e.g. the closure of a fisheries area to protect a vulnerable marine ecosystem) are not compromised by conflicting activities (e.g. seabed mining).

4. Dispute Settlement and Compliance Mechanisms

A robust dispute settlement mechanism is a vital component of good governance and compliance and will be essential to effective implementation of the Instrument. While many sectoral and regional Instruments have their own dispute resolution provisions, reliance on these can result in legal uncertainty, forum shopping, confusion, and expense. Thus, disputes under the Instrument should be resolved peacefully in accordance with Part XV of UNCLOS, which already provides for compulsory and binding settlement of disputes. All States Parties to the Instrument, some of whom may not be party to the Convention, should be addressed.

The Instrument can gain further inspiration from the [FSA](#) Part VIII. In particular, relevant provisions include:

- Article 27 (Obligation to settle disputes by peaceful means);
- Article 28 (Prevention of Disputes);
- Article 29 (Disputes of a Technical Nature) (technical disputes could be resolved expeditiously without recourse to binding procedures by designating an ad hoc expert panel);
- Article 30 (Procedures for the settlement of disputes) (*mutatis mutandis*); and
- Article 31 (Provisional Measures).

The Instrument should also provide for the ability to request Advisory Opinions from the International Tribunal for the Law of the Sea (ITLOS), and allow standing for non-governmental organizations (NGOs) (at present NGOs cannot request an Advisory Opinion). ITLOS is a standing tribunal under UNCLOS Art. 287, with funding provided from the public purse at no additional cost, whereas arbitration, such as that under Annex VII or Special Arbitration in Annex VIII, can be very expensive and prohibitive. It may be appropriate to establish a special chamber of ITLOS on marine biodiversity (akin to the Seabed Disputes Chamber), which is possible under Article 15 of the ITLOS Statute.

Other Compliance Mechanisms

States Parties to the Agreement should adopt laws and regulations to implement the Instrument, consistent with its provisions, and encourage non-Parties to become Parties to the Instrument and to adopt laws and regulations where needed.

A compliance mechanism should be integrated with dispute resolution and be non-confrontational, transparent, flexible, cost-effective, preventive and facilitative in nature. It should help Parties implement the

provisions of the Agreement, and should build on compliance mechanisms in other instruments such as the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)² and the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).³

If, after undertaking the facilitation procedure, and considering the cause, type, degree and frequency of compliance difficulties, it is considered necessary to pursue further measures to address a Party's implementation and compliance difficulties, the Instrument should provide mechanisms for:

- (a) Further support for the Party concerned, including prioritization of technical assistance and capacity-building and access to financial resources; and/or
- (b) Issuance of a cautionary statement and provision of advice regarding future compliance to help Parties to implement the provisions of the Convention and to promote cooperation between all Parties, and/or reporting to the Conference of the Parties for appropriate action.

These procedures are non-binding and non-confrontational and have been shown to improve compliance and implementation in a cost-effective way.

5. Monitoring, reporting and review

The Instrument should include a strong framework for three different tiers of monitoring, reporting and review to determine: 1) the effectiveness in achieving its objectives; 2) the fulfillment of State obligations under the Instrument; and 3) the mechanisms for implementation of the Instrument in the light of the best available scientific information.

Monitoring

The Instrument should include provisions for monitoring action taken by all stakeholders, namely:

- A global monitoring mechanism to, inter alia, collect monitoring data from national, regional and sectoral bodies, assess implementation, and ensure that the impacts of authorized activities in ABNJ are monitored, reported and reviewed; and
- A global data bank or clearing-house mechanism developed through an appropriate publicly accessible online platform that supports data collection, handling, and data analysis.

Reporting

The Instrument should include a transparent, inclusive and participatory mechanism that supports reporting by all relevant stakeholders, and sets out national, regional and sectoral activities on implementation.

- The Instrument should provide for reporting by States Parties and annual submission of reports, data or other information by States, regional and sectoral organizations, international organizations and civil society including NGOs.
- Reports should be made publicly available and all interested stakeholders, including civil society, should have an opportunity to comment on the reports.

² The Instrument could provide for a non-confrontational, non-judicial and consultative compliance mechanism similar to that of the Convention, Art. 15. The Aarhus Convention's arrangements allow for appropriate public involvement and include the option of considering communications from members of the public and have established a Compliance Committee.

³ The Espoo Convention has established an Implementation Committee, which is also a non-adversarial and assistance-oriented procedure, without prejudice to the settlement of disputes provisions of the Convention.

- Reports could also address initiatives on capacity building and technology transfer, and use data and information from existing reporting mechanisms where possible.

Review

The Instrument should provide for a mechanism to undertake periodic reviews of its effectiveness in achieving its objectives, including systematic follow-up and review at the various levels, namely:

- A holistic, multi-year transparent review by States Parties on the implementation of the Instrument and its effectiveness;
- Periodic reporting by States Parties on the establishment or strengthening of national and regional action/regulatory regimes;
- A review of the mechanisms established under the agreement to ensure effective implementation; and
- Annual submission of reports, data or other information by States, regional and sectoral organizations, international organizations and civil society groups including NGOs. Reports should be made publicly available and all interested stakeholders, including civil society, should have an opportunity to make comment on the reports.

6. Non-Parties

The Instrument should aim at achieving broad participation. Parties could request non-Parties whose activities, flagged vessels or nationals operate in areas covered under the Instrument, including in marine protected areas designated under the new Instrument, to become Parties or to agree to cooperate fully in the implementation of measures adopted by the Instrument.

This can be done by building on the approach used by the FSA, where activities of non-Parties are addressed under Articles 17 and 33.1. These articles are based on the legal obligation of all UNCLOS Parties to cooperate for the conservation and management of straddling and highly migratory fish stocks, require respect for measures established by competent organizations, and include measures to exchange information and deter activities of vessels flagged to non-Parties that undermine the effectiveness of the Agreement. In developing the Instrument, States should adopt a similar approach, building on UNCLOS Article 197, which establishes a duty for all UNCLOS Parties to cooperate to protect and preserve the marine environment.

7. Responsibility and liability

The Instrument could include an enabling clause to elaborate a regime for liability and redress for harm to marine biodiversity, including the possibility of a fund(s). The work by the International Law Commission on international liability in case of loss from transboundary harm arising out of hazardous activities⁴ provides an example of a process for elaborating international rules and procedures regarding liability and redress for damage to marine biological diversity in ABNJ, including an emergency trust fund. Other possible funds could include:

- A rehabilitation fund and a contingency fund;
- A single fund for the purposes of providing compensation for restoration activities, emergency funds and funds for otherwise unrecoverable damages; and
- Funding to support Member States' costs, including capacity building in relation to implementing recovery of damaged marine biological diversity.

⁴ http://legal.un.org/ilc/guide/9_10.shtml