



High Seas Alliance Views on Cross-Cutting Provisions of the President's Draft Text of Nov. 27, 2019

I. Relationship to Other Bodies (Art 4(3))

The BBNJ Agreement's relationship to other ocean governance agreements and organizations will be critical to ensuring that governance gaps are addressed and that the high seas are managed in a cohesive, coordinated manner. The HSA recommends the following changes to the draft text, in order to achieve this objective:

- **Delete “[respects the competences of and]”**: because this language is more likely to deter the cooperation encouraged in UNCLOS 197 and 278 rather than promote it. BBNJ will have competence on marine biodiversity issues.
- **Add “the effectiveness of”** so the relevant part of Article 4(3) would read: “does not undermine **the effectiveness of** relevant legal instruments.” This provides greater precision as well as consistency with the UN Fish Stocks Agreement (UNFSA), which uses the term “undermine the effectiveness” of “measures” throughout.¹ It is the undermining of the effectiveness of the measure concerned, rather than the ‘body’, which is at issue in these provisions.
- Replace the term “*relevant*” with “*competent*” with regards to “legal instruments and frameworks”. “*Relevant*” is not a particularly effective gatekeeper as there will almost always be “relevant” bodies. The term ‘competent’ is consistent with usage in UNCLOS,² UNFSA, and the UNGA Sustainable Fisheries resolutions on bottom fishing.³

II. Principles and Approaches (Art. 5)

The current draft text includes a number of important principles and approaches that the HSA believes will be critical to include in order to ensure that the BBNJ Agreement meets its objectives, and we thus strongly support retaining the principles and approaches identified in Article 5. We believe it could be helpful to add additional context to some of the currently drafted provisions, including:

- The principle of transparency;
- The “principle of equity” could be expanded to clarify that that the conservation and sustainable use should be conducted for the benefit of current and future generations;
- The precautionary “principle” should be retained and expanded consistent with Rio Declaration Principle 15, and additional context could be provided to ensure consistency with UNFSA Articles 5 and 6.

¹ Articles 7(2)(a), 17(4), 18(1), 18(3)(h), 20(4), 20(7), 23(3)

² See, e.g. UNCLOS 119(2), 130(2), 163(13), 197, 210(4), and 278

³ UNGA Resolution 61/105, para 83. Similar language used in 64/72, 66/68, and 71/123.

- The “integrated approach” could benefit from additional detail that clarifies that a holistic and integrated approach can guide humanity to live in harmony with nature and restore the health and integrity of the ocean’s ecosystem.⁴
- The “ecosystem approach” in paragraph (f) could be combined with the approach to build ecosystem resilience articulated in paragraph (h) to clarify that the ecosystem approach could be applied in a manner which builds ecosystem resilience to the adverse effects of climate change and ocean acidification and restores ecosystem integrity.
- A principle of stewardship of the marine biological diversity in areas beyond national jurisdiction enabling their conservation and sustainable use for present and future generations should be added.

III. Emergency measures

The HSA supports New Zealand’s proposal on emergency measures to empower the CoP to adopt measures to be applied on an emergency basis, when a natural or human-caused phenomenon disasters has had or may have a significant adverse impact on marine biological diversity of areas beyond national jurisdiction. This Emergency Measures provision could be added to Article 6 or have a stand-alone article.

IV. Institutional Mechanisms

The HSA supports the general institutional mechanisms established in the President’s draft text and offers the following recommendations:

- **Conference of Parties (Article 48).** We recommend clarifying the decision-making process to make it clear substantive decisions can be taken by two-thirds majority voting. This proposal is based on UNGA resolution 72/249 paras 17 and 19 and is consistent with UNGA rules of procedure on voting, as well as in a number of other ocean governance organizations, including, *inter alia*, the IMO, ISA, and some RFMOs, and learns from lessons from CBD and UNFCCC.
- **Secretariat (Article 50).** We recommend striking [1. Alt. 2] because we strongly support that the Secretariat should be established by and determined within the text of the BBNJ Agreement, as suggested in [1. Alt. 1] or [1. Alt. 3].
- **Implementation [and compliance] (Article 53).** We recommend moving Article 53 to Part VI (Institutional Arrangements) and establishing an Implementation and Compliance Committee, to be operated in a no-confrontational cooperative way to facilitate the effective operation of the Agreement.

V. Settlement of Disputes

Dispute resolution should be cost effective, accessible, transparent and expeditious, and we recommend establishing non-binding facilitative and co-operative dispute resolution mechanisms.

- **Obligation to settle disputes by peaceful means (Article 54).** The HSA recommends adding text allowing the COP to establish facilitative dispute settlement procedures such as expert fact-finding panels and non-adversarial problem solving mechanisms.

⁴ See, e.g. The Future We Want para. 40; Rio Declaration Principle 15; UNFSA Article 6.

- **Procedures for the settlement of disputes (Article 55).** The HSA proposes that text be added to empower the CoP to request an Advisory Opinion from either the International Court of Justice or the International Tribunal for the Law of the Sea (at the option of the CoP making the decision at the time).

VI. Final Provisions

- **Entry into Force (Art 61).** States must find the right balance of ratifications needed for entry into force. Too high a requirement may unduly delay entry into force; too low a requirement may result in budgetary constraints and introduce legitimacy concerns. UNFSA, which required 30 ratifications, may serve as a useful example here.
- **Annex[es] (Art 68).** Annexes should be able to be adopted by the COP according to its decision-making procedures, rather than explicitly requiring consensus (as the current draft would require).

VII. Additional Provisions

The HSA suggests the addition of two critical elements

- **Transparency.** The HSA supports [suggested text](#) on a new transparency article proposed by New Zealand, Canada, Australia, and Norway, which enjoyed considerable support on the floor of IGC3. In that proposed text, we also suggest deleting 'relevant' before stakeholders to avoid restricting stakeholders.
- **Responsibility and Liability.** We suggest adding a provision stating that States Parties are liable for damage or loss attributable to them in regard to the Agreement, and an empowerment clause allowing the COP to adopt a time-bound process to elaborate international rules and procedures in the field of liability and redress.