



BLOG POST November 10th 2020

Technical but strategic: reflections on the institutional mechanisms of a future High Seas Treaty

Authors

Julien Rochette

Director, Ocean programme

Klaudija Cremers

Senior Research Fellow, International Ocean Governance

Glen Wright

Former IDDRRI Senior Research Fellow, International Ocean Governance

Cyrille Barnerias

European and International Relations Director, OFB, France

Phénia Marras-Ait Razouk

Marine Adviser, Project Engineering for International Cooperation, OFB

 Reading time: 4 min



The negotiations for the development of a legally binding instrument on high seas biodiversity began at the end of 2017 and are currently suspended due to the public health crisis. The negotiations have focused mainly on the substantive issues at stake, but negotiators must also carefully consider the development of the treaty's institutional mechanisms, which will be crucial for ensuring effectiveness.

The process of drafting an international legally binding instrument on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction—more commonly referred to as the “high seas”¹—was initiated by the UN General Assembly towards the end of 2017. Three negotiating sessions, held at UN headquarters in New York, have already taken place. The fourth, intended to finalise the treaty text, was originally scheduled for March 2020, but has been postponed due to the global health crisis. However, under the impetus of certain States, civil society, and the President of the intergovernmental conference, Rena Lee (Singapore), delegations are nevertheless taking advantage of this period to discuss informally and make progress on the content of the text, bringing their positions closer together and creating coalitions.

The negotiations have mainly focused on the four elements of the “Package Deal”, the core elements of the future treaty, namely: (i) marine genetic resources (MGRs), including issues relating to the sharing of benefits linked to their exploitation; (ii) measures such as area-based management tools (ABMTs), including marine protected areas (MPAs); (iii) environmental impact assessments (EIAs); and (iv) capacity building and the transfer of marine technology. The institutional mechanisms of the future agreement—included in the “cross-cutting issues” component—has received little attention, even though appropriate institutional arrangements are a prerequisite for effective implementation.

In this respect, the mandate of the future Conference of the Parties (COP) will be decisive in ensuring the treaty's implementation. For example, the COP should be responsible for adopting guidelines on the key elements of the text, for creating any subsidiary bodies that are deemed necessary, and for adopting the budget. It is therefore essential that the COP is able to take its own decisions without being dependent on other organizations, whether sectoral or regional. Take the example of area-based management tools, particularly MPAs: to avoid deadlocks—and adhere to the obligation to “not undermine” existing bodies²—the COP will not only need the capacity to recognize measures implemented by existing bodies, but also the power to “complement” them through its own decisions and actions. More broadly, the agreement will need to [build on the many existing bodies](#), without leaving the system entirely reliant on them, while at the same time adopting a holistic approach through the mandate given to the COP.

Voting rules within the future COP should also be subject to critical reflection as the negotiations approach their conclusions. As is traditional in UN diplomacy, the search for consensus remains the primary objective. However, recent experience of negotiations within the [Commission for the Conservation of Antarctic Marine Living Resources](#) (CCAMLR), where two countries are hindering the creation of MPAs agreed by the other 22 Parties, demonstrates the importance of leaving open the possibility of majority decisions to avoid deadlocks. At this stage, this option is included in the [preliminary draft treaty](#) (Article 48-3bis), but remains “bracketed”.

Reflection is also required regarding the role of the future Scientific and Technical Body (Article 49) and of the clearing-house mechanism (Article 51), whose functions remain largely undefined at present; funding and application of the agreement, which remains vague in the draft text (Article 52); and the appointment of the secretariat (either from existing organizations or by creating a new body - Article 50).

More generally, it is essential that the negotiators systematically anticipate the necessary conditions for implementing the future agreement. The virtue of an international agreement must no longer be assessed solely in terms of the legal quality of its provisions, but in terms of how well it is implemented in practice. In this respect, the strengthening of [monitoring, control and surveillance systems](#) as well as the creation of an effective and transparent reporting system that open to civil society (and possibly complemented by a compliance committee), are all tools that will need to be carefully considered.

The issue at stake in the current negotiations is often reduced to the opportunity to create MPAs on the high seas. However, the effectiveness of these measures, and more broadly of the future structure as a whole, also depends on the provisions of the future institutional system. While these issues can be highly technical they are also of vital strategic importance. It is therefore time for the delegations to seize this debate and build the institutional mechanisms needed for an effective high seas treaty.

This blog post stems from a discussion held in June 2020 at a meeting of the National Informal High Seas Group. Co-chaired by IDDRI and the French Office for Biodiversity (OFB), this group, which convenes twice a year, brings together various French stakeholders (representatives of ministries, research, private sector and NGOs) with an interest in issues relating to the governance of the high seas.

1 In reality, marine areas beyond national jurisdiction refer to two zone types: the "high seas", i.e. the water column beyond the exclusive economic zones, and the "Area", i.e. the seabed and subsoil beyond the continental shelves.

2 Resolution 72/249, adopted by the UN General Assembly on 24 December 2017 and formally opening the negotiations, expressly states that this process and its result "should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies". This provision has been, and continues to be, the subject of considerable comment and interpretation.

OCEAN

HIGH SEAS

NÉGOCIATIONS INTERNATIONALES OCÉAN