Marine Policy 108 (2019) 103664

Contents lists available at ScienceDirect

Marine Policy

journal homepage: www.elsevier.com/locate/marpol

A soft treaty, hard to reach: The second inter-governmental conference for biodiversity beyond national jurisdiction

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ARTICLE INFO

Keywords:
UNCLOS
BBNJ
High seas
Marine genetic resources
MPAs
Environmental impact assessment

ABSTRACT

The United Nations is halfway through the scheduled negotiations for a new legally binding instrument to govern biodiversity beyond national jurisdiction (BBNJ). This paper discusses the results of the second inter-governmental BBNJ conference, which took place March 25 - April 5, 2019, and analyzes the trends, variables, and obstacles shaping the emerging agreement. The paper considers the discussion surrounding each of the four elements of the BBNJ agenda in turn: area based management tools including marine protected areas, environmental impact assessments, marine genetic resources and access and benefit sharing, and capacity building and technology transfer. At the second session of negotiations, progress towards consensus on the four major elements of the BBNJ package was limited and uneven. Drawing on close observations, interviews with a variety of participants, and document analysis, we conclude that the dictum that the new BBNJ agreement "should not undermine" existing elements of the ocean governance regime serves to inhibit movement towards a consensual and effective instrument.

1. Introduction

The negative environmental trends in the ocean are no secret, and reminders pervade popular and social media [1]. But while many people understand on a basic level that humans need to protect the ocean, it is not entirely clear how this can or should be achieved. There is significant uncertainty about the long term effects of, *inter alia*. marine litter, ocean acidification, sea level rise, and changes to thermohaline circulation, or the ocean's 'biological pump' [2–7]. Uncertainty is coupled with increased resource exploitation, and unknown opportunities in unexplored and under-explored areas beyond national jurisdiction (ABNJ) [8]. This situation of challenges, opportunities, and uncertainties in the global ocean drove the move towards a new treaty to address biodiversity in ABNJ, which is currently governed by a fragmented system that includes regional fisheries management organizations (RFMOs), Regional Seas Programmes, and global and sectoral organizations. Including other forms of global governance, there are more than 190 multi- and bilateral agreements in place for this vast area of the globe [9]. These management schemes collectively cover almost all parts of ABNJ, and although they represent a significant investment in rule-making, they are insufficient to protect and conserve marine biodiversity in ABNJ. The main regime for this area ultimately reflects the overarching "freedom of the seas" principle enshrined in centuries of customary international law and the United Nations Convention on the Law of the Sea (UNCLOS). The overall result is a complex, loosely coordinated, and generally permissive regime for governing ABNJ [10].

International pressure to better address emerging and worsening ocean challenges culminated in the first of four scheduled intergovernmental conferences (IGC-1) for an international legally binding instrument on the conservation and sustainable use of biodiversity beyond national jurisdiction (BBNJ) in September 2018. The second intergovernmental conference (IGC-2) took place between March 25th and April 5th, 2019, and is the subject of this article. The four elements of the BBNJ agenda are (i) area based management tools, including marine protected areas, (ii) environmental impact assessments, (iii) marine genetic resources and access and benefit sharing, and (iv) capacity building and technology transfer. These elements represent parts of a "package deal" negotiation structure, wherein nothing is agreed until everything is agreed upon. But because each element represents a distinct set of goals and issues, they are generally discussed separately. The overall aim of the emerging BBNJ instrument is the conservation

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https://doi.org/10.1016/j.marpol.2019.103664
Received 26 April 2019; Received in revised form 14 August 2019; Accepted 14 August 2019

and sustainable use of marine biodiversity in the ABNJ.

IGC-2 was significantly different than IGC-1, reflecting an advancement in the negotiation process, and the diligent preparatory work of the President of the negotiations (Rena Lee of Singapore), the working group facilitators, and the United Nations Division for Ocean Affairs and the Law of the Sea. The change in the tenor and detail of the negotiations in IGC-2 was reflected in the President's Aid to Discussions which, compared to the equivalent aid for IGC-1, had more than quadrupled in length, and replaced questions and discussion topics with a highly detailed set of options and sub-options [12,13]. This made the negotiations seem to progress further and faster, if only because most delegations found an option they could support, on most topics (in large part because "no text" was frequently listed as an option). As delegates plodded through the detailed - and highly praised - President's Aid, they identified options they preferred, would support, could work from, could not support, and/or suggest should be removed from the list of options. Because the President's Aid included separate sections for general terms, scope of application, and institutional arrangements, fundamental disagreements about the design of any BBNJ agreement had plenty of opportunities to come to the fore. This article communicates some preliminary results of a larger qualitative study on the overall trends and patterns of the BBNJ negotiations.

At IGC-2, several delegates were new to the BBNJ negotiations, having not attended the PrepCom or first session. Many of these participants expressed optimism about movement towards consensus in informal interviews with the authors. But in general, we find that the nature and breadth of disagreements has not changed significantly since the PrepCom [14,15]. These disagreements are surveyed and explained in the body of the paper, after a discussion of the "should not undermine" phrasing that guides the relationship between the existing ocean governance regime and any BBNJ instrument. This basic commitment to "not undermine" existing agreements significantly shapes the discussions about each of the four elements.

2. Research methods

This article is the second in a series of viewpoints that seek to identify important variables shaping the negotiations, describe developing trends with regard to consensus building, and comment on the obstacles and challenges facing delegates. Our analysis of IGC-1, published in *Marine Policy*, concluded *inter alia* that 'Beyond National Jurisdiction' seemed to be driving positions more than concerns about 'Biodiversity' [16]. In the current analysis, we build on our previous findings to discuss developments during the results of the second intergovernmental conference (IGC-2), which took place March 25 - April 5, 2019. Our overall research question is about the factors that can explain the final outcome of the BBNJ negotiations. Our analysis of IGC-1 explored whether and how the desire to maintain and expand national jurisdiction shapes the emerging BBNJ instrument. In this paper, we explore whether and how the pre-existing ocean governance regime constrains or enables the nascent BBNJ agreement. Specifically, we ask: to what degree does the challenge of working within the existing structure of ocean governance impede movement towards an effective final treaty?

Our primary method of analysis can be described as 'process tracing,' the initial stage of which entails observation of sequences and patterns in order to develop theoretical ideas. The overall goal is to construct an explanatory narrative that sheds light on the BBNJ process and outcomes. This article draws on close and systematic observation of the recent session, including interventions, side events, statements, and official documents, as well as interviews by the authors with a variety of participants in the negotiations. Because the structure of IGC-2 did not include parallel official meetings, at least one co-author was present at each of the working group meetings. Interviews were conducted on an ad hoc basis, and the authors sought interviewees that represented the diversity of countries and groups participating in the BBNJ process. Documents included written statements posted on the PaperSmart document sharing system and literature handed out or made available to delegates during the conference.

3. "Should not undermine"

> Undermine (verb) - to subvert or weaken insidiously or secretly; to weaken or ruin by degrees

The basic parameters of the BBNJ agenda were developed over the last 15 years, especially through the activities of the Ad Hoc Open-Ended Informal Working Group (2006–2015), and at the meetings of the Preparatory Committee (2016–2017). The key elements of the BBNJ package were articulated in UNGA Resolution 69/292, which established the Preparatory Committee, and Resolution 72/249, which called for the convening of an intergovernmental conference to negotiate a legally binding instrument. Both resolutions included the clause that any new agreement *"should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies."* This phrase has played a critical role in shaping the negotiations thus far, with most delegates expressing strong commitment to the idea. The language of "not undermine" is also present throughout the President's Aid.

Close analysis of the recent history of the "*should not undermine*" phrase suggests that it may have been chosen because of its ambiguity [17,18]. During the Working Group phase of preparations, participants disagreed as to the appropriate relationship between a potential new instrument and existing institutions. Several formulations of the preferred relationship were considered, including those that specified what should be avoided (duplicating, changing or subordinating), and those that focused on what ought to be achieved (respecting or complementing). "Should not undermine" seems to have been a "maneuver to break a deadlock," with the goal of moving the BBNJ process along [19]. The phrase is not typically used in conflict clauses found in other international agreements, meaning that there is little precedent to rely on for its interpretation. And the "should not undermine" clause complicates the application of the *lex specialis* principle, whereby the more specific law or rule is typically interpreted as being the one most applicable in a given circumstance.

This lack of clarity was evident in the IGC-2 negotiations. Although the commitment to not undermining was frequently repeated, it seemed to mean different things to different delegations. Some interventions expressed uncertainty about the "should not undermine" concept directly, but mostly the confusion was apparent in the differences between interventions. Underlying questions include: What are we concerned about undermining - the effectiveness, the mandate, or the jurisdiction of existing bodies and instruments? And how do you define or identify an undermining relationship? Is it possible, or required, for the new BBNJ instrument to provide positive/active support to existing bodies? These questions are at the heart of BBNJ regime design, because they concern what institutional forms can/should be created for ocean governance. The section of the President's Aid covering the relationship between the BBNJ instrument and other bodies offered different options, including "shall not undermine," "shall promote greater coherence with and shall complement" and "shall be implemented in a mutually supportive manner." No consensus about the correct relationship emerged during IGC-2. While some delegations focused on the magnitude of ocean problems that needed to be solved, others cautioned that the BBNJ was only an implementing agreement intended to "fill the gaps" of an already-crowded governance space.

The vagueness and flexibility of the "should not undermine" concept leaves open the broader debate about the nature of any new BBNJ institutional architecture [17–19]. But in general, the concept seems to be wielded as a buffer by those who oppose new institution building as part of any BBNJ agreement. At IGC-2, regional and sectoral institutions emphasized their existing mandates and jurisdictions. During the

second week, the International Seabed Authority, in a joint statement with the International Maritime Organization, stated that *"the exercise of substantive responsibilities rests within existing sectoral, regional and global bodies … tampering with it might open up more questions than it answers for the effective conservation and sustainable use of marine biodiversity"* [20]. The debate over the meaning and implications of the "should not undermine" mandate taps into larger disagreements about regional versus global governance, and the utility and desirability of international law in general.

Subsequent sections of this paper describe efforts to restrain the creation of new governance architecture during each of the four working groups on (i) marine genetic resources (MGRs), (ii) area based management tools (ABMTs) including marine protected areas (MPAs), (iii) environmental impact statements (EIAs), and (iv) capacity building and technology transfer (CBTT). The anticipated shape, size, and weight of the instrument were also discussed in detail during sessions on the scope of application and cross-cutting elements. Overall, we find that the "should not undermine" commitment may be undermining the BBNJ process as a whole, by preventing the emerging agreement from contributing to the evolution of the ocean governance regime, and minimizing the compliance and implementation functions that a BBNJ instrument could feasibly adopt [21]. The result is an agreement that is most likely to be "soft" in terms of the level of precision, obligation, and delegation found in the instrument [22]. But, as shown in this analysis, even a soft BBNJ instrument appears very hard to reach.

4. Elements of the BBNJ package

At IGC-2, the four elements of the BBNJ package were discussed one at a time in informal working groups that lasted 2–3 days each, with a separate discussion at the end for 'cross cutting' elements. Because the informal working groups at this stage occurred one at a time, all delegates were able to be present at all working groups. These meetings were often pressed for time, as a large number of states sought to speak on each of the issues on the agenda. The intergovernmental conferences have so far enjoyed broad participation, with representatives from the majority of countries in attendance. Several international organizations with a role in governing or managing ocean use activities were also present, including representatives from the Food and Agriculture Organization, the International Maritime Organization, the International Seabed Authority, and the International Cable Protection Committee. Environmental non-governmental organizations (NGOs) were also present, and used their interventions to establish a 'high bar' for environmental protection and conservation. Most visible were the International Union for the Conservation of Nature and the High Seas Alliance, which represents approximately 40 NGOs, including Greenpeace, the Natural Resources Defense Council, OceanCare, and Oceana. Considering each of the four elements of the BBNJ package separately, as the delegates did, is the easiest way to follow the decision-making process.

4.1. Marine genetic resources

> *"Commercialization is not a term of art, and has no meaning in the business world"*
>
> -Holy See

> *"Permits and licenses would allow for better management, monitoring and review as State parties would be able to set conditions on access to MGRs through the established body, especially for any access in the high seas that is adjacent to our national jurisdiction"*
>
> -Fiji on behalf of Pacific Small Island Developing States (PSIDS)

The discussion around marine genetic resources (MGRs) and access and benefit sharing did not show significant progress towards consensus during IGC-2. This working group was facilitated by Janine Coye-Felson of Belize, and topics covered included scope (geographical, material, temporal), access, principles and approaches, benefit sharing modalities, intellectual property, monitoring, and a clearing-house mechanism. In the background of the MGR debate are vastly different estimations of the potential commercial and economic value of MGRs in ABNJ [23–26]. Discussions throughout were marked by two basic sets of disagreements relating to ideology and practicality. On an ideological level, contestation persists between the 'common heritage of mankind' (CHM) and 'freedom of the seas' principles, and between expansive notions of justice and equity, and the narrower goals of conservation and sustainable use. There are strong and diverse arguments supporting both positions, and the debate "has proceeded to further entrench already deeply held ideological commitments to both sides" [14]. These fissures largely correlate with orientations towards progressive international law in general, such that there are two polarized positions present in the negotiations: (i) the freedom of the seas, narrow goals, limited architecture position, and (ii) the common heritage, broad goals, institution-building position. Not all states' preferences are perfectly defined by either of these two basic positions, but many states and coalitions clearly fall into one type or the other. This is especially visible in the debate over MGRs, including access and benefit sharing.

This ideological divide also correlates with the basic division between the developing and developed countries, echoing the 'New International Economic Order' paradigm that influenced the negotiations for UNCLOS [27,28]. The explicit inclusion of the CHM principle is strongly supported by the G77/China (135 states), African Group (54), CARICOM (15), the Like-Minded Latin American countries (14). These states also overwhelmingly support the idea that benefit sharing should include monetary and mandatory benefits, both of which were objected to by some of the developed states. Many states that supported the CHM principle also preferred objectives for benefit sharing that went beyond the BBNJ agenda's overall goal of conservation and sustainable use of marine biodiversity. Two of the most controversial were the objectives of "realization of a just and equitable international economic order" and "intergenerational equity." Many developing countries supported the former, with Eritrea reminding everyone that the goal of a "just and equitable international order" was clearly enshrined in the preamble of UNCLOS. Some developed countries spoke against this objective, including Norway, Australia, and the United States, the latter of which stated simply that: "it is not the role of the instrument to change the international economic order." These more specific objectives for benefit sharing were tied to the larger CHM principle, as articulated by Iran: "realization of a just and equitable international economic order and ensuring intergenerational equity would remain aspirational but not achievable without considering CHM as a guiding principle."

One reason for the emphasis on CHM as a point of departure was articulated by Colombia: "any other position would lead us to maintain the status quo … where resources are being used in these areas without any guarantee of conservation … without any need for benefit sharing." This 'freedom of the seas' status quo certainly does seem to be preferred by some states, in some areas, though. For example, the United States argued that access to MGRs in ABNJ ought to "remain open and unimpeded," without any new rules or procedures. The Republic of Korea reiterated, as it had during IGC-1, that the CHM principle applies only to mineral resources in the international seabed, while 'freedom of the seas' applied to the ABNJ. Unsettling that division would, they argued, undermine UNCLOS.

As noted by Iceland, the debate between CHM and 'freedom of the seas' as a guiding principle for MGRs has been ongoing since the PrepCom phase, and the principles are "problematic obstacles in our negotiations." Indonesia and others expressed the need for a *sui generis* (i.e. novel) regime to sidestep the dichotomy between these two principles. The delegate from the Holy See - following her established trend of focused, innovative, and controversial interventions - suggested a way around the contest by focusing on the UNCLOS concept of "due

regard," which could be given specific definition in the BBNJ instrument. Although "due regard" is used many times throughout UNCLOS, it currently lacks a single authoritative definition, and is generally taken to have two components: awareness and consideration of the interests, rights, and duties of other states, and incorporating those interests, rights, and duties in decision-making analysis [29]. The Holy See suggested that "due regard" could provide for a duty of states to adopt laws, regulations, and administrative measures for securing compliance with the agreement by natural and juridical persons under their jurisdiction."Due regard" could also be defined in such a way as to incorporate science-based and ecosystem-based approaches, the precautionary approach, due diligence, adaptive management, assistance to developing states, stakeholder engagement, and other approaches and principles. It could be defined to include benefit sharing between states. This alternative did not gain any readily visible traction among other delegations.

The other basic disagreement related to MGRs concerns the practicality, efficiency, and cost of various regulatory proposals, especially related to access and benefit sharing. The complexity of regulating access to and benefit sharing of MGRs is increasingly obvious to both participants and observers [15,30]. As Norway remarked, "we are looking for a simple regime, a practical regime, a workable regime for benefit-sharing." Designing that regime requires decisions about when benefit sharing occurs, what is shared, and who it is shared with. Required functions of a BBNJ instrument (or subsidiary body) may include disseminating information, undertaking monitoring and review, and distributing benefits. Ideas proposed by developing states - like a licensing and permitting scheme, benefit sharing triggered by different stages of access and utilization, and monetary benefit sharing - were often rejected by developed states as impractical or infeasible. The Holy See again tried to offer ways around these obstacles: when pointing out that "commercialization … has no meaning in the business world," and therefore would not be a suitable legal category for triggering benefit sharing, she also emphasized the distinction between actual and potential value as an "objective economic measure, easily understood by the business community" that could be used to identify a threshold for benefit sharing.

Even if feasibility barriers could be overcome, many states may still oppose detailed institution-building as a barrier to efficient exploitation *and* benefit sharing. As voiced by New Zealand, the concern is that "a heavy and costly regulatory regime … risks absorbing any benefits rather than facilitating their sharing with those in need … this is a particular risk given that no one has yet managed to commercialize an invention based on MGRs from ABNJ."

4.2. Area based management tools

> *"regarding the relevance of traditional knowledge in this context … the main question is why it should be internationally accepted, and how we differentiate, because science is science"*
>
> -Russia on identification of areas

> *"[global processes such as climate change and acidification] should not be part of our decision-making schemes when it comes to identification of certain ABMTs or MPAs, because otherwise the threshold to take that decision can be very low … you can actually create MPAs in every region of the world"*
>
> -Russia on criteria for identifying areas

The working group on area based management tools (ABMTs) including (MPAs) addressed the objectives of ABMTs, their relationship to existing bodies (including questions of complementarity and the rights of coastal states), the criteria for identifying and designating ABMTs, and their implementation, including monitoring and review. This working group was facilitated by Alice Revell of New Zealand. Key contentious points that arose during the discussions included: (i) determining criteria for ABMTs, (ii) the role of science in the decision-making process, including traditional knowledge (TK), (iii) adjacency, i.e. rights of coastal states with exclusive economic zones adjacent to high seas ABMTs, and (iv) regional versus global authority, i.e. whether to work within existing processes in regional fisheries management organizations (RFMOs), versus having a new global mechanism, or some form of hybridized approach.

Given existing processes for designating ABMTs beyond national jurisdiction via RFMOs and Regional Seas Programmes (in the case of the OSPAR Convention), the question of how to work with existing arrangements will be critical for this treaty. This coherence/complementarity issue parallels states' preference for regional/sectoral versus global approaches, with some states showing strong preference for one or the other, and a few suggesting a hybridized way forward. New Zealand proposed having a new overarching body to establish ABMTs and MPAs where no body currently exists, acknowledging that it would be critical for such a body to work with existing regional and sectoral bodies [31–33]. Canada also bridged both sides of the regional/global divide, suggesting that perhaps each ABMT submission could be considered on its own merit, first by states, and then referred either to a new global authority, or to a relevant regional/sectoral body on a case-by-case basis; the US suggested something similar. However a few states are firmly supporting only using existing regional bodies, including Japan, Russia, and Iceland, with the latter adding that the new agreement has the potential to strengthen the coordination role of existing Regional Seas Programmes, whose coverage should be expanded "in a comparable way to how the Fish Stocks Agreement led to the growth of RFMOs." In contrast, NGOs/observers, including the International Council on Environmental Law, emphasized the necessity of global approaches for achieving representative networks of MPAs and, therefore, that initiatives more focused on regional and sectoral issues should instead focus on ABMTs.

With respect to the process for identifying areas, differences emerged regarding what criteria to include. New Zealand and several supportive countries emphasized the need for complementarity with other criteria/approaches, such as the Ecologically or Biologically Significant Marine Areas under the Convention on Biological Diversity. The President's Aid document provided a long list of potential standards and criteria for identifying areas, most of which were amenable to the delegates - however several pushed back against including "economic and social factors," including Algeria (on behalf of the African Group) and the US, citing the criteria as too vague, and requiring a definition if included. However Eritrea considered the issue "close to our heart," citing concerns with access and benefit sharing (within which they include conservation benefits), and with respect to safeguarding "livelihoods at stake." There were also disagreements about whether to include criteria linked to "the adverse impacts of climate change and ocean acidification" and/or "cumulative and transboundary impacts," both of which go beyond strictly ecological criteria related to uniqueness, but which are linked to vulnerability, which is an important criterion in MPA designation [34].

Regarding scientific standards and criteria for identifying areas to protect, the EU, Japan, China, Australia, and Russia did not support including "internationally accepted scientific standards and criteria"; China suggested the language "best available scientific evidence" was sufficient, but this could be subject to interpretation and even politicized. In inshore MPA contexts, shifts in the discourse around evidence-based decision-making towards "best available evidence" has led to perceived differences in what evidence is needed to identify a site, versus designate it [35]. The inclusion of TK in identifying areas was also contentious - while the Federated States of Micronesia (on behalf of PSIDS), Canada, and Cameroon supported it, Argentina, Japan, Korea, and Russia were opposed. Russia questioned the role of TK vis-a-vis science, as evidenced in the quote above. Micronesia responded to these queries in an eloquent intervention that emphasized three relevant components of TK to the BBNJ negotiations: (i) the wealth of TK on the behavior and characteristics of marine species, (ii) experiences with

environmental management practices, such as taboo areas that allow recuperation, and (iii) accumulated knowledge on marine features from thousands of years of journeying in the Pacific.

Consideration of TK in the designation of protected areas assumes that proximate populations, especially small island states, have special knowledge of adjacent high seas areas. Whether adjacent states should have special rights and duties is a recurring feature of several of the BBNJ issue areas. The adjacency issue arose in the ABMTs discussion with respect to the rights of coastal states during the designation process, in particular whether they should have additional rights, and questioning how adjacency would be applied in practice. However a lot remains to be defined and determined on this issue - as the US put it, "We need to have further discussions about what adjacency, and what 'adjacent states' means, including whether these are areas immediately bordering the area that you're talking about." The Seychelles, in contrast, wanted to ensure coastal state participation in decision-making, "as any decision will impact management activities that such adjacent States may already be undertaking."

Overall, the entrenchment on key themes is deepening, however there are some areas for potential compromise and middle-road "hybrid" approaches. There is still a way to go before delegates will be able to agree on the finer points of determining the evidence base for protecting BBNJ, or designing effective compliance and enforcement mechanisms, or how best to engage with relevant stakeholders [36].

4.3. Environmental impact assessments

> *"We can't support any decision making on EIAs by a decision making body or forum"*
>
> -Delegate from the United States

> *"time is of the essence when it comes to cable operations – any delay threatens the continuity of international communications"*
>
> -International Cable Protection Committee

The discussion about Environmental Impact Assessments (EIAs), facilitated by René Lefebre of the Netherlands, was broad and technical. Topics covered include the obligation to conduct EIAs, the relationship with existing assessment processes, activities that require an EIA, the process and content of EIA reports, and monitoring, reporting, and review. Strategic Environmental Assessments - generally understood to be a broader form of impact assessment that includes multiple activities across a larger space and longer time scale - were also considered [37]. At IGC-2, the EIA issue area became a contender for the most difficult topic for achieving collaboration and consensus. In addition to the complex web of technical details, the EIA issue area touches on broad debates about the purpose and nature of the BBNJ instrument.

One area of disagreement concerned the application of existing UNCLOS provisions on monitoring the risks or effects of pollution, the publication of associated reports, and the assessment of potential effects of activities (Article 204–206). While these articles do contain relevant guidance, they do not mention EIAs or biodiversity, and are not specific to ABNJ. Articles 204–206 were referred to often, but in different ways. The EU and New Zealand both suggested that the BBNJ agreement's status as an 'implementing agreement' of UNCLOS implied that the text should go beyond mere repetition of or reference to UNCLOS articles 204–206, to operationalize those general obligations. In contrast, the United States argued that the new rules being considered should not "go beyond" articles 204–206, which was reaffirmed by Japan on the question of monitoring, reporting, and review and by Russia on the topic of thresholds for an EIA. The Federated States of Micronesia questioned whether the intent behind express references to articles 204–206 was less about fidelity to UNCLOS, and more about limiting the applicability of the new instrument.

The majority of the discussion on EIAs consisted of highly technical responses to the detailed President's Aid for Negotiations, more so than perhaps any other section. This made it challenging to identify areas of agreement or map the lines of disagreement, but close analysis of the interventions reveals some discernible trends. Two contentious issues related to the overall scope of the EIA provisions (what impacts should they consider?) and the special role of adjacent coastal states.

EIAs are on their face about the environmental impacts of an activity, but many delegates seemed to expect, hope, or insist that they serve the function of more holistic cost-benefit analysis. Trinidad and Tobago, speaking early on in the discussion on behalf of CARICOM, called for EIAs to include "a description of the potential socioeconomic, cultural, and other relevant impacts … as well as an estimation of its significance." The Solomon Islands on behalf of the PSIDS quickly agreed with the inclusion of socioeconomic factors in any proposed EIA requirements, and Eritrea also expressed strong support. The representative from the International Cable Protection Committee suggested that the *positive* social and economic impacts of proposed activities should also be factored into the EIA process (and also reiterated the need to not delay cable repairs via lengthy EIA processes). However, the delegate from the United States countered, saying that his state "could not support assessing social or socio-economic impacts" because "the focus of environmental assessment of the impacts should be the natural and physical environment." Canada and Australia both suggested potential compromise positions. Canada claimed that they could support the inclusion of socioeconomic factors in EIAs, but that they wanted to see a specific definition of socioeconomic factors in order to prevent the EIA from requiring too broad an assessment. Australia, on the other hand, supported the use of socioeconomic factors in a separate process from the EIA that would also impact the decision to proceed with a proposed activity. Even if one of these compromises did achieve consensus in IGC-3 - which we believe is unlikely - this situation would open new and complicated questions about how exactly a social, economic, or socio-economic impact is identified, measured, and weighed against environmental impacts.

Another contentious issue related to whether the location of a proposed activity should affect the process for conducting and evaluating an EIA. Some delegations argued that states with waters adjacent to proposed activities in ABNJ should be involved in the EIA process, or have some role in the approval of these activities based on the results of the EIA. For the small island developing states especially, the issue of adjacency seemed more important, and more present in their interventions, during ICG-2 compared to IGC-1. During other working groups, the Maldives, Micronesia, and Papua New Guinea emphasized the high degree of ecological and cultural connectivity between their national waters and the high seas. This heightened connectivity is supported by scientific evidence [38]. These states want assurances that if there are to be any activities right outside their Exclusive Economic Zones this will trigger an EIA immediately, as they are the ones that are the most affected by this. One interviewee also emphasized that they would want assurances that the EIAs would be the responsibility of states - and not the private actors themselves. Micronesia called attention to the peculiar case of extended continental shelves, where the water column is an ABNJ but the seafloor is not, and asserted that in these cases, an EIA and approval by the coastal state should be mandatory. Other members of the PSIDS group, speaking in their national capacity, backed up these general principles. In contrast, the delegate from China took an opposite position, claiming "we should try to avoid contentious principles like adjacency." The discussion on adjacency also occurred during consideration of benefit sharing and ABMTs as well, proving equally contentious there.

Due to the nature of the discussion held, where each state responded to the President's Aid to Discussion rather than to each other, it is difficult to state the extent to which a compromise on these issues and others is likely to be reached in the next round of negotiations. The expression of compromise positions, however, provides some reason to hope that such agreement is possible.

4.4. Capacity building and technology transfer

"Funding needs to be voluntary across the board"

-United States

"We all know our experiences with voluntary funds … they are never adequate, they are never predictable, they are never sustainable … the definition of madness is doing the same thing and trying to get a different result"

-Kenya

During the working group on capacity building and technology transfer (CBTT), similar to the EIA working group, the discussions became highly technical, with delegates remarking that "the level of detail is too high for a treaty" (Canada) and "the level of detail is a bit uncomfortable if we are going to … find agreement" (Russia). But despite this challenge, delegates waded through detailed options outlined in the President's Aid. The discussion was facilitated by Olai Uludong of Palau.

The pre-existing commitment to "not undermine" existing frameworks, bodies, and instruments once again constrained the modalities (means of implementation) that many delegations were willing to consider. In fact, Singapore early on called for the "should not undermine" text to be explicitly added to the section on modalities of CBTT, as it was not originally mentioned in the Aid to Discussion under this package. They emphasized here not only other instruments but also existing programs or mechanisms for capacity building and technology transfer. Indeed, the "should not undermine" commitment was sometimes paired with references to existing and ongoing voluntary CBTT programs, suggesting that much was already being done to achieve the goals of this section. As Russia pointed out during an intervention that sought to minimize the creation of new CBTT institutions, "we have participated in a wide range of bilateral agreements with various states on this issue." The United States pointed to international scientific collaboration through the International Oceanographic Commission.

Existing asymmetries in capacity and technology underlied the debate about modalities [39]. Developing country coalitions argued that CBTT is "the enabler of the other issue areas" (CARICOM) and necessary for all countries "to be able to implement the new instrument" (African Group). In contrast, the United States emphasized that the important elements of CBTT are increasing and sharing knowledge, and strengthening cooperation and synergies with existing organizations. While many delegates emphasized the importance of providing specific types of CBTT to states based on a context-specific needs-assessment, either conducted by a new body or by the recipient state, the Republic of Korea suggested that "supplier states … should be able to decide the types and modalities in accordance with their capabilities." An apparent middle ground option, favored by New Zealand and Australia among others, would transfer technology on "mutually agreed terms." But, as Tuvalu pointed out on behalf of the PSIDS, mutually-agreed terms in a situation of resource asymmetry "would subject the transfer of marine technology to unequal contracting status."

The landlocked developing countries were also very specific in their preferences, emphasizing the need for more support and resources so that the gap between them and other states was lessened. They emphasized that the purpose of CBTT under UNCLOS was social development, and human and institutional capacity building. However, this is likely in reference to the common heritage of mankind (Article 136 UNCLOS), which appears to be less of a discussion point during IGC2 than in IGC1, a topic that was also brought up during the MGR discussion. One interviewee said that inclusion of the concept of common heritage of mankind into this instrument would open UNCLOS up for renegotiation again, since that agreement clearly states that this concept refers to mineral extraction and not to marine genetic resources. The debate about the purposes of CBTT also emerged on the topic of special categories of states.

The landlocked states would probably fall under the category of states that are considered "environmentally challenged and vulnerable," though there was some disagreement and uncertainty as to what criteria countries would need to fulfill to fall within this group. Algeria suggested that in addition to developing countries, the text could say "including landlocked states and geographically disadvantaged states, in line with article 266(2) of UNCLOS" - but also wanted a definition as to what criteria or definitions would work. Russia stated that there was no need for this type of categorization, as "in the process of providing assistance … on the voluntary basis, and on mutually agreed upon conditions, then there would be a situation for the evaluation of needs on all sides, and therefore no matter the special requirements, in this case this would not be necessary." The US similarly was opposed to any language that would give preferential treatment to developing countries, though they were open to consider ideas for how categories and special requirements for capacity building and marine technology transfer might be reflected. The EU suggested a more flexible option, suggesting that there could be a state that would not fit neatly into the categories suggested in the instrument but would still have greater needs for capacity building and marine technology transfer than those that do fit. A provision recognizing special needs would therefore be the best and most fair way - as it would support an inclusive and flexible regime rather than predetermined allocation of resources based on geography or group membership.

4.5. Cross-cutting elements

"We cannot put the cart before the horse"

-Philippines

"It is essential to fully utilize ongoing efforts of existing institutions and to not duplicate them"

-Japan

The so-called "cross-cutting issues" were addressed in a separate informal working group towards the end of IGC-2. These include decisions about the types, number, and functions of new institutions created by the agreement, such as a decision-making body or forum, a scientific and/or technical body, other subsidiary bodies, and a secretariat. President Rena Lee introduced the idea that "form follows function" as a recognition that the issues in the substantive elements of the package would need to be settled before the precise institutional architecture could be crafted (referred to as the "triple F" principle). The basic idea is that new institutions should only be created as a response to need. This "triple F" principle was echoed by Canada, Singapore, and Indonesia. But Iceland suggested instead that, in reality, "function follows form" because you need to know what the ultimate destination of the negotiations - a legally binding agreement - looks like before you can move forward towards that goal. This reversed "triple F" principle, which was noted by few and endorsed by no other interventions, highlights a fundamental reality of the negotiations: the light, low-cost, efficient global instrument envisioned by many states (including Iceland) cannot be given too many critical functions, but must instead assign the bulk of the BBNJ mandate to existing regional and sectoral bodies. In contrast, those states that favor expansive objectives and functions tend also to assume that a bulkier, more hierarchical institutional form is both possible and necessary.

The negotiations do seem to be heading towards a thin institutional architecture, which fills in the gaps of the existing ocean governance regime by taking on functions related to information sharing, coordination of voluntary activities, and recommendations. These functions represent a low level of obligation for states, which is paired with very limited willingness to delegate authority or decision-making. Many delegations would prefer that state parties bear the primary responsibilities of proposing an ABMT/MPA, evaluating EIAs, managing CBTT relationships on a voluntary basis, and certifying access to or utilization of MGRs. Other functions can be taken on by RFMOs (often mentioned), the IMO (occasionally mentioned), or the International

Seabed Authority (controversial). Because the ocean governance regime includes many different agreements, and the international political climate is not conducive to the creation of hard law or new institutions, the "should not undermine" dictate in UNGA Resolution 69/292 and 72/249 is being deployed to restrict the functions and form of the BBNJ instrument, making a soft law agreement seemingly inevitable.

5. Conclusion

> *"divergent views still remain in the fundamental aspects of every part of the package"*
>
> - Japan

> *"while we are negotiating, our people on the islands are fighting the exacerbated impacts of climate change – my people need immediate solutions for these daily challenges"*
>
> -Micronesia

In terms of scheduled sessions, the BBNJ negotiations are currently at the halfway point. As a representative from the EU reminded the group, only four weeks of negotiations remain before the hoped-for deadline, and "the world is counting on us to deliver." In interviews, delegates expressed mixed thoughts about whether the negotiations would be able to produce a consensus text by the scheduled final session in Spring 2020, or whether they would require additional sessions. Many delegations affirmed the need for a 'zero draft' negotiating text by mid-summer, so that representatives have adequate time to consult domestic stakeholders and coordinate international coalitions before IGC-3. Just as they had done at the end of IGC-1, the Russian delegate argued that the negotiations were not ready for a text, and that producing one would require them to make inefficient objections all through IGC-3. Instead, Russia argued that "the more productive way would be to work on a renewed and focused president's guide." Remaining at the President's Aid phase seems unlikely, however, as most delegations and President Lee seemed bullish about the prospect of a workable zero draft.

IGC-3 is likely to adopt a different format. Whereas the first two BBNJ sessions were organized as sequential informal working groups where all parties attended, IGC-3 will switch to a format where so-called "informal informals" will be interspersed with the typical working groups. These "informal informals" are intended to allow delegates to have a more frank discussion. Most delegations expressed support for an adjusted format, although many emphasized the importance of transparency, NGO/IGO participation, and ensuring that no more than two parallel meetings occurred at any one time so that smaller delegations would not be overly disadvantaged. Russia was the only state that suggested closed meetings, "which would allow delegations to react in real time." As President Lee also affirmed the importance of transparency, closed meetings in IGC-3 seem unlikely.

Despite disagreements on some topics, a feeling of camaraderie and cooperation pervaded Session 2 of the BBNJ negotiations. One unforgettable moment came during day six, when the popular delegate from Algeria, speaking on behalf of the African Group, announced to the room that it was his birthday, and as a present, asked for "some flexibility from other delegations" on the topics at hand. As almost every subsequent delegate began their interventions with a birthday wish, the Algerian delegate eventually apologized to the facilitator for the "unplanned digressional pollution - the cumulative impact of which could have a negative impact on your facilitation." These moments of humor and personality peppered the negotiations and buoyed spirits during what might otherwise be a tedious and/or contentious debate.

Of course, the narrowing of the President's Aid and the production of a zero draft text before IGC-3 in August 2019 is likely to enhance the visibility of disagreements. President Lee warned that delegations may have a harder time "finding themselves" in the next guiding document. Discussion over the next draft will likely clarify just how hard it will be to achieve consensus on the major issues. One participant described the situation as follows: "I think the second session is more smooth than the first, but the coming one is going to be harder." Signals thus far suggest that consensus may be achieved by softening the agreed-upon rules, keeping the level of precision, obligation, and delegation low enough to decrease the difficulty and cost of ratifying the eventual BBNJ agreement.

This analysis demonstrates how the "should not undermine" clause provides a primary means to restrict or constrain the content of a final BBNJ agreement. It also identifies a series of variables and patterns that this research project will continue to follow during IGC-3, IGC-4, and any additional meetings. These include ideas, concepts, principles, and ideologies with limited flexibility, which shape how delegates interpret the meanings of conservation and sustainable use. At the negotiations, the presence or absence of industry and NGO voices, and the level of consensus among coalitions, will influence the uptake and actualization of different concepts and ideas. Other relevant factors include elements of the pre-existing ocean governance regime, such as the political geography of the oceans, where many borders are undefined or contested. Provisions from UNCLOS and other pre-existing instruments can provide useful precedents, and be a source of rules of reference. Practical hurdles related to the utilization and dissemination of science and technology will continue to challenge negotiators, such as the need for threshold assessments (how much scientific data is enough? how much risk is too much? etc.) and uncertainty about the economic feasibility of commercial exploitation of marine genetic resources. And finally, our observations at IGC-1 and IGC-2 suggest that negotiations are influenced by general orientations towards: progressive international law, the prevailing global economic order, and the history and status of special categories of states. Our on-going and future research examines and traces these and other factors, in order to generate explanations about the trends and outcomes of the BBNJ process.

Declarations of interest

The authors have no competing interests to disclose.

Acknowledgement

The authors acknowledge funding from Horizon 2020 project (European Union project) GoJelly, project number 774499 and the Research Council of Norway with project Regimes, project number 257628.

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