

Ships on the High Seas: Implications of the UN High Seas Treaty

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On 19 June 2023, after years of negotiations, a historic marine biodiversity treaty was adopted by the United Nations (“**UN**”) in respect of areas beyond national jurisdiction. The objective of the *Agreement under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, referred to as the Biodiversity Beyond National Jurisdiction Treaty or the UN High Seas Treaty (the “**Treaty**”), is to protect, care for and ensure the responsible use of the marine environment, maintain the integrity of ocean ecosystems, and ensure the present and long term conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. Areas beyond national jurisdiction are commonly termed the “High Seas” and make up two-thirds of the world’s oceans.

The Treaty seeks to achieve its objectives by balancing 14 competing principles and approaches which include:

- the polluter-pays principle;
- the principle of freedom of the High Seas which permits freedom of navigation, overflight, laying of submarine cables and pipelines, construction of artificial islands and other installations, fishing and scientific research¹; and
- the principle of common heritage of humankind.

The Treaty, which will open for signature on 20 September 2023, will enter into force 120 days after it is ratified by 60 States. State Parties will then have to introduce new legislation to introduce the Treaty into their domestic laws.

Two ways in which the Treaty seeks to achieve its objectives are through the creation of Marine Protected Areas and using Environmental Impact Assessments.

Marine Protected Areas

The Treaty allows area-based management tools to be established including the creation of geographically defined marine protected areas (“**MPAs**”) in order to protect, preserve, restore and maintain biological diversity and ecosystems, and to strengthen the resilience of MPAs to climate change, acidification and marine pollution. There are already 15,000 MPAs worldwide but these are largely within territorial waters, with only 13 MPAs currently existing on the High Seas.

The Treaty provides that any State party can propose an MPA on the High Seas, with such proposals being subject to the review of the Scientific and Technical Body² and consultation. It also provides that measures can be adopted on an emergency basis where serious or irreversible harm could be caused by natural phenomenon or human-caused disaster.

A draft management proposal forms part of the proposal and can propose limits on human activities in the MPA and could ban all human entry, place restrictions on all or certain vessels entering the

area, as well as underwater drilling and/or fishing.

The scientific input and contributions received during the consultation process will be taken into account by the Conference of the Parties³ in making its decision⁴ on the establishment of an MPA.

Environmental Impact Assessments

The Treaty requires procedures to be put in place to ensure that activities conducted under a party's jurisdiction or control are assessed and conducted in such a way as to prevent, mitigate and manage the significant adverse impacts that they may have on the marine environment. A party to the Treaty will need to ensure that when an activity is to take place under their jurisdiction or control but in areas beyond national jurisdiction, it should be assessed prior to authorisation, and where it is determined that it will have more than a minor or transitory effect on the marine environment or the effects are unknown or poorly understood, then a screening should be carried out to determine whether an environmental impact assessment ("**EIA**") is required for the planned activity.

Where an EIA is required, it will include, amongst other things, the results of a scoping exercise (which will have looked at the key environmental, economic, social, cultural and human health impacts of the activity); a baseline assessment of the marine environment likely to be affected; potential impacts; potential prevention, mitigation and management measures; uncertainties and gaps in knowledge; and consideration of reasonable alternatives to the planned activity; and follow-up actions, including an environmental management plan. The draft EIA report should be made available to the Scientific and Technical Body to consider and evaluate prior to its publication via the Clearing-House Mechanism⁵.

Once an EIA is in place, Parties are required to monitor the authorised activity and issue publicly available reports via the Clearing-House Mechanism on the impact of the authorized activity which will be reviewed by the Scientific and Technical Body.

While jurisdiction and control are not defined by the Treaty, it is likely that this will include the operation of State flagged vessels. Those operating vessels on the High Seas will be required to take steps to minimise their adverse impact on the environment and may be the subject of EIAs.

Comment

The adoption of the Treaty is a significant step towards improved protection of the High Seas and to helping meet the '30 by 30' pledge, which aims to protect 30 per cent of the planet's lands and inland waters, as well as of marine and coastal areas, by 2030. As acknowledged by the UN Secretary-General, Antonio Guterres, the Treaty "*is critical to addressing the threats facing the ocean, and to the success of ocean-related goals and targets*". Achieving these goals, however, requires State Parties to ratify the Treaty promptly and to introduce appropriate domestic legislation expeditiously.

¹ As set out in Article 87 of the UN Convention on the Law of the Sea of 10 December 1982 ("UNCLOS").

² The Treaty establishes a Scientific and Technical Body and describes its role.

³ The decision-making body of the Treaty. The Conference of the Parties comprises of all the States that are parties to the Treaty. They will meet periodically to discuss the operation of the Treaty and also to hold Parties to account.

⁴ The Treaty sets out decision making process (in first instance by consensus but failing this by relevant majority vote arrangements).

⁵ The Treaty establishes a Clearing-House Mechanism and sets out how it will operate.