

# HSA BRIEFING

## A legally binding treaty for the conservation of marine biodiversity on the high seas

In 2012 at the Rio+20 summit<sup>1</sup>, governments recognized that the current fragmented and often incoherent approach to high seas governance was failing to protect marine biodiversity and they committed to “address, on an urgent basis, the issue of the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (ABNJ)<sup>2</sup>, including by taking a decision on the development of a new instrument under the United Nations Convention on the Law of the Sea”<sup>3</sup> (UNCLOS) by the end of the 69th session of the UN General Assembly, or September 2015. The UN General Assembly adopted by consensus Resolution 69/292 in June 2015, deciding to develop a legally binding instrument (or treaty) for the conservation and sustainable use of marine biodiversity of ABNJ. This is the first global treaty process related to the ocean in over two decades and the only one targeted specifically at the protection of marine biodiversity in ABNJ.

### Bolstering UNCLOS for the 21st century

While UNCLOS is recognized as the ‘constitution’ for global ocean governance, it is a framework convention. As such, its scope is broad and does not contain the detailed provisions necessary to address specific activities, nor does it establish a mechanism that enables its Parties to implement their obligation to cooperate on the protection of the marine environment and living resources. Indeed, since its adoption in 1982, there have been two subsequent implementing agreements to address gaps and other areas that were not sufficiently covered under UNCLOS<sup>4</sup>.

UNCLOS gives States rights to sustainably use our ocean and, correspondingly, contains the duty to conserve it. However, under UNCLOS there is currently no global framework setting out a management mechanism and rules for biodiversity protection in the high seas. The biodiversity of the high seas, which constitute almost two-thirds of the Earth’s global ocean and nearly one-half of its overall surface, remains largely unprotected from multiple threats including pollution, overfishing and destructive fishing, noise, and other new and emerging uses, which are all compounded by the effects of climate change and ocean acidification.



Clearly, and unsurprisingly, UNCLOS (a Convention negotiated in the 1970s) has not kept up with the challenges and technological developments of the 21st Century. Indeed, the words ‘biodiversity’ and ‘genetic’ do not even appear in the Convention text. Given the many anthropogenic threats to the ocean, it is essential that ocean governance provides the protections necessary

to restore today’s ocean to health, as well as to ensure the health of the ocean for future generations. Further, a new agreement that includes access to, and benefit sharing of, marine genetic resources in ABNJ could have significant benefits for developing countries as well as the entire world. Marine genetic resources include potentially valuable deep-sea genetic resources that may contribute to significant medical breakthroughs, such as anti-cancer drugs.

### MPAs and EIAs

At present, there is no global framework that enables the establishment, monitoring and control of marine protected areas (MPAs) and reserves on the high seas, nor the conducting of environmental impact assessments (EIAs) and strategic environmental assessments (SEAs), where activities and their individual and cumulative impacts can be assessed in a comprehensive manner. Although one MPA in Antarctica was established in 2009, since then

efforts to establish a second MPA in Antarctica over the last few years have failed. The only other MPA in the high seas is in the North Atlantic, and establishing it was a long and complicated process.

The process for setting up MPAs has been extraordinarily difficult – painfully slow and fraught with problems in terms of ensuring effective cooperation between the various international sectoral (such as shipping or fishing) and regional competent authorities operating in the area. And for the vast majority of the high seas there is no framework that enables the protection of areas. Regional fisheries management organizations (RFMOs) are only able to regulate fisheries within their remit and in their convention area; they do not have the mandate to set up broader MPAs or to control other threats to the ocean. States have shown the need to provide a mandate for the establishment of MPAs through Aichi Biodiversity Target 11 of the Convention on Biological Diversity (CBD) by calling for at least 10 percent of the ocean to be designated as MPAs by 2020. Yet currently less than 1 percent of the high seas is a designated MPA.

Scientists have alerted us to the threats of ocean acidification, which has been occurring at unprecedented rates. The ocean is about 30 percent more acidic now than before the Industrial Revolution. Both mitigation and adaptation measures are needed in order to address this serious challenge. Adaptation measures include reducing local pressures in order to allow organisms to evolve and adapt to this more acidic environment. EIAs and SEAs can help identify the type of management measures that need to be put in place to avoid further degradation of the marine ecosystems and biodiversity loss. MPAs and marine reserves can provide a 'breathing space' so that organisms can evolve and adapt, thereby ensuring the survival of key ecosystems and species.

There are obligations under UNCLOS to prevent, reduce and control transboundary pollution and environmental harm and to cooperate, as well as to conduct EIAs in accordance with Articles 205 and 206 of UNCLOS. But these provisions have been all but ignored in the absence of institutional mechanisms implementing guidance, coordination and accountability measures. Thirty years after UNCLOS was concluded, there is still no global mechanism established to receive, analyze and approve such assessments. Neither is there a mechanism to assess the cumulative impacts of activities in marine ABNJ.

### Gaps in high seas governance

There are many gaps in the current ocean governance regime that could be addressed by a new, legally binding treaty, including the following:

- There is no mandate or framework for the establishment, monitoring and enforcement of MPAs, including reserves, in ABNJ;
- There is no coordinating decision and reporting mechanism for the conducting and review of comprehensive EIAs in ABNJ;
- There is no global institutional mechanism for the operationalization of modern principles of environmental management, such as the precautionary principle, ecosystem-based management, and cross-sectoral management, including global cross-sectoral monitoring, control and surveillance, and an enforcement/compliance mechanism for human activities in ABNJ;
- There is no framework for access to, and benefit sharing of, marine genetic resources in ABNJ;
- There are few regional ocean management organizations with a broad mandate for environmental management and protection, and no global mandate for the establishment of such organizations. In addition, there is no framework for global coordination and cooperation among existing regional and global competent organizations;
- The provisions in UNCLOS on technology sharing and capacity building are not adequately addressed and implementation mechanisms are needed.

### The path to a treaty

The new UNGA Resolution 69/292 stresses “the need for the comprehensive global regime to better address the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction.” It allows for a two-year preparatory process (PrepCom) to consider elements that could comprise the treaty, with a total of four weeks each year during 2016 and 2017. The first meetings are scheduled to take place at UN Headquarters from 28 March to 8 April, and 29 August to 12 September 2016, followed by additional PrepCom meetings in 2017. At the end of 2017, PrepCom will report to the UN General Assembly on its progress in negotiating draft elements of the treaty; the General Assembly will then decide, by September 2018, on the convening and starting date of an intergovernmental conference for finalizing the treaty text.

Over the next two years, governments will carefully explore and consider the range of options and detailed proposals on the treaty elements, including conservation measures such as area-based management tools, which include MPAs and reserves, EIAs, marine genetic resources, capacity building and the transfer of marine technology.

The High Seas Alliance is committed to working with States to progress to rapid and effective negotiations of a comprehensive treaty to protect the world's ocean beyond national jurisdiction.

#### FOOTNOTES

1. Conference on Sustainable Development known as Rio+20.
2. ABNJ includes the high seas as well as the deep seabed known as 'the Area'.
3. Paragraph 162 of the outcome document *The Future We Want*.
4. Namely, the Agreement Relating to the Implementation of Part XI of the Convention, which establishes 'the Area' and concerns deep seabed mining, and the 1995 UN Fish Stocks Agreement on straddling and highly migratory fish stocks.