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The Ghost of Hugo Grotius: The UN High Seas Treaty

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Ever so rarely, the human species can reach accord and agreement on some topic seemingly contentious and divergent. Such occasions tend to be rarer than hen's teeth, but the UN High Seas Treaty was one of them. It took over two decades of agonising, stuttering negotiations to draft an agreement and went someway to suggest that the "common heritage of mankind", a concept pioneered in the 1960s, has retained some force.

Debates about the sea have rarely lost their sting. The Dutch legal scholar **Hugo Grotius**, in his 1609 work *Mare Liberum* (*The Free Sea*), laboured over such concepts as freedom of navigation and trade (*commeandi commercandique libertas*), terms that have come to mean as much assertions of power as affirmations of international legal relations.

The thrust of his argument was directed against the Portuguese claim of exclusive access to the East Indies, but along the way, statements abound about the nature of the sea itself, including its resources. While land could be possessed and transformed by human labour and private use, the transient, ever-changing sea could not. It is a view echoed in the work of John Locke, who called the ocean "that great and still remaining Common of Mankind".

With empires and states tumbling over each other in those historical challenges posed by trade and navigation, thoughts turned to a relevant treaty that would govern the seas.

While there was a general acceptance by the end of the 18th century that states had sovereignty over their territorial sea to the limit of three miles, interest in codifying the laws on oceans was sufficient for the UN International Law Commission to begin work on the subject in 1949.

It was a project that occupied the minds, time and resources of nation states and their officials for decades, eventually yielding the UN Convention on the Law of the Sea. Brought into existence in 1982, it came into effect in 1995. UNCLOS served to define maritime zones, including such concepts as the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, the high sea, the international seabed area and archipelagic waters.

What was missing from the document was a deeper focus on the high sea itself, lying beyond the "exclusive economic zones" of states (200 nautical miles from shore) and, by virtue of that, a regulatory framework regarding protection and use. Over the years, environmental concerns including climate change, biodiversity loss and pollution became paramount. Then came those areas of exploration, exploitation and plunder: marine genetic resources and deep-sea mining.

The High Seas Treaty, in its agreed form reached by delegates of the Intergovernmental Conference on Marine Biodiversity and Areas Beyond National Jurisdiction, retains the object of protecting 30% of the world's oceans by 2030. The goal is in line with the Kunming-Montreal Global Biodiversity Framework (GBF) which was adopted at the conclusion of Biodiversity COP15 in December last year. This, it is at least hoped, will partially address what has been laboriously described as a "biodiversity governance gap", especially as applicable to the high seas. (To date, only 1.2% of the waters in the high seas is the subject of protection.)

The Treaty promises to limit the extent of a number of rapacious activities: fishing, busy shipping lane routes and exploration activities that include that perennially contentious practice of deep-sea mining. As the Jamaica-based International Seabed Authority explained to the BBC, "any future activity in the deep seabed will be subject to strict environmental regulations and oversight to ensure that they are carried out sustainably and responsibly."

Laura Meller of Greenpeace Nordic glowed with optimism at the outcome. "We praise countries for seeking compromises, putting aside differences and delivering a Treaty that will let us protect the oceans, build our resilience to climate change and safeguard the lives and livelihoods of billions of people." There were also cheery statements from the UN **Secretary General António Guterres** about the triumph of multilateralism, and the confident assertion from the Singaporean Conference president **Ambassador Rena Lee**, that the ship had "reached the shore."

The text, however, leaves lingering tensions to simmer. The language, by its insistence on the high seas, suggests the principle of "Freedom of the High Seas" having more truck than the "Common Heritage of Humankind". (The ghost of Grotius lingers.) How the larger powers seek to negotiate this in the context of gains and profits arising out of marine genetic resources, including any mechanism of sharing, will be telling.

The text also lacks a clear definition of fish, fishing and fishing-related activities, very much the outcome of intense lobbying by fishing interests. Given the treaty's link to other instruments, such as the Agreement on Port State Measures, which defines fish as "all species of living marine resources, whether processed or not", the risk of excluding living marine resources from the regulatory mechanism is genuine enough.

Then comes the issue of ratification and implementation. Signatures may be penned, and commitments made, but nation states can be famously lethargic in implementing what they promise and stubborn on points of interpretation. Lethargy and disputatiousness will do little to stem the threat to marine species, complex systems of aquatic ecology, and disappearing island states.

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