International and Comparative Law Quarterly (2025), **74**, 291–303
doi:10.1017/S002058932510119X

British Institute of International and Comparative Law

FORUM

Negotiating Plastics Futures: The Law of the Sea and the Role of Non-State Stakeholders

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Abstract

This article explores the nexus between the law of the sea and the potential future treaty on plastic pollution, which is currently being negotiated under the auspices of the United Nations (UN) Environment Programme. The potential treaty aims to regulate the full lifecycle of plastics, including in the marine environment. The relevance of the law of the sea regime is fundamental given the highly transboundary nature of already existing legacy plastic pollution in the ocean as well as ocean and land-based sources of plastic pollution. A particular contentious element is the engagement of stakeholders such as industry, academia, Indigenous Peoples and local communities in the development of this treaty. The article will explore possible options for the formulation of the treaty and draws on lessons learnt from the negotiations of the Agreement under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction.

Keywords: non-State actors; UNCLOS; plastics treaty negotiations; participation in decision-making; BBNJ Agreement; plastic pollution

1. Introduction

When addressing the triple planetary crisis of biodiversity loss, climate change and pollution, the word 'transformation' has been raised in relation to legal responses.[1] However, understanding what transformation may mean in this context is a challenge. This is even more evident when one looks at environmental pressures, such as plastic pollution which originates from a broad range of sources and is characterised by shifting impacts, meaning that the source of this pollution is often geographically removed from where it causes impact.

Plastics are synthetic materials in commercial use since the 1950s and have a widespread application including in healthcare, construction, food and transportation.[2]

[1] United Nations (UN) Office of the High Commissioner for Human Rights, 'Report of the Special Rapporteur on the Human Right to a Clean, Healthy and Sustainable Environment' (2 August 2024) UN Doc A/79/270, para 114.

[2] JR Jambeck et al, 'Plastic Waste Inputs from Land into the Ocean' (2015) 347(6223) Science 768.

The regulation of plastic pollution (in the marine environment) finds it origins in the law of the sea, with measures taken in the context of the International Maritime Organisation (IMO) in the 1970s. These measures focused on the regulation of the dumping of wastes and disposal of onboard generated waste, including plastic, into the marine environment through the adoption of the International Convention for the Prevention of Pollution from Ships as well as the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London Convention).[3] However, their scope was limited to addressing the pollution of the marine environment, whereas current efforts are much broader, aiming to regulate the entire lifecycle of plastics, which spans a wide range of global instruments,[4] due to the diversity of sectors and products involved.[5]

Increasingly, the significant environmental impacts of plastics and the chemicals used therein have been the subject of regulatory attention, with negotiations currently underway to develop an international legally binding treaty on plastic pollution, including in the marine environment, under the auspices of the United Nations (UN) Environment Programme (UNEP) (the plastics treaty).[6] It aims to develop a comprehensive approach that addresses the full lifecycle of plastics. Creating a regulatory convergence of a 'regime complex'[7] is seen as one of the central measures to ensure a comprehensive system to protect and preserve the (marine) environment from plastic pollution. A regime complex may be defined as 'functionally overlapping parallel regimes and institutions that are non-hierarchical, but which nevertheless affect one another's sphere of operations'.[8] The negotiation process, which was originally envisaged to be completed by the end of 2024, is still in flux due to the unsettled status of the draft negotiating text of the plastics treaty, and the failure to adopt a treaty in August 2025.[9]

While scholars have already commenced studying relationship between the law of the sea and a potential plastics treaty, the ongoing negotiations seem to reveal more layers of complexity and relations between them.[10] The negotiations towards a plastics

[3] International Convention for the Prevention of Pollution from Ships with Protocol (adopted 17 February 1978, entered into force 2 October 1973) 17 ILM 546; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120.

[4] N Oral, 'From the Plastics Revolution to the Marine Plastics Crisis: A Patchwork of International Law' in R Barnes and R Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenge, Essays in Honour of David Freestone* (Brill Nijhoff 2021) 286.

[5] See further O McIntyre, 'Addressing Marine Plastic Pollution as a "Wicked" Problem of Transnational Environmental Governance' (2020) 25 Environmental Liability 282.

[6] United Nations Environment Program (UNEP), Assembly Resolution 5/14 'End Plastic Pollution: Towards an Internationally Legally Binding Instrument' (2 March 2022) UN Doc UNEP/EA.5/Res.14.

[7] KN Scott, 'Law of the Sea in the "Plasticene"' in EA Kirk et al (eds), *Research Handbook on Plastics Regulation Law, Policy and the Environment* (Edward Elgar 2024) 3.

[8] ibid, referring to KJ Atler and S Meunier, 'The Politics of International Regime Complexity' (2009) 7 Perspectives on Politics 13. See also T Gehring and B Faude, 'The Dynamics of Regime Complexes: Microfoundations and Systemic Effects' (2013) 19 Global Governance 119.

[9] See UNEP, 'Press Release: Talks on Global Plastic Pollution Treaty Adjourn without Consensus' (15 August 2025) <https://www.unep.org/inc-plastic-pollution/media#PressRelease15Aug>.

[10] Van der Marel and Stöfen-O'Brien have outlined and described the relationship between the law of the sea and the potential plastics treaty. Undoubtedly, the law of the sea and any associated measures that may be relevant under the plastics treaty, such as protection of the marine environment from plastic pollution by

treaty have revealed rifts among States concerning how a governance framework for regulating plastics pollution should look. Contentious issues include defining the scope of the new treaty's potential lifecycle approach and the ban of certain plastic products and/or chemicals used therein, among others.[11]

Furthermore, and to stay with the language of plastic regulation, in the 'upstream production' of law, that is, during the treaty-making process, the engagement and involvement of non-State actors (NSAs) has been a critical issue. This relates, among other things, to the involvement and access of scientists and industry as well as Indigenous Peoples and communities to the plastics treaty negotiations, both in terms of substantive and procedural aspects.[12] The UN Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes indicated that there is very little public participation in decision-making relating to plastic pollution and waste management.[13] Some observers have even described the negotiations as being approached in bad faith and marked by conflicts of interest.[14] The negotiations have revealed a specific governance deficit and a lack of solutions from institutions to the rise and strong involvement of NSAs in the process.[15] For example, NSAs have not had full access to the negotiation space due to capacity limitations, and there has been very limited provision of time for observers to make interventions on specific points and generally during the negotiation process.[16]

This article aims to shed light on this emerging dimension as many of the NSAs are crucial in ensuring ownership over, implementation of and compliance with relevant obligations, which lie at the intersection between the law of the sea and plastics regulation. This is, in itself, not an isolated discussion; rather, it is closely aligned to other processes under the law of the sea and also in the broader context of international environmental law. As Oxman points out, '[s]tability in the law is not possible without adaptation to new circumstances'.[17] Undoubtedly, the potential plastics treaty is such a

shipping, dumping or fisheries, and even also waste management in ports or bio-fouling activities, need to be developed in close coordination with the IMO: ER van der Marel and A Stöfen-O'Brien, 'Accommodating a Future Plastics Treaty: The "Plasticity" of the UN Convention on the Law of the Sea' (2024) 39 IJMCL 322.

[11] UNEP, 'Draft Report of the Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment, on the Work of the First Part of Its Fifth Session' (10 February 2025) UN Doc UNEP/PP/INC.5/8, para 85.

[12] R Ralston et al, 'Corporate Interests and the UN Treaty on Plastic Pollution: Neglecting Lessons from the WHO Framework Convention on Tobacco Control' (2023) 402 The Lancet 402.

[13] UNGA, 'Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes' (22 July 2021) UN Doc A/76/207.

[14] Ralston (n 12) 403.

[15] R Tiller et al, 'Standoff at the Four-Way Stop Sign: Late-Night Diplomacy at the Fourth Session of Negotiations (INC-4) on the Global Treaty to End Plastic Pollution' (2024) 6 Journal of Environmental Studies and Sciences 6; J Vince et al, 'The Zero Draft Plastics Treaty: Gaps and Challenges' (2024) 2(24) Cambridge Prisms: Plastics 1.

[16] See Tiller et al (n 15). See, e.g. the concept of floating badges for observers which was limited to two access badges during the second meeting of the INC in Paris from 29 May to 2 June 2023. UNEP, 'Information Note to Participants, Second Session of the Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment (INC-2)' (29 May–2 June 2023).

[17] BH Oxman, 'The Fortieth Anniversary of the United Nations Convention on the Law of the Sea' (2022) 99 ILS 871.

new development, and is considered to be one of the most significant developments for marine environmental protection in the last 30 years.[18] Section 2 introduces the Chair's text of the proposed plastics treaty which serves as a basis for further negotiations, and outlines the relevance of law of the sea considerations. It also addresses which possible NSAs or stakeholders may need to be involved. Section 3 provides an introduction to NSAs in the context of the negotiations and argues that their engagement may have benefits, such as ownership over and legitimacy of any future measures adopted under the plastics treaty. Section 4 reflects on the engagement of NSAs within the recently adopted Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement) and how lessons learnt during its negotiation could inspire the plastics treaty negotiation process.

2. Negotiations towards a plastics treaty and the relevance of the law of the sea

In 2022, UN Member States adopted the United Nations Environment Assembly (UNEA) Resolution 5/14 (UNEA Plastic Resolution) to end plastic pollution and negotiate an international legally binding instrument.[19] Through the UNEA Plastic Resolution, an Intergovernmental Negotiating Committee on Plastic Pollution (INC) was established to develop an international legally binding instrument (ILBI) on plastic pollution, including in the marine environment.

Since the adoption of Resolution 5/14 in 2022, the INC convened six times between November/December 2022 and August 2025.[20] The pathway set out in the UNEA Plastic Resolution aimed for a conclusion of the process after INC 5 in 2024. However, during INC 5, States did not agree on a range of aspects concerning the treaty and a resumed INC 5.2 took place in August 2025 in Geneva, Switzerland, with the aim of adopting a treaty. During INC 5.2, however, no agreement was adopted.

Currently, the basis for the negotiations is the Chair's text published on 1 December 2024.[21] The objective of the potential new treaty is outlined in draft Article 1 and aims to 'protect human health and the environment from plastics pollution, including in the marine environment [based on a comprehensive approach that addresses the full life cycle of plastics]'. The relevance of the United Nations Convention on the Law of the Sea (UNCLOS)[22] in the implementation of the plastics treaty is its framework for regulating

[18] Scott (n 7) 7.

[19] UNEP (n 6).

[20] See UNEP, *Intergovernmental Negotiating Committee on Plastic Pollution* <https://www.unep.org/inc-plastic-pollution>.

[21] UNEP, 'Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment: Chair's Text' (1 December 2024). Following INC 5.2, the Chair's text was updated (see UNEP, 'Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment: Chair's Revised Text Proposal' (15 August 2025)), but no consensus has been achieved on the revised proposal, and it is not clear what the authoritative text will be in future negotiations. This article refers to the original 2024 draft because certain key aspects were omitted from the 2025 revised proposal. For more on this, see UNEP (n 9).

[22] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 14 November 1994) 1833 UNTS 3 (UNCLOS).

plastic pollution in the marine environment. It is beyond doubt that plastic falls under the definition of pollution as outlined in Article 1(4) UNCLOS.[23] Regulating plastic is also subject to the general obligation for all States to protect and preserve the marine environment within and beyond their maritime zones.[24] UNCLOS also outlines general obligations to monitor the risks of pollution[25] and to engage in the exchange of scientific knowledge[26] as well as to provide scientific and technical assistance.[27] These obligations can be seen as duties of due diligence.[28] What this may mean in the context of plastic pollution has been analysed by scholars,[29] who make reference to the evolutionary nature of a due diligence standard in regard to land-based pollution which may make it suitable to adapt to the development of a plastics treaty.[30]

The relevance of UNCLOS as well as other international agreements is highlighted in the preamble of the Chair's text. Furthermore, the text includes several relevant linkages to UNCLOS. These can be found, among others, in the draft provisions on: plastics product design (Article 5); releases and leakages of plastic in the (marine) environment (Article 7); waste management (Article 7); as well as existing pollution (Article 9).[31]

With regard to plastic product design, the 2024 Chair's text envisages in Article 5 that States Parties shall take appropriate measures to 'contribute to sustainable production and consumption of plastics by increasing reuse and recycling of plastics' (Article 5(1)(a)). This is also to be done with the aim of minimising 'releases of plastic, including microplastics, during the product life' (Article 5(1)(a)(iv)). Furthermore, with regard to biodegradable plastic, which may not be suitable for release into the marine environment due to differing standards of what constitutes biodegradability in aquatic environments, the Chair's text also makes reference to fostering research, innovation and the development and use of sustainable and safer alternatives and non-plastics substitutes, which may also include technologies and services based on best available science and, where applicable, traditional knowledge, knowledge of Indigenous Peoples and local communities (Article 5(1)(b)). NSAs which may be relevant in the implementation of these provisions include those in the packaging industry, but also standard bodies

[23] A Stöfen-O'Brien, *The Regulation of Marine Litter in International Law and the European Union* (Nomos 2015) 93–121.

[24] UNCLOS (n 22) arts 192, 193. See, for a comprehensive review, Stöfen-O'Brien (n 23).

[25] UNCLOS (n 22) art 204.

[26] ibid art 200.

[27] ibid art 202.

[28] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion) (ITLOS, 21 May 2024) (Advisory Opinion on *Climate Change*); *South China Sea Arbitration (Republic of the Philippines v Peoples' Republic of China)* PCA Case No 2013-19, Award (12 July 2016) para 944, citing with approval *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion) (ITLOS, 2 April 2015) para 131; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, 79, para 197.

[29] Scott (n 7) 8; Y Tanaka, 'Shared State Responsibility for Land-Based Marine Plastic Pollution' (2023) 12 TEL 250.

[30] It must also be noted that in *Request for an Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* (Advisory Opinion) (ITLOS, 1 February 2011) para 117 it is stated that: '"due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge'.

[31] Chair's text (n 21).

such as the International Organization for Standardization, consumer associations and supermarkets as well as research and development actors.

In the 2024 draft Article 7 on releases and leakages, the Parties are required to take measures to prevent, reduce and, where possible, eliminate: 'releases and leakages of plastics, including microplastics, into the environment and from all sources' (Article 7(1)(a)); 'releases and leakages of plastic pellets, flakes and powders to the environment and aquatic systems, taking into account other relevant international instruments' (Article 7(1)(b)); plastic pollution from fishing activities including, but not limited to, abandoned, lost or otherwise discarded fishing gear in the marine environment, taking into account other relevant multilateral agreements on this subject as well as the needs of artisanal and small-scale fishers' (Article 7(1)(c)). Furthermore, States Parties should 'cooperate in researching leakages and releases of plastics into the environment, including available, affordable and accessible technologies and measures for preventing releases and leakages into the environment' (Article 7(2)). Pursuant to draft Article 7(3), States Parties 'shall promote the use of best available and affordable technologies and environmental practices on preventing releases and leakages of plastics into the environment'. Relevant NSAs at the intersection of the law of the sea and plastics include the fisheries sector, gear producers, ports, vessel owners as well as other maritime industries when it concerns the use of paint or other biofouling measures.

In relation to waste management, the Chair's text makes reference in Article 8(2)(d) to measures to prevent littering, and to prohibit open dumping, open burning and ocean dumping of plastic waste, taking into account internationally agreed rules, as well as measures to prevent and reduce abandoned, lost or otherwise discarded plastic fishing gear (Article 8(2)(f)). Furthermore, the proposed draft treaty identifies existing (or legacy) plastic pollution as a central problem, with a specific article dedicated to this problem (Article 9). Among other things, States Parties are 'to identify, evaluate and monitor locations or accumulation zones most affected by existing plastic pollution within [their] national jurisdiction, and cooperate, as appropriate, with other Parties, relevant international or regional organisations or other stakeholders with respect to existing plastic pollution in areas beyond national jurisdiction' (Article 9(1)(a)). They are also required in Article 9(1)(b) to 'take appropriate removal measures in an environmentally sound manner, including clean-up activities in such identified affected locations or accumulation zones within areas of national jurisdiction and cooperate, as appropriate, to do so in areas beyond national jurisdiction'. Potential NSAs in relation to dumping and clean-up include ship owners, the waste management industry, scientists and operators of clean-up activities, among others. When implementing any activities to address existing pollution, States Parties ought to 'take into account the best available science and relevant technologies, the knowledge of Indigenous Peoples and local and traditional knowledge and practices, as appropriate' (Article 9(2)(b)), as well as 'promote the engagement of Indigenous Peoples, local communities, civil society, scientists and the private sector, and foster the exchange of relevant technologies, experiences and lessons learned' (Article 9(2)(c)).

Although the above provisions are certainly not the final version of the treaty text (as their recent revision shows), they already provide a broader picture of provisions which may be directly relevant to the law of the sea. Admittedly, there are many other

factors, such as the means of implementation, including capacity-building or technology transfer and technological assistance, that may play a role in this. The participation of a range of NSAs in the development and later in the implementation of a potential plastics treaty has been an important topic of the negotiations. The engagement of NSAs is crucial in the development phase, as the specific technical expertise or perspectives, such as those of local communities, industry and Indigenous Peoples, may shape the obligations and scope of the instrument beyond the public sector which is represented by the States negotiating the potential treaty. In the implementation of an eventual treaty, specific maritime actors such as ship owners or ports are also important actors, which will carry the responsibility to interpret and apply these international obligations in a specific regional or local setting.

3. The engagement with NSAs in international law-making

The plastics treaty would, among other things, serve to advance the implementation of the UN's 2030 Agenda for Sustainable Development (Sustainable Development Agenda). The Sustainable Development Agenda places a strong emphasis on NSA engagement in decision-making processes, especially through Sustainable Development Goal 17 on Partnership for the Goals.[32] They are seen as central actors that enable the implementation and, indeed, operationalisation of international law and the policy recommendations set out by the Sustainable Development Agenda. The role of NSAs within the UN system has been subject to scholarly debate and has also been critically addressed in the context of procedural rules about participation in decision-making and meetings.[33] NSAs have a de facto right to participate in international decision-making processes. However, a significant variation exists among international organisations in terms of the extent to which this is actually facilitated through procedural rules.[34] This cannot be equated to decision-making powers but, as Rocha argues, 'private actors [are] somewhere halfway between merely possessing substantive rights and being able to shape the law that confers those rights'.[35]

3.1. NSA engagement in the development of international law: benefits and risks

Benefits of engagement with NSAs may be that they provide relevant information and coordination and reflection on key elements and therefore enhance the social, economic and environmental impacts of measures developed at an international level, enabling them to reflect a wider range of perspectives.[36] Engaging NSAs in the law-making process may also present risks, including conflicts of interest, improper or undue influence or even the potential whitewashing of a NSA's image through the engagement with global

[32] UNGA Res 70/1 (25 September 2015) UN Doc A/RES/70/1.

[33] See, for a general overview, A Boyle and C Chinkin, *The Making of International Law* (OUP 2007) ch 2.

[34] A Peters, 'Membership in the Global Constitutional Community' in J Klabbers et al (eds), *The Constitutionalization of International Law* (OUP 2009) 153, 160.

[35] A Rocha, *Private Actors as Participants in International Law* (Hart 2021) 23.

[36] World Health Organization (WHO), 'Framework of Engagement with Non-State Actors' (28 May 2016) WHO Doc WHA69.10.

processes.[37] In terms of the framework of the plastics treaty, NSAs may play a significant role in the development and implementation of national action plans and will increase ownership over implementation measures, among other things.[38] Research has shown that ownership and effective engagement of NSAs is closely linked to legitimacy of decision-making, including negotiations, which may lead to better compliance.[39]

A specific issue which was raised during the negotiations is that of conflicts of interest and undue influence of certain NSAs in decision-making.[40] Furthermore, some NSAs outlined perceived misconduct and harassment by NSAs which also has been noted by Volker Türk, the UN High Commissioner for Human Rights, who has argued that scientists need an enabling environment and must be protected from attacks, threats, smear campaigns and harassment, and that the development of environmental policy must also be informed by a diversity of voices.[41]

The World Health Organization (WHO) Framework of Engagement of Non-State Actors[42] outlines different means of engagement which may also be useful when developing ideas on the involvement of NSAs in a law of the sea and/or plastics treaty setting. It identifies participation, resources, evidence, advocacy and technical collaboration as NSA interactions in the context of the work of the WHO.[43] The interactions range from attending meetings to providing in-kind or financial contributions for services or goods, to providing evidence for decision-making as well as advocacy, which is understood as creating awareness for a certain issue. Furthermore, NSAs are also engaged in capacity-building, product development and the implementation of WHO policies. This is also pertinent vis-à-vis the plastics treaty regime as these areas of involvement are also subject to discussions, with potential conflicts of interest and issues of accountability and transparency having been raised.[44]

In the context of the plastics treaty, NSAs are engaging in the negotiations and will also engage in the implementation of a potential plastics treaty. Admittedly, this is angled around the specific UNEP framework of engagement with NSAs. In the framework of UNEP, nine major groups are identified as stakeholders: communities; women; farmers; the scientific and technical community; children and youth; Indigenous Peoples and their communities; workers and trade unions; business and

[37] ibid para 7(a)–(b), (g).

[38] I Papanicolopulu and A Rocha, 'Oceans, Climate Change and Non State Actors' in J McDonald et al, *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar 2020) 193, 197.

[39] EA Kirk, 'The Role of Non-State Actors in Treaty Regimes for the Protection of Marine Biodiversity' in M Bowman et al (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar 2016) 95, 122.

[40] S Laville, 'Plastics Lobbyists Make Up Biggest Group at Vital UN Treaty Talks' *The Guardian* (27 November 2024) <https://www.theguardian.com/environment/2024/nov/27/plastic-lobbyists-biggest-group-un-treaty-talks-busan-korea>.

[41] V Türk, 'Protect the "Right to Science" for People and the Planet' (2023) 623 Nature 6. See also P Villarubia-Gómez, 'The Bumpy Road towards a Plastic Treaty' (Stockholm Resilience Centre, 10 November 2023).

[42] WHO (n 36).

[43] ibid.

[44] P Dauvergne, JI Allan and S Beaudoin, 'Competing Axes of Power in the Global Plastics Treaty: Understanding the Politics of Progress and Setbacks in Negotiating a High-Ambition Agreement' (2025) 181 Marine Policy 106820.

industry; non-governmental organisations; and local authorities.[45] The methods of engagement with these stakeholders include: access to information, expert input and advice, as well as funding for their engagement at UNEP, which ought to be guided by a code of conduct. During the INC meetings, there was a dedicated space within the negotiation venue for observers who had to be registered under any of the nine major groups. However, difficulties arose due to limited venue space, a limited number of available observer spaces, and also the convening of closed meetings, most crucially during INC 5.1 in the Republic of Korea where, for large parts of the meeting, the negotiations were closed to all observers.[46] Furthermore, scientists from publicly-funded universities do not have the right to register directly. The reasoning behind this is that these universities would, in essence, represent the States from which they receive their funding. Consequently, observers can only register if they are associated with an intergovernmental organisation, UN Entity, non-governmental organisation or industry.[47]

3.2. Meaningful engagement and participation of NSAs in law of the sea: relevant obligations in the potential plastics treaty

Rocha argues that the study and understanding of NSAs in law of the sea is 'a curious case' because the research is deeply embedded in a State-centred conception of international law.[48] Indeed, private actors occupy a space so small in international negotiations that it may be compared to a small rock or island, according to Papanicolopulu.[49] As was highlighted during the plastics treaty negotiations, the transboundary nature of plastic pollution necessitates a response that is based on a harmonised approach to the benefit of a shared ocean.[50] Whereas these remarks were made in the context of plastic pollution, they recall the essence of the notion of the law of our common ocean. At its core, it envisages that the global community has shared common values and interests, which include the protection of the marine environment.[51] Tanaka highlights that this also entails the engagement of NSAs in the protection of these common interests.[52] However, the ever-changing balance between the approach of a shared ocean or an ocean which is used for economic gain and benefit, for example,[53] may require change over time. It may be argued that both have a purpose in the function of the law of the sea, which may range from ensuring enforcement to creating incentives and capacity-building or technology assistance.[54]

[45] UNEP, 'Handbook for Stakeholder Engagement at the United Nations Environment Programme' (Nongovernmental Liaison Service, 2020).

[46] UNEP (n 11) para 69.

[47] UNEP, 'Intergovernmental Negotiating Committee to Develop an International Legally Binding Instrument on Plastic Pollution, including in the Marine Environment: Observers' Engagement Guide' (undated) <https://www.unep.org/inc-plastic-pollution/observers>.

[48] Rocha (n 35) 2.

[49] I Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons?' (2012) 27 IJMCL 868.

[50] UNEP (n 11) para 12.

[51] B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 RACDI 235.

[52] T Yoshifumi, *The International Law of the Sea* (CUP 2023) 7.

[53] ibid.

[54] Van der Marel and Stöfen-O'Brien (n 10).

The provisions of a potential plastics treaty outlined in Section 2 will be part of a range of obligations that aim to safeguard a shared interest in a common ocean whose protection and conservation may serve all countries. This shared interest and vision may not only be State-driven but, as outlined in this section, may also include other actors which play an important role in developing and, indeed, implementing these measures. This is in line with the understanding that 'the systematic relationship of humanity to the sea is not merely a legal relationship of property but rather a social relationship of participation' and 'that the management of the relationship of humanity to the sea is socially and legally accountable'.[55]

Concretely, for the law of the sea, this means finding approaches that include a sort of pluralism of values and ideas, both in the upstream development of legal norms as well as downstream in the implementation and enforcement of these obligations.[56] This has to be done in a framework that is largely State-driven with strong power structures in which formal decision-making prevails.[57] According to Rocha, UNCLOS provides for participation of private actors as rights holders in the context of the rights of exploration and exploitation of resources in the Area (that is, the seabed, ocean floor and subsoil thereof in areas beyond national jurisdiction (ABNJ)) or the property rights over these resources.[58] Notwithstanding this, the limited inclusion of NSAs within the law of the sea has resulted in their 'meagre procedural relevance'.[59] This, however, is regime-dependent, as the engagement of private actors varies across regimes. An example of this is the International Seabed Authority's (ISA) approach to engagement with NSAs. The ISA engages with NSAs, including private companies that sponsor deep-sea mining activities.[60] This engagement encompasses the submission of plans for mineral exploitation, the regulation of mining and contributions to scientific understanding, among other things.[61]

During the negotiations for the BBNJ Agreement,[62] the engagement of NSAs was discussed and was also raised in scholarship.[63] The BBNJ Agreement was adopted

[55] P Allott, 'Mare Nostrum: A New International Law of the Sea' (1992) 86 AJIL 764.

[56] As outlined by Rocha (n 35) 6.

[57] K Scott, 'The LOSC: A "Constitution for the Oceans" in the Anthropocene?' (2023) 41 AustYBIL 1.

[58] UNCLOS (n 22) art 137(3). Rocha (n 35) 5.

[59] Rocha (n 35) 6.

[60] K Willaert, 'The Enterprise: State of Affairs, Challenges and Way Forward' (2021) 131 Marine Policy 104590.

[61] This may be with contractors or other NSAs. See International Seabed Authority, 'Enforcement and Liability Challenges for Environmental Regulation of Deep Seabed Mining' (Discussion Paper No 4, June 2016) 7, 8 <https://isa.org.jm/publications/enforcement-and-liability-challenges-for-environmental-regulation-of-deep-seabed-mining-04-2016/>.

[62] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (adopted 19 June 2023, not yet in force) (BBNJ Agreement). The BBNJ Agreement will enter into force on 17 January 2026.

[63] R Albar, 'Common Heritage of Mankind at the Expense of Indigenous Peoples' Rights: BBNJ Treaty and Beyond' (2023) HarvHumRtsJ (online) <https://journals.law.harvard.edu/hrj/2023/10/common-heritage-of-mankind-at-the-expense-of-indigenous-peoples-rights-bbnj-treaty-and-beyond/>; E Morgera et al, 'Participation at BBNJ Negotiations Matters' (*One Ocean Hub*, April 11 2022) <https://oneoceanhub.org/participation-at-bbnj-negotiations-matters/>; VS Radovich, 'Indigenous Peoples and Local Communities' Participation Provisions in Negotiations on Conservation of Marine Areas beyond National Jurisdiction' in B Peters and EJ Lohse (eds), *Sustainability through Participation?* (Brill 2023) 406; C Verdon, 'The Participation

in 2023 and aims to address threats to marine biodiversity in ABNJ by establishing a governing framework for the regulation and management thereof.[64] The BBNJ Agreement identifies key stakeholders in the context of the Area-Based Management Tools (ABMT) regime, which include: Indigenous Peoples; local communities; civil society; the scientific community; and the private sector.[65] According to Article 19(2) BBNJ Agreement, States shall consult and cooperate with relevant stakeholders on proposals for ABMT.

Verdon notes that even though the BBNJ Agreement includes a 'quantitative inclusiveness' in outlining key stakeholders, it fails to acknowledge that certain stakeholders are rights holders.[66] In this regard, it is argued that the treatment of Indigenous Peoples is symbolic of a common trait in several instruments relating to ABMT in that 'NSA participation is sought primarily for knowledge, efficiency, and compliance reasons, and not to increase legitimacy or fulfil participation rights inherent to certain actors'.[67] Currently, the revision and review of any ABMT would be done by the Scientific and Technical Body.[68] According to Article 49 BBNJ Agreement, the members of the Scientific and Technical Body shall be nominated by States Parties and elected by the Conference of the Parties (COP). In this procedure, the States Parties take into account the need for multidisciplinary expertise, including relevant scientific and technical expertise as well as expertise in relevant traditional knowledge of Indigenous Peoples and local communities, gender balance and equitable geographical representation.

Research has shown that, in some fora, representatives from NSAs make up a major share of participants, such as industry representation in certain regional fisheries management organisations.[69] Furthermore, due to financial and logistics constraints, the geographical diversity of NSAs is in some fora also limited to representatives from certain regions.[70] This all provides for an opportunity to reflect on whether the plastics treaty text and any annex that may be negotiated, should also make explicit reference to stakeholders or even rights holders, including gender and regional representation.

According to draft Article 20 of the 2024 Chair's text, a subsidiary body or bodies to provide scientific and technical information and assessments on plastic pollution to support informed decision-making by the COP shall be established during the first meeting of the COP. Furthermore, the COP shall decide on the terms of reference,

of Non-State Actors in the BBNJ Agreement's Area-Based Management Tools Regime: Successes and Roadblocks' (2024) 47 FordhamILJ 243.

[64] E Mendenhall, 'Regional Coalitions at the "Biodiversity Beyond National Jurisdiction" Negotiations' (2023) Oceans 1; K Hassanali, *Negotiating the BBNJ Agreement: Exploring the Caribbean Community's Engagement from a Blue Economy Perspective with Special Focus on Environmental Impact Assessment Provisions* (PhD Dissertation, World Maritime University, 2022).

[65] BBNJ Agreement (n 62) art 19(2). See also Verdon (n 63) 243.

[66] Verdon (n 63) 290.

[67] ibid 292.

[68] See BBNJ Agreement (n 62) art 26(3)–(5).

[69] MT Petersson et al, 'Patterns and Trends in Non-State Actor Participation in Regional Fisheries Management Organizations' (2019) 104 Marine Policy 146.

[70] ibid 149–50.

composition, organisation and operation of such a body. Therefore, lessons learnt from the BBNJ Agreement could be used to inform the development of a body that provides scientific and technical information and assessment.

Research has shown that, in the assessment of scientific and technical advice, the exact nature of the body of knowledge may also provide structural disadvantages.[71] Specifically, certain sources of information or assessments are not documented in the form of peer-reviewed articles, which form the backbone of certain global assessments.[72] These may therefore disadvantage certain types of knowledge provided by specific NSAs, such as local communities or Indigenous Peoples. Their knowledge may, in the best case, be documented in informal sources of literature, such as grey literature, and may potentially lack accountability and verifiability.[73] Alternative models used by a subsidiary body may need to include participation and equal access for all, especially marginalised groups, including their sources of information and knowledge that may not fit the regular cast of the provision of knowledge.

Thinking ahead and assuming a broader perspective, the potential successful adoption and ratification of a global plastics treaty may also depend on the access regimes and standing of NSAs on matters at the intersection of the law of the sea and the plastics treaty. In terms of enforcement, only States and currently the European Union may appear before the International Tribunal for the Law of the Sea (ITLOS), and UNCLOS does not provide *locus standi* for private actors.[74] However, there seems to be a shift towards allowing amicus curiae briefs by NSAs, which appears to be opening the door in international courts and tribunals including ITLOS.[75] Furthermore, exploring the human rights perspective within the law of the sea may also be an important future research trajectory, also within the context of plastic pollution. In its Advisory Opinion on *Climate Change and International Law*, which was handed down in 2024, ITLOS noted that 'climate change represents an existentialist threat and raises human rights concern',[76] but did not elaborate further. This reference also resonates with approaches

[71] A Stöfen-O'Brien and R Graham, 'The Establishment of Science-Policy Interfaces for the Global Plastics Treaty: Reflections on Small Island Developing States' Perspectives' (2024) 39 IJMCL 3.

[72] JP Tennant and T Ross-Hellauer, 'The Limitations to Our Understanding of Peer Review' (2020) 5 Research Integrity and Peer Review 6.

[73] G González-Alcaide et al, 'How Scientific Papers Mention Grey Literature: A Scientometric Study' (2019) 12 Current Contents 44.

[74] TM Ndiaye, 'Human Rights at Sea and the Law of the Sea' (2019) 10 Beijing Law Review 261, 262. However, the Seabed Dispute Settlement Chamber is open to individuals, providing specific conditions are met.

[75] M Tignino, and R Prado, 'The Role of Amicus Curiae in the ITLOS Advisory Opinion' (2024) 13 ESIL Reflection 4. ITLOS is open to States Parties to UNCLOS ((n 22) art 20(1) annex VI). According to art 1(2) UNCLOS, States Parties means 'States which have consented to be bound by this Convention and for which this Convention is in force'. According to art 305 UNCLOS, States and other entities (international organisations and certain self-governing associated States and territories) may become Party to UNCLOS. Art 1 annex IX UNCLOS outlines a rather restrictive definition of international organisation. Accordingly, it means an organisation 'constituted by States to which its member States have transferred competence over matters governed by the Convention, including the competence to enter into treaties in respect of those matters'.

[76] Advisory Opinion on *Climate Change* (n 28) para 66.

supported within the current plastics treaty negotiations, which also have strong references to human rights-based approaches.[77]

4. Conclusion

The current negotiations towards a global plastics treaty commenced, in essence, to address existing plastic pollution in the marine environment. Whereas the overall framing is that of addressing plastics throughout the full lifecycle, the intersection with the law of the sea obligations is central to the draft treaty. This relates, among other things, to sea-based sources of plastic pollution, as well as waste management in ports and existing or legacy pollution in the marine environment. The contentious issues during the negotiations have ranged from procedural aspects relating to voting rights, the understanding of what the full lifecycle of plastics includes, as well as the engagement and participation of NSAs in the negotiations and future implementation, as outlined in Section 3. The engagement of certain NSAs as observers or members of delegations has been seen to unduly influence decision-making by vested interests of industry groups, for example.

The BBNJ Agreement and its reference to the list of stakeholders within the context of ABMT who shall be consulted in this process may be an important reference point for the current plastics treaty negotiations. Since the plastics treaty is developed in the context of UNEP, the nine major groups could be listed or certain stakeholders could be spelled out either within the treaty text or in any annexes. An additional layer would be to specify what such a consultation mechanism should look like.

Furthermore, the plastics treaty may serve as an opportunity to revisit the interpretation of Part XII UNCLOS in relation to any measures which aim to protect and conserve the marine environment. This could, for example, expand the understanding of current definitions and concepts in relation to plastic pollution. This also includes further attention to the human rights dimension of plastic pollution and the law of the sea. It is argued that NSAs, in particular Indigenous Peoples and local communities, can help to provide a broader and systematic understanding of the impacts of pollution.

It is hoped that through consideration of management of environmental issues in law of the sea, and particularly in the BBNJ Agreement, the members of the INC, including observers, may move to a manner and approach in which the urgency and shared concern of the impacts of plastics as well as the triple planetary crisis is understood.

Acknowledgments. The author would also like to acknowledge the generous funding by The Nippon Foundation of the World Maritime University (WMU)–Sasakawa Global Ocean Institute as well as for The Nippon Foundation & WMU-Sasakawa Global Ocean Institute's Future Ocean Programme.

[77] N O'Meara, 'Human Rights and the Global Plastics Treaty to Protect Health, Ocean Ecosystems and Our Climate' (2023) 38 IJMCL 3.

Cite this article: A Stöfen-O'Brien, 'Negotiating Plastics Futures: The Law of the Sea and the Role of Non-State Stakeholders' (2025) 74(Supp) ICLQ 291–303. https://doi.org/10.1017/S002058932510119X