



High Seas Alliance
Suggestions for Consideration by the Preparatory Committee
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Submitted by the National Resources Defense Council for the High Seas Alliance

The high seas make up 45 percent of the surface of our planet, and together with the seabed Area on the sea floor, are brimming with biodiversity and vital resources. However, these areas and the biodiversity they contain are under increasing pressure from threats including overfishing, destructive fishing practices, pollution, habitat destruction and degradation and the impacts of climate change and ocean acidification. Due to the sectoral nature of current ocean governance, the existing patchwork of management arrangements for the high seas and the Area does not provide adequate protection nor does it promote sufficient conservation measures to address these threats. It is exceptionally difficult under these existing arrangements to establish marine protected areas, including reserves in areas beyond national jurisdiction (ABNJ), and a comprehensive framework for the carrying out of environmental impact assessments is missing. Nor is there a regime addressing access to and equitable benefit sharing of marine genetic resources, and capacity building and technology transfer need to be enhanced.

On June 19, 2015, the UN General Assembly adopted resolution 69/292 in which it decided to develop an international legally-binding instrument under the UN Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The resolution provides for a preparatory committee “to make substantive recommendations to the General Assembly on the elements of a draft text” of the instrument. The High Seas Alliance submits the following suggestions for consideration by the Preparatory Committee.

Consideration of the scope of an international legally binding instrument and its relationship with other instruments

1. The “package deal” should remain the basis for determining scope.

Resolution 69/292 provides that negotiations shall address topics identified in the 2011 package, “namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, *together and as a whole*”:

- marine genetic resources, including questions on the sharing of benefits
- measures such as area-based management tools, including marine protected areas
- environmental impact assessments, and
- capacity building and the transfer of marine technology

2. **The scope should be comprehensive.**

- Fish and the species, habitats and ecosystems impacted by high seas fisheries are important, and some of the most threatened, components of marine biodiversity in ABNJ. Therefore the Instrument should not exclude any sectoral activity including fishing.
- A comprehensive instrument should establish a framework to enhance cooperation and coordination between States and the institutions through which States act, to ensure that their obligations related to the conservation of marine biodiversity under UNCLOS, the Instrument and other agreements, are met.
- The resolution stresses the need for a “comprehensive global regime”. Thus, there is consensus that the current piecemeal and sectoral system of ocean governance for ABNJ is not sufficient. Only an instrument that is comprehensive in scope with ecosystem-based management (EBM) at its core can achieve the major change that is warranted.

3. **The Instrument should address State Parties and non-State Parties**

The new legal instrument will establish legally binding obligations for its State Parties. However, in order to successfully fulfill the Instrument’s objectives, States should consider operational provisions relating to engaging with non-parties concerning activities under their jurisdiction or control. This can be done by building on the approach used by the UN Fish Stocks Agreement, 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, mandate respect for measures established by competent organizations, and includes measures to exchange information and deter activities of vessels flagged to non-Parties which undermine the effectiveness of the Agreement.

In developing the new legal instrument, States could adopt a similar approach, building on UNCLOS Article 197, which establishes a similar duty for all UNCLOS Parties to cooperate to protect and preserve the marine environment.

¹ http://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm

Guiding approaches and principles of an international legally binding instrument

Within multilateral agreements, principles guide implementation by providing context for the rules which are elaborated in the agreement. The following are recommended principles to guide States Parties in implementing any new international instrument on the conservation and sustainable use of marine biodiversity in ABNJ:

- Protection and restoration of the health, productivity and resilience of oceans and marine ecosystems, and maintenance of their biodiversity, in areas beyond national jurisdiction.
- The sustainable and equitable use of marine life for the benefit of present and future generations.
- Ongoing co-operation 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.

Area-based management tools, including marine protected areas

- The new instrument should enable the establishment of a global system of ecologically representative, connected and effectively managed marine protected areas and marine reserves, including representative networks, in areas beyond national jurisdiction. The new instrument should enable States to decide on management measures necessary to effectively reach the conservation objectives in these marine protected areas, which should be directly applicable to the activities under their jurisdiction or control.
- The Instrument should establish requirements to adopt conservation objectives and require effective management plans in consultation with competent bodies for each marine protected area established under the instrument, including a requirement for prior assessment of the potential impacts of any permitted uses.
- The new instrument should further require States to cooperate, including through competent sectoral and regional organizations and otherwise on the establishment and effective management of MPAs through the adoption of complementary conservation measures designed to further the objectives for which the MPA is established.
- The new Instrument should serve to ensure the full implementation of existing obligations under other agreements and of commitments set out in relevant

decisions, including the objective agreed under Aichi Target 11² and confirmed under SDG 14 and the description of ecologically or biologically significant marine areas (EBSAs) through the Thematic Programme on Marine and Coastal Biodiversity of the Convention on Biological Diversity.

- The new Instrument should give special consideration to the need to establish and manage fully protected marine reserves in ABNJ, which are acknowledged as a key tool for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction; and to deliver effective compliance with and enforcement of agreed management measures.

Environmental impact assessments

Regarding environmental impact assessments and strategic environmental assessments, the new Instrument should:

- establish a framework for States 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 permit an activity to take place after having ascertained that it will not cause significant adverse effects and that measures are in place to ensure that identified potential adverse effects are prevented; and
- 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, and provide for strategic environmental management plans to be implemented where necessary.

- ***Consideration of marine genetic resources, including questions on the sharing of benefits***

- When defining the scope of a new UNCLOS Implementing Agreement with respect to marine genetic resources (MGRs), States should:
- Address all marine genetic resources originating in ABNJ including the high seas and seabed Area thus filling a significant existing gap in governance;
- Facilitate access to MGRs *in-situ* and *ex-situ* including for research and product development, and access to samples and sample collections;
- Ensure traceability, checkpoints and financial mechanisms, such as a Clearing-House if necessary; and

² <https://www.cbd.int/sp/targets/rationale/target-11/>

- Establish a *sui generis* regime for benefit sharing, which could include provisions on exchange of information, sharing of research, access to and transfer of technology, capacity-building and sharing of benefits arising from exploitation.

Capacity-building and the transfer of marine technology

In addressing capacity building and the transfer of technology, States should give priority to:

- establishing means for the full implementation of Part XIV of UNCLOS on Development and Transfer of Marine Technology³, taking into account the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology;⁴
- 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; and
- the design and conduct of scientific research, preferably with developing country partners where possible, in cooperation with institutions of such countries, and developing capacity for such research in fields where they are needed.

Institutional Considerations

When considering institutional aspects of the new instrument, States should consider the following:

- Establish the institutional mechanisms necessary to implement the above-referenced commitments, including potentially a Secretariat, Conference of the Parties, a Scientific Committee, a compliance body, and other necessary subsidiary bodies to fulfill the mandate of the convention.
- Provide for emergency measures where there is an urgent threat to the marine environment or marine biodiversity and for interim measures where necessary.
- Implement transparency and participatory decision-making processes throughout the Instrument and its bodies, including bodies and review procedures open to civil society (akin to the Aarhus Convention Compliance Committee).
- Commit to enhanced cooperation to achieve the purposes of this instrument, including through participation in, or cooperation with, the FAO, IMO, ISA, RFMOs, RSOs and other relevant international fora and bodies and to promote institutional reform of and cooperation between these fora, as necessary to achieve the purposes of the instrument.
- Establish streamlined decision-making procedures to ensure effective decision-making.
- Provide for regular reviews, such as biennial reviews of performance and implementation of the instrument with a view to assessing the effectiveness of this

³ http://www.un.org/depts/los/convention_agreements/texts/unclos/part14.htm

⁴ <http://unesdoc.unesco.org/images/0013/001391/139193m.pdf>

instrument in securing the conservation and sustainable use of marine biodiversity and the adoption of mechanisms to facilitate improvements where necessary.

- Ensure the establishment of strong monitoring, control and surveillance (MCS) and compliance and enforcement (C&E) systems for activities in ABNJ, including compulsory dispute- settlement arrangements, consistent with Part XV of UNCLOS.