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The New United Nations High Seas Treaty: A Primer

Robin Kundis Craig

The world is gearing up to protect biodiversity in the open ocean. Whether the United States will participate remains an open question.

On November 27, 2019, the United Nations released the latest draft of its proposed *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*. This new treaty draft is the product of the third and penultimate treaty negotiation session, which occurred over the second half of August 2019. The last negotiation session will take place in the first half of 2020, and shortly thereafter the United Nations expects to open the treaty for signature.

The proposed agreement—better known as the BBNJ (for Biodiversity Beyond National Jurisdiction) Treaty or High Seas Treaty—would become a new protocol to the third United Nations Convention on the Law of the Sea (LOS), the international “constitution for the ocean” that has been in force since 1994. As of June 2019, 168 of the 195 United Nations-recognized nations have become parties to the LOSC, making its provisions fairly global in application. The United States is *not* a party to the LOSC, although it does recognize that treaty’s jurisdictional provisions as binding customary international law.

It is the rules covering the LOSC’s marine jurisdictions that the BBNJ Treaty seeks to adjust. One of the LOSC’s biggest innovations was to allow any coastal nation to claim an Exclusive Economic Zone (EEZ) extending up to 200 nautical miles out to sea from its coastal baselines (art. 57). (A nautical mile is one minute of latitude or 1.1508 terrestrial miles.) Within this EEZ, the coastal nation acquires two basic sets of rights. First, it has

sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. (art. 56(1)(a)).

Thus, coastal nations can regulate fishing and offshore energy development in their EEZs. In addition, within its EEZ, each coastal nation acquires jurisdiction over “the establishment and use of artificial islands, installations and structures,” marine scientific research, and “the protection and preservation of the marine environment.” (art. 56(1)(b)).

As such, under the LOSC, coastal nations have broad authority to institute marine biodiversity protection in their EEZs. Notably, 195 nations and the European Union are parties to the United Nations Convention on Biological

Diversity; only the Holy See and the United States are *not*. In 2010, the parties to the Biodiversity Convention adopted the Aichi Biodiversity Targets, and Target 11 set an international goal of protecting 10 percent of coastal and marine areas by 2020, with emphasis on biological support systems like tropical coral reefs. The LOSC provides the primary legal support for achieving these biodiversity goals in the world’s EEZs.

However, collectively, nations’ EEZs cover only 36 percent of the ocean’s surface and incorporate only 5 percent of its volume. The rest of the ocean beyond the EEZs—beyond national jurisdiction—is the LOSC’s high seas. Since the early seventeenth century, the international legal regime for the high seas has been “freedom of the seas,” and the LOSC preserves this tradition. Specifically, “[t]he high seas are open to all States, whether coastal or land-locked,” to enjoy at least six enumerated freedoms: (1) “freedom of navigation”; (2) “freedom of overflight”; (3) “freedom to lay submarine cables and pipelines”; (4) “freedom to construct artificial islands and other installations”; (5) “freedom of fishing”; and (6) “freedom of scientific research” (art. 87). In addition, no nation “may validly purport to subject any part of the high seas to its sovereignty” (art. 89).

Currently, therefore, *no one* has the authority or jurisdiction to protect biodiversity over the 64 percent of the ocean’s area that constitutes the high seas, leaving 95 percent of the ocean’s volume to free exploitation by all nations. Providing the legal means to restrict the LOSC’s freedom of the seas regime is the BBNJ Treaty’s main purpose.

Importantly, the BBNJ Treaty would not be the first LOSC protocol to restrict that regime. In August 1995, the United Nations adopted the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, better known as the Fish Stocks Agreement, which came into force in December 2001. This treaty deals with the problem of international fish species—that is, species whose ranges either cross two or more nations’ EEZs (straddling stocks) or, like tuna, that migrate across entire oceans (highly migratory stocks). Currently, 90 nations are parties to the Fish Stocks Agreement—including the United States. It applies primarily on the high seas (art. 3(1)) and requires party nations to adopt, using a precautionary approach, “measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization” (art. 5). In addition, nations “fishing on the high seas shall . . . pursue cooperation in relation to straddling fish stocks and highly migratory fish stocks either directly or through appropriate subregional or regional fisheries management organizations or arrangements” (art. 8(1)). The Fish Stocks Agreement led to the creation of 18 Regional Fishery Management Organizations that together span the globe and focus on managing commercially important species like tuna.

The BBNJ Treaty goes beyond fisheries management. As currently drafted, this treaty acknowledges the need for the LOSC’s “comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction” and the desire for parties “to act as stewards of the ocean in areas beyond national jurisdiction on behalf of present and future generations” (Preamble). It applies to both the high seas and the areas of seabed beyond national jurisdiction (arts. 1(4), 3(1)) and seeks “to

ensure the [long-term] conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination” (art. 2; bracketed text is still being negotiated).

Although the exact language of many of the treaty’s core principles is still being negotiated, the parties have settled on an ecosystem-based precautionary approach based on the best available knowledge (the status of indigenous knowledge is still being negotiated) “that builds ecosystem resilience to the adverse effects of climate change and ocean acidification and restores ecosystem integrity” (art. 5). Within that overall goal and subject to an overarching duty to cooperate for conservation (art. 6), the BBNJ Treaty addresses four specific topics: (1) exploitation and sharing of marine genetic resources (Part II); (2) use of area-based protections/marine protected areas on the high seas or on the seabed (Part III); (3) environmental impact assessments for activities on the high seas or on the seabed (Part IV); and (4) capacity building and technology transfer (Part V).

The text regarding marine genetic resources is currently the least settled, but the thrust of Part II is to prevent parties from turning marine genetic resources found in the high seas or deep seabed into intellectual property that the rest of the world has to respect (and pay for). The collection of such material may be subject to a licensing or permitting scheme and may be subject to requirements that the discoverers share their knowledge or aid in developing other nations’ capacities to engage in similar activities, or both, and perhaps with particular respect for indigenous peoples’ traditional knowledge regarding these resources. The treaty also provides for monitoring of these activities.

As for area-based protections, individual parties or coalitions of parties will be able to submit proposals for areas to protect, based on the treaty’s criteria, to the Secretariat. After review by the Scientific and Technical Body, parties can vote on the proposed protected areas at the Conferences of the Parties. Parties must use their own laws to respect any protected areas thus established, and the Scientific and Technical Body will monitor and review the areas.

A key issue remaining for environmental impact analyses is whether the requirement applies only to activities actually occurring in locations beyond national jurisdiction, or whether activities occurring within an area subject to national jurisdiction but that could affect the high seas or deep seabed are also subject to that requirement. Nations are also still negotiating what additional requirements the assessment might trigger, including mitigation, review by the Scientific and Technical Body or Conference of the Parties, and a duty to not proceed in the face of severe environmental impacts.

Finally, with respect to technology transfer and capacity building, the negotiators have clearly privileged “the special requirements of developing States Parties, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States and developing middle-income countries.” They also clearly intend to include marine biotechnology within Part V, but the exact duties that parties will acquire are still being negotiated. However, some requirement that parties provide for access to and transfer of their marine technologies seems likely.

The United States has participated in all three negotiation sessions for the BBNJ Treaty, but that does not mean it will become a party. The United States was an important negotiator of the 1982 LOSC but refused to become a party for multiple reasons, including the LOSC’s technology transfer and revenue sharing provisions. Similar provisions in the BBNJ Treaty are thus also likely to prove problematic, as are its marine genetic resource provisions. As of 2017, the United States strongly led the world in number of patents based on marine genetic sequences, with 6278—more than the next nine leading nations *combined* and close to half of all such patents that had then been issued. The United States’ ability to exploit marine biodiversity is thus likely to lead it to pass on becoming a party to this new treaty—although timing, the outcomes of the 2020 elections, and the treaty’s final text could all matter to this nation’s final decision. 🌳

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