HIGH SEAS ALLIANCE

Key Recommendations for IGC3 on President's Text

The High Seas Alliance welcomes the release of draft text of an agreement under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction ("Draft Text")[1], and congratulates the President of the Intergovernmental Conference, Ambassador Rena Lee, on this achievement.

For the first time, the third session of the Intergovernmental Conference (IGC3) taking place from August 19-30, 2019, will provide an opportunity for governments to negotiate legal text toward the development of a new legally binding instrument (Agreement) under UNCLOS for the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (ABNJ). With only two negotiating sessions remaining, this briefing sets out some key issues for the High Seas Alliance with respect to the Draft Text.

After 15 years of discussions, it is clear that our ocean – indeed our very planet – is at a crossroads. The Global Biodiversity Assessment Report[2] recently demonstrated unprecedented biodiversity loss and species extinction across all sectors of the globe, and stressed that "transformative change is needed." This cautionary report reminds us that we have the responsibility to ensure that our ocean is not irreversibly damaged by human activity. Loss of biodiversity is not only an environmental issue, but also a developmental, economic, food security, social and cultural issue as well. For the high seas, *this* is our moment for transformative change.

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[1] Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction: https://undocs.org/en/a/conf.232/2019/6.

[2] Global Assessment Report on Biodiversity and Ecosystem Services, IPBES, https://www.ipbes.net/news/ipbes-global-assessment-summary-policymakers-pdf "Through 'transformative change', nature can still be conserved, restored and used sustainably – this is also key to meeting most other global goals. By transformative change, we mean a *fundamental, system-wide reorganization across technological, economic and social factors, including paradigms, goals and values*."

Preamble

As the Preamble outlines the purpose of the treaty, it would benefit from additional visionary and aspirational language that highlights the need for enhanced cooperation to meet the challenges of accelerating climate change related impacts, marine environmental degradation and associated risks to marine biodiversity and ecosystem services which a fragmented governance system is ill-suited to address. The importance and urgency for action, and the overarching goals for the agreement could be laid out in a format similar to UNCLOS, incorporating more recent elements from the Draft Global Pact for the Environment, the UNGA Regular Process, IPCC and IPBES reports and the CBD Preamble.[3]

Part I: General Provisions

Art. 1: Use of terms

- **"Area-based management tool"** (Para 3). Caution against defining ABMTs as "other than a marine protected area" because MPAs are a type of ABMT. Understanding that this treaty may wish to treat MPAs separately from other types of ABMTs, this distinction would be better made and operationalized in the definition of MPA (see below) and within Part III (Measures such as ABMTs, including MPAs), rather than in the use of terms. Therefore, recommend that the phrase "other than a marine protected area," be struck from Article 1, Para 3. HSA suggests the following definition for ABMTs:

  3. "Area-based management tool" means a **management measure** ~~tool~~ for a geographically defined area~~, other than a marine protected area, through which one or several sectors or activities are~~ managed **to achieve one or more of the** ~~with the aim of achieving particular conservation and sustainable use~~ objectives **of the Agreement** ~~[and affording higher protection than that provided in the surrounding areas].~~

[3] As an example, some language suggested by IUCN includes:

- *"Stressing the need to strengthen and implement the framework provided in the United Nations Convention on the Law of the Sea";*
- *"Stressing the need for the comprehensive global regime to effectively address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction";*
- *"Committed to the protection, preservation and restoration of marine biological diversity and the marine environment and the maintenance and restoration of ecosystem integrity and resilience in areas beyond national jurisdiction";*
- *"Affirming that the conservation of marine biodiversity and the protection and preservation of the marine environment in areas beyond national jurisdiction are a shared right and responsibility of humankind"* (based on CBD/UNCLOS);
- *"Reaffirming that States are responsible for taking actions both individually and collectively to conserve marine biological diversity in ABNJ and for ensuring that its use and associated impacts are ecologically sustainable"* (based on CBD);
- *"Aware of the urgent need for an integrated, ecosystem-based and precautionary approach that builds ecosystem resilience to the adverse effects of climate change and ocean acidification and restores ecosystem integrity"* (new);

- "**Environmental impact assessment**" (Para 7). This definition should include evaluation of cumulative impacts. In addition, an activity that has **impacts on** ABNJ, (as opposed to an **activity** that takes place **in** ABNJ, should be subject to EIA. This formulation better reflects the status of ABNJ as a global commons of interest and concern to all. We recommend:
    - ~~[~~7. Alt. 1. "Environmental impact assessment" means a process to evaluate the **potential** environmental impact**s, including cumulative effects,** of a~~n~~ **proposed** activity ~~[to be carried out in areas beyond national jurisdiction [,~~ with an effect on areas within or beyond national jurisdiction~~]] [~~, taking into account ~~[~~, inter alia,~~]~~ interrelated ~~[socioeconomic] [~~social, ~~and~~ economic~~]~~, cultural and human health impacts.~~, both beneficial and adverse].]~~

- **"Marine protected area"** (Para 10). We recommend striking "sustainable use" from the definition, as MPAs are more conservation--focused. We further caution against defining MPAs as those which are focused only on long-term conservation, since we would want to include those which meet short-term conservation goals as well. We suggest this definition to address these concerns:

    10. "Marine protected area" means a geographically defined marine area **where human activities are regulated,** ~~that is designated and~~ managed **or prohibited** to achieve ~~specific [long-term~~ biodiversity~~]~~ conservation ~~and sustainable use objectives [and that affords higher protection than the surrounding areas]~~.

- **Stakeholders:** We suggest a definition of stakeholder such as:

    "*Stakeholder" means a natural or juristic person or an association of persons or a State or an intergovernmental organization with an interest or concern of any kind in, or who may be affected by, activities in areas beyond national jurisdiction, or who has relevant information or expertise.*

Art. 2: Objective

- Recommend referring to Art. 2 objective throughout text instead of reformulating it.

Art. 4: Relationship between this Agreement and the Convention and other [existing] relevant legal instruments and frameworks and relevant global, regional and sectoral bodies

- Recommend deleting *[respects the competences of and]* in Art. 4(3). The term "not undermining" is provided in UNGA resolutions 69/292 and 72/249 with broad support. The additional phrase is unclear and further muddies the water on competence of the agreement with respect to marine biodiversity, as well as MGRs, capacity building and other issues. "Respecting competence" would increase, not decrease, sectoral and regional "silos". "Not undermining" captures the essence in a dynamic and flexible way.

Art. 5: General Principles

- We suggest including the precautionary principle; ecosystem approach; use of best available science, including traditional knowledge; intra- and intergenerational equity, transparency in decision-making and public participation.

Part III: Area-based Management Tools and MPAs

General Comments

HSA recommends the Draft Text:

- Throughout Part III, use "**establishment** of ABMTs, including MPAs" instead of "designation." "Establishment" is more consistent with actively managed tools, whereas "designation" has at times been associated with paper parks.
- Provides a clear obligation for the Parties to the Agreement to establish MPAs under the Agreement under the ABMT-specific objectives (Art. 14). The UN Fish Stocks Agreement includes an obligation for States to "adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks" (UNFSA Article 5(a)). The Agreement should adopt a similar obligation with respect to the establishment of MPAs.

Art. 14 & 16: Objectives & Identification of Areas

- **Art. 14:** HSA recommends that negotiators look to CCAMLR Conservation Measure 91-104 for guidance as a model for MPA and ABNJ objectives and amend Art. 14 accordingly.[4] Relying on criteria instead of objectives can result in MPAs in data poor areas such as ABNJ being rejected due to the absence of sufficient information on all the criteria. Even if ABMTs are not required to meet all criteria, areas that do meet more of the criteria may be favored over those that meet only a handful, which could result in critical areas being overlooked. Instead, MPAs should be considered on a proactive, precautionary basis. The CCAMLR approach represents latest and best practice.

Art. 15: International cooperation and coordination

HSA recommends:

- Delete bracketed Para. 2 (the Alt. to para 1. (b) (ii)). The language in para 1. (b) (ii) is preferred because it focuses on actions that can be taken under the Agreement itself, rather than rely upon the creation of new bodies. Would make a slight adjustment to 1. (b) (ii) so that it reads: "Establishing area-based management tools, including marine protected areas, and adopting conservation and management measures **to achieve the objectives set out in this Part."**
- Delete Para. 3—As this Agreement would serve as the coordination and collaboration mechanism, there would be no need for States to establish new ones, as set forth in Paragraph 3
- Para. 4: This is already covered in Art. 4, and thus is unnecessary to also include here.

[4] See CCAMLR Conservation Measure 91-104 (2011), https://www.ccamlr.org/en/measure-91-04-2011

Art. 19: Decision-making

- This Article provides an opportunity to distinguish between the decision-making process for MPAs specifically from that of other non-MPA ABMTs. The ABMT decision-making process could be further bifurcated into non-MPA ABMTs for which there is no relevant regional/sectoral body, and those non-MPA ABMTs for which there is such a body. The HSA strongly supports Alt. 1, which empowers the COP to directly take decisions on the establishment of ABMTs. In order to ensure that the Agreement can enable the creation of more than "paper parks" and become a meaningful vehicle for enhancing cooperation among existing ocean governance regimes, it is essential that the parties be able to take decisions on specific proposals. Ensuring that ABMTs including MPAs have associated management measures as well as an associated management plan will also be critically important to establish effective MPAs and other ABMTs, and avoid future "paper parks." HSA therefore strongly supports the inclusion of references to the management measures and a management plan being included in the proposal on which the COP will take decisions.

Art. 21: Monitoring and Review

- Alt. 1 of this Article is preferable over Alts. 2 and 3, and would thus recommend deleting Alts. 2 and 3. Additionally, would propose adding language between current paragraphs 1 and 2 that would read: "1.bis The existing relevant legal instruments or frameworks, or a relevant global, regional or sectoral body shall be invited to report to the Conference of the Parties on progress towards meeting the objectives of area-based management tools, including marine protected areas established under this Agreement."

Part IV: Environmental Impact Assessment (EIA)

General Comments

HSA Recommends:

- Objective: unlike the ABMT section of the draft, the EIA section lacks an objective. We suggest:
    - *"The objective of this part is to ensure that human activities that affect ABNJ, including cumulative effects, are assessed and managed to prevent significant adverse effects, or not permitted to proceed."* This draws on Art. 38 para 2.
- Overall comment regarding the level of detail on the EIA process: The agreement or Annex needs sufficient detail on the EIA process to ensure a uniform baseline process across sectors and regions, including details in Arts. 30-41.

Art. 22: Obligation to conduct environmental impact assessments

It is important to adopt an effect rather than an activity criterion. We recommend Art. 22(3):

- "The requirement in this Part to conduct an environmental impact assessment applies ~~[only to activities conducted in areas beyond national jurisdiction]~~ to all activities that have an impact in areas beyond national jurisdiction.

Art. 23: Relationship to other agreements

- The "not undermining" language in Art. 23(2) is not needed given Art. 4, which covers the same ground and applies to the entire agreement.
- The EIA provisions in the Agreement should be considered as *global minimum standards* that apply to all EIAs conducted for activities with an effect on ABNJ. [Art. 23. 4. Alt 2.] This is needed to correct the current situation, where EIA requirements differ substantially among sectors (and even within sectors), and some sectors lack them altogether.
- For activities that have *already undergone EIA* in a sector with existing EIA requirements [Art. 23.5 Alts 2-4], there is no need to conduct a new EIA as long as the existing EIA is substantively equivalent to one undertaken pursuant to the requirements of this part and the threshold has been properly applied (per Art. 23.5. Alt.4). Activities that meet or exceed the threshold defined in this part, but have not been assessed by a relevant body, must be assessed in a manner consistent with this Part.
- The process for the conduct of EIAs should not be subject to some undefined future development of guidelines, but should come into effect as soon as the Agreement comes into force. Art. 23.4 Alt 1 should be deleted.

Art. 24: Thresholds and Criteria

- The threshold for requiring an EIA should be when States have reasonable grounds for believing that planned activities under their jurisdiction and control are likely to have *more than a minor or transitory effect.* [Art. 24 Alt 1]. If the State determines that the planned activities are not likely to have more than a minor or transitory effect, a provision should be added permitting States to request a review of that determination by the COP.

Art. 25: Cumulative effects

- It is essential that all EIAs describe and take into account cumulative effects [Art. 25.1], which should explicitly include climate change-related effects.
- The requirement for assessing cumulative effects must not be subject to some undefined future process but should come into effect as soon as the Agreement comes into force. Art. 25.2 Alt 1 should be deleted.
- Note that Art. 25. 2 Alt 2 would require an assessment of cumulative impacts of *activities*, including climate change caused by human activity. Thus the words "and effects" should be added after "activities" to capture climate change-related effects on the ocean. To ensure clarity, we recommend adding the phrase "whether or not exercise control over the other activity."

Art. 27: EBSAs

- It would be unwise to set up a two-tier process under which areas previously identified as ecologically or biologically significant or vulnerable get a higher level of scrutiny, as any list of areas is unlikely to be complete. Given how little data and information we have about the significance or vulnerability of most of the ocean beyond national jurisdiction, all EIAs should be conducted according to the same rigorous standards.

Art. 28: Strategic Environmental Assessments

- A clause should be added empowering the Scientific Body to carry out SEAs.

Art. 29: List

- A list of activities, even if indicative, could take years to negotiate and would quickly become outdated. We recommend deletion of Article 29.

Art. 30-32: Assessment (Conduct of EIA)

- The EIA should be conducted by a panel of experts designated by the Scientific Committee [Art. 32.3. Alt 2]. As noted above, if the State is responsible for the preparation of an EIA, it is essential to have a backstop to prevent substandard and inadequate EIAs or forum shopping.
- If the State determines no EIA is necessary for a proposed activity [Art. 32.1], the Agreement should provide for automatic review by the Scientific Body, or provide the opportunity for other States to request a review by Scientific Body.
- Art. 31 (Scoping): Suggest specifying that the scoping must be consistent with standards under the Agreement.

Art. 34: Public Consultation

- All substantive comments should be considered, addressed and responded to [Art. 34.4]. Stakeholders should include the public to reflect its interest in the global commons. See HSA's suggested definition of "Stakeholder" in "Use of Terms" above.

Art. 36: Public Consultation

- Suggest that the Clearing House Mechanism transmits to stakeholders and the public.

Art. 38: Decision making

- *Standard:* The decision regarding whether or not an activity may proceed should be governed by a standard [Art. 38.1 Alt 3.]. However, the standard proposed in the draft, under which activities would be allowed to proceed as long as they did not have "severe" adverse impacts on the environment, is inconsistent with UNCLOS and would weaken the existing "significant adverse effects" standard that already applies to some activities in ABNJ (e.g., bottom fishing under UN resolution 61/105).

- *Who decides:* The COP should be responsible for determining whether a proposed activity may proceed [Art. 38.1 Alt 2]. If States are responsible, a backstop is essential to

prevent substandard or flag of convenience EIAs. For example, a State or group of States should be able to request the COP to review (i) a decision not to conduct an EIA; (ii) whether the EIA was conducted in accordance with the requirements of this Agreement, and/or (iii) the decision to proceed with a proposed activity and under what conditions. The COP could then step in and require re-evaluation and/or make a decision on whether a proposed activity should be allowed to proceed and if so under what conditions.

Art. 41: Review

- It is critically important that the COP retain authority to review and take necessary steps as noted above, and in case of emergency and to address urgent issues.

We suggest, for example "3. Any Party may notify the Conference of the Parties of a concern with either:

- a failure to conduct an environmental impact assessment under this Part;
- the conduct of environmental impact assessment under this Part;
- the outcome of an environmental impact assessment under this Part;
- a potential or actual breach of this Part; or
- an emergency situation requiring action by the CoP.

Para 4: Following a notification under Para. 3, the Conference of the Parties may take a decision to address the notification, including: "notifying a suggested action or course of action to any Party."

Part V: Capacity Building and Transfer of Marine Technology

Art. 51: Clearing-House Mechanism

- The Clearing-House Mechanism will have many functions under the Agreement. We suggest not stating that it consists primarily of a web-based platform, and adding that it may consist of Secretariat personnel, and add to 51(3)(d) (vii) monitoring reports; and (viii) such other matters as are necessary or desirable as directed by the Conference of the Parties. Also suggest that Cl-HM is managed by the Secretariat, under the direction of the COP.

Part VI Institutional Arrangements

Art. 48: Conference of the Parties

- There are several provisions within this section that would strengthen high seas conservation and sustainable use and should be retained. This includes establishing a Conference of Parties (COP) as the Agreement's dedicated decision-making body (Article

48.1) with a broad, flexible mandate. Specifically, we suggest that the COP remain empowered to:

- *"Make, within its mandate, decisions and recommendations related to the implementation of this Agreement;" (48.4(a))*
- *"Establish such subsidiary bodies as deemed necessary for the implementation of this Agreement;" (48.4(d))*
- *"Undertake other functions identified in this Agreement or as may be required for its implementation." (48.4(f))*

HSA suggests the following elements related to the COP be strengthened:

- **Review.** The ability of the COP to undertake a review of the adequacy and effectiveness of the Agreement's provisions and propose means of strengthening them if necessary is an important provision to retain in the treaty. (Art. 48, Para. 5).
- **Voting.** The Draft Text provides that the COP "shall agree upon and adopt rules of procedure for itself and for any subsidiary body that it may establish." (Art. 48, Para. 3). This will pose challenges with regards to voting procedures. HSA recommends that rather than leave the development of decision-making modalities to a later stage (which may create uncertainties), to instead provide clarity on decision-making within the text of the Agreement. This applies to all decision-making. A standalone Article seems necessary. Possible language could be modeled after UNGA Res. 72/249 which calls for negotiators to strive to reach consensus, but if all efforts to reach agreement by consensus have been exhausted, "decisions of the conference on substantive matters shall be taken by a two-thirds majority." Alternatively, UNGA Rules of Procedure on voting provides for 2/3 majority for important questions and a majority for other issues.

Art. 49: Scientific/technical body

- Ambiguity remains in the Draft Text with respect to the name, form, and function of the scientific/technical body.
- The Draft Text provides a choice of nomenclature between a Scientific and Technical "Body" vs. "Network". Our view is that "body" is a more appropriate, given that implementation of the Agreement will likely require a more substantial organizational architecture than simply a network of scientists and technical experts. We could envisage that the Scientific and Technical body might oversee/facilitate one or multiple networks *(e.g.* of experts), but it would be useful to have a broader body that can identify different types of needs for scientific and/or technical advice, as well as identify which modalities would be the most appropriate and effective way to deliver that scientific/technical advice.
- It will be important to **ensure that the Scientific body can establish subsidiary bodies as required**. This will ensure that the Agreement can flexibly and efficiently address

current and future needs to most effectively deliver on its objectives. Language to this effect is currently in bracketed text (49. [4 (Alt 1) [(n)]], and we recommend retaining this language.

- HSA supports language that would empower the Scientific Body to perform such other functions as may be determined by the COP or assigned to it under the Agreement (currently in Article 49. [4 (Alt 1) (o)], but would not want to wait until after the Agreement has come into force and the COP has met to determine any of the functions of the scientific body.

Art. 50: Secretariat

- Having a well-funded Secretariat will be critical to the success of the Agreement. The HSA would prefer either a dedicated Secretariat to be established [1. Alt 1], or that those functions be carried out by DOALOS [1. Alt 3.]. Utilizing existing Secretariats [1. Alt. 2 and 1. Alt. 4] would present a number of challenges.

Art. 53: Implementation [and compliance]

- Suggest adding an Implementation and Compliance Committee that could monitor and review implementation and compliance of decisions of the COP, provide recommendations to the COP, provide technical advice on implementation and compliance, and which should operate in a collaborative, non-confrontational consultative, preventive, facilitative and transparent way, and consider communications made by stakeholders, all without prejudice to dispute resolution procedures. It should help Parties implement the provisions of the Agreement, and should build on compliance mechanisms in other instruments such as the Aarhus[5] and Espoo Conventions.[6]

Art. 54: Obligation to settle disputes by peaceful means

- Suggest adding provisions such as an ad hoc expert panel and/or similar fact-finding panels, draw from Fish Stocks Agreement Articles 27-31, Suggest consider establishing a specialist chamber of the International Tribunal for the Law of the Seas (ITLOS) on marine biodiversity.
- Suggest add provision to request advisory opinions, and allow stakeholders to join proceedings upon application.

[5] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

[6] Convention on Environmental Impact Assessment in a Transboundary Context, https://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf.

Art. 56: Non-parties to this Agreement

- Suggest drawing from Art. 33 Fish Stocks Agreement, e.g. *"States Parties shall encourage non-parties to this Agreement to become parties thereto and to adopt laws and regulations consistent with its provisions. States Parties shall take measures consistent with this Agreement and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this Agreement."*

Additional:

- **Article on responsibility and liability**
  - We recommend including 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 activities 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.

- **Article on Transparency**
  - HSA recommends that an article is needed on transparency that would be applicable to the entire agreement. We suggest the new article promote overall transparency in decision-making, observer provisions, publication of documents, and participation. It could read in part:
    "The Conference of the Parties shall promote transparency in decision making processes and other activities carried out under this Agreement. All meetings of the Conference of the Parties and its subsidiary bodies shall be open to all participants and observers registered in accordance with paragraph [] unless otherwise decided by the Conference of the Parties. Publication of reports, decisions and recommendations, dissemination of non-commercially sensitive information and, as appropriate, facilitating consultations with, and the participation of, Stakeholders." (Add accreditation procedures etc).