

The Scope, Parameters and Feasibility of a New UNCLOS Implementing Agreement on Marine Biodiversity in Areas Beyond National Jurisdiction

The high seas and international seabed Area, which make up 45 percent of the surface of our planet and are brimming with biodiversity and vital resources, are under increasing pressure from threats such as overfishing, habitat destruction and the impacts of climate change. Due to the sectoral nature of current ocean governance, the existing patch work of management tools for the high seas and the Area does not adequately protect and conserve or help rebuild depleted marine life. A UN decision is needed to begin negotiations, and thereafter, to develop a new UNCLOS implementing agreement to establish a legal regime to safeguard biodiversity of the high seas and the seabed Area and bolster the health of the global ocean.

Scope of a new Implementing Agreement under UNCLOS

A. Scope in relation to the overall objective of the Implementing Agreement

When defining the scope of a new UNCLOS Implementing Agreement, States should agree that the instrument will:

- Cover the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction¹ (ABNJ), in particular, together and as a whole:
 - 1) marine genetic resources, including questions on the sharing of benefits,
 - 2) area-based management tools, including marine protected areas (MPAs),
 - 3) environmental impact assessments,
 - 4) capacity-building and transfer of marine technology.
- Adopt the necessary measures to ensure that any activities that have the potential to adversely impact biodiversity in ABNJ are managed on the basis of key principles of good governance and international environmental law, including through the application of the precautionary principle, the ecosystem approach, and the best available science, as well as transparency, accountability and ensuring full public participation.
- Establish a strong monitoring, control and surveillance (MCS) and compliance and enforcement (C&E) system for activities in ABNJ, including compulsory dispute-settlement arrangements, consistent with Part XV of UNCLOS.

1) Regime for Access to and Benefit Sharing of Marine Genetic Resources

When defining the scope of a new UNCLOS Implementing Agreement with respect to marine genetic resources, States should:

- Include marine genetic resources originating in ABNJ including the high seas and seabed Area thus filling a significant existing gap in governance.
 - Establish terms for access to the resource, including agreement to comply with the provisions under the Agreement, adherence to the precautionary principle and ecosystem approach, and prior environmental impact assessment.
 - Establish mechanisms for facilitating access to marine genetic resources for research and product development, including access to samples and sample collections both physically and electronically.
 - Establish terms for benefit sharing, including through the following mechanisms: the exchange of information, the sharing of research, the sharing of the benefits arising from commercialization, access to and transfer of technology, capacity-building.
- #### 2) Area-based Management Tools for the Conservation and Sustainable Use of Marine Biodiversity and Marine Resources

When defining the scope of a future UNCLOS Implementing Agreement with respect to area-based management tools, including marine protected areas, States should:

- Mandate that the Agreement establish a global system of ecologically representative, connected and effectively managed marine protected areas and reserves, including representative networks, in ABNJ.
- Give special consideration to the establishment of fully protected marine reserves in ABNJ, which are acknowledged as a key tool for the conservation and sustainable use of marine biodiversity in ABNJ and important to consider from an enforcement perspective.
- Establish the requirement to have Conservation

¹ As agreed to at the 2011 BBNJ meeting and discussed within the working group over the past several years.

Objectives and/or a management plan for each marine protected area and reserve established under this Agreement, including a requirement for prior assessment of the potential impacts of permitted uses.

3) Environmental Impact Assessments

When defining the scope of a future UNCLOS Implementing Agreement with respect to Environmental Impact Assessments, States should:

- Commit to conduct prior environmental impact assessments, including cumulative impact assessments, for activities under their jurisdiction or control that may have a potential adverse impact on the marine environment or marine biodiversity in ABNJ.
- Only allow an activity to take place after having ascertained that it is regulated in line with their obligations under the Convention to address identified effects and do not compromise the objectives of the Agreement.
- Require strategic environment assessments for programmes, plans or policies that may have a potential adverse impact on the marine environment or marine biodiversity in ABNJ, including cumulative and synergistic impacts.

4) Capacity-building and Transfer of Marine Technology

When defining the scope of a future UNCLOS Implementing Agreement with respect to capacity-building and transfer of marine technology, States should give priority to:

- Establishing and/or strengthening programmes for scientific and technical education and training in conservation and sustainable use of marine biodiversity, in particular in developing countries.
- Design and conduct of scientific research preferably, and where possible, with developing country partners, in cooperation with institutions of such countries, and developing capacity for such research in fields where they are needed.
- Establishing means for the full implementation of Part XIV of UNCLOS on Development and Transfer of Marine Technology, taking into account the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology.

Parameters of a new UNCLOS Implementing Agreement under the Convention

A. Principles, rules and norms

When establishing the parameters of a future international Agreement, States should:

- Recognize UNCLOS as the overarching legal framework within which all activities in the maritime area (within and beyond national jurisdiction) should take place.
- Recognize the two existing Implementing Agreements under the Convention, and their respective mandates.
- Establish a system for enhanced cooperation and coordination between existing bodies and with any institutions pursuing to the implementing agreement.
- Ensure that decisions are based on the best available scientific information.
- Apply the precautionary principle.
- Adopt integrated ocean management.
- Use ecosystem-based management as the basis for decision making and management of activities planned or carried out under the Agreement.
- Ensure public access to information, transparency, and public participation, in all policy and decision making processes related to the Agreement.

B. Institutional parameters

When establishing the parameters of a future international Agreement, States should establish necessary institutional mechanisms, such as a Conference of the Parties, and other subsidiary bodies as necessary to operationalize the commitments in the Agreement, review implementation, and other necessary operational mechanisms, bearing in mind the need and opportunity to capture synergies and avoid duplication.

Feasibility of a new UNCLOS Implementing Agreement under the Convention

An implementing agreement is essential to adequately protect the diversity of marine life in the high seas through a coordinated, integrated and collaborative approach. It would assist in addressing shortcomings in implementation and existing gaps by establishing an overarching legal, institutional and governance framework. It is urgently needed and highly feasible, both technically and politically, that a new UNCLOS Implementing Agreement to protect marine biodiversity in ABNJ can be successfully established. Technically, two implementing agreements have been successfully negotiated and adopted under UNCLOS. And politically, States should take into consideration that there are a number of *existing* legal obligations and agreed political commitments which cannot be fully implemented in the absence of a new UNCLOS implementing agreement.