Submission by the High Seas Alliance following the
Second Session of the Preparatory Committee on the Development of an International Legally
Binding Instrument 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
22 November 2016

Introduction

At the invitation of H.E. Mr. Eden Charles, Chair of Preparatory Committee (PrepCom) on the
development of an international legally binding instrument (international Instrument) under the United
Nations Convention on the Law of the Sea for the conservation and sustainable use of marine biological
diversity in areas beyond national jurisdiction, the High Seas Alliance (HSA) hereby submits the following
for consideration.

Area Based Management Tools, including Marine Protected Areas

The High Seas Alliance views area based management tools (ABMTs), and in particular, marine protected
areas (MPAs), including marine reserves, as necessary tools for achieving integrated ocean management
and the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction
(ABNJ). In 2015, the 193 member States of the United Nations confirmed their commitment to conserve
at least 10 percent of coastal and marine areas by 2020, incorporating a target established under the
Convention on Biological Diversity into U.N.’s 2030 Agenda for Sustainable Development. More recently,
in September 2016, the IUCN World Conservation Congress passed a motion that calls for nations to set
aside at least 30 percent of the world’s ocean as “highly protected” areas by 2030. To achieve these
targets, the HSA believes that the new international Instrument should mandate and enable the
establishment of a global system of ecologically representative, connected and effectively managed
MPAs, including marine reserves, in ABNJ.

ABMTs: Elements of an MPA Proposal

The instrument should specify who can submit proposals, which may include States Parties, competent
international organizations, a subsidiary technical body or accredited scientific experts or NGOs. It
should designate a competent body with the mandate to review and adopt, modify or reject proposals,
resulting in formal international recognition of adopted sites.

HSA supports the process to establish MPAs through the new international Instrument as proposed by
Costa Rica and Monaco in their 31 August 2016 Joint Submission.¹

An MPA proposal should contain at least the following elements:
(i) the spatial boundary of the MPA;

(ii) a description of the characteristics and biodiversity values of the area, including an evaluation of the current state of the marine ecosystem;
(iii) a description of ongoing and potential human activities in that area, including their known or potential impacts, including cumulative impacts;
(iv) a statement of the conservation objectives to be achieved by establishing the MPA; and
(v) (priority elements for) management measures through which those objectives will be achieved and of the plan for monitoring, enforcement and review of the MPA once established.

**ABMTs: Concepts and Definitions**

HSA agrees that existing concepts and definitions should be adopted where appropriate and adapted only where necessary. Where concepts or definitions may need to be adapted for ABNJ, any changes should reflect clarifications or elaborations, and be consistent with existing definitions.

With respect to a definition of “marine protected areas”, HSA recommends, in particular, adoption of a definition broad enough to encompass marine reserves that are completely protected from all extractive and destructive activities, except as necessary for monitoring or research. As marine reserves are marine protected areas where extractive and damaging activities are prohibited, they offer the highest level of protection: providing insurance, reference zones, and sources of resilience in the face of ocean warming, acidification and deoxygenation. Because marine reserves prohibit all extractive and destructive activities, they are far easier and more cost effective to enforce than MPAs that restrict only some activities but not others.

HSA therefore recommends adoption of the following definition of a “marine protected area,” which builds upon the IUCN and CBD definitions:

*Marine protected area:* “A geographically defined area, in which human activities are regulated, managed or prohibited in order to achieve specific conservation objectives, including the long-term conservation of nature.”

**ABMT’s: Guiding Principles and Approaches**

HSA recommends that the new international instrument incorporate and operationalize existing principles and approaches, including the ecosystem approach, the precautionary principle, the use of the best available science, stewardship, transparency and participation. We enumerated these and other principles in our submission to the first PrepCom, which we incorporate here by reference:


**ABMTs: MPA Characteristics**

Recent studies have shown that five key characteristics contribute to a successful MPA. Specifically, MPAs that are (i) no-take (marine reserves), (ii) well enforced, (iii) long-term, (iv) large, and (v) isolated
are best suited to accomplish their conservation goals.\textsuperscript{2} This research reinforces the value in ensuring that MPAs are all designed with these basic principles in mind. Research has also shown that strictly protected marine reserves are a key part of an MPA system, and can be most effective at protecting vital biodiversity areas and processes.\textsuperscript{3} HSA supports MPAs that are indefinite in duration and appropriately regulated to best ensure the long-term conservation of marine biodiversity and ecosystem services. A particular MPA’s conservation and management plan and any specific measures applied to it may be adjusted to reflect the status of the area based on a review process.

In addition, representative networks of MPAs are necessary to ensure that biological connections are maintained between interdependent MPAs and that a full array of marine habitats are protected. Representative networks of MPAs add value to the case-by-case approach traditionally taken with MPAs by focusing on protecting habitats, species, and ecosystems from a variety of threats before they become endangered or irreversibly damaged. A comprehensive and representative network of MPAs, including strictly protected marine reserves, would protect the key components, including species and habitats, which are necessary for a particular ecosystem to function and thrive. To be successful, a system of MPA networks in ABNJ requires robust management of all human activities in order to maintain and restore ecological viability and integrity, and be effectively enforced.

**ABMTs: Regional and Sectoral Bodies**

While there are regional and sectoral bodies with mandates that intersect with marine biodiversity in ABNJ, it is important to note that most of these existing sectoral organizations were established with a specific purpose and legal mandate to guide the exploitation of the resources under their remit or to regulate particular activities. Many do not have the competence, capacity, or mandate to adopt measures with the primary objective to conserve and protect biodiversity in the high seas and seabed and none have a mandate to implement the cross-sectoral measures needed for comprehensive protection. In addition, guidance and supervision is needed to harmonize the identification, design, and implementation of ABMTs.

It is therefore not enough merely to require coordination between sectoral organizations or to periodically review their activities. The international instrument should provide explicit authority and a mandate to establish multi-sectoral, high seas MPAs, including marine reserves, by a set date. This is essential to meet the conservation objectives agreed to by States, including those under the Sustainable Development Goals, the Rio +20 outcome document (*The Future We Want*), or the Aichi Biodiversity Targets, as well as their obligations under the Convention and other relevant instruments.

http://www.nature.com/nature/journal/v506/n7487/abs/nature13022.html

At the same time, the new international Instrument is an important opportunity to integrate and mainstream biodiversity considerations into the work of sectoral organizations. This can be done in several complementary ways. Building on the duty of cooperation (including that required in Article 197 and 279 of the Convention and the in situ conservation requirements of Article 8 of the CBD), contracting Parties should be obligated to apply the principles and approaches, objectives and guidelines of the new international Instrument in regulating or managing marine activities or resources important for the conservation of marine biodiversity in ABNJ, including through the use of area-based management tools (for further examples, see the IUCN Matrix at http://www.marinebiodiversitymatrix.org/c_1_2_1.html). Competent international organizations should be invited to adopt specific measures necessary to achieve the conservation objectives of the new Instrument and to regularly report on their progress. They could also be requested to develop and implement “biodiversity strategies and action plans” (akin to what is already called for at the national level under CBD Article 6) as a tool to integrate biodiversity considerations into management and decision-making.

It is important to note that regional seas conventions, even those with wider functional remits in terms of biodiversity protection, like OSPAR, BARCON or CCAMLR, remain limited within their specific geographical regions and ability to regulate multiple activities. No existing bodies have membership or participation broad enough to account for the full spectrum of interests in ABNJ.

Although regional seas organizations could be invited to exercise and extend their geographic mandate to ABNJ, we wish to emphasize that it is not enough to leave implementation of the ABMT provisions of the new agreement solely in the hands of existing bodies. A global management approach is needed to ensure that sectoral and regional efforts deliver on global obligations.

Environmental Impact Assessments (EIAs)

The development of the new international Instrument is an opportunity to incorporate best practices for EIAs and strategic environmental assessments (SEAs) already found under a number of multilateral and regional agreements, and apply lessons learned. Importantly, the new Instrument should also require that any assessments account for cumulative impacts of activities and climate change.

In addition to the suggestions below on EIAs, we would like to reference a detailed submission on EIAs that was made to the Chair during the second PrepCom meeting and is available on the DOALOS website at: http://www.un.org/depts/los/biodiversity/prepcom_files/NRDC_HSA_EIA_Brief_PrepCom2.pdf

EIAs: Principles and Approaches

General governance principles applicable to EIAs, which we view as cross-cutting amongst all aspects of the new international Instrument, should include the precautionary principle, the ecosystem approach, transparency, stewardship, and applying the best available science.
Borrowing from Article 3 of the Madrid Protocol, widely recognized to reflect best practices for EIAs, we propose the following text:

“In order to maintain the health and resilience of marine biodiversity in ABNJ, activities in ABNJ shall be planned and conducted so as to avoid significant adverse impacts on marine biological diversity and on the marine environment, taking into account the principles of precaution, transparency, stewardship, and integrated, cross-sectoral ecosystem based management, and applying best available science.”

**EIAs: Criteria and Screening Threshold**

With respect to screening, it is important to include a threshold where an activity has the potential for “significant adverse effects,”⁴ or alternatively, as utilized in the Madrid Protocol, a preliminary threshold of a “minor or transitory impact”⁵ that leads to a multi-layered approach to assessment with increasing requirements based on the level of potential harm. It is also important that screening and scoping criteria take into account possible cumulative effects, including those resulting from climate change, ocean acidification, and deoxygenation that may increase the significance of the effect of proposed projects. Another complementary approach is to provide a list of activities in an Annex that would always require an EIA, such as found in the Espoo Convention.⁶ When applying a list approach, it is important that the list be adaptable over time to reflect new and emerging uses.

HSA recommends that a combination of the tiered threshold approach and a list approach be adopted.

**EIAs: Responsibility**

States Parties should be required to ensure that an EIA is conducted, in accordance with the terms of the Instrument, prior to permitting any activity under their jurisdiction or control that may have a significant adverse impact on the marine environment in ABNJ or is listed in an annex of activities presumed to have such impacts. Although the EIA may be carried out by the project proponent or its designee, it would be the responsibility of the State (or States) with jurisdiction over the proponent – by reason of flag, nationality, or beneficial ownership - to ensure that the EIA is conducted pursuant to the terms of the IA. The instrument should also apply to activities organized in or proceeding from the territory of States Parties, as is the case with the Antarctic Treaty in Article VII.5. Such a requirement would be consistent with UNCLOS Article 194.2 and would assist States to implement their obligations under international law including CBD Article 14 with respect to processes and activities under their jurisdiction or control.

The international Instrument should provide for a pool of experts capable of conducting EIAs for activities in ABNJ, perhaps under the auspices of the Instrument’s scientific body. These experts would be charged with reviewing EIAs submitted by States to determine whether such EIAs meet the standards

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⁴ UNCLOS article 206, Rio Declaration Principle 17, CBD article 14, SDG 14.2.
⁵ Madrid Protocol art 8; Annex I. Unless it has been determined (by the national authority, in that case) that an activity will have less than a minor or transitory impact, an Initial Environmental Evaluation (IEE)) must be prepared.
contained in the Instrument. These experts could also be commissioned to conduct and evaluate EIAs for States with capacity limitations.

**EIAs: Content**

A number of multilateral environmental agreements contain EIA provisions and more specifically, required content in an EIA. One model for consideration is the Espoo Convention, which provides the following:

(a) A description of the proposed activity and its purpose;
(b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;
(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;
(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;
(e) A description of mitigation measures to keep adverse environmental impact to a minimum;
(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;
(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and
(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

**EIAs: Public Participation and Consultation**:

Provision for public participation and consultation should exist at each stage of the EIA process, beginning with the scoping phase. The relevant State(s) should circulate a draft assessment that includes public comment and input and the information required by the Instrument to the members of the Scientific Committee (SC) for review, and to any affected State, or stakeholder and to all States Parties for information. The draft assessment, along with any subsequent comments and recommendations of the SC, should be made publicly available on a website or equivalent.

**EIAs: Decision**

The proposed activity should be permitted only where the assessment concludes that the activity would not have significant adverse impacts (SAIs), or can be managed to avoid such impacts. Each decision to permit an activity should include an environmental management plan. The decision shall be made on the basis of comments and recommendations of the SC, which may include proposed provisions of an environmental management plan, including monitoring, review and compliance provisions.

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7Espoo Convention, Appendix II, [http://www.unece.org/env/eia/about/eia_text.html#appendix2](http://www.unece.org/env/eia/about/eia_text.html#appendix2)
**EIAs: Reporting**
On an annual basis, States Parties should be required to prepare and submit to a review committee established as described below a report detailing their implementation of the EIA-related provisions of the IA. States may also report on any failures to implement the EIA-related provisions by other parties. The reports shall be made publicly available without delay.

**EIAs: Review**
Members of the review committee shall be elected from among the States Parties and shall be term-limited. With the assistance of the Secretariat and the Scientific Body, the committee will prepare an annual synthesis document that evaluates States’ compliance with their EIA-related obligations, identifying any specific instances of non-compliance and publish such report.

**EIAs: Scientific Body**
A scientific body should be established under the new international Instrument to, among other things, review the adequacy of EIAs, make recommendations based on the EIA, and provide a body of experts who can undertake EIAs where necessary (i.e., if required by the Instrument or where States have capacity limitations).

**EIAs: Strategic Environmental Assessments (SEAs)**
SEAs identify the cumulative, synergistic and cross-cutting impacts of planned policies and programmes and can be used as a tool to facilitate marine spatial planning, science-based decision-making in mitigating environmental impact, and identifying potential cross sectoral ‘conflicts’. Similar to the Kiev Protocol, a new International Instrument would need to establish clear, transparent and effective requirements and procedures for SEAs.

A critical linkage between EIA and SEA is that collective investment in SEA makes it much quicker and easier to conduct individual EIAs, because much of the work has already been done. SEAs can identify matters for the scope and content of an EIA and threat assessments conducted under SEAs ensure prior identification of risks and potentially acceptable impact thresholds which allow for risk management strategies to already be in place, providing enhanced levels of certainty. SEA also provides the appropriate framework for spatial planning including the application of area-based management tools (ABMT) to give effect to plans.

**EIAs: Transboundary EIAs**
All human activities with the potential for significant adverse impacts in ABNJ need to be assessed, regardless of where they actually take place. Transboundary EIAs (TEIAs) should be required for activities conducted within national jurisdiction that may significantly affect marine biodiversity or the environment in ABNJ, as well as for activities conducted in ABNJ that may affect biodiversity or other interests of coastal States within national jurisdiction.

Effective management of biodiversity in ABNJ not only involves management of a complex set of relationships between sectoral bodies with ABNJ competencies, but also relationships with coastal
States with competencies over their respective exclusive economic zones and, in cases, outer continental shelves.

Reflecting marine ecosystems’ fluidity across jurisdictional boundaries, TEIAs constitute an obligation under international law,⁸ and are necessary to ensure that assessment processes are sufficiently comprehensive and management responses are effective. The Espoo Convention has for years provided guidance to States Parties for carrying out transboundary environmental impact assessments for activities that may affect other States. This guidance however has not been applied to activities that may affect areas beyond national jurisdiction.

**Capacity Building**

Many important interventions were made during the second PrepCom meeting on the need for meaningful capacity building and technology transfer, which is long term and meets the needs and goals of the recipient country for the conservation and sustainable use of marine areas beyond national jurisdiction.

There is great value in improving and expanding capacity building and technology transfer globally as those efforts can be leveraged to achieve conservation objectives set out in a new international Instrument through the effective participation of all States.

With respect to marine scientific research, a new international Instrument could establish a mechanism for enhancing:

- access to samples, data and knowledge, including the publication and sharing of scientific knowledge;
- collaboration and international cooperation in scientific research;
- scientific training and access to resources, research infrastructure and technology; and
- other socio-economic benefits (e.g. research directed to priority needs such as health and security).

There are already numerous bilateral and multilateral capacity building and technology transfer initiatives with respect to marine scientific research that have been conducted or are underway. An international Instrument could include a provision to support coordination and collaboration of these various initiatives and associated stakeholders. The Intergovernmental Oceanographic Commission (IOC) could be given additional support to play an important role in providing a structure for fostering that coordination and collaboration and taking it a step further. The IOC could be charged with utilizing the Ocean Biogeographic Information System (OBIS) among other tools to develop an international meta-

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⁸ As seen *inter alia* in the *Pulp Mills* Case and also in the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts.
database or clearing house mechanism to facilitate an effective mechanism for accessing information relevant for the conservation and sustainable use of marine biodiversity in ABNJ.

Further, capacity building could include a mechanism to assist developing States in drafting legislation and associated regulatory, scientific and technical requirements at a national or regional level to enable them to effectively implement various components of the envisaged new Instrument. This could include, but not be limited to, conducting an environmental impact assessment or participating in a strategic environmental assessment, and participating in the development and management of marine protected areas and marine reserves.

Cross-Cutting Issues

Cross-Cutting Issues: Principles
On governance principles, we would like to reference the document entitled “Governance Principles Relevant to Marine Biodiversity in Areas Beyond National Jurisdiction” which is available on the DOALOS website under Greenpeace’s submission for the first PrepCom session: http://www.un.org/depts/los/biodiversity/prepcom_files/greenpeace.pdf

On the use of precautionary “principle” versus “approach”, we support the use of the word ‘principle’. The difference is more than semantic: A principle can be objective, mandatory and enforceable, whereas an approach may be seen as more subjective. For these reasons, the precautionary principle is the preferred formulation, as is set forth in the OSPAR Convention in Article 2 and the Helsinki Convention in Article 3.

Cross Cutting Issues: Relationships with UNCLOS and Other Agreements
UNGA resolution 69/292 recognizes that the process “should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”. This is an important concept, particularly with respect to the discussion on the new International Instrument’s relationship to other instruments and frameworks. However, we have not found the phrase to appear in any Convention other than the UN Fish Stocks Agreement. It is significant that the term “undermine” and particularly “undermine the effectiveness” appears in the UN Fish Stocks Agreement in eight places.9

The UN Fish Stocks Agreement does not define “undermine”, but based on an analysis of its use of the term, it is clear that “undermine” means “undermine the effectiveness,” or reduce the effectiveness. To cite just one example, under article 17.4 of the UNFSA, States which are members of RFMO/As are to take measures consistent with the Agreement and international law to deter activities of such vessels which undermine the effectiveness of sub-regional or regional conservation and management measures.

9 The term appears in Articles 7.2, 16.2, 17.4, 18.1 and 18.3, 20.7, 23.3 and 33.2.
The new international Instrument can enhance, rather than undermine, existing processes and bodies. For example, it can ensure EIAs are conducted for activities that could impinge on the health of fish stocks and broaden the protection of key spawning areas. At the same time, it is crucial to avoid a situation where the limited sectoral approach prevents the application of best practice or results in the application of the lowest common denominator.

Implementation of the new international Instrument will take more than simply expanding the mandate of RFMOs to address fisheries-related biodiversity concerns: for one thing, there are tuna RFMOs and general RFMOs. For instance, in the Pacific, WCPFC\(^\text{10}\) addresses tuna, and SPRFMO\(^\text{11}\) addresses non-tuna species, IATTC\(^\text{12}\), which addresses tuna, and the North Pacific RFMO, which addresses other fish species. To establish an area closed to all fishing activities in the Pacific, both sets of RFMOs, or even all RFMOs if the MPA is proposed in the North and South Pacific, would need to agree. Even after successful coordination between all involved RFMOs, they would still be unable to address mining, shipping, or other activities. Further, RFMOs have been established to address fishing needs; boundaries and regions have been set according to fisheries needs, and fisheries needs alone.

What is lacking, in our view, is a global management approach that is integrated with regional efforts and activities in ABNJ to enable effective ecosystem-based management. Thus the meaning of paragraph 3 of resolution 69/202 is that the process should not undermine, or reduce, the effectiveness of existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies. As indicated in the previous sections, there are many ways the international Instrument can enhance the effectiveness of regional and sectoral organizations, rather than supplant or undermine them.

**Cross Cutting Issues: Dispute Settlement**

The new international Instrument should include a streamlined dispute settlement mechanism to resolve disputes arising from the implementation of the Instrument and should enhance and build upon contemporary global dispute mechanisms. Existing mechanisms under UNCLOS (e.g. ITLOS) are a good starting point but are not sufficient.

The dispute settlement mechanism should incorporate a progressive approach and be accessible, efficient, support good governance, transparency and accountability. Specific clauses to be considered include qualified opt-out mechanisms. One example of how to integrate good governance and dispute resolution is the South Pacific RFMO Convention, where a Party can implement an opt-out mechanism, which allows the measure to go forward and at the same time offers an opportunity for the State concerned to go to arbitration in The Hague over the matter. This has been used successfully and is widely seen as being best practice, as was evidenced in the recent outcome of the Fish Stocks Review Conference.\(^\text{13}\)

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10 Western and Central Pacific Fisheries Commission
11 South Pacific RFMO
12 Inter-American Tropical Tuna Commission
13 Recommendation 5(b): Ensure that post opt-out behaviour is constrained by rules to prevent opting out parties from undermining conservation, by establishing clear processes for dispute resolution and for the adoption of
HSA further supports the establishment of a body, such as a Compliance Committee, that could address cases of non-compliance, including duties of enhanced cooperation. This body could investigate allegations of breach, find facts as necessary and, where appropriate, recommend to the State(s) in question the action to be taken to fulfill the obligation. The notion of this body stems from the ‘non-compliance procedures’ adopted by some multilateral environmental agreements and from procedures adopted by some RFMOs for dealing with technical disputes or for reviewing management measures of the RFMO concerned. Technical assistance could be offered to address capacity issues.