

High Hopes for the High Seas: beyond the package deal towards an ambitious treaty

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Cognisant of the growing threats to biodiversity in marine areas beyond national jurisdiction (ABNJ), States at the United Nations are negotiating a treaty to ensure the conservation and sustainable use of this vast global commons. These negotiations provide a unique and timely opportunity to strengthen the management regime for the global ocean, building on the vision of the UN Convention on the Law of the Sea (UNCLOS).

The treaty will cover a 'package deal' of issues: marine genetic resources (MGRs); area-based management tools (ABMTs), including marine protected areas (MPAs); environmental impact assessments (EIAs); and capacity building and technology transfer. In order to be effective, ambitious provisions are needed on each of these elements, including by addressing climate change and ensuring the protection of marine ecosystems. A fair and equitable treaty could further support conservation and sustainable use by strengthening existing management frameworks and providing global oversight, developing capacity, and placing science at the heart of decision making.

KEY MESSAGES

States at the United Nations are currently negotiating a treaty to conserve and sustainably manage marine biodiversity in areas beyond national jurisdiction.

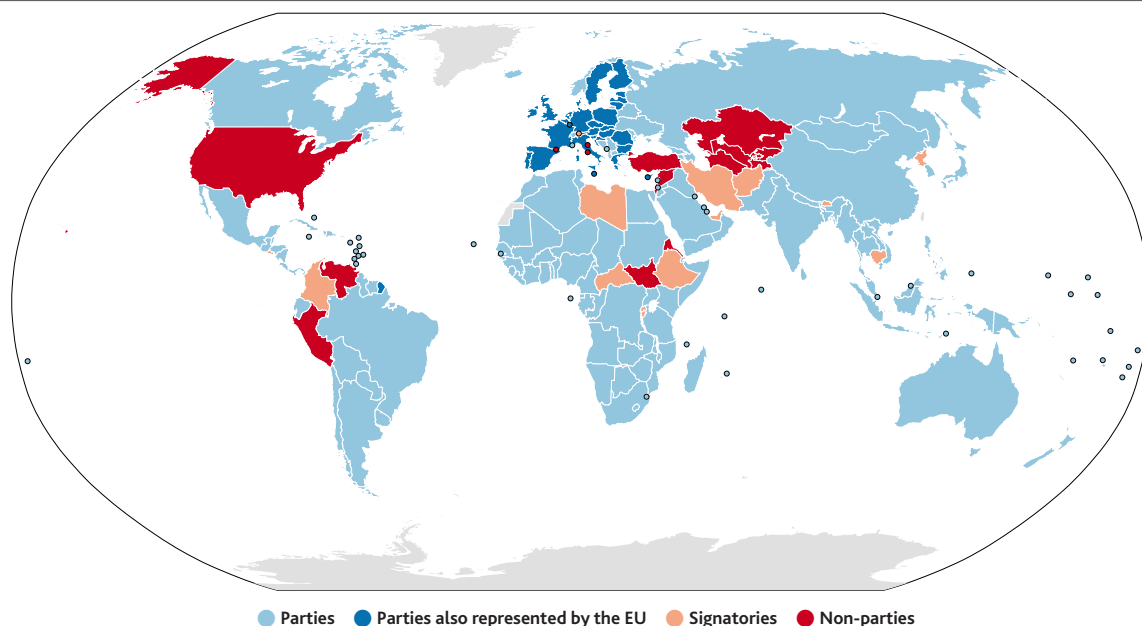
In order to safeguard ocean health, States and stakeholders should cooperate to conclude an ambitious, effective and equitable treaty with strong global oversight.

Negotiations are based on a 'package deal' of issues: marine genetic resources; area-based management tools; environmental impact

assessments; and capacity building and technology transfer. It is crucial that States not only take strong action on these elements, but also include provisions that will future-proof the treaty.

The new treaty can build on the vision of the Law of the Sea Convention to strengthen the existing governance framework, protect marine biodiversity and place cooperation and science at the heart of the management regime for this vast global commons.

FIGURE 1. Parties to UNCLOS



Source: https://upload.wikimedia.org/wikipedia/commons/a/a4/United_Nations_Convention_on_the_Law_of_the_Sea_parties.svg

INTRODUCTION

The deep and distant waters of marine areas beyond national jurisdiction (ABNJ) cover nearly half of the Earth's surface and host a significant portion of its biodiversity. Previously beyond the reach of human activities, recent scientific and technological advancements have enabled us to explore these areas, and a growing human population and its ever-increasing demand for resources is now driving the exploitation of their resources.

Shipping and fishing have intensified and expanded in recent decades. Seabed mining and bioprospecting are developing, and a range of novel activities may be on the horizon¹ (World Ocean Assessment, 2016; Merrie *et al.*, 2014; Ramirez-Llodra *et al.*, 2011). The impacts of these activities on marine ecosystems are being compounded by climate change and ocean acidification (Gattuso *et al.*, 2015; Levin & Le Bris, 2015).

Cognisant of the growing threats to biodiversity in ABNJ and gaps in the current legal framework, an intergovernmental conference (IGC) has been convened to elaborate an international legally binding instrument (ILBI) for the conservation and sustainable use of marine biodiversity beyond national jurisdiction (BBNJ), under the auspices of the United Nations Convention on the Law of the Sea (UNCLOS).

The negotiations focus on a 'package deal' of issues, comprising: marine genetic resources (MGRs); area-based management tools (ABMTs), including marine protected areas (MPAs); environmental impact assessments (EIAs); and capacity building and technology transfer. As the agreement is intended

to address conservation and sustainable use as a whole, this policy brief explores some potential avenues for strengthening the overall framework beyond the package deal elements.

1. ADVANCING THE VISION OF UNCLOS

The United Nations Convention on the Law of the Sea, the "Constitution for the Ocean" (Koh, 1982),² aimed to establish a "legal order for the seas and oceans [to] facilitate international communication, and... promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment".³

The current negotiations provide a unique and timely opportunity to advance the ambitious vision of UNCLOS by strengthening the legal framework for high seas biodiversity. The new agreement should:

- Be based on a set of best-practice governance principles, including the precautionary principle, ecosystem-based management and transparency;
- Stimulate enhanced cooperation and coordination between States, intergovernmental organisations and stakeholders;

¹ E.g. Open ocean aquaculture, ocean cleanup efforts, rocket launches at sea, recovery of shipwrecks, and ocean-based server farms.

² There are currently 168 Parties to UNCLOS and the UN General Assembly has regularly stressed its goal of universal participation in its resolutions on oceans and the law of the sea. A chronological list of ratifications is available at: http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm.

³ UNCLOS, preamble.

- Operationalise existing conservation obligations, e.g. by clarifying and elaborating the duty to cooperate to adopt conservation measures and specifying a process for EIAs;
- Build global ocean science capacity and advance the development and sharing of technologies;
- Ensure fair access and ability to share the benefits of marine resources; and
- Provide strong global oversight to ensure effective conservation and sustainable use of marine biodiversity.

2. PROVIDING GLOBAL OVERSIGHT

The governance framework for ABNJ is often characterised as fragmented, with a wide variety of international instruments and institutions addressing particular sectors or geographic regions. For example, shipping and seabed mining are managed at the global level through the International Maritime Organization (IMO) and the International Seabed Authority (ISA) respectively, while fishing is managed regionally by a myriad of Regional Fisheries Management Organizations (RFMOs).

These bodies are not required to take into account the mandates and management measures of overlapping or neighbouring organizations and there is little cooperation and coordination between them (Wright *et al.*, 2018). While there has been some success in advancing cooperation, the current framework makes it practically impossible to manage cumulative impacts and ensure ecosystem-based management (Wright and Rochette, 2018).⁴ Furthermore, in some regions there are no

⁴ The “Collective Arrangement” between the North-East Atlantic Fisheries Commission (NEAFC), and the OSPAR Commission is frequently cited as an example of effective cooperation, but even here the process has been time-consuming and faces considerable challenges (NEAFC and OSPAR, 2015). While NEAFC can adopt binding fisheries management measures, OSPAR, a Regional Seas organization with an environmental protection mandate, has little power to regulate human activities. In any case, decisions taken within these frameworks apply only to parties to the respective agreements.

competent organizations to regulate human activities or coordinate management (Freestone, 2018).

In order to address these challenges, strong international oversight is required through a treaty that will:

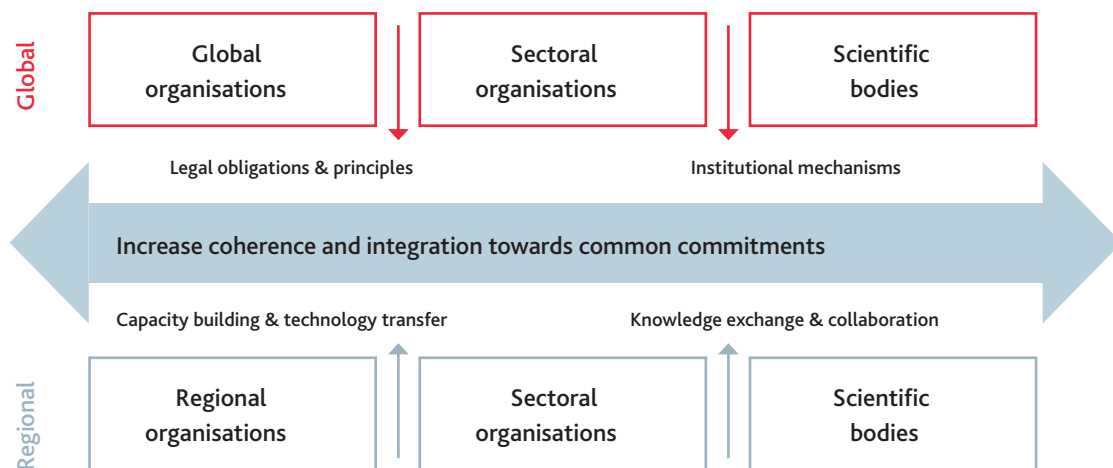
- Empower a global body to make recommendations and take decisions based on a comprehensive, multi-sector, ecosystem view of the marine environment;
- Provide decision-makers with the best available scientific information, for example through a dedicated scientific body and mechanisms for independent scientific review;
- Facilitate the cooperation and coordination between management bodies, including by obliging States Parties to pursue management actions within relevant competent organizations and instruments;
- Bring increased transparency to the governance of the high seas;
- Improve the logistical and funding mechanisms for the collection, aggregation and dissemination of data and knowledge; and
- Promote greater accountability through robust public reporting, compliance and dispute-resolution mechanisms.

3. STRENGTHENING SECTORAL AND REGIONAL GOVERNANCE

Strong regional and sectoral management organisations and cooperative mechanisms could underpin global standards and play a key role in implementation of the new treaty. Many sectoral organisations have developed specialised knowledge and management practices, while regional-level cooperation has long been a cornerstone of international environmental law, allowing parties to account for local circumstances, challenges and needs.

These efforts can offer lessons learned, platforms for scientific data and knowledge exchange, and mechanisms for

FIGURE 2. Increasing coherence and integration through a high seas treaty



Source: Gjerde *et al.*, 2018.

convening States and stakeholders. There is however both a need and opportunity to increase the interplay between the regional, sectoral and global levels of ocean governance. A new treaty could facilitate successful cross-sectoral cooperation by (Gjerde *et al.*, 2018):

- Providing common principles and objectives to help ensure that all organisations with a role in ABNJ are working toward the same overall goals;
- Supporting the efforts of existing institutions, e.g. by enhancing cooperation and coordination, providing advice, collating and communicating information, and formulating recommendations;
- Placing obligations upon parties to implement the treaty both directly and via their participation in competent international organisations; and
- Stimulating renewed political and financial commitment to strengthen existing efforts.

4. ADDRESSING CLIMATE CHANGE

At the Paris climate conference in 2015, world leaders agreed to strengthen the global response to climate change, including by "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5°C".

Some States have included marine components as part of their "nationally determined contributions" (NDCs) to the climate mitigation effort (Gallo *et al.*, 2017), but climate change is a complex problem that demands an urgent and comprehensive response through all governance regimes and at all levels.

It is therefore imperative that climate change is integrated into the treaty through the preamble and guiding principles, as well as throughout the package, e.g.:

- **ABMTs:** Recognizing the role the ocean plays as a carbon sink and protecting this function; using management tools to build resilience and protect species and ecosystems that are particularly vulnerable to climate impacts; taking into account changes in the vertical and horizontal distribution of biodiversity in the design and adaptation stages of ABMTs; and pursuing management measures that account for future climate change.
- **EIAs:** Requiring cumulative impacts to be taken into account, including those from climate change, deoxygenation and ocean acidification; requiring assessments to consider alternatives to the proposed activity; providing stronger standards for particularly sensitive areas.
- **Capacity building and technology transfer:** Recognizing the need to build global scientific capacity to monitor climate change and ocean acidification and institutional capacity to respond in a timely way to its effects.

5. BUILDING A FAIR AND EQUITABLE TREATY

Distribution of the benefits and externalities from activities in ABNJ is highly uneven. Ten developed countries account for 71% of high seas fishing catches (Sumaila *et al.*, 2015) and 98% of the patents on MGRs (Blasiak *et al.*, 2018). At the same time, the interconnected nature of the ocean means that even countries remote from the high seas feel the effects of exploitation (Popova *et al.*, 2019). This is especially concerning for developing countries, whose large coastal populations often depend heavily on healthy marine ecosystems for nutrition, livelihoods and government revenues.

In drafting the treaty, the special requirements of developing countries, including Least Developed Countries (LDCs) and Small Island Developing States (SIDS), should be fully considered, in particular by:

- Clearly linking resource access to technology transfer obligations;
- Setting up a clearing house mechanism to facilitate cooperative and inclusive multi-stakeholder partnerships and broker technology transfer and capacity building;
- Taking into account the position of the majority of States who support the application of the principle of "common heritage of mankind" to MGRs and establishing effective mechanisms for benefit sharing; and
- Providing for the designation of networks of MPAs and other ABMTs that protect biodiversity, are ecologically representative, take into account the connectivity of ocean ecosystems, and safeguard the ecosystem services that support coastal livelihoods.

6. PROTECTING MARINE ECOSYSTEMS

The international community has set a number of targets for marine conservation and MPA coverage⁵ and protection of waters under national jurisdiction is increasing.⁶ A range of priority areas for management and protection have already been identified in ABNJ,⁷ but there is currently no global mechanism

⁵ For example, Aichi biodiversity Target 11: "By 2020, at least 17 per cent of terrestrial and inland water areas and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscape and seascape." See <https://www.cbd.int/sp/targets/rationale/target-11/>.

⁶ The UN notes that as of January 2018, 16 per cent of marine waters under national jurisdiction were covered by protected areas (more than double the 2010 coverage level). See <https://sustainabledevelopment.un.org/sdg14>.

⁷ E.g. Through the Convention for Biological Diversity (CBD) process to describe "ecologically or biologically significant marine areas" (EBSAs) and Vulnerable Marine Ecosystems (VMEs) identified by RFMOs as being at risk from the impacts of bottom fishing.

for the designation of MPAs or other cross-sectoral ABMTs. Several international organisations have a mandate to implement sector-specific ABMTs, though they have made limited use of these tools to date. In any case, such sector-specific ABMTs cannot provide for comprehensive and coherent protection of marine ecosystems.

The new treaty can require States Parties to promote the full use of ABMTs available in existing agreements and enable the designation and implementation of cross-sectoral ABMTs at the global level. This should include fully protected marine reserves that are designed to build resilience and allow threatened marine ecosystems and species to recover. The treaty could also support broader marine spatial planning (MSP) by providing an appropriate framework for gathering scientific knowledge and setting out the basic elements for an MSP process (Wright *et al.*, 2018).

The treaty could provide:

- A clearly identifiable overarching mechanism for integrated policy development and coordination;
- An obligation to establish ABMTs, including MPAs, to achieve the conservation and sustainable use of marine biological diversity in ABNJ;
- A framework for MSP, including defining the triggers for initiating an MSP process, establishing a mandate for cooperation and coordination, and providing oversight and review;
- Mechanisms to ensure that critical scientific knowledge is effectively and systematically communicated and

integrated into policy and management decisions across sectors and geographic regions;

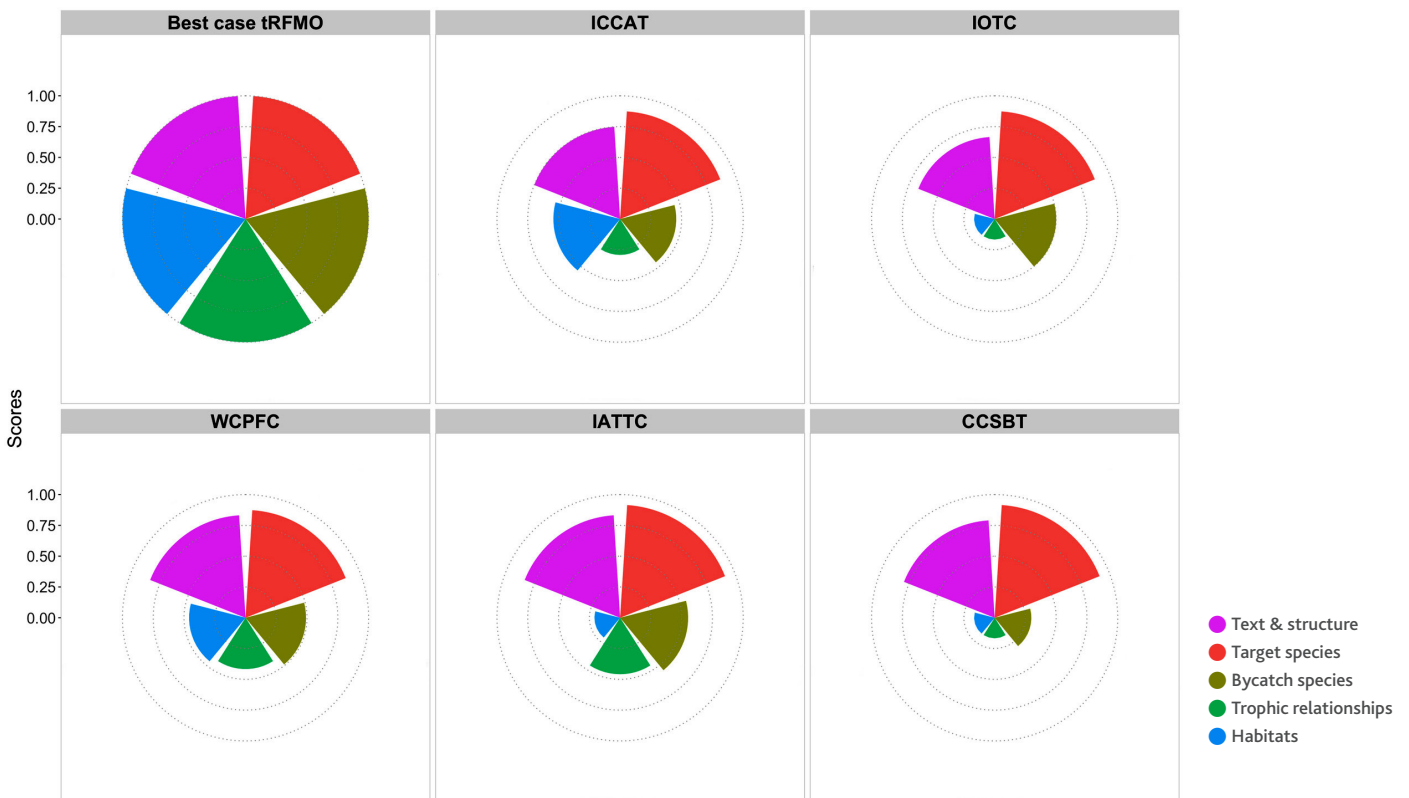
- A shared set of core obligations and principles, e.g. conservation and sustainable use, the precautionary principle, and ecosystem-based management; and
- Operational principles that are essential for good governance, such as transparency, accountability, participation, and efficiency to enable informed decision-making.

7. SUPPORTING EFFECTIVE MANAGEMENT OF HIGH SEAS FISHERIES

High seas fishing can cause significant environmental impacts, not only on target species, but also on non-target species and ecosystems, in both open ocean and deep-sea environments (Clark *et al.*, 2016; Crespo & Dunn, 2017). Fishing activities can also reduce the resilience of these systems to other stressors such as climate change. Fishing effort is growing faster on the high seas than within national jurisdictions and approximately 45% of highly migratory fish stocks are unsustainably fished (compared to 33% globally) (FAO, 2018).

The UN Fish Stocks Agreement (UNFSA) places responsibility for the management of high seas fisheries primarily with RFMOs —consensus-based organizations comprising fishing States. The

FIGURE 3. Progress of tuna RFMOs in implementing an ecosystem-based approach to fisheries management



Source: Juan-Jorda *et al.*, 2018.

UNFSA calls for management of target stocks, associated or dependent species and species belonging to the same ecosystem. However, RFMOs have focussed almost exclusively on management of target stocks (Crespo *et al.*, 2019) and there has been limited implementation of ecosystem-based approaches (Juan-Jordá *et al.*, 2018). Implementation of UN General Assembly resolutions requiring protection of vulnerable marine ecosystems (VMEs) from the impacts of bottom fishing has also been slow and uneven (Gianni *et al.*, 2016; Wright *et al.*, 2015).

The management of high seas fisheries is a significant challenge due to geographic and taxonomic gaps, lack of monitoring, control, surveillance (MCS) and enforcement capabilities, limited data and understanding of the composition and trophic interactions in open ocean and deep-sea ecosystems, and the vertical and horizontal connectivity between them (Ban *et al.*, 2014). All of these factors limit the ability of RFMOs and their member States to implement an ecosystem approach to fisheries management in ABNJ.

A new treaty could:

- Provide mechanisms for increased monitoring and management of non-target species (e.g. bycatch quotas);
- Protect important habitats for commercial fish stocks and associated ecosystems from pollution or other forms of degradation;
- Promote the application of expansion of ABMTs for fisheries, including dynamic management measures;
- Improve the science for ecosystem-based approaches, including by studying the broader biological communities within which target species are found; and
- Strengthen monitoring of vessels in the high seas, including by calling for the use of vessel tracking systems.

8. REINFORCING CAPACITY AND SHARING MARINE TECHNOLOGY

Capacity building and technology transfer play a key role in enabling developing countries to conserve and sustainably use marine resources, meaningfully participate in international fora dealing with ocean affairs, and meet their international obligations to protect the marine environment.

The new treaty could provide an enabling environment for capacity building and technology transfer by:

- Clarifying and strengthening existing standards and obligations;
- Establishing a clearing house mechanism (including, but not limited to, a web-based platform) with clear guiding principles that can catalyse capacity building, technology transfer, and cooperation between different actors;
- Enabling the generation and exchange of information regarding existing capacity, capacity needs and priorities (e.g. through technology needs assessments), and available opportunities (including those offered by global, national, regional and sectoral organisations, as well as non-governmental organisations); and

- Identifying clear institutional responsibilities, including for: assembling information on current needs; undertaking a gap analysis to identify opportunities for enhanced capacity building and technology transfer; promoting international collaboration; and developing financial mechanisms to support capacity development.

9. PUTTING SCIENCE AT THE HEART OF CONSERVATION AND MANAGEMENT

Management of natural resources relies on the collection, analysis and operationalization of data as actionable and accessible scientific knowledge. This workflow, from data collection to knowledge transfer across the science-policy interface, determines what the “best available science” is for any given management or policy decision. Yet our knowledge of ABNJ is limited due to the high cost of sampling such diverse environments and variables at great distances from shore under extreme conditions.⁸

Conservation and sustainable use of marine biodiversity in ABNJ cannot be achieved without better structural support for science (including scientific databases), new avenues of data collection, and improved access to data and usable knowledge. A variety of actors already contribute to this scientific effort (Crespo *et al.*, 2019), and there are huge opportunities for industry to play a more prominent role in data collection and sampling.

Options for improving data availability include:

- Cross-sectoral standards for transparency that increase access to critical data streams (e.g. fisheries observer program data and vessel tracking systems);
- Requirements to submit data to the Ocean Biogeographic Information System (OBIS), e.g. data generated during the EIA process;
- Development of partnerships to deliver more opportunities for ocean observing; and
- Interaction or integration of the Global Ocean Observing System’s Regional Alliances and Regional Seas organizations.

To be useful in management and policy arenas, data must not only be readily available, but it must also be comparable and interoperable. This requires the application of harmonised standards to data collection, storage and analysis. Existing international institutions that address data standards⁹ and provide data exchange mechanisms (e.g. OBIS) should be strengthened and supported. Any scientific body established under a new treaty could provide guidance regarding opportunities and gaps

⁸ Assessments of the Ocean Biogeographic Information System (OBIS) clearly demonstrate how data availability decreases by orders of magnitude with distance from shore and depth (Webb *et al.*, 2010).

⁹ E.g. The Global Ocean Observing System (GOOS) through the development of Essential Ocean Variables.

in the framework for delivering “best available science” and facilitate coordination across regional and sectoral bodies.

10. KEEPING AN EYE ON THE HIGH SEAS

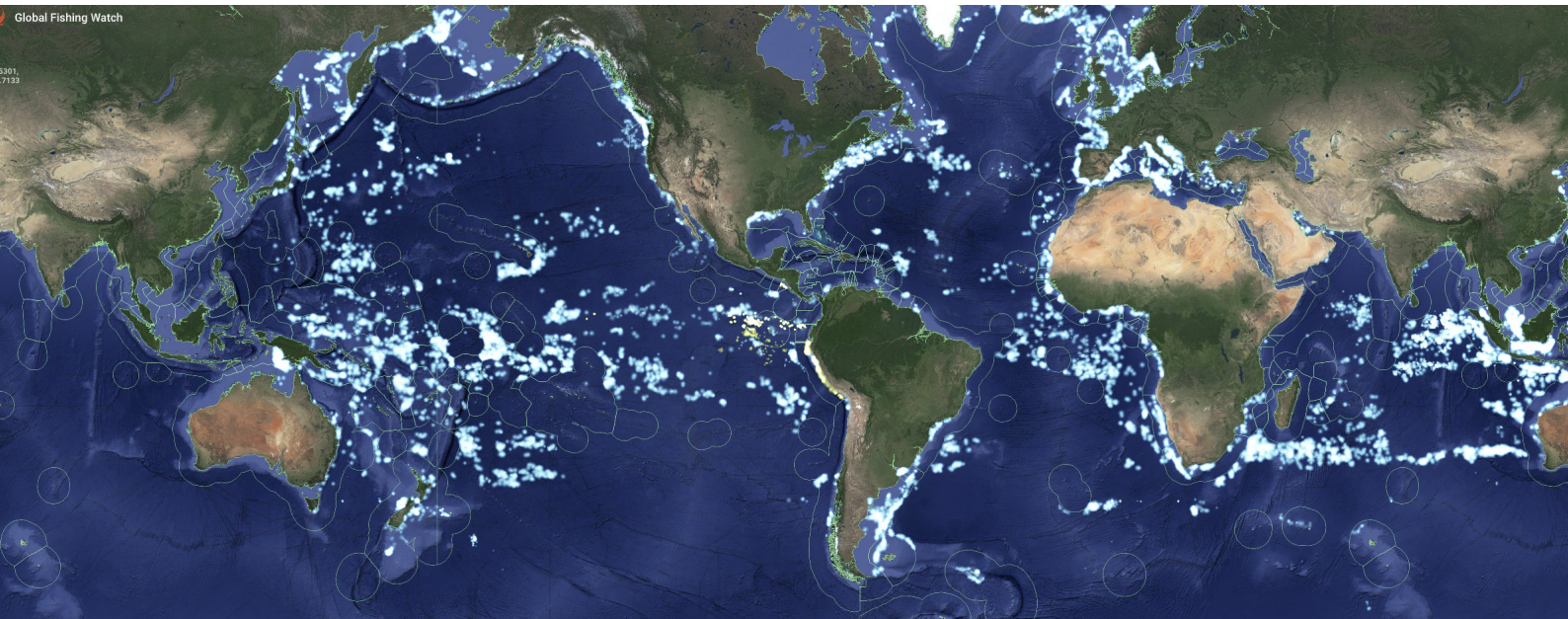
Effective monitoring, control and surveillance (MCS) is critical for the success of marine conservation and management. In addition to traditional MCS mechanisms, such as on-board observers and logbooks, innovative technological tools and monitoring systems are now being developed that are set to revolutionise the way the marine environment is monitored.

Initiatives like Global Fishing Watch are utilising advanced computing techniques and public data sources, such as signals from vessels' Automatic Identification Systems (AIS), to track fishing activity in near real-time. Many States are now contributing proprietary Vessel Monitoring System (VMS) data in an effort to increase transparency and better understand and manage their fisheries resources.¹⁰

The negotiations provide an opportunity to facilitate the development of a more efficient and harmonised system of MCS and raise both the capacity and ambition of States. In particular, the treaty could (Cremers *et al.*, 2019):

- Consolidate and reinforce key MCS principles, such as transparency, cooperation and coordination, and reporting;
- Provide a clearing-house mechanism with a mandate to strengthen MCS, specifying that it shall serve as a platform to share best MCS practices, exchange data on MCS activities, and match capacity-building needs in relation to MCS tools;
- Standardise the application of MCS rules and reporting across RFMOs in order to ensure best practice; and
- Require inclusion of an MCS strategy in ABMT proposals, thereby encouraging consideration of the available technological tools and institutional frameworks that can support effective implementation and compliance.

Global Fishing Watch uses satellite data and advanced computing techniques to shine a light on the high seas fishing fleet.



Source: Global Fishing Watch

¹⁰ Indonesia, Peru, Panama, Costa Rica, Namibia and Chile have made information about their fishing vessels transparent by committing to publish their VMS data via Global Fishing Watch: <https://globalfishingwatch.org/press-release/chile-to-publish-vessel-tracking-data-through-gfw/>. Indonesia and Peru have published data so far.

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