

## **The Once and Future Treaty: Towards a new regime for biodiversity in areas beyond national jurisdiction**

In the classic book *The Once and Future King* by T.H. White [1], the protagonist King Arthur recognizes prior to his death that, although he had not succeeded in creating the kingdom he had hoped for, he will return again in a time of future need, try again, and hopefully have better results. This theme seems relevant in light of the recently commenced negotiations on a new international legally binding instrument (ILBI) under the United Nations Convention on the Law of the Sea (UNCLOS), aimed at the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ) - where UNCLOS is the once and future treaty, and the BBNJ negotiations represent the renewed attempt at finalizing a successful and comprehensive ocean governance regime, filling in the gaps left behind at the first attempt. These gaps were either because provisions and definitions were not specific enough for states to be certain of the treaty's meaning at the time of UNCLOS, such as the application of the common heritage of mankind; or did not address problems that have either arisen since its ratification, such as exploitation of Marine Genetic Resources (MGRs), or worsened since the treaty's completion in 1982, such as marine pollution [2]. On December 24<sup>th</sup>, 2017 the UNGA, in its 72nd session, therefore adopted Resolution 72/249, approving the start of negotiations for a new treaty based on the final report of the Preparatory Committee meetings [3]. The first round of formal negotiations took place in September 2018, guided by an 'Aid to Discussions' issued by the President [4]. Four negotiation sessions are planned over the next two years, with the aim of concluding in the first half of 2020.

Similar to *The Once and Future King*, which consists of four separately composed works developed over 20 years, so too the process leading to the negotiations for this new treaty has been long lasting and is split into different parts. It has persisted for 15 years so far, [5] and is separated into four suites of topics agreed upon in 2011. These issues included 1) marine genetic resources, including questions on benefit sharing, 2) area-based management tools, including marine protected areas, 3) environmental impact assessments, and 4) capacity-building and the transfer of marine technology [6]. A number of recent publications have discussed in-depth the scientific basis for the different elements of these issues, the diversity of state views, and the past convergence of state positions, see e.g. [7-15]. This commentary therefore analyzes the first session of negotiations of this treaty, based on both public statements and behind-the-scenes interviews, to identify emerging trends and obstacles in consensus building among delegates towards a once and future treaty, or at least a first version of a draft text, a 'zero draft'.

### *From a suite of issues towards a zero draft*

A central thread of disagreement during the negotiations, which challenges the creation of a 'zero draft' text in the first place, was the question of what developed states should provide to developing countries in terms of capacity building, technology transfer, access and benefit sharing. These general issues came up in discussions across the four issue areas, and common disagreements were centered on whether sharing of access, benefits, and technology should be mandatory or voluntary for states; and monetary or non-monetary; where in both cases the developing and developed states often disagreed. The dichotomy between common heritage of mankind and freedom of the seas approaches were also central to the discussion for some delegates. In the following sections, we assess each of the issue areas within the framework of these first two weeks of negotiations.

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## **Capacity Building and Technology Transfer**

*“There must be some kind of money or nothing is going to happen” - Federated States of Micronesia*

Capacity-building and the transfer of marine technology was the first package to be discussed during the meeting. Within the context of the BBNJ treaty, this package aims to achieve conservation and sustainable use of marine living resources in ABNJ [3]. To achieve this, the new instrument has to both develop and strengthen the capacity of the states that have a need and request help, so that they will be able to fulfill their rights and obligations under the new treaty. The discussion during the negotiations centered not on this specifically, but instead on whether or not these transfers and capacity building measures should be mandatory or voluntary for states to participate in, and if there were to be money involved. Nauru, on behalf of the Pacific Small Island Developing States (PSIDS) emphasized that they were “...convinced and [had] learned from experience that voluntary funding alone will not suffice”. Some delegates, however, argued that UNCLOS already provided for capacity building and technology transfer in Part 13 and 14 [16] [17]. Others stated that this would not be enough, and that without a clear obligation on states with associated funding through the BBNJ instrument, the objectives and principles that would be formulated in the final text would not be effective.

Although capacity building and technology transfer is a separate package, it nevertheless appeared to be more of a cross cutting issue and were for many delegates one of the most important elements of all of the packages. In fact, capacity building and technology transfer spilled over into debates about access and benefit sharing related to MGRs as well, and were also tied to the implementation of requirements related to marine conservation and impact assessment during the discussions. Developing states sought to build on the general commitment of UNCLOS by suggesting the creation of new institutions to facilitate capacity building and technology transfer, including a trust fund for disbursement of monetary benefits and a clearinghouse to register specific needs requests. Some small island developing states (SIDS) pointed out though that assistance would be required to even determine the specific capacities and technologies needed. There was also disagreement about whether the agreement should include a list of possible technologies that could be transferred or capacities that ought to be built. The question of obligations though - what should be provided, who should provide it, and to whom it should be provided - represented a significant obstacle to consensus building around the discussion on the development of a possible draft text. But discussion within each of the other packages entailed particular disagreements and challenges that will also need to be addressed.

## **Area Based Management Tools (ABMTs), including MPAs**

*“ABMTs cannot be established using a one size fits all approach” - International Seabed Authority*

Contrary to Capacity Building and Technology transfer, the ABMT package could not refer specifically to UNCLOS for guidance. The only tools currently available for ABMTs in the ABNJ fall under regional fisheries management organizations (RFMOs), the International Seabed Authority (ISA), and the International Maritime Organization (IMO) - often referred to in a group as ‘sectoral organizations’. Furthermore, of these, only the RFMOs and a regional environmental protection convention (OSPAR<sup>1</sup>) have designated closures beyond national jurisdiction to date. Most RFMO closures are seasonal and/or

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<sup>1</sup> The OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic ([www.ospar.org](http://www.ospar.org)). The OSPAR geographic region overlaps with the North-East Atlantic Fisheries Commission (NEAFC) RFMO, and there is also some overlap between OSPAR MPAs and NEAFC closures.

partial closures to protect vulnerable marine ecosystems (VMEs), spawning areas, and/or juvenile fish. To date, only nine marine protected areas (MPAs) have been designated in ABNJ, including two under the CCAMLR<sup>2</sup> RFMO, and seven under the OSPAR Convention (with an eighth open to consultation as of October 2018). Given the sector-specific focus of these instruments and their tendency to be spatially and/or temporally limited (i.e. covering only the seabed or water column, rarely both, and rarely in perpetuity), the conservation community is wary of relying on these mechanisms to build a network of protected areas on the high seas. As Ocean Care stated at the negotiations, reiterating concerns highlighted by Switzerland and others, “*We believe that ABMTs, including MPAs, are central to the discussion and that the precautionary approach must be included as a core principle of the instrument.*”

However, several parties and organizations still pushed for existing regional bodies to be responsible for ABMTs, including Russia and Iceland, as well as the IMO and RFMOs that were present. The issue of whether to give primary authority over designating ABMTs to regional and sectoral bodies or whether to invest this authority in a new or existing global organization is difficult to resolve. While some states supported the idea of a global approach to designing and implementing ABMTs, others argued that regional approaches were already working well, and there was no need to replicate effort. There is a movement towards pursuing a “hybrid” approach, which could involve delegating existing regional bodies (e.g. RFMOs or UNEP Regional Seas Programmes) to oversee regions and liaise with a global authority, such as a Conference of Parties for the new BBNJ agreement. The role of the global authority under this scenario could be to improve coherence in ABMTs by sharing best practices, and/or proposing new sites to the sectoral organizations that would implement them.

States also discussed whether or not ABMTs should be time-limited and subject to periodic review and adaptive management. Adaptive closures allow managers to implement *in situ* changes that can extend a protected area’s value in a changing climate, however it is essential to have a well-designed decision-making process in place [18], based on best available science. However, implementing science-based advice can be challenging and politicized in marine resource contexts [19], and it is important for states to improve the design of these pathways in the new instrument. Equitable and transparent stakeholder engagement and participation are also important, both for ABMTs including MPAs and other themes within the ILBI [20].

### **Environmental Impact Assessments (EIA)**

*“Many small impacts may lead to a large effect, as we have seen with marine plastics. There is no major or minor [environmental] impact.” - Ecuador*

EIAs have under UNCLOS Article 204 [21] as its goal “...to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.” This phrase however leaves much unclear, which explains why this was one of the elements that needed to be emphasized during these negotiations. Should EIA be required any time an activity takes place in the ABNJ in general, or just when activities have a high risk for environmental harm? Parties at the negotiations struggled to define this during the negotiations, and there was no obvious consensus. And while most states agreed that the state undertaking the activity should be the one responsible for the EIA, they found less agreement on what should be done with the assessment at that time. Some states, mostly developing countries, wanted a scientific committee attached to a global body to review the EIAs.

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<sup>2</sup> CCAMLR: Commission for the Conservation of Antarctic Marine Living Resources.

However, there was much pushback from the developed states on this idea, most vociferously on the part of the Russian Federation, who argued that global review of EIAs would indicate a lack of trust in the scientists who drafted those already existing. Furthermore, the debate also centered on Strategic Environmental Assessments (SEAs). There was some argument over what exactly SEAs were and how it related to an EIA where some delegates argued that it was a type of EIA, but one that included future prospects as well. Others similarly argued that the difference centered on the fact that EIAs would be developed prior to a proposed project to measure risk and would therefore not include future concerns like SEAs would. There were also queries about whether SEAs were called for under UNCLOS Articles 204-206, and if they were allowed, when they should be used rather than EIAs. This is not to say there was no agreement whatsoever. Most states that spoke agreed that there needed to be a clearinghouse mechanism to store EIAs and emphasized that the point of this was to make them publicly available. This public access was cited by many states as vital, and the only condition put upon it was the protection/redaction of material related to intellectual property rights or other sensitive information.

### ***Marine Genetic Resources***

*“...Only a minority on this planet will appropriate MGRs. Is this what we want? At least 2/3rds of this room don't share this opinion...”* – Algeria, on behalf of the African Group.

Often referred to as an odd element of the negotiations by delegates and NGOs in interviews, the role of Marine Genetic Resources (MGRs) in the BBNJ negotiations echoes the central role played by seabed mining in the UNCLOS negotiations [22]. Like seabed mining, ‘bio-prospecting’ for MGRs in the ABNJ is believed to be on the cusp of a major increase in activity, offers the potential of vast profits, and is the subject of disagreement between developed and developing states, especially in terms of benefit sharing [23, 24]. At this stage, the economic value of MGRs in the ABNJ remains uncertain, and most commercialized products come from areas within national jurisdiction, but there is enough optimism to make the governance of MGRs a heated topic for negotiations. Several technologically advanced states noted the need to avoid burdensome regulations and costs that might deter industry investment, while developing states pointed out that an open access and weak benefit-sharing regime would result in all the profits and potential being scooped up by multinational corporations from the developed world [25, 26]. A central issue in the BBNJ negotiations is the question of which existing UNCLOS principles apply to MGRs and the activities involved in their exploitation and use: the ‘freedom of the high seas’ principle that ensures access to high seas navigation, fishing, and laying of seafloor cables, or the ‘common heritage of mankind’ principle that underpins the rules on seabed mining and the structure and mandate of the International Seabed Authority. Because the organisms that contain MGRs could be attached to or dependent on the seabed, or be free floating in the water column, it is not obvious or clear which principle should apply.

One challenge is that MGRs exist in three possible modes: *in situ* (on site in the ocean), *ex situ* (in collections, and no longer in the ocean, for example in gene banks or a biorepository), and *in silico* MGRs that exist as digital data representing the genetic sequences of interest. Developed and developing states had very different ideas about which stages should be subject to access and benefit sharing. Developing states in general supported a much stronger set of rules to govern access to MGRs, including both non-monetary *and* monetary benefit sharing and open access data repositories for the dissemination of *in silico* genetic information obtained in ABNJ. Algeria, speaking on behalf of the African group, argued that the ‘common heritage’ principle should apply across the BBNJ agenda, and that its explicit application to

seabed minerals in UNCLOS was not meant to exclude other resources in the Area (seabed beyond national jurisdiction), and argued that "...when UNCLOS was negotiated we were not aware of the economic value of MGRs." Japan, however, noted that extracts obtained from sea pineapple showed anti-cancer effects already as early as 1969, and there were patent applications for vitamins from ocean organisms in 1978, thereby highlighting that the usefulness of organisms in deep sea floor was already known during the UNCLOS negotiations and the common heritage of mankind principle was still only applied to mineral resources in the Area [27]. Developed countries also emphasized that they did not support any type of monetary benefit sharing in this treaty, demonstrating that, despite some convergence on the need for meaningful access and benefit sharing that avoids undue burdens on private sector bio-prospectors, the schism between the developing and developed nations remains on several important topics.

## Conclusion

*"we need a treaty with teeth that bites when necessary...a real tiger"* - South Africa

At the end of this first round of negotiations towards a new ocean regime, is important to be also be realistic about what a BBNJ treaty can and cannot accomplish within the framework of the agreed upon packages. Despite increasing public and scholarly [2, 28-33] concern about, and attention to, the problem of marine plastic pollution and ocean acidification as threats to marine biodiversity for example, the issues were barely mentioned during the first session. Regardless, the role of ABMTs in bolstering the resilience of ecosystems so that it will have a better ability to withstand issues such as climatic stressors, including ocean acidification, and marine pollution such as plastics, will likely be front and centre in the minds of a number of delegates during the negotiations forthcoming. When asked whether plastics will be discussed, for example, one delegate from a G77 country said that *"I highly doubt it. But if it does, I will be the happiest person in the world."* The absence can also be interpreted as indicative of what is truly shaping the agenda, and outcomes, of the BBNJ process. Rather than *'Biodiversity,'* it is *'Beyond National Jurisdiction'* that determines what states are willing to commit to.

After this first round of negotiations, though, does there appear to be any hope of a treaty that is not what some delegates called a *"paper treaty"* or *"paper tiger,"* with beautiful provisions but no monitoring or control? Will this treaty fulfill the aspiration of UNCLOS, as in the *Once and Future Treaty?* The statements during the last days of the first session lend some hope, at least insofar as negotiations will continue. Egypt, on behalf of the G77 and China (a coalition of more than 130 countries), emphasized that the time had come for the development of a "zero draft" document by the President, to serve as a focus for discussion during the second round of negotiations. Norway also expressed optimism about the increasing level of detail being discussed at this meeting and requested a negotiating text for the next session (although not a "zero draft"). Russia disputed the so-called "convergence of views" however, identified by the informal working group facilitators when summarizing discussions, highlighting that these represent the views of the majority at best, but not consensus.

In the end, the President informed delegates that she would indeed prepare a document with treaty language reflecting many different options, and that this would not be a "take it or leave it" text and would likely not be named a "zero draft," but maybe a "sub-zero draft" as some had suggested to her (perhaps in jest). She then concluded by saying *"... You know what time it is? I want to say 'Hammer time'..."* but she feared the younger colleagues would not understand what she was talking about. With most of the room laughing, this reflected the often humorous and primarily friendly atmosphere of the first round of negotiations for the BBNJ treaty. This friendly atmosphere, which permeated the negotiations, brings the most hope for further negotiations that are moving in a collaborative direction.

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