

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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OCEANS, ENVIRONMENT, AND SCIENCES

The United States Signs the High Seas Treaty

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The United States has signed the 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 (High Seas Treaty).¹ Adopted on June 19, 2023, following five years of negotiations, the treaty creates the first international legal framework to address critical issues threatening marine biodiversity in the high seas.² The agreement's main provisions focus on: a process for the equitable sharing of the monetary and non-monetary benefits of marine genetic resources (MGRs); procedures for establishing area-based management tools, including marine protected areas (MPAs); requirements for assessing and mitigating the potential maritime harm of activities through conducting environmental impact assessments; and the creation of mechanisms for capacity-building and the transfer of marine technologies, especially in regard to developing countries, to allow for the full implementation of the treaty's provisions by all parties. Announcing the U.S. signature, Secretary of State Antony J. Blinken said that “[t]he United States stands with the global community in committing to safeguard the health and resilience of our ocean so that it may continue to sustain us for generations to come.”³

The ocean is in “a state of emergency as increasing eutrophication, acidification, ocean warming and plastic pollution worsen its health.”⁴ Because two-thirds of the ocean is beyond the national jurisdiction of any country, it is largely without any protection against these threats. The high seas are “governed in a fragmented way,” with disparate treaties regulating fisheries, shipping, and deep-sea mining.⁵ These agreements, and the organizations they have established, “ha[ve] proven inadequate in stemming environmental degradation and loss of biodiversity.”⁶ As a Pew study concluded, “Too often, this piecemeal governance approach leads to the degradation of the environment and its resources, and makes deploying management and conservation tools such as environmental impact assessments and marine protected areas (MPAs), including marine reserves, challenging both legally and logistically.”⁷

¹ See U.S. Dep’t of State Press Release, Signing of the High Seas Treaty (Sept. 21, 2023), at <https://www.state.gov/signing-of-the-high-seas-treaty> [<https://perma.cc/GS46-LKYS>] [hereinafter Signing of High Seas Treaty]. The treaty is also known as the BBNJ Agreement (Biodiversity Beyond National Jurisdiction).

² See 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, UN Doc. A/CONF.232/2023/4 (2023) [hereinafter High Seas Treaty].

³ Signing of High Seas Treaty, *supra* note 1.

⁴ United Nations, The Sustainable Development Goals Report 2023: Special Edition 40 (2023), at <https://unstats.un.org/sdgs/report/2023/The-Sustainable-Development-Goals-Report-2023.pdf> [<https://perma.cc/CHN9-GEZW>] [hereinafter SDG Report].

⁵ UN Environment Programme Press Release, Marine Biodiversity Gets a Lifeline with High Seas Treaty (June 20, 2023), at <https://www.unep.org/news-and-stories/story/marine-biodiversity-gets-lifeline-high-seas-treaty> [<https://perma.cc/2JXA-2MTP>].

⁶ *Id.*

⁷ The Pew Charitable Trusts, *Mapping Governance Gaps on the High Seas* (2017), at https://www.pewtrusts.org/-/media/assets/2017/04/highseas_mapping_governance_gaps_on_the_high_seas.pdf [<https://perma.cc/5XFV-AE2H>].

Impelled by current and projected harms to marine biodiversity stemming from mineral prospecting, bioprospecting, overfishing, pollution, and climate change, the negotiators of the High Seas Treaty aimed to fill the regulatory void by establishing a legal framework for the dual goals of conservation and sustainable use, adopting techniques designed to do both in four substantive areas. To ensure the “fair and equitable sharing of benefits arising from activities with respect to marine genetic resources [MGRs],” such as from the development of medicines and cosmetics, the agreement establishes processes for the disclosure of information and the distribution of benefits.⁸ The treaty precludes states from making “claim[s] [to] or exercis[ing] sovereignty or sovereign rights” over MGRs.⁹ Instead, the treaty declares that “[a]ctivities . . . [regarding MGRs] are in the interests of all States and for the benefit of all humanity, particularly for the benefit of advancing the scientific knowledge of humanity and promoting the conservation and sustainable use of marine biological diversity, taking into particular consideration the interests and needs of developing States.”¹⁰ To ensure transparency, the treaty establishes a Clearing-House Mechanism for information pertaining to the collection of MGRs, including plans for the collection of MGRs, the location of any collected MGRs, how the collected MGRs were utilized (including in publications, patents, and products), and, if marketed, information on sales.¹¹ Any benefits, monetary and non-monetary (such as samples, scientific data, and marine technology), arising from MGRs are to “be shared in a fair and equitable manner . . . and contribute to the conservation and sustainable use of marine biological diversity.”¹² Critically, exactly how that will take place was not decided. It will be for the treaty’s conference of the parties to “decide on the modalities for the sharing of monetary benefits . . . , taking into account the recommendations of the access and benefit-sharing committee [created by the treaty],” with payments made through a special fund.¹³

To protect certain vulnerable areas of the high seas, the treaty details procedures for establishing “area-based management tools, including marine protected areas,” to “[c]onserve and sustainably use areas requiring protection.”¹⁴ Detailed provisions elaborate: how MPAs can be proposed by the parties (how the area meets the criteria identified by the treaty, the conservation and sustainable use objectives, and a management plan outlining the measures and monitoring proposed to achieve the objectives); how proposals will be reviewed (through consultations with a broad range of stakeholders, including: bodies of legal instruments and frameworks; global, regional, subregional, and sectoral bodies; Indigenous peoples and local communities with relevant traditional knowledge; and the scientific community, civil society, and other stakeholders); and how decisions on proposals will be taken by the conference of the parties (by a vote if consensus is unattainable).¹⁵ Parties to the treaty agree to ensure that activities within their jurisdiction or control are conducted consistently with MPAs, and they agree as well to promote measures in other bodies (for example, regional fisheries management organizations) that

⁸ High Seas Treaty, *supra* note 2, Art. 9(a).

⁹ *Id.* Art. 11(4).

¹⁰ *Id.* Art. 11(6).

¹¹ *See id.* Art. 12; *see also id.* Art. 16.

¹² *Id.* Art. 14(1).

¹³ *Id.* Art. 14(7).

¹⁴ *Id.* Art. 17(a)–(b).

¹⁵ *See id.* Arts. 19–23; Annex I.

support MPAs.¹⁶ The agreement's mechanism for creating MPAs was celebrated as a pathway toward achieving the "30×30" target adopted in December 2022 by the Conference of the Parties to Convention on Biological Diversity to conserve and manage at least 30 percent of "terrestrial and inland water areas, and of marine and coastal areas" by 2030.¹⁷

To try to prevent future harm to the high seas, parties also agree to assess "the potential impacts on the marine environment of planned activities [such as marine geoengineering and aquaculture] under their jurisdiction or control that take place in areas beyond national jurisdiction" prior to their authorization.¹⁸ The treaty sets out thresholds and factors for when environmental impact assessments (EIAs) will be conducted and a process for conducting those EIAs.¹⁹ Public notification and consultation in the EIA process, by states and stakeholders, in an inclusive, transparent, and timely manner, are required, with any comments considered and addressed.²⁰ Parties must prepare EIA reports, including specified information.²¹ Draft reports must be shared with the treaty's Scientific and Technical Body (STB) and the STB's comments considered by parties.²² Final reports must be published, including through the Clearing-House Mechanism.²³ Decisions to undertake activities must take "full account . . . of an environmental impact assessment . . . [and will] only be made when, taking into account mitigation or management measures, 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."²⁴ Authorized activities must subsequently be monitored, reported on, and reviewed by the party.²⁵ The STB may consider the monitoring reports and make recommendations.²⁶ It also may consider any concerns raised by other parties, evaluate the concerns raised, and make recommendations to the authorizing party, which must consider them.²⁷ More generally, the STB is required to develop standards or guidelines relating to EIAs for adoption by the Conference of the Parties, including, for example, on the "assessment of impacts . . . and how those impacts should be taken into account in the environmental impact assessment process."²⁸

To ensure that parties, particularly developing states, can implement the treaty and participate in its activities, and to "[e]nable inclusive, equitable and effective cooperation and participation in the activities" under the treaty, particularly the three noted above (MGRs; MPAs; and EIAs), the agreement sets out requirements for cooperation in capacity-building and the transfer of marine technology.²⁹ Possible types of capacity-building and technology

¹⁶ See *id.* Art. 25.

¹⁷ See Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity: Kunming-Montreal Global Biodiversity Framework, Annex, at 9, UN Doc. CBD/COP/DEC/15/4 (Dec. 19, 2022) (Target 3).

¹⁸ High Seas Treaty, *supra* note 2, Art. 28(1).

¹⁹ *Id.* Arts. 30–31.

²⁰ See *id.* Art. 32.

²¹ See *id.* Art. 33(1)–(2).

²² See *id.* Art. 33(3)–(4).

²³ See *id.* Art. 33(5).

²⁴ *Id.* Art. 34(2).

²⁵ See *id.* Arts. 35–36.

²⁶ See *id.* Art. 37(3).

²⁷ See *id.* Art. 37(4).

²⁸ *Id.* Art. 38(1)(c).

²⁹ See *id.* Art. 40(b).

transfer are extensive, and include the “development and strengthening of relevant infrastructure, including equipment and capacity of personnel for its use and maintenance” and the “development and strengthening of institutional capacity and national regulatory frameworks or mechanisms.”³⁰ A Capacity-Building and Transfer of Marine Technology Committee will: assess and review the needs required by developing states; “[r]eview[] the support required, provided and mobilized, as well as gaps in meeting the assessed needs”; “[i]dentify[] and mobiliz[e] funds . . . to develop and implement capacity-building and the transfer of marine technology”; measure performance; and make recommendations.³¹ The treaty establishes a financial mechanism to fund capacity-building projects and assist in the implementation of the agreement.³²

The treaty does not take the place of existing international bodies, such as regional fisheries management organizations (RFMOs) and the International Seabed Authority (ISA); instead, it aims to work with existing organizations and legal frameworks. At its outset, the agreement clarifies that it “shall be interpreted and applied in the context of and in a manner consistent with the [UN] Convention [on the Law of the Sea]” and “in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.”³³ It does, though, create obligations on its parties that are relevant to their membership in those organizations. Thus, for example, parties will be required to use EIAs consistent with the requirements of the High Seas Treaty for deep-sea mining activities authorized by the ISA. Similarly, if an MPA is established that applies to the seabed, any ISA-authorized activities will need to be conducted consistently with the High Seas Treaty. The treaty also may act as a mechanism for the coordination of organizations, such as the International Hydrographic Organization, the International Maritime Organization, and the World Meteorological Organization (in addition to RFMOs), including through consultations to set up MPAs. Throughout the treaty, provisions require the collaboration with, among others, global, regional, subregional, and sectoral bodies. To that end, the agreement stipulates that it should be interpreted to “promote[] coherence and coordination with [the full array of international and regional] instruments, frameworks and bodies.”³⁴

The treaty was praised by the United States, particularly its MPA provisions, which align with the 30×30 commitment made by President Joseph R. Biden, Jr. in the first week of his administration.³⁵ As negotiations concluded, then-Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs Monica Medina tweeted that “Today the world came together to protect the ocean for the benefit of our children and grandchildren.”³⁶ In his statement marking the U.S. signature, Secretary Blinken noted that “[t]he ocean is one global system, and its health is key to the health of our planet. This historic High Seas Treaty creates a coordinated approach to establishing marine protected areas on the high seas, a critical step to conserving ocean biodiversity and reaching the global community’s ‘30×30’ target to

³⁰ *Id.* Art. 44(1); *see also id.*, Annex II.

³¹ *Id.* Art. 45.

³² *See id.* Art. 52.

³³ *Id.* Art. 5(1)–(2).

³⁴ *Id.* Art. 5(2).

³⁵ Exec. Ord. 14,008, Sec. 216, Fed. Reg. 7619, 7627 (Jan. 27, 2021).

³⁶ Monica Medina (@SciDiplomacyUSA), X (Mar. 4, 2023, 10:24 p.m.), at <https://twitter.com/SciDiplomacyUSA/status/1632220549974818818>.

conserve or protect at least 30 percent of the ocean by 2030.”³⁷ The administration has not yet indicated whether it will transmit the treaty to the Senate for its advice and consent to ratification.

INTERNATIONAL ECONOMIC LAW

The United States Accepts the WTO's Fisheries Subsidies Agreement

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In April 2023, the United States accepted the World Trade Organization's (WTO) Agreement on Fisheries Subsidies,¹ the first WTO deal that focuses on environmental issues and just the second agreement reached under the WTO's auspices.² “We are proud to be among the first WTO members to accept this agreement. . . . It will help improve the lives of fishers and workers here in the United States and elsewhere,” remarked U.S. Trade Representative Ambassador Katherine Tai.³ Adopted at the WTO's twelfth ministerial conference in June 2022, the agreement, which establishes three disciplines that prohibit certain forms of fisheries subsidies,⁴ is the result of more than two decades of negotiations.⁵ The world's top five fisheries subsidizers—China, the European Union, Japan, South Korea, and the United States—have already signed on to the agreement,⁶ which will enter into force upon acceptance by two-thirds of the WTO's membership.⁷ Though an important initial step, the agreement is only partial. Negotiations continue on “outstanding issues . . . [to] achieve a comprehensive agreement on fisheries subsidies.”⁸

Governments pay an estimated \$35 billion a year in fisheries subsidies⁹ (defined by the WTO as “financial contributions” by a government or public body that confer a “benefit”).¹⁰ Subsidies drive overfishing by reducing operating costs. The Food and Agriculture

³⁷ Signing of the High Seas Treaty, *supra* note 1.

¹ World Trade Organization Press Release, United States Formally Accepts Agreement on Fisheries Subsidies (Apr. 11, 2023), at https://www.wto.org/english/news_e/news23_e/fish_11apr23_e.htm [<https://perma.cc/75WJ-LNRL>] [hereinafter U.S. Formally Accepts Agreement].

² See World Trade Organization, Agreement on Fisheries Subsidies, at https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm [<https://perma.cc/YSU2-QHMH>]. The first agreement was the Trade Facilitation Agreement.

³ U.S. Formally Accepts Agreement, *supra* note 1.

⁴ See World Trade Organization, Agreement on Fisheries Subsidies, Arts. 3–5, WTO Doc. WT/MIN(22)/33 - WT/L/1144 (2022) [hereinafter Fisheries Subsidies Agreement].

⁵ Office of the United States Trade Representative Press Release, Fact Sheet: WTO Agreement on Fisheries Subsidies (Aug. 2022), at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2022/august/fact-sheet-wto-agreement-fisheries-subsidies> [<https://perma.cc/7U9M-S49Y>].

⁶ See Members Submitting Acceptance of Agreement on Fisheries Subsidies, at https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_acceptances_e.htm.

⁷ Ministerial Decision of 17 June 2022, para. 3, WTO Doc. WT/MIN(22)/33 - WT/L/1144 (2022), at https://www.wto.org/english/news_e/news22_e/wtmin22w22.pdf [hereinafter Ministerial Decision].

⁸ *Id.*, para. 4.

⁹ See Rashid Sumaila et al., *Updated Estimates and Analysis of Global Fisheries Subsidies*, 109 MARINE POL'Y 103695 (2019).

¹⁰ Agreement on Subsidies and Countervailing Measures, Art. 1, at https://www.wto.org/english/docs_e/legal_e/24-scm.pdf [hereinafter SCM Agreement].