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Commentary—A High Seas Treaty on the Horizon: Progress and Prospects for the Intergovernmental Conference

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Context*

Biodiversity in marine areas beyond national jurisdiction (BBNJ) is increasingly threatened by human activities[1] and the accelerating impacts of climate change (ocean warming, acidification and deoxygenation),[2] with novel activities such as seabed mining set to place further pressure on marine ecosystems.[3] Yet the international legal framework for conservation and sustainable use of

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1 E. Ramirez-Llodra et al., "Man and the last great wilderness: Human impact on the deep sea," *PLoS ONE* 6 (2011): e22588, available online: <http://dx.plos.org/10.1371/journal.pone.0022588>; G. Wright et al., *The Long and Winding Road: Negotiating a Treaty for the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction* (Paris: IDDRI Studies No. 08/18, 2018), available online: <https://www.iddri.org/en/publications-and-events/study/long-and-winding-road-negotiating-high-seas-treaty>; J. Jouffray et al., "The blue acceleration: The trajectory of human expansion into the ocean," *One Earth* 2 (2020): 43–54, available online: <https://doi.org/10.1016/j.oneear.2019.12.016>.

2 L.V. Weatherdon et al., "Observed and projected impacts of climate change on marine fisheries, aquaculture, coastal tourism, and human health: An update," *Frontiers in Marine Science* 3 (2016): 48, available online: <https://doi.org/10.3389/fmars.2016.00048>; Group of Experts of the Regular Process, *The First Global Integrated Marine Assessment* (*World Ocean Assessment I*) (2016); Intergovernmental Panel on Climate Change (IPCC), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* [H.-O. Pörtner et al., eds] (2019), available online: <https://www.ipcc.ch/report/srocc/>.

3 Wright et al., n. 1 above; L.A. Levin et al., "Climate change considerations are fundamental to management of deep-sea resource extraction," *Global Change Biology* 26 (2020): 4664–4678, available online: <https://doi.org/10.1111/gcb.15223>; B. Christiansen, A. Denda and S. Christiansen, "Potential effects of deep seabed mining on pelagic and benthopelagic biota," *Marine Policy* 114 (2019): 103442, available online: <https://doi.org/10.1016/j.marpol.2019.02.014>; K.A. Miller et al., "An overview of seabed mining including the current state of development, environmental impacts, and knowledge gaps," *Frontiers in Marine Science* 4 (2018): 418, available online: <https://doi.org/10.3389/fmars.2017.00418>.

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BBNJ is fragmented, with limited cooperation and coordination between a plethora of regional and sectoral bodies.[4]

States have been negotiating a new international legally binding instrument to fill gaps in the framework and operationalize obligations set out in the United Nations Convention on the Law of the Sea (UNCLOS). These negotiations cover a package of four elements:[5]

– marine genetic resources (MGRS), including questions on the sharing of benefits;
– measures such as area-based management tools (ABMTs), including marine protected areas (MPAs);
– environmental impact assessments (EIAs) of human activities in the high seas; and
– capacity-building and the transfer of marine technology (CBTT).

Negotiators meeting during August 15–26, 2022 at UN headquarters for the fifth session of the intergovernmental conference (IGC5) were charged with finalizing the treaty text.[6] After two decades of discussions, IGC5 was intended to be the final session and result in adoption of an Agreement, but negotiators were ultimately unable to "bring the ship into shore," as urged by the President of the Conference (Ms. Rena Lee, Singapore).[7] While some commentators and non-governmental organizations (NGOs) reported the result as a failure,[8] many veteran negotiators and observers view the meeting as a partial success and left New York convinced that an Agreement is in reach.[9]

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4 Wright et al., n. 1 above; R. Billé et al., *Regional Oceans Governance: Making Regional Seas Programmes, Regional Fishery Bodies and Large Marine Ecosystem Mechanisms Work Better Together* (UNEP, 2016); G. Wright et al., "*Conserving the Global Ocean: Initial Indications for Effective Area-based Management Tools on the High Seas*," STRONG High Seas Project (2022), available online: <https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/Rapport/SHS%20ABMTs_EN.pdf>.

5 United Nations General Assembly (UNGA), Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, UN Doc A/66/119 (June 30, 2011), I. Recommendations, s. 1(a) and (b), available online: <https://digitallibrary.un.org/record/707498/files/A_66_119-EN.pdf>.

6 Upon the basis of a "Further revised draft text" UN Doc A/CONF.232/2022/5 (June 1, 2022), available online: <https://undocs.org/A/CONF.232/2022/5>.

7 IISD, "Summary of the Fifth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction," *Earth Negotiations Bulletin* 25 (2022).

8 E. Stallard, "Efforts to pass global ocean protection treaty fail," BBC News (August 27, 2022), available online: <https://www.bbc.com/news/science-environment-62680423.amp>.

9 IISD, n. 7 above; K.M. Gjerde, H. Harden-Davies and K. Hassanali, "High seas treaty within reach," *Science* 377 (2022): 1241, available online: <https://doi.org/10.1126/SCIENCE.ADE8437>.

Progress and Pitfalls

Delegations showed significantly more flexibility in finding compromises, apparently heeding the high-level calls made at the second UN Oceans Conference (Lisbon, June 2022). Negotiators primarily met in "informal informals," often breaking into smaller *ad hoc* groups to explore specific issues, and collaborated to develop cross-regional proposals. In parallel, the Conference President engaged delegations in private dialogues. Despite significant progress, key issues remained unresolved at the end of the two weeks, and delegates ultimately could not deliver the clean text needed to negotiate the final trade-offs.

Two draft treaty texts were distributed to negotiators and observers during the session—a Conference Paper providing a "refreshed text" (Sunday, 21 August) and a "further refreshed draft text" (Friday, 26 August) seeking to "capture the outcomes arising from the informal informals, as well as from the small working groups." Various informal proposals and documents were also in circulation and small-group negotiations continued late into Friday afternoon, leaving insufficient time for comprehensive reporting back to plenary. As a result, there is no authoritative record of the current state of play and delegations lack clarity on the starting point for the next round.

In the closing plenary, several delegations emphasized that procedural matters stood in the way: States with small delegations lamented their inability to follow the many parallel groups; Russia and China noted that the lack of consensus on many issues was not properly reflected in the texts provided; the Core Latin American Group (CLAM) and others underlined the linguistic challenges inherent in small-group negotiations, where no interpretation is available; and the group of Pacific Small Island Developing States (PSIDS) decried the lack of ambition and urgency, having invested US$260,000 to bring a 24-person delegation ("this money was not spent on roads, on medicine, on schools").

Marine Genetic Resources

Developed States with the capacity to conduct research and development have long argued for free access and unregulated exploitation of MGRs as part of the "freedom of the high seas" enshrined in UNCLOS; developing States argue for the application of the common heritage of mankind (CHM) principle, which would require that access be regulated and the benefits of exploitation shared.[10] The current draft includes CHM in the list of overarching

10 Wright et al., n. 1 above; D. Tladi, "The common heritage of mankind and the proposed treaty on biodiversity in areas beyond national jurisdiction: The choice between

principles that the Agreement is to be "guided by," though this remains in brackets, and discussion of CHM at IGC5 quickly resulted in reversion to the familiar dynamics.

Negotiators nonetheless appeared close to finally breaking the deadlock, with many key developed States now expressing willingness to entertain some form of monetary benefit-sharing. Different proposals were advanced, with some support for both a flat-rate access fee and a royalty-like payment system. Despite making progress in principle, patience began to wear thin as time ran out, with developing States feeling that further concessions were warranted.

Area-based Management Tools and Marine Protected Areas

Delegates streamlined the critical part concerning conservation and sustainable use, while also approaching consensus on many key provisions, including preparation/review of proposals, consultation and decision-making. The current draft would aim for the "establishment of a comprehensive system" of ABMTs, including an "ecologically representative and well-connected network" of MPAs. It would give the Conference of the Parties (COP) a mandate to adopt measures, formally recognize measures adopted under other frameworks (thus extending their applicability to Parties to the BBNJ Agreement), and make recommendations to existing bodies (or members thereof).

Consensus also began to emerge on principles and approaches to advance ecosystem-based management, recognizing roles for science as well as traditional knowledge of Indigenous peoples and local communities. Importantly, there appears to be support for a majority voting mechanism for the adoption of measures where consensus cannot be reached, which should discourage Parties from stifling progress.[11] Negotiators also advanced the section on emergency measures, though the current text would leave the procedures for the establishment of emergency measures to be elaborated by a future Scientific and Technical Body (STB) for consideration and adoption by the COP.

Environmental Impact Assessment

Impact assessment was subject to intense debate and many small groups were formed in an attempt to advance specific textual proposals on technical issues.

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pragmatism and sustainability," *Yearbook of International Environmental Law* 25, no. 1 (2015): 113–132, available online: <https://doi.org/10.1093/yiel/yvv060>.

11 B. Pentz and N. Klenk, "The 'responsiveness gap' in RFMOs: The critical role of decision-making policies in the fisheries management response to climate change," *Ocean and Coastal Management* 145 (2017): 44–51, available online: <https://doi.org/10.1016/j.ocecoaman.2017.05.007>; C.M. Brooks et al., "Reaching consensus for conserving the global commons: The case of the Ross Sea, Antarctica," *Conservation Letters* 13, no. 1 (2019): 1–10, available online: <https://doi.org/10.1111/conl.12676>.

Delegations nonetheless remain divided regarding the extent of the role to be played by the future BBNJ Agreement. Many developed States continue to insist on light-touch provisions that would provide limited international oversight and input, whereas developing States are in favor of an internationalized process.[12] Negotiators similarly remain divided over whether the BBNJ Agreement should develop global minimum standards or non-binding guidelines for EIAs conducted under existing bodies.

Consensus therefore continued to prove elusive on many key issues, including definitions, the threshold for conducting an assessment, whether EIA should be impact- or activity-based, the role of a future STB, and decision-making, including the powers of the COP over EIAs conducted by Parties. Many delegations supported inclusion of strategic environmental assessments (SEAs), which would provide a collaborative process for understanding marine ecosystems, developing scientific knowledge, and managing cumulative impacts,[13] though the definition was removed from the draft and there was little agreement on the definition or modalities.

Capacity-Building and the Transfer of Marine Technology

In general, discussions on capacity-building have been less polarizing, though developing States want to see more ambitious commitments while developed States have resisted inclusion of strong provisions and obligations (e.g., calling for the Agreement to "ensure" capacity-building and the transfer of marine technology (CBTT), rather than maintaining the UNCLOS language of "promoting").

Delegates appeared to approach consensus on the establishment of a dedicated CBTT committee, as well as on provisions for monitoring and review of capacity-building efforts. Negotiators have vacillated on whether to include a list of CBTT activities. Many delegations support the listing of some activities in the text, as well as reintroducing an annex containing an indicative, non-exhaustive list of CBTT activities (thus it would form part of the Agreement and could be periodically reviewed and amended); however, others wish to leave the development of a list to the COP and/or the CBTT committee.

12 K. Hassanali, "Internationalization of EIA in a new marine biodiversity agreement under the Law of the Sea Convention: A proposal for a tiered approach to review and decision-making," *Environmental Impact Assessment Review* 87 (2021): 106554, available online: <https://doi.org/10.1016/j.eiar.2021.106554>.

13 K.M. Gjerde, G. Wright and C. Durussel, *Strengthening High Seas Governance Through Enhanced Environmental Assessment Processes. A Case Study of Mesopelagic Fisheries and Options for a Future BBNJ Treaty* (STRONG High Seas Project, 2021), available online: <https://doi.org/10.48440/iass.2021.001>.

Institutional Arrangements

Negotiators did not reach agreement on the arrangements for a secretariat, with some preferring to establish a dedicated secretariat and others arguing that the Agreement could be housed under existing UN mechanisms, such as the UN Division for Ocean Affairs and the Law of the Sea (DOALOS). Concerning funding, a large number of States favor the inclusion of distinct provisions for institutional and non-institutional funding, insisting that adequate financial resources for CBTT and other areas will require mandatory contributions. There appeared to be some momentum for establishing a dedicated finance committee and there continues to be broad consensus on the establishment of a clearing-house mechanism, whose diverse functions would be further specified by the COP.

The relationship to existing bodies, such as regional fisheries management organizations (RFMOs)[14] and Regional Seas Programmes,[15] remains among the most controversial issues. Seeking a positive approach to the "not undermining" requirement,[16] some have proposed language on "complementarity," while others have argued for a narrower interpretation that would only give the COP a mandate where no other organizations exist.

Two options are on the table for implementation and compliance: one allows the COP to adopt mechanisms to promote compliance but would leave it to Parties to ensure and monitor implementation; the other takes a more comprehensive approach by establishing a dedicated implementation and compliance committee, as is common in multilateral environmental

14 G. Wright et al., *High Seas Fisheries: What Role for a New International Instrument?* (Paris: IDDRI Studies No. 03/16, 2016), available online: <https://www.iddri.org/en/publications-and-events/study/high-seas-fisheries-what-role-new-international-instrument>; R. Barnes, "The proposed LOSC Implementation Agreement on Areas Beyond National Jurisdiction and its impact on international fisheries law," *International Journal of Marine and Coastal Law* 31, no. 4 (2016): 583–619, available online: <https://doi.org/10.1163/15718085-12341411>; Z. Scanlon, "The art of "not undermining": Possibilities within existing architecture to improve environmental protections in areas beyond national jurisdiction," *ICES Journal of Marine Science* 75 (2018): 405–416, available online: <https://doi.org/10.1093/icesjms/fsx209>.

15 UNEP, *Regional Seas Programmes and Other UNEP Activities Relevant to Marine Biodiversity in Areas Beyond National Jurisdiction* (2016).

16 A. Friedman, "Beyond "not undermining": Possibilities for global cooperation to improve environmental protection in areas beyond national jurisdiction," *ICES Journal of Marine Science* 76 (2019): 452–456, available online: <https://doi.org/10.1093/icesjms/fsy192>; K.M. Gjerde, N.A. Clark and H.R. Harden-Davies, "Building a platform for the future: The relationship of the expected new agreement for marine biodiversity in areas beyond national jurisdiction and the UN Convention on the Law of the Sea," *Ocean Yearbook* 33 (2019): 3–44.

agreements.[17] Monitoring, control and surveillance (MCS) is included in the list of areas for CBTT and could form part of a management plan submitted as part of an ABMT/MPA proposal. The absence of dedicated MCS provisions is nonetheless a missed opportunity, as the BBNJ Agreement could reinforce existing agreements/principles and encourage Parties to pay specific attention to these critical aspects of implementation.[18]

Next Steps

While the adoption of a new BBNJ Agreement will be a landmark moment in the development of the law of the sea, the practical import of its obligations, mechanisms and institutions will only be felt once the treaty is ratified, brought into force, and implemented. In this regard, preparatory work in three priority areas should begin without delay:[19] 1) bringing the BBNJ Agreement into force by securing sufficient ratifications; 2) establishing core institutions, including financial mechanisms; and 3) developing capacity, science, and technology. Preparatory work for the proposal and designation of ABMTs and MPAs can also begin, building upon a wealth of existing efforts to deliver concrete and workable proposals that Parties can bring to the COP as soon as possible.[20]

The Conference President will now request the UN General Assembly to schedule a resumed IGC5, suspending the negotiations and ostensibly locking in progress and momentum. However, there is no indication that another draft text will be produced in the interim and it remains to be seen whether the highly tentative compromises made in-person will survive another months-long hiatus. As one delegate noted, the resumed conference will need "creative ideas and considerable compromises" to finalize the treaty.[21] In addition, the next session would benefit from having an inclusive, clear and transparent process so that all delegations are on the same page regarding progress made and to ensure that negotiations are not stalled based on procedural grounds.

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17 M. Bouvet et al., *Ensuring Effective Implementation of a High Seas Biodiversity Treaty: Lessons Learned and Options for an Implementation and Compliance Committee* (STRONG High Seas Project, 2022).

18 K. Cremers, G. Wright and J. Rochette, "Strengthening monitoring, control and surveillance of human activities in marine areas beyond national jurisdiction: Challenges and opportunities for an international legally binding instrument," *Marine Policy* 122 (2020): 103976, available online: <https://doi.org/10.1016/j.marpol.2020.103976>.

19 K.M. Gjerde et al., "Getting beyond yes: Fast-tracking implementation of the United Nations Agreement for Marine Biodiversity Beyond National Jurisdiction," *npj Ocean Sustainability* 1(6) (2022), available online: <https://doi.org/10.1038/s44183-022-00006-2>.

20 Wright et al., 2022, n. 4 above.

21 IISD, n. 7 above.