The High Seas Treaty and Shipping

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Content

1. Introduction

This article discusses the relevance and implications of the forthcoming international agreement on the conservation and sustainable use of marine biological diversity beyond national jurisdiction for international shipping (such new agreement hereinafter referred to as the 'Agreement' or 'The High Seas Treaty'[1]). The Agreement has been adopted under the auspices of the United Nations and the UN Convention on the Law of the Sea (UNCLOS).[2]

The living resources and biodiversity of the areas beyond national jurisdiction (ABNJ) are threatened by depletion due to overexploitation, pollution, and climate change. Maritime transport remains central for international trade, as over 80% of the total volume of international trade in goods is carried by sea.[3] In addition to traditional shipping activities, high seas areas are also used by fishing vessels, various special purpose vessels, and warships, as well as floating platforms and installations for research, energy production etc. Furthermore, exploitation of marine genetic resources (MGRs) of the ABNJ and bioprospecting will reportedly have intensified by 2025, as the global marine biotechnology industry pursues a broad range of commercial purposes for the pharmaceutical, biofuel, and chemical industries.[4] Thus, in addition to impact from traditional uses of the high seas for fishing and shipping, the high seas and deep seabed are subject to increasing pressures from novel industrial and economic activities. At the same time, significant gaps remain in the international legal framework applicable to the use and protection of the marine environment and biodiversity of the high seas.

In 2015, the UN General Assembly (UNGA) adopted a Resolution to develop an international legally binding instrument (ILBI) under UNCLOS and to that end to establish a preparatory committee. Following its recommendations, the UNGA decided to convene an intergovernmental conference on the ILBI.[5] The final text of the Agreement was negotiated on 5 March 2023 and adopted on 19 June 2023, to be ratified by States in due course.[6] The Agreement seeks to 'address, in a coherent and cooperative manner, biodiversity loss and degradation of ecosystems of the ocean' and the 'need for the comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction'.[7] Admittedly, shipping is not among those economic activities in the high seas raising the greatest concerns; for example, mining, energy exploitation, waste disposal and commercial fishing were mentioned expressly in the initial report on the need for the ILBI. Shipping may, however, have impacts on marine biodiversity which vary depending on the ecological sensitivity of the

1 The Agreement is also broadly referred to as BBNJ.

2 Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3.

3 UNCTAD, Review of Maritime Transport 2022: Navigating Stormy Waters, <Review of Maritime Transport 2022 | UNCTAD>.

4 See, e.g., Marta Abegon-Novella, 'Negotiating an International Legal Instrument on Biodiversity Beyond National Jurisdiction: A Look Ahead' (2022) 52*Environmental Policy and Law* 21–37;*Paul Oldham, Stephen Hall, Colin Barnes, Catherine Oldham, Mark Cutter, Natasha Burns, Leonie Kindness, Valuing the Deep: Marine Genetic Resources in Areas Beyond National Jurisdiction* (2014) published online (bookdown.org).

5 UNGA Resolution 72/249 of 24 December 2017, International legally binding instrument 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, <Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction | (un.org)>.

6 The negotiations of the Agreement have concluded with the adoption of the final draft agreement (5 March 2023) and the adoption of the Agreement by the UN on 19 June 2023. The Agreement and the Final Statement by the UN Secretary General are available at <Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction | (un.org)>.

7 Ibid., the Preamble and art 2.

area.[8] As discussed further in this article, the scope of the forthcoming instrument is broad and applies to all activities in the ABNJs, including shipping.

While the Agreement has already been extensively discussed in the legal scholarly literature, there are gaps in the understanding of the specific legal implications of this international legal development for shipping. This article begins with a brief presentation of the existing international legal framework governing shipping on the high seas, including the jurisdiction and responsibilities of flag States, the role of the International Maritime Organisation (IMO) as the 'competent international organization' under UNCLOS and its central conventions regulating the environmental safety of ships on the high seas (Section 2). Section 3 presents and discusses selected provisions of the adopted draft Agreement, focusing on the scope of the Agreement and its relationship with the IMO, and on the provisions governing Area-Based Management Tools as defined therein. Section 4 concludes.

8 Working Group on Conservation of Arctic Flora and Fauna (CAFF), AS3: Reducing the effects of shipping on biodiversity (11 October 2018), <AS3: Reducing the effects of shipping on biodiversity - Arctic biodiversity, Conservation of Arctic Flora and Fauna (CAFF)>.

2. The international legal framework governing shipping on the high seas

2.1 The high seas freedoms

UNCLOS Part VII lays down provisions governing the use and protection of the high seas. Article 87(1) provides that '[t]he high seas are open to all States, whether coastal or land-locked' and that the '[f]reedom of the high seas is exercised under the conditions laid down by' UNCLOS and 'by other rules of international law'. The freedoms of the high seas include the freedom of navigation, of overflight, to lay submarine cables and pipelines, and to construct artificial islands and other installations, as well as freedom of fishing, and freedom of scientific research.[9]

The high seas freedoms are not absolute and unconditional. Article 87(2) provides that the high seas freedoms 'shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights' with respect to activities in the Area (Part XI). Seen in light of other UNCLOS provisions, notably Part XII Protection of the marine environment, it is obvious that States exercising freedoms of the high seas may be subject to existing rules of international law not expressly mentioned in Part VII. They may also be subject to post-UNCLOS legal developments, resulting in further conditions being imposed on the high seas' freedoms.

Living marine resources of the water column beyond the EEZ as well as sedentary species beyond the continental shelf or Extended Continental Shelf are regulated by the regime of the high seas.[10] While no State may claim sovereignty over the high seas[11] and the Area,[12] living marine resources of the high seas are considered by some States as being *res communis* (property of the community of States).[13] Since all States are granted equal access to the living resources of the high seas, fish stocks, especially low productivity species, are prone to depletion and the 'tragedy of the commons'.[14] However, by contrast to mineral resources of the Area governed by the principle of the Common Heritage of Mankind (Part XI UNCLOS), the high seas regime does not envisage equitable benefit sharing of marine resources and does not establish any institutional frameworks or bodies to govern the marine resources of the high seas as a common resource.[15]

UNCLOS grants a special role to the "competent international organization", through which States establish "international rules and standards to prevent, reduce and control pollution of the marine environment from vessels" that are necessary to fulfil States' obligations under UNCLOS.[16] The IMO performs these obligations by adopting international conventions and developing non-binding

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9 Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th edition, Manchester University Press 2022), 375, point out that freedoms of the high seas cannot be exhaustively listed, since States cannot control the activities of other States and their vessels on the high seas and new ocean technologies are constantly developing.

10 UNCLOS (n 2) Articles 87 and 116.

11 Ibid., Article 89.

12 Ibid., Article 137.

13 See Tore Henriksen, 'Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations' (2009) 40 *Ocean Development and International Law* 80-96, 86.

14 Margaret E Banyan, 'Tragedy of the Commons' (2020), Encyclopædia Britannica Online; FAO (2009), *Deep-sea Fisheries in the High Seas: Ensuring sustainable use of marine resources and the protection of vulnerable ecosystems*, <FAO Fisheries and Aquaculture Department - Deep-sea Fisheries in the High Seas: Ensuring sustainable use of marine resources and the protection of vulnerable marine ecosystems>.

15 UNCLOS Article 118 imposes a duty on States whose nationals are engaged in high seas fisheries to cooperate for the purposes of management and conservation of stocks.

16 UNCLOS (n 2) Article 211.

recommendations for States within maritime safety and environmental protection. As discussed further, flag States are given the principal responsibility for ensuring the safe conditions and environmentally responsible operation of vessels sailing under their flag.

2.2 Flag State jurisdiction and responsibilities

The flag State is the State which has granted to a ship the right to sail under its flag.[17] Each flag State is obliged to "take such measures for ships flying its flag as are necessary to ensure safety at sea".[18] These measures relate to the safety parameters of the vessel, its navigational systems and the proper qualifications and working conditions of the crew. The flag State is also obliged to conduct obligatory technical surveys of the ship, ensuring both the proper qualifications of the master and crew and the ability of the crew to communicate.[19]

Part XII of UNCLOS deals specifically with States' obligations with respect to the protection of the marine environment. Article 194 prescribes the obligations of all States (including flag States) to protect the marine environment. It says that States must take *all measures necessary to ensure* that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention. According to Article 194(3)(b), these measures must include ones designed to minimise to the fullest possible extent pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation, and manning of vessels.

Further provisions of Part XII lay down rules specifically addressing States' obligations to adopt legislative and enforcement measures to prevent and minimise vessel-source pollution. Article 211 requires States to adopt international measures to regulate and prevent pollution from ships, and flag States are required to adopt anti-pollution measures for ships under their flag which at least have the same effect as that of generally accepted international rules and standards. UNCLOS does not specify the actual discharge standards or other obligations with respect to safety to be observed by vessels, but merely refers to the obligation of flag States to comply with the "international rules and standards" adopted by the 'competent international organization' (IMO). Coastal States may also establish particularly sensitive sea areas in their EEZs for which they may adopt provisions to prevent ship-source pollution, subject to certain conditions and authorisation by the IMO.[20] However, the implementation and compliance responsibility within the designated areas lies with the flag State.

Flag States enjoy exclusive jurisdiction over their ships on the high seas.[21] A few narrow exceptions follow from UNCLOS and, as the case may be, other inter-

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17 Churchill, Lowe & Sander (n 9), 381.

18 UNCLOS (n 2) Art. 94(3).

19 Ibid., Art. 94(4).

20 UNCLOS (n 2) Article 211(6). Further conditions for such areas are provided in Article 211(6) and the IMO's Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (Resolution A.982(24)): The Guidelines set out detailed criteria for the designation of such areas and envisage associated protective measures (APMs) and the procedure. The Guidelines item 6 mentions the following options: Designation of an area as a Special Area or the application of special discharge restrictions to vessels operating in PSSA; the adoption of ship routing and reporting systems near or in the area (including an area to be avoided); and other measures which have an identified legal basis. 'In some circumstances, a proposed PSSA may include a buffer zone, i.e. an area contiguous to the site-specific feature (core area).'

21 UNCLOS (n 2) Article 92(1).

national law.[22] The supremacy of a flag State jurisdiction on the high seas is based on the ancient principle of freedom of navigation, respect for state sovereignty, as well as on the trust that flag States are the best suited to control vessels flying their flag, due to the close link between them and these vessels. At the same time, flag States are required to exercise effective jurisdiction and control over their ships in administrative, technical and social matters. Article 217 requires flag States to take measures to ensure their ships' compliance with requirements for marine environmental protection, and to investigate violations of international shipping safety standards.[23]

Serious concerns about the effective and adequate protection of the high seas have been raised, due to irresponsible practices associated with so-called 'flags of convenience'. UNCLOS provides that flag States determine the conditions for granting their nationality to vessels and does not prescribe conditions for obtaining the flag State's nationality and ship registration requirements, except that "[t]here must exist a genuine link between the State and the ship."[24] In the absence of international obligations or harmonised registration requirements in force,[25] flag States enjoy a nearly unlimited discretion with respect to the conditions for registration of vessels in their domestic registries.[26] States' approaches to registration of ships as well as to the rigour of supervision and enforcement vary greatly. Relaxed registration conditions and supervision in States offering "flags of convenience" contribute to inadequate environmental protection in the international shipping.[27]

2.3 The role and competences of the IMO

The idea of establishing an international organisation to study and develop an international legal order for peaceful uses of the seas "in conformity with the common interests of the international collectivity" first emerged in the inter-war period.[28] The IMO (IMCO at the time) was established in 1948 in accordance with Articles 57 and 63 of the UN Charter of 1948.[29] Thus, the IMO is a UN specialised agency vested with responsibility for the safety and security of shipping and the prevention of marine and air pollution by ships.

The mandate of the IMO is set out in the IMO Convention.[30] One of the central tasks of the IMO is to enable cooperation between States 'in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade', and 'to encourage and facilitate the general adoption of the highest practicable standards in matters concerning

22 Port States and coastal States are granted certain prescriptive and enforcement jurisdiction with regard to foreign ships calling at ports and sailing through their territorial sea and EEZ (UNCLOS Articles 218-220).

23 See also Article 94.

24 Article 91(1). For a more detailed discussion of the genuine link see, e.g., Churchill, Lowe & Sander (n 9), 471.

25 UN Convention on Conditions for Registration of Ships (7 February 1986, 26 ILM 1229, not in force) seeks to ensure and strengthen the genuine link between the ship and its flag State so that the flag State can effectively exercise its jurisdiction and control, <United Nations Convention on Conditions for Registration of Ships 1986 (unctad.org)>.

26 This has been confirmed in international case law, e.g. Saiga (nr 2) (St.Vincent v. Guinea), 120 I.L.R. 143, International Tribunal for the Law of the Sea (ITLOS) 1999, para 82.

27 Churchill, Lowe & Sander (n 9), 471 et seq.; Alan Khee-Jin Tan,*Vessel-Source Marine Pollution. The Law and Politics of International Regulation*, Cambridge University Press, Cambridge, 2006, 47*et seq*.

28 Resolution by the Institute of International Law, Annuaire de l'Institut de Droit International, Vol. 39 (1934) 711-713, cited in Kenneth R. Simmonds,*The International Maritime Organization* (London: Simmonds & Hill Publishing Ltd, 1994), 1.

29 Simmonds, ibid.

30 Convention on the Intergovernmental Maritime Consultative Organization (hereinafter the IMO Convention), Geneva, 6 March 1948, in force 17 March 1958, 289 UNTS 3.

the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.'[31] In addition, the IMO addresses 'any matters concerning shipping and the effect of shipping on the marine environment that may be referred to it by any organ or specialised agency of the United Nations.'[32] These tasks have to a significant extent been accomplished through multilateral instruments of a binding nature.[33]

The IMO's scope of work has evolved remarkably since its early years. After the Torrey Canyon disaster (1967), the task of adopting standards on the prevention and control of marine pollution from ships was expressly incorporated into the IMO's mandate.[34] Since then, the IMO has contributed to the development of general marine environmental protection law, exceeding its initial task of pollution control and encompassing a wider range of rights and duties relating to ocean environment and development activities.[35] The IMO's strategy has changed from reactive to proactive; the problems the IMO addresses today encompass environmental matters, climate change, maritime security, piracy, armed robbery, and ocean governance.[36] The Strategic Plan of the IMO confirms its mission to promote safe, secure, environmentally sound, efficient and sustainable shipping, through cooperation and in light of the 2030 Agenda for Sustainable Development.[37]

This evolution is hardly surprising: the IMO holds the responsibility of being the "competent international organization" under UNCLOS to adopt global shipping standards. As a dynamic, living instrument, UNCLOS also recognises that 'the problems of ocean space are closely interrelated and need to be considered as a whole'.[38] Since the IMO's mission has always been global in scope, it is pertinent for the IMO to adapt its law-developing activities to the dynamic context of the international legal order.

Article 2(b) of the IMO Convention envisages that, among other aspects, the IMO's function is to "[p]rovide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to Governments and to intergovernmental organizations, and convene such conferences as may be neces-

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31 Ibid., Article 1(a).

32 The IMO Convention (n 30), Article 1(d).

33 Aldo Chircop, 'The International Maritime Organization' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott, Tim Stephens (eds),*The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press 2015), 421.

34 Amendments to the Convention on the Inter-Governmental Maritime Consultative Organization, London, 17 November 1977, in force 10 November 1984, UNTS 1984 p 269. See also Chircop (ibid.), 419.

35 Simmonds (n 28), 37; Obinna Okere, 'The Technique of International Maritime Legislation',*The International and Comparative Law Quarterly*, Jul., 1981, Vol. 30, No. 3 (Jul., 1981), 513-536, 524. Malgosia Fitzmaurice and Olufemi Elias,*Contemporary issues in the law of treaties* (Utrecht: Eleven International Publishing, 2005), 90; Julian Roberts, Aldo Chircop and Siân Prior, 'Area-Based Management on the High Seas: Possible Application of the IMO's Particularly Sensitive Sea Area Concept', (2010) 25*Int'l J. Marine & Coastal L.* 483.

36 OECD (2016),*International Regulatory Co-operation: The Role of International Organisations in Fostering Better Rules of Globalisation*, 44, <https://doi.org/10.1787/9 789 264 244 047-en>, <Microsoft Word - IO-CRC.docx (oecd-ilibrary.org)>; Ilker Basaran, 'The Evolution of the International Maritime Organization's Role in Shipping' (2016) 47 J. *Mar.L. & Com.* 101.

37 IMO Resolution A.1149(32), Revised Strategic Plan for the Organization for the Six-Year Period 2018 to 2023, available at <Strategic Plan for the Organization (imo.org)>. On the influence of Sustainable Development Goals on the IMO's agenda see also Rosalie P. Balkin, 'The IMO and Global Ocean Governance: Past, Present, and Future' in David Joseph Attard, Rosalie P. Balkin and Donald W. Greig (eds),*The IMLI Treatise on Global Ocean Governance: Volume III: The IMO and Global Ocean Governance* (Oxford: Oxford University Press, 2018), 2.

38 The Preamble, UNCLOS (n 2); IMO,*Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, 31 January 2007, LEG/MISC.5. See also UNGA, A/Res/66/288, The future we want, <un.org>.

sary."[39] The wording of Article 2(b) indicates that the IMO may draft both binding and non-binding instruments to accomplish its tasks.[40] Other than the requirement that the instrument to be drafted should be 'suitable', the IMO Convention does not clarify the criteria for choosing a particular form for an instrument or for determining whether or not it should be binding. The IMO Convention should be understood in light of the UNCLOS requirement that States must take all *appropriate measures necessary* to prevent, reduce and control pollution of the marine environment and to endeavour to harmonize their policies.[41] In practice, the IMO contribution to the development of the international maritime law consists of 'hard' and 'soft' law norms, where non-binding provisions may eventually lead to the adoption of a binding instrument, the establishment of detailed technical rules and standards or the provision of authoritative interpretations of a convention.[42]

Binding multilateral instruments in the shape of conventions, agreements, protocols and codes have been central to the IMO's input in international maritime law-making. Since its establishment in 1958, the IMO has contributed to the adoption of over fifty treaties (and multiple non-mandatory instruments).[43] The proposing Member States first needs to demonstrate a 'compelling need for a new treaty' to the relevant IMO Committee.[44] The IMO practice indicates that serious matters pertaining to central areas of the IMO's competence will usually be addressed by treaties.

The key treaty regulating ship-source pollution is the International Convention for the prevention of pollution from ships of 1973, as amended in 1978 (hereafter referred to as MARPOL). Although closely linked to UNCLOS, Marpol performs a different function. Its objective is not to address jurisdictional issues, but is instead to specify *how* State jurisdiction should be exercised so as to ensure compliance with safety and anti-pollution regulations.[45] At the same time, obligations under MARPOL and other IMO conventions should be carried out in a manner consistent with UNCLOS.[46]

The IMO may adopt Special Areas under MARPOL Annexes I (oil), II (noxious liquid substances), V (garbage) and VI (SOx emission control areas), where discharges of the respective pollutants are limited or banned.[47] The special areas also extend to parts of the high seas (in the Mediterranean and Antarctica).[48] As

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39 Article 3(b) in the IMO Convention (n 30).

40 The IMO does not have competence to take formally binding decisions for its member States; the power to adopt IMO's instruments and the responsibility to implement and enforce them lies with the member States.

41 Articles 194 and 211.

42 Dorota Lost-Sieminska, 'The International Maritime Organization' in Michael J. Bowman and Dino Kritsiotis,*Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press, 2018).

43 Lost-Sieminska (ibid.). In addition, the IMO updates the major maritime safety conventions, which already existed when the IMO was created, such as SOLAS, OILPOL, Load Lines Convention and COLREG.

44 Dorota Lost-Sieminska, 'Implementation of IMO treaties in domestic legislation: Implementation and enforcement as the key to effectiveness of international treaties' in Justyna Nawrot and Zuzanna Pepłowska-Dąbrowska (eds),*Maritime Safety in Europe: A Comparative Approach* (1st ed., Informa Law from Routledge 2020), 7 <https://doi.org/10.4324/9 781 003 030 775>.

45 IMO (n 38), 8.

46 UNCLOS (n 2) Article 237. In its Article 9, MARPOL also took account of the work on the codification and development of the law of the sea carried out by the United Nations Conference on the Law of the Sea (UNCLOS) at the time of its adoption and it expressly says that it is without prejudice to this work and to "the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction."

47 See also 2013 Guidelines for the Designation of Special Areas under MARPOL, <imo.org>.

48 Jeff Ardron,*Overview of Existing High Seas Spatial Measures and Proposals with Relevance to High Seas Conservation,* as of August 2007, p 22, <ewsebm-01-ardron-en (cbd.int)>.

mentioned earlier, the IMO also approves coastal States' applications under Article 211(6) UNCLOS for the establishment of specially protected sea areas in their EEZs.

MARPOL requires States to give effect to its provisions and related Annexes in order to prevent pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention. Like other IMO conventions, MARPOL is aimed principally at the flag State. Implementation of MARPOL standards is primarily the responsibility of the flag State. Flag States' duty to ensure compliance are generally aimed at technical surveys and issuing certificates,[49] and investigating violations. Persons and entities directly involved with the vessel, such as the shipping company, the master and crew, and classification societies, all play a crucial role in ensuring compliance with the Marpol obligations.

The way in which international treaties are implemented in the domestic legal systems varies from State to State. Universal and uniform acceptance and proper implementation by States of the IMO treaties is a necessary condition for the effectiveness of IMO measures.[50] The IMO itself does not have a mandate to examine the quality of national implementation and to take enforcement measures vis-à-vis its Member States.[51]

2.4 International law gaps in the regulation of shipping on the high seas

A persistent issue is the ineffective monitoring and implementation of IMO commitments by flag States, since implementation and compliance on the high seas is the responsibility of individual flag States. Insufficient implementation of the IMO instruments is mentioned as a serious hindrance to the effectiveness of the IMO's work.[52] In addition, there is reportedly very little information about vessel-source pollution and insufficient follow-up of high seas pollution incidents by flag or port States.[53]

Another continuing issue is the liability and compensation for marine environmental and biodiversity damage on the high seas. Notably, existing agreements on civil liability for vessel-source pollution do not apply to damage caused only on the high seas, where not affecting coastal waters (EEZs and territorial sea).[54]

Special areas under MARPOL are not envisaged for all sources of pollution, but only for oil, noxious liquid substances, sewage, garbage, and SOx emissions, and these cover only negligible sections of the high seas. An issue to which we return in the next section is the absence of marine protected areas and similar area-based management tools on the high seas which would be established on a global basis; preferably, through the IMO as the global shipping organization. Protection of particularly vulnerable marine ecosystems at the regional level (e.g., OSPAR[55]) does not ensure an effective protection from international shipping, due to freedom of navigation enjoyed by ships under the law of the sea.

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49 See Regs 4 and 5-8 of Annex I Marpol. See also Articles 94 and 217 of UNCLOS.

50 See, e.g., Lost-Sieminska (n 44).

51 Lost-Sieminska. However, IMO renders implementation support to member States through the Sub-Committee on Implementation of IMO instruments under the Maritime Safety Committee (MSC) and the Marine Environmental Protection Committee (MEPC).

52 See, e.g., Lost-Sieminska (n 44).

53 Robin M Warner, 'Marine biodiversity beyond national jurisdiction' in Rothwell, Elferink, Scott and Stephens (n 33) 763.

54 See generally, Robert C. Beckman, Millicent McCreath, J Ashley Roach, Zhen Sun,*High seas governance: gaps and challenges* (Brill Nijhoff, 2018).

55 OSPAR Commission – Marine Protected Areas <Marine Protected Areas | OSPAR Commission>.

3. The High Seas Treaty: implications for international shipping

3.1 Introduction

As noted earlier, the forthcoming international agreement on the conservation and sustainable use of marine biological diversity beyond national jurisdiction (hereinafter 'The High Seas Treaty' or 'Agreement') seeks 'to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term.'[56] This is to be accomplished 'through effective implementation of the relevant provisions of the [UNCLOS] and further international cooperation and coordination.'[57]

The High Seas Treaty contains 12 Parts: the Preamble and general provisions (Part I), marine genetic resources, including the fair and equitable sharing of benefits (II), measures such as area-based management tools, including marine protected areas (III), environmental impact assessments (IV), capacity-building and the transfer of marine technology (V). The High Seas Treaty also contains provisions on institutional arrangements (Part VI), financial resources and mechanism (Part VII), Implementation and compliance (VIII), Settlement of disputes (IX), a part on non-Parties (X), Good faith and abuse of rights (XI) and Final provisions (XII). Annex I contains indicative criteria for the identification of areas (for the purposes of ABMT provisions) and Annex II lists types of capacity-building and transfer of marine technology.

The High Seas Treaty may admittedly be criticized for leaving out some important issues pertaining to the protection of marine biodiversity and for relying too much on the existing and future cooperation frameworks. It does not generally seek to establish new substantive obligations for States, but rather strengthens and expands the duty of cooperation, while building on UNCLOS and international environmental law.[58] The adopted text articulates important principles and objectives of States' cooperation in the Preamble and general provisions (Part I), as well as throughout the text. Notably, Article 7 says that Parties 'shall be guided by' several principles and approaches: some of those listed in this provision are 'the polluter-pays principle', the principle of the common heritage of humankind as set out in UNCLOS, freedoms of the high seas, the principle of equity and the fair and equitable sharing of benefits, the precautionary principle or precautionary approach ('as appropriate'), and an ecosystem-based approach.[59]

Importantly, the High Seas Treaty spells out the duty to cooperate, including with regard to marine genetic resources, and exercise due regard to the rights and duties of other States. It contains a number of provisions requiring States Parties to ensure that activity under their jurisdiction or control is carried out in conformity with its provisions.[60]

The High Seas Treaty applies to 'areas beyond national jurisdiction', i.e. the High Seas and the Area.[61] According to UNCLOS Article 86, the High Seas are defined by

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56 Cited in n 6, Article 2.

57 Article 2.

58 However, Treaty also includes 'new' obligations for shipping: e.g., provisions on environmental impact assessment (EIA) may have an effect of expanding flag States' obligations with regard to EIAs. During negotiations, the IMO was critical of including such provisions without exceptions for shipping: see, e.g., <Presentation-informationsessionBBNJ-21-06-19.pptx (live.com)>.

59 The analysis of the legal nature and effect of the principles set out in the Treaty and their implications for shipping are outside the scope of this article.

60 The definition of an 'activity under jurisdiction or control' included in earlier versions (Article 1(2: 'an activity over which a State has effective control or exercises jurisdiction') was deleted from the final version adopted on 5 March 2023.

61 Article 1(2) and Article 3.

way of determining the scope of application of Part VII, which governs 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.'[62] The Area is defined as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction' (Article 1(1) UNCLOS). The Area regime set out in Part XI governs all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules (Article 133), while living resources of the seabed and subsoil beyond the limits of national jurisdiction and living resources of the water column are governed by the High Seas regime.[63]

Does the High Seas Treaty apply to shipping? It does not contain lists of activities to which it applies, so, in principle, it encompasses all activities which may affect marine biological diversity of ABNJs.[64] It was proposed during negotiations to exclude activities undertaken or permitted by States to occur within their national jurisdiction, unless they pose significant risks to the ABNJ. It was also proposed to exclude activities listed in Article 87(1) Freedom of the High Seas, which include navigation.[65] In the end, only a 'usual' exception was included in the Treaty (Article 4) which envisages that it "does not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service." This exception is supplemented by the requirement for States to adopt appropriate measures to ensure that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with the Agreement.[66]

The Treaty lays down procedural and institutional provisions which, in this author's view, may bring about important changes in the functioning and development of the international regime of the high seas. Notably, these provisions raise questions as to their relationship with well-established global frameworks, e.g., the IMO. As discussed further, the High Seas Treaty provisions are indeed relevant for the IMO competences and work. This article focuses on the provisions on area-based management tools (ABMTs) and examines the relationship with the competences vested into the IMO to adopt ABMTs for shipping.

3.2 The IMO and the High Seas Treaty

The Flag State of the vessel involved in shipping or other activities in ABNJ is logically a State holding jurisdiction or control over the (shipping) activity within the meaning of the High Seas Treaty.[67] The environmental safety (and other)

62 Article 86 UNCLOS.

63 It should be noted that States disagree on the legal regime governing the living resources of the Area. Developed countries strongly argue that MGRs are governed by the high seas regime, while developing countries consider that they are already included in the Common Heritage of Mankind principle: Vito De Lucia, 'The Question of the Common Heritage of Mankind and the Negotiations towards a Global Treaty on Marine Biodiversity in Areas beyond National Jurisdiction: No End in Sight?' [2020] 16*McGill J. Sust.Dev. L.* 141, 144-145.

64 However, a certain threshold is indicated with regard to the application of some obligations: see, e.g., Article 30 of Part IV (Environmental impact assessments) requires screening (only) when a planned activity may have more than a minor or transitory effect on the marine environment or the effects of the activity are unknown or poorly understood.

65 See proposal by the International Chamber of Shipping, Textual proposals submitted by delegations by 20 February 2020, for consideration at the fourth session of the Intergovernmental conference (A/CONF.232/2020/3) <textual_proposals_compilation_article-by-article_-_15_april_2020.pdf (un.org)>, 34.

66 This mirrors Article 236 UNCLOS.

67 See also Section 2.2 above.

standards applicable to these vessels may be already governed by the international instruments adopted by the IMO.[68]

Obligations under the High Seas Treaty are directly addressed to the States Parties and not the IMO or other international organizations. However, the Treaty contains provisions relevant to the IMO as the 'competent international organization' under UNCLOS. Some of the issues addressed by the Treaty also fall within the IMO's areas of work, notably with regard to ABMTs. Other issues appear to be in a 'grey zone' as they are regulated in UNCLOS and now also in the Treaty, but have only been addressed on a piecemeal basis in the IMO framework: this is the case with Environmental Impact Assessments (EIAs).[69] In any case, the role of the IMO in the international legal and governance framework to be established by the Treaty is crucial.

Generally, the High Seas Treaty is designed as a framework agreement, which is largely dependent on the existing international and sectoral frameworks and bodies for implementation. Starting from its general objective (Article 2), the Treaty emphasizes the need for the 'effective implementation of the relevant provisions of [UNCLOS]' and to ensure coherence with other existing frameworks through international cooperation and coordination.

During negotiations, it was proposed not to apply the High Seas Treaty to activities "subject to the regulation or supervision of specialized agencies of the United Nations or the programs instituted thereby" and "subject to the regulation or supervision by, or under the jurisdiction of, recognised global, regional, sub-regional or sectoral bodies, agreements, treaties or other binding agreements among States."[70] The proposal was not incorporated into the negotiated text, but shows stakeholders' concern with possible conflicts between the framework (to be) established by the Treaty and the existing organizations.

To resolve possible tensions or conflicts between the measures to be adopted under the Treaty and the existing frameworks and bodies, Article 5 contains provisions on the relationship between the Treaty and UNCLOS, relevant legal instruments and frameworks, and relevant global, regional, sub-regional and sectoral bodies. Firstly, Article 5(1) states that "[t]his Agreement shall be interpreted and applied in the context of and in a manner consistent with the [UNCLOS]". It also adds that 'Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the [UNCLOS], including in respect of the [EEZ] and the continental shelf within and beyond 200 nautical miles.' Thus, shipping on the high seas remains generally governed by the provisions of UNCLOS, including provisions on the freedoms of the high seas set out in Article 87 of UNCLOS. However, as explained earlier, Article 87 envisages that the freedom of the high seas is to be exercised 'under the conditions laid down by [UNCLOS] and by other rules of international law'.[71] While the development of new rules to apply to the high seas is not incompatible as such with UNCLOS, it is important to avoid the adoption and application of provisions in a manner incompatible with globally accepted international frameworks, such as the IMO.

To tackle this issue, Article 5(2) envisages that the Treaty 'shall be interpreted and applied in a manner that *does not undermine* relevant legal instruments and

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68 Some conventions seek to include nearly all types of crafts within their scope, regardless of more specific uses, design and mobility features (eg art 2(7) of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships), while others adopt a more restrictive definition. See also Vaughan Lowe 'Report on the interpretation of the term "ship" in the 1992 Civil Liability Convention (September 2011) written for the IOPC Funds, document IOPC/OCT11/4/4 <https://documentservices.iopcfunds.org/meeting-documents/>.

69 This article excludes analysis of some other IMO-relevant aspects of the High Seas Treaty, such as environmental impact assessments, clearing-house mechanisms, and capacity building and transfer.

70 See n 65 above.

71 UNCLOS (n 2) Article 87(1).

frameworks and relevant global, regional, subregional and sectoral bodies and *that promotes coherence and coordination with* those instruments, frameworks and bodies' (author's italics). This provision contains two important elements. Firstly, it seeks to preclude undermining the existing IMO's instruments.[72]

Secondly, it seeks to promote coherence and coordination with the IMO's instruments. Rather than being a self-standing provision containing substantive rules governing States Parties, Article 4 is, in this author's view, a provision which serves to clarify interpretation approaches of the High Seas Treaty and to prevent conflicts between the measures (to be adopted) under the Agreement and existing rules and principles under UNCLOS and IMO instruments. Thus, it is to be read in conjunction with other provisions of the Treaty, including those governing designation of the area-based management tools discussed further below.

3.3 Area-Based Management Tools and shipping

Part III of the High Seas Treaty is dedicated to area-based management tools (ABMT) for the high seas, including marine protected areas (MPAs). In general, area-based management contributes to implementing an ecosystem-based approach to the oceans by determining and applying feasible conservation and/or management tools in a spatially defined area. Some marine areas may be particularly vulnerable to ship-source pollution,[73] due to their special ecological and biological characteristics: for example, these areas may be habitats to endangered and rare species and may already be subject to pressures from shipping and other economic and recreational activities. Addressing the special needs of such vulnerable and sensitive sea areas both within and outside national jurisdiction is a crucial objective of the ecosystem-based approach to protecting the ocean.

Provisions on ABMT on the high seas are an important contribution by the forthcoming Treaty to the holistic, ecosystem-based approach to protection and use of the ABNJs. The Treaty itself does not establish any measures directly; it invites States Parties to submit proposals on ABMT and establishes decision-making procedures to consider the proposals. Several existing global and regional international legal frameworks already support the ecosystem-based approach by expressly envisaging various types of ABMT,[74] including those covering marine areas.[75] Regional cooperation frameworks (notably, the OSPAR) envisage both MPAs and networks of MPAs as also encompassing parts of the high seas.[76] However, all in all, only a marginal share of the high seas is as of today protected by ABMTs.

Due to the navigational freedoms enjoyed by flag States under the law of the sea, international shipping has always been in a special position compared to other, less mobile, sea-based activities. Regulating or limiting international shipping

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72 See generally Arne Langlet and Alice B.M. Vadrot, 'Not 'undermining' who? Unpacking the emerging BBNJ regime complex' 2023(147)*Marine Policy*, 105372 <https://doi.org/10.1016/j.marpol.2022.105372>.

73 Shipping can produce a number of negative impacts, in form of pollution by substances such as oil, garbage, soot and other atmospheric pollution as well as acoustic pollution (noise), introduction of invasive species with ballast water and bio-fouling, by ship strikes and other wildlife disturbance caused by ships: see n 8.

74 Thus, Convention on Biological Diversity (CBD),Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 69, Article 2 provides for protected areas as geographically defined areas designated or regulated and managed to achieve specific conservation objectives. International Union for Nature Conservation (IUCN) work to establish ABMTs including MPAs, Important Marine Mammal Areas (IMMAs) and Important Bird and Biodiversity Areas (IBAs).

75 Conference of Parties (COP) of CBD (ibid.) has adopted scientific guidance for ecologically and biologically sensitive sea areas (EBSA), as well as scientific guidance for designing representative networks of MPAs. See also Ingvild Ulrikke Jakobsen,*Marine Protected Areas in International Law: an Arctic Perspective* (Leiden: Brill, 2016), 202 < doi 10.1163/9789004324084_015>.

76 OSPAR Commission – Marine Protected Areas <Marine Protected Areas | OSPAR Commission>.

activities beyond the territorial sea limits, through the use of global or regional ABMTs outside the framework of the IMO (or in the absence of coordination with the IMO), is not realistic. As the competent organisation, the IMO may adopt Special Areas and approve coastal States' applications for PSSAs under UNCLOS.[77]

The IMO's competences with regard to ABMTs may, however, have some limitations. Firstly, the IMO's measures are based on a single-sector approach to those areas of the sea which need special protection from shipping impacts. By comparison, MPAs (and MPA networks) adopted under the auspices of OSPAR and other relevant bodies seek to address the full range of activities to be managed or even prohibited there.[78] Admittedly, despite this narrow sectoral approach, the IMO's contribution to the protection of ecologically sensitive sea areas is generally recognised.[79] However, the highest potential would probably be realised if PSSAs were designated together (combined) with more comprehensive ABMTs, in line with the ecosystem-based approach and other principles and approaches promoted by the High Seas Treaty.

Secondly, Article 211(6) and other provisions of UNCLOS are silent on the possibility of adopting specially protected areas beyond the EEZs. However, in the PSSA Guidelines, the IMO considers that it generally has competence to adopt PSSA on the high seas. It is also generally recognised in the literature that such measures would be within the IMO's mandate.[80]

Thirdly, significant gaps exist in the actually adopted IMO's measures for the high seas. Currently, the IMO has not established Particularly Sensitive Sea Areas (PSSAs) for the High Seas. In this author's view, the High Seas Treaty may encourage the further development of shipping-related ABMTs for the high seas under the auspices of the IMO, by promoting and enabling a more comprehensive approach based on the combination of sectoral and area-based measures. The Treaty also encourages individual States Parties to promote their objectives when participating in the decision-making in the IMO.[81] This may speed up the IMO's work on the designation of the ABMT for the high seas, especially due to the provisions requiring States Parties to the High Seas Treaty to promote the adoption of measures within the IMO to support the implementation of the decisions and recommendations made under the High Seas Treaty.[82] As the implementation responsibility within the designated ABMTs lies with the flag State, the Treaty may contribute to better implementation by flag States.[83]

Although it is obvious that the IMO will retain its crucial role in designating ABMT applicable to international shipping activities, several issues arise with regard to the Treaty's impact on IMO's competences and work. It is unclear to what extent the IMO's function of balancing international navigational rights with other interests (notably, marine environmental and biodiversity protection) will remain

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77 See 2.3 above.

78 Roberts, Chircop and Prior (n 35), 498.

79 In its statement at the second intergovernmental conference for negotiations of the High Seas Treaty, the IMO emphasised that the designation of special areas and PSSAshas not been developed or implemented in isolation. The PSSA process draws heavily on the EBSA process and criteria when identifying areas, and there are also strong links and continuous dialogue with the UNESCO World Heritage Centre Marine Programme. Available at<statements-second-session (un.org)>.

80 Roberts, Chircop and Prior (n 35).

81 E.g., Article 8(2) lays down that 'Parties shall endeavour to promote, as appropriate, the objectives of this Agreement when participating in decision-making under other relevant legal instruments, frameworks, or global, regional, subregional or sectoral bodies'.

82 Article 25(4) of Part III 'Measures such as Area-based Management Tools, including Marine Protected Areas'.

83 Article 25(1) requires Parties to 'ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted under this Part.'

unaffected by the Treaty's provisions. International trade and navigation are not among the interests explicitly protected under the ABMT goals set out in the High Seas Treaty.[84]

Furthermore, the High Seas Treaty does not expressly acknowledge the priority of the IMO as the main authority for the designation of ABMT concerning international shipping activities.[85] Proposals regarding ABMTs, including MPAs, are to be submitted by the States Parties, individually or collectively, to the secretariat to be established under the Treaty.[86] Proposals must, among other requirements, contain a description and limits of the area and measures proposed, as well as information on any consultations undertaken with relevant global, regional and sectoral bodies, and information on the already implemented ABMTs. The Scientific and Technical Body[87] reviews the proposals to be adopted by Conference of Parties (COP)[88] and will thus take account of the existing mandates and measures. The IMO (or other bodies) are not given any explicit priority in the submission of the proposals or decision-making. However, provisions on consultations and decision-making with regard to such proposals[89] ensure that the IMO may submit its views on the merits of the proposal before any decision is taken by the COP.

According to Article 22(1), the COP takes decisions on the establishment of the ABMTs, including MPAs, and related measures. It may also take decisions on measures compatible with those adopted by the IMO (or other bodies), acting in cooperation and coordination with it. If the proposed measure is within the competence of the IMO, the COP may recommend to the Parties and the IMO the promotion of the adoption of relevant measures in accordance with their respective mandates.[90] Read in light of Article 4 and 19(2), this means that the COP will seek to avoid encroaching upon the IMO's competences by adopting shipping-related ABMTs for the high seas. Indeed, measures adopted for shipping outside the IMO framework may arguably threaten to undermine the IMO's work.

At the same time, it is debatable to as whether this will be the case, so long as the high seas are not covered by ABMT adopted for shipping under the IMO. Article 19 also does not fully rule out the possibility that proposals on ABMTs applicable to international shipping on the high seas could be established by the COP under Part III of the High Seas Treaty, rather than under auspices of the IMO. All things considered, it would not be effective to open up the way for parallel forums to adopt ABMT for shipping on the high seas. However, the availability of such an option highlights the need for the IMO member States to work more actively towards the establishment of ABMT on the high seas.

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84 Article 17 and indicative criteria listed in Annex I. However, the Preamble of the High Seas Treaty acknowledges generally the importance of balancing the rights, obligations and interests set out in UNCLOS.

85 Articles 19-23.

86 Articles 19 and 50.

87 Articles 20 and 49.

88 Articles 22 and 47.

89 Article 19 and 21.

90 Article 22(1)(c).

4. Conclusions

The discussion in this article shows that the High Seas Treaty will apply to international shipping in the ABNJ. The shipping on the high seas continues to be governed by UNCLOS provisions on the high seas' freedoms and protection of the marine environment. Vessels on the high seas will remain under exclusive jurisdiction of flag States, as regulated by UNCLOS. However, the Treaty will have legal implications for flag States' obligations with regard to their ships, as flag States are those having jurisdiction or control over the activity, i.e. shipping. The Treaty's provisions on EIAs may apply to shipping in the ABNJ (but this has not been analysed in this article).

Further, all States joining the Treaty undertake an obligation to promote its objectives and to implement their obligations with regard to the protection of marine biodiversity of the ABNJ. Indeed, the effectiveness of the Treaty will depend on its effective implementation by flag States. This article shows the crucial role of the IMO as an international organisation for shipping to regulate and improve the high seas' governance. However, shipping cannot be regulated on a purely sectoral basis, i.e. in isolation from other sectors and societal problems and regulatory approaches. The adoption of the High Seas Treaty presents an opportunity for the IMO to contribute to the ocean governance in a fundamentally new way, engaging more actively with other ocean governance frameworks and law-developing bodies. The IMO has significant experience of cooperation with other international organisations with major ocean responsibilities. The IMO may strengthen its position as a pro-active, constructive actor in the ocean governance and support the collective effort of the international community to address concerns caused by depletion of marine biodiversity. This also supports the spirit of UNCLOS, which calls for cooperation between States as a positive duty.

The point at issue for this article is the need to establishing ABMTs applicable to shipping on the high seas, since currently there is a significant gap in IMO's input on ABMTs for the high seas. It is important for the IMO and its member States to strengthen their prospective contribution to ocean governance by moving ahead with high seas' PSSAs and cooperating with other bodies on relevant ABMT for shipping. The High Seas Treaty seeks to enable cooperation and coordination across global and regional bodies and economic sectors.