

The New High Seas Biodiversity Treaty Offers Conservation, Equity, and Regulatory Certainty

Introduction

Oxygen production, food, carbon dioxide sequestration, and more than ten million species of living creatures (some of surpassing beauty) are found in the marine environment beyond national jurisdiction, which encompasses nearly half of the Earth's surface. Its intrinsic value and our dependence on the ecosystem services it provides are sufficient reasons to protect it, yet less than one percent is now protected under international law. This ocean space shared by all nations is inhabited by life forms that are able to thrive under crushing pressure, intense heat and cold, total lack of sunlight, and the chemical outpourings of hydrothermal vents. Their adaptations are mapped in their genetic codes, called marine genetic resources (MGR). Products based on this information have already been commercialized for uses that include medical treatments and food crops, but the regulatory framework is uncertain, and benefits primarily flow to states with advanced technology.¹ Better governance for conservation, a more certain regulatory situation for investment, and integration of equity can now become a reality with the new High Seas Biodiversity Treaty.

The Treaty was adopted on June 19, 2023, as the third implementing agreement to the UN Convention on the Law of the Sea (UNCLOS).² This new international agreement seeks to fulfill UNCLOS's objectives to protect and preserve the marine environment in areas beyond national jurisdiction (ABNJ) (the seabed, the water column, and, by inference, the air space above), to ensure adequate assessment and monitoring of potentially harmful activities, to acknowledge the shared ocean as the common heritage of humankind, to promote the transfer of marine technology on fair and reasonable terms and conditions, and to support the development and use of marine scientific research.³

In this era of struggle between nationalism and multilateralism, the treaty represents a commitment to solve global problems together, with most states parties to UNCLOS and several states that have not ratified UNCLOS participating in the negotiation. The adoption of the treaty text by consensus reflected their enthusiasm. This *Insight* details its underlying approach, describes the history leading up to the Treaty, outlines its major features, and identifies some outstanding questions about its relationship to UNCLOS.

The Treaty's Approach to Marine Conservation and Its History

The Treaty's biodiversity conservation measures seek to prevent injury to ocean life and to build its resilience to harms that cannot be prevented. Humanity faces a triple planetary crisis: biodiversity loss, climate change, and pollution. Therefore, the Treaty's central strategies to conserve marine biodiversity are to prevent or reduce damage from activities that humans can control by requiring environmental impact assessment of new and unregulated activities in ABNJ and to limit activities in marine areas characterized by values like uniqueness, rarity, and vulnerability to ocean warming and acidification.

As early as 2000, civil society organizations like the International Union for Conservation of Nature called for the international community to protect ocean life. In 2004 the United Nations created an ad hoc open-ended informal working group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ). Completing the task would take another 19 years.⁴ The BBNJ Working Group fashioned the 2011 "package deal" addressing four elements, discussed below. The 2012 UN Conference on Sustainable Development called for a new implementing agreement under UNCLOS, advancing step by step toward the negotiation of a treaty.⁵

In 2015 the UN General Assembly launched the negotiation of the High Seas Biodiversity Treaty, which came to be known as the "BBNJ Agreement"⁶ and has the formal title "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." The 2015 resolution established a Preparatory Committee tasked with developing the basic treaty elements. Two years later, the UN General Assembly further mandated the negotiation of the BBNJ Agreement.⁷ Seven meetings were held over the next several years, with interruption and delay caused by COVID.

The final negotiating session continued through the night of March 3, 2023, and into the following evening, when an agreed text was welcomed by the exhausted delegates with the declaration by the President of the intergovernmental conference, Ambassador Rena

Lee, that “the ship has reached the shore.” The High Seas Biodiversity Treaty will be opened for signature on September 20, 2023, at the United Nations, and will remain so for two years. Entry into force will require 60 states to accept, approve or ratify it. Supporters of the treaty are urging states to sign and to ratify so that it comes into force by 2025.

The Package Deal and Institutions

The UN General Assembly mandated four parts to the Treaty, based on the package deal:

the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, [1] marine genetic resources, including questions on the sharing of benefits, [2] measures such as area-based management tools, including marine protected areas, [3] environmental impact assessments and [4] capacity-building and the transfer of marine technology.⁸

It included the proviso that “the process indicated in paragraph 1 above [i.e., the negotiation] should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.”

Potentially the most consequential result of the Treaty will be the creation of the Conference of the Parties (COP). UNCLOS does not provide a regular forum for states to meet, set policy goals, and collaborate to achieve them, although we are used to seeing the climate change regime and other multilateral agreements make good use of their COPs. Other treaty bodies will include a Scientific and Technical Body, a Secretariat, and a Clearing-House Mechanism. Committees are also established for access and benefit-sharing, capacity-building and transfer of marine technology, finance, and implementation and compliance.

General principles and approaches set out in Article 7 capture principles found in UNCLOS and reflect more recent developments in international environmental law. An element shared with UNCLOS is the non-transfer of damage or hazards from one area to another and the non-transformation of one type of pollution into another.⁹ The polluter pays principle reinforces the statement in the Preamble that “as set out in the Convention, States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment and may be liable in accordance with international law.” Formulations of precaution were intensely debated, with divergent

views ultimately reconciled by reference to “the precautionary principle or precautionary approach, as appropriate.”

Common Heritage, Freedom of the High Seas, and Marine Genetic Resources

Is the ocean beyond national jurisdiction a commons belonging to all humanity? Hard-fought agreement was reached to include “the principle of the common heritage of humankind which is set out in the Convention.” In the final hours, this wording was accepted along with reference to “the freedom of marine scientific research, together with other freedoms of the high seas.” The addition of the two letters “hu” to the UNCLOS “common heritage of mankind” brought important gender equity, a revision that was heartily welcomed by delegates when it was proposed. “The principle of equity and the fair and equitable sharing of benefits,” also in the principles section, is a corollary to the common heritage.

These principles are fundamental to the question of who can take ownership of high seas resources, whether that means fish or the information embedded in the genetic code of diverse ocean life. UNCLOS, Article 87, asserts the freedom of fishing in the high seas, but it does not mention MGR. The new Treaty treats MGR as a shared resource, and the developed/developing state asymmetry of access and ability to develop actual or potential value from MGR and digital sequence information is addressed in the Treaty through the sharing of non-monetary and monetary benefits.¹⁰ The Clearing-House Mechanism is the site where notices of activities from sample collection to commercialization are published, and it also may be used to access relevant traditional knowledge held by Indigenous Peoples and local communities with free, prior, and informed consent.

Area-Based Management Tools, Including Marine Protected Areas

The COP may establish area-based management tools, including marine protected areas (Part III)¹¹ to create a connected network of high seas marine protected areas through a state-led procedure. A state or a group of states may submit a proposal for a marine protected area or other measures that limit or coordinate specific activities. The proposal must include identification of the area to be protected, the threats it faces, and a draft management plan. During a consultation process, stakeholders will have an opportunity to review and comment on the proposal, and the proponents will be able to revise the proposal based on the input they receive. The Treaty’s Scientific and Technical Body then will review and assess the proposal and will provide a recommendation to the COP. The COP will decide whether or not to establish the marine protected area. The text also

provides guidelines for implementation, monitoring, and review of the marine protected areas that are established.

Environmental Impact Assessment

The environmental impact assessment (EIA) provisions¹² build on the general international law obligation to conduct EIAs and provisions found in UNCLOS; they also allow for the eventual development and use of strategic environmental assessment. The provisions require that states parties conduct environmental impact assessments for unregulated and new activities in areas beyond national jurisdiction. Assessments prepared under other legal regimes must be reported through the Clearing-House Mechanism. Principles of transparency and access to information by stakeholders are reflected in the requirements for public notification and consultation that begin with scoping potential impacts of a planned activity and continue through the review process. The state party with jurisdiction or control of the planned activity may decide whether to proceed with an activity when “the Party has determined that it has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with the prevention of significant adverse impacts on the marine environment,” and taking into account mitigation or management measures proposed to limit harms from the activity.¹³ The state must then monitor the impacts of an authorized activity under its jurisdiction or control in accordance with the conditions set out in the approval of the activity. If significant adverse impacts are observed, the state must notify the COP and the public and take measures to address the harm.

Capacity Building and Transfer of Marine Technology

An essential component for developing states, capacity is referenced throughout the Treaty and in a dedicated section.¹⁴ The objectives are to provide what is needed for developing states to implement the Treaty, to participate in its activities, and to develop scientific and technical capacity in relevant fields. While UNCLOS states similar commitments, they have not been fully implemented, so the modalities included in this Treaty attempt to apply lessons learned for a more successful outcome.

Relationship to UNCLOS

It has been a matter of debate whether or not the Treaty is an implementing agreement to UNCLOS. Implementing agreements are intended to operationalize principles and general measures stated in the parent treaty, and relevant parts of the parent treaty generally carry through to the implementing agreement. Some argue that this Treaty goes

beyond UNCLOS by integrating concepts from international environmental law. Alternatively, the evolution of law under UNCLOS through the BBNJ Agreement can be understood as part of the same process also observed in the climate change and ozone regimes that respond to new knowledge and policy needs. Moreover, in Article 197, UNCLOS itself calls on states to cooperate in developing rules “for the protection and preservation of the marine environment.”

A different basis for arguing that the Treaty should not be considered an UNCLOS implementing agreement is that a number of states that were very active in the negotiation are not parties to UNCLOS, including the United States, Colombia, Turkey, and Venezuela. For them, it was important to establish the non-application of parts of UNCLOS that they do not already consider themselves bound by as customary international law. Accommodations were made in the text for their concerns, in Article 5(3), stating that non-parties’ legal status is not affected by the Treaty, and in Article 60, Procedures for the settlement of disputes. The dispute settlement measures in UNCLOS, Part XV, will apply to UNCLOS state parties, while those provisions “shall be deemed to be replicated” for disputes involving non-UNCLOS parties. In electing a means of dispute settlement, non-UNCLOS parties may choose the International Tribunal for the Law of the Sea, the International Court of Justice, or either of the two different arbitral tribunals described in UNCLOS; UNCLOS parties make their election of these alternatives under UNCLOS. Further specific measures are included to address situations such as the existence of dispute settlement mechanisms provided by another “relevant legal instrument or framework” and disputes that might involve maritime boundaries between a coastal state and areas beyond national jurisdiction subject to the Treaty. Should disputes arise under this Treaty, the jurisdictional issues may prove complex to parse.

It will now be for the UN General Assembly to authorize a Preparatory Commission in advance of the Treaty’s entry into force, to request the UN Office of Legal Counsel’s Division of Ocean and Legal Affairs to support that work, and to make arrangements for financial support so that developing states are able to participate fully.

About the Author: Rutgers University; International Union for Conservation of Nature, World Commission on Environmental Law, Ocean Law Specialist Group Chair; ASIL member.

¹ Paul V. Snelgrove, *An ocean of discovery: Biodiversity beyond the census of marine life*, 82:09/10 PLANTA MEDICA 790-799 (2016); Robert Blasiak, et al., *Corporate control and global governance of marine genetic resources*, 4(6) SCIENCE ADVANCES (2018).

² 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 (adopted June 19, 2023) A/CONF.232/2023/4 (2023), https://treaties.un.org/doc/Publication/CTC/Ch_XXI_10.pdf?_gl=1*1d299d9*_ga*MTUxMTc1NTIzMy4xNjUyNzIxMzk5*_ga_TK9BQL5X7Z*MTY5MDk4MjkwOC44LjEuMTY5MDk4MzQ1Mi4wLjAuMA. [hereinafter High Seas Biodiversity Treaty].

³ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Preamble, arts. 136 & 192, Part XIII, and art. 266 [hereinafter UNCLOS].

⁴ Glen Wright, Julien Rochette, Kristina Gjerde & Isabel Seeger, *The long and winding road: negotiating a treaty for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction*, IDDRI Studies, No. 08/18 (2018).

⁵ G.A. Res. 66/288 (Sept. 11, 2012).

⁶ G.A. Res. 69/292 (July 6, 2015).

⁷ G.A. Res. 72/249 (Dec. 24, 2017).

⁸ *Id.*

⁹ UNCLOS, art. 195.

¹⁰ High Seas Biodiversity Treaty, Part II, arts. 9-16.

¹¹ *Id.*, Part III, arts. 17-26.

¹² *Id.*, Part IV, arts. 27-39.

¹³ *Id.*, art. 34.

¹⁴ *Id.* Part V, arts. 40-46.