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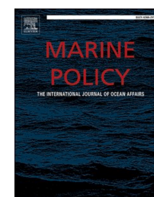

Shake it Off: Negotiations suspended, but hope simmering, after a lack of consensus at the fifth intergovernmental conference on biodiversity beyond national jurisdiction☆

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ABSTRACT

The process for formulating a new treaty for 'Biodiversity Beyond National Jurisdiction' (BBNJ) has been long. Since informal discussions began in 2004, the international community has devoted nearly 20 years to setting the agenda, circumscribing the issue areas, and negotiating the terms of a legally binding BBNJ instrument. The fourth and fifth inter-governmental conferences (IGCs), which both occurred in 2022 after a two-year hiatus due to COVID-19, were supposed to be the last. But despite major movement, altered modalities, and three versions of the draft treaty texts circulated during IGC-5, another round of negotiations ended without consensus on a new agreement. This paper explores the relationships between the pace and content of the emerging treaty, on the one hand, and the dynamics of process, interests, power, and ideology, on the other. After an overview of the negotiation format and apparent progress, subsequent sections consider in turn the issue areas of marine genetic resources (MGRs), area-based management tools, including marine protected areas (ABMTs/MPAs), environmental impact assessments (EIAs), and capacity building and transfer of marine technology (CBTMT). Institutional arrangements and cross cutting issues are also highlighted as key areas where obstacles remain, but where there is simmering hope.

1. Introduction

In a prize winning 2009 TED talk, Sylvia Earle called for action to protect the ocean with a simple statement: "No water, no life. No blue, no green" [1]. That was what global leaders set out to do at UN headquarters during the last two weeks of August 2022 at the fifth intergovernmental conference (IGC-5) for the BBNJ[1] agreement. This agreement covers areas beyond national jurisdiction (ABNJ), which make up nearly two-thirds of the global ocean. Here, the concept of Mare Liberum, or "Freedom of the Seas," has historically supported practices of free navigation, trade, and fishing outside the bounds of sovereign territory [2]. This concept lasted for hundreds of years as the principal institution for global ocean management, until the United Nations Convention on the Law of the Sea (UNCLOS) – sometimes referred to as the 'Constitution of the Oceans' – entered into force in the mid-1990 s. This framework convention established maritime zones including the 200 nm Exclusive Economic Zones (EEZ) that effectively nationalized large portions of the oceans. Although the ABNJ (which includes the 'high seas' and international seabed or 'Area') is outside these sovereign zones, UNCLOS created obligations for states to cooperate to protect and preserve the marine environment here too. Still, there has to date only been a patchwork of uncoordinated governance efforts actualizing this responsibility, especially in terms of anthropogenic and climatic stressors. The goal for IGC-5 was finalize a third 'implementing agreement' to UNCLOS for ABNJ, which had been discussed at the United Nations for almost 20 years. As an implementing agreement, the BBNJ agreement must be "fully consistent" with UNCLOS [3]. Once it enters into force, the BBNJ agreement will act as a governance mechanism to

☆ The title references the 2014 song "Shake it Off" from Taylor Swift's album '1989'.

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[1] Intergovernmental Conference on an international legally binding instrument 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 (BBNJ).

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achieve conservation and sustainable use of marine biodiversity in ABNJ.

This article is the fifth in a series published in *Marine Policy*, which seeks to identify important variables shaping the developing BBNJ agreement at the IGCs that have taken place since the official start of negotiations in 2018. In this series, we have identified significant trends regarding consensus building, and analysed the obstacles and challenges facing both delegates and negotiation leadership as they seek consensus on a well-designed legal instrument [4–7]. Our overall research question centres on the factors that explain the prospects for and design of the final BBNJ agreement. Our analysis of the first intergovernmental conference in August 2018 (IGC-1) concluded inter alia that ‘Beyond National Jurisdiction’ seemed to be driving positions more than concerns about ‘Biodiversity’ itself [4]. In the analysis of IGC-2 (March/April 2019), we explored whether and how the current ocean governance regime constrained or enabled the nascent BBNJ agreement, as the provison that the treaty “should not undermine” existing elements of the ocean governance regime appeared to inhibit movement towards a consensual and effective instrument [5]. The third round of negotiations, IGC-3 (August 2019), were guided by a draft treaty text, but the negotiations seemed to have reverted back to the dichotomy between the common heritage of mankind and the freedom of the seas principles, despite attempts to set these principles aside in favour of less polarized alternatives [6].

The fourth and planned final meeting of the BBNJ negotiations, IGC-4, had originally been scheduled to take place in March 2020 but was delayed until March 2022 because of Covid-19 restrictions. During the two and a half years following IGC-3, non-governmental organizations (NGOs) and groups of interested states held virtual informal meetings to discuss key issues, and the negotiation leadership organized a series of informal interactions via Microsoft Teams from September 2021 into 2022. However, no revised draft text was produced, and there were differing views on the utility of these digital platforms [8]. IGC-4 finally took place in person in March/April 2022, but because of continued pandemic restrictions, there were limitations of two persons per state delegation and no observer participation was allowed in person. A ’lowest common denominator’ feeling pervaded during this IGC, and a marked lack of political will was observed, with states continuing to object to building robust new institutions [7]. While significant progress was made during this latest round of negotiations in 2022, IGC-5, a final consensus treaty text remained elusive. After the President announced the suspension of the fifth session and plans to resume at a subsequent date, such that delegates would essentially pick up where they left off, the delegate from Micronesia in his closing statement seconded this by saying that "*…we’re not having another IGC, only an IGC-5bis,*[2] *so you better hold on to your little octopus …*" – referring to the small knit octopi provided to delegates by the High Seas Alliance of NGOs, which had decorated desks throughout the IGC negotiations since 2018. At the time of writing, no official date has been set for this resuming of IGC-5 negotiations but based on the atmosphere in the room at the last day of negotiations, there is hope that negotiators will be able to ‘shake it off’ and sustain the positive momentum reached at the end of IGC-5 for resumed talks during spring of 2023 and IGC5bis.

Against this background, our research question within the context of this fifth article og this *Marine Policy* series on the BBNJ negotiations is what the factors are that led to this disappointing result of no consensus but simmering hope after IGC-5, and what the path forward towards IGC-5bis is? We start with describing the methodology used in this work, followed by an overview of the expected content of the new agreement and the steps taken during IGC-5 to reach an agreement that could be adopted. These main sections are grouped by the four main issue areas that make up the BBNJ ‘package’ agreed to before the negotiations began, and part of the draft treaty text versions circulated during the meeting. We conclude by considering the discussion of treaty procedures, and what the role of institutional elements will be, including the future BBNJ Conference of Parties (COP).

2. Methodology

The overarching goal of this series of articles has been to provide an explanatory narrative that sheds light on the BBNJ process and outcomes, enabling us to systematically identify the factors that shape the negotiations and eventual agreement, and situate them within the larger literature on regime creation and effectiveness. This commentary on the fifth session of negotiations draws on public statements made during plenary sessions, text proposals and statements posted on the BBNJ website, as well as anonymized interventions within informal informal sessions. These data have been collected by the authors since the first round of negotiations in 2018 and used as reference material throughout our analyses [4–7,9–11]. At the request of the BBNJ conference leadership, from IGC-3 onwards, our analysis does not report identifying features of speakers (name, state, group or organization) when referencing the negotiations during informal informal sessions. This format is intended to facilitate more frank discussion as a result of the more closed nature. In places where we do identify specific speakers or positions, these are drawn from publicly available plenary sessions, written statements, and text proposals. Throughout the IGCs, this data has been collected in Microsoft Word and Excel formats and analysed by the authors using a process tracing approach [12], in which Delegates’ statements are examined and compared with previous positions as well as the context of the current meeting and other Delegates’ positions. We rely heavily on textual analysis, examining the statements made both orally and in writing. Our aim is to provide a suite of analyses that trace the process underpinning the negotiation of the BBNJ agreement, highlighting key causal mechanisms and tensions that will help and/or hinder its effectiveness.

As the negotiations were already running over schedule, and there was strong urgency to finalize an agreement, all ten days of IGC-5 included parallel sessions, which required delegations (and the authors of this article) to split into two groups. One co-author was able to follow each of the parallel meetings, either in person or in the live streamed version on UN Web TV. In addition, there were smaller closed meetings (“informal informal informals” as the President sometimes referred to them) with specific “homework” from facilitators on textual provisions that were closed to observers and could not be directly tracked, and as such are not part of the data used in this article. When referred to in this article, descriptions of these discussions were based on summaries presented at the sessions by facilitators or official documents uploaded to the UN website.

In terms of negotiation modalities, these too had evolved, enabling a fair amount of access for researchers, and even more than pre-pandemic IGCs. First, COVID-19 restrictions had been lifted by August 2022, so there was no limit on the size of delegations at IGC-5. Secondly, observers were allowed full access to *all* sessions [13]. This differed from the pre-COVID IGC-3, when informal informals were first introduced for BBNJ negotiations. At that time, the spots for NGOs in these sessions were limited, thereby restricting access by observers and leaving them to have to advocate amongst themselves for access [6]. Finally, the conference leadership retained an important new element of transparency held over from IGC-4 and COVID-19 restrictions: all sessions were streamed live either on UN Web TV (plenaries, visible to anyone) or WebEx (informal informals, visible only to registrants) for IGC-5. As such, transparency and access were greater during IGC-5 than in any other negotiation session thus far.

[2] The term "bis" is used in drafting treaties to indicate another version of the text. In this case it refers to an addition that is made subsequent to, but connected with, a previous provision or conference. https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095508312

3. Setting the stage of the negotiations

On the first day of IGC-5, with the area set aside for NGOs and observers overflowing, Conference President Rena Lee declared the IGC-5 open. The urgency to finalize an agreement was clear. President Lee emphasized that the General Assembly had authorized this *one* additional meeting to finalize the agreement, and that during the UN Ocean Conference in Lisbon that summer, almost all who had spoken about the BBNJ treaty had called for its conclusion in 2022. It was time to "squeeze the creative juices," the President said, and to not let "the perfect be the enemy of the good." Quoting REO Speedwagon's 1984 hit "Can't help this feeling," she encouraged the delegates to "*…bring this ship into the shore,*" evoking laughter and applause. All the same coalitions from previous sessions were active at IGC-5, including and especially the Group of 77 (G77) plus China, the African Group, the Pacific Small Island Developing States (PSIDS), the Caribbean Community (CARICOM), and the Core Latin American Group (CLAM). Throughout the discussions, delegates could be seen responding in real time to proposals on the floor, drafting quick emails and messaging one another on WhatsApp groups, demonstrating their commitment to finalizing the BBNJ agreement during IGC-5.

The work started with an updated draft version of the treaty, referred to here as the IGC-5 draft text. This had been circulated prior to the negotiations by President Lee, who was responsible for producing it in consultation with the issue area facilitators [14]. During the course of ten days of negotiations, two additional versions were later circulated, reflecting changes and new text that smaller groups and parallel sessions had generated [15,16]. These are referred to as the "refreshed" draft and the "further refreshed" draft, with the latter being released on the final morning of the negotiations (Table 1).

There were clearly some steps forward during the IGC-5, as Table 1 shows. The word count in the document declined, and the number of places in the treaty text with options, for example, was reduced from 29 to 10 during these ten days, which *suggests* that at least some differing perspectives managed to find common language states could agree on. The use of the word "shall", which creates stronger obligations on states parties, was reduced overall during the two weeks, though, and the use of the word "shall" in brackets more than doubled, showing disagreement on the strength of treaty language, and illustrating a slight weakening of the obligations in the text. Although some concessions were made during this period, the most updated version unfortunately still had options and brackets of such a high number, so that hope of an adopted agreement during IGC-5 progressively dimmed, leaving many delegates frustrated and saddened at the end of two weeks of negotiations when the President had to conclude that no consensus had been achieved.

Some of the reason for this lack of consensus may be attributed to new organizational challenges that had materialized during IGC-5, with important implications for equity. The first involved the use of the aforementioned "homework groups" assigned by the President and facilitators, which was a major change in modalities. These were often 'off-the-cuff,' when discussions revealed a clear disagreement on the direction of a particular article in the draft treaty text. These smaller groups tended to meet before and after sessions, including through the lunch hour. At least one group met simultaneously with two parallel informal informals. The main idea was a quick turnaround, and conclusions were reported on during plenary sessions. However, the "homework group" model was also criticized as especially inaccessible for small states and challenging for large coalitions that had to coordinate positions with many member states. Kenya, for example, speaking in its national capacity, was especially eloquent, noting that such groups were a "necessary evil" but led to decisions about the draft text that were not representative of the views in the room. The use of these modalities means that observers should be cautious to not conflate apparent "progress" (movement in the text) with consensus-building around that text.

A second equity issue concerned the schedule for the informal informals. These also often ran over time, going into lunch or late into the night, when interpretation services were discontinued, and discussion proceeded in English only. This disadvantaged delegates whose first or primary languages were one of the other official UN languages, and who relied on interpretation and translations to follow and participate in negotiations. During the second week, facilitators began displaying the draft text on screen – also in English only. Right away, some delegates objected to the fact that the text they were seeing on the screen was only available in English, and not the other official languages of the United Nations, creating "unequal working conditions" that put non-native English speakers at a disadvantage. The main risks were confusion about what states were agreeing to, and inconsistencies between versions of the text in different languages, both of which would delay the finalization of the agreement.

4. Elements of the BBNJ package

Equity and modalities aside, the BBNJ "package" as negotiated during IGC-5 still contained four sets of main issues: Area Based Management Tools (ABMT) including Marine Protected Areas (MPAs), Environmental Impact Assessments (EIA), Capacity Building and Transfer of Marine Technology (CBTMT), and Marine Genetic Resources (MGR) including access and benefit sharing. While the first two relate mainly to conservation and sustainable use, MGRs and CBTMT also include issues of economic justice and equity.

Table 1
Differences in options, strength of language, and length between the treaty drafts.

Version	Section	Places with "options"	Number of "shall"s	Bracketed "shall"s	Word count (including titles)
11 July 2022	**Full draft**	**29**	**371**	**3**	**22,099**
IGC-5 draft	MGRs	3	60	0	3255
	ABMTs/MPAs	2	54	2	2579
	EIAs	12	94	1	4830
	CBTMT	1	29	0	2020
	Institutional arrangements	2	39	0	2024
21 Aug 2022	**Full draft**	**14**	**336**	**5**	**20,389**
"Refreshed" IGC-5 draft	MGRs	0	46	0	2602
	ABMTs/MPAs	1	56	2	2821
	EIAs	5	81	3	4792
	CBTMT	0	26	0	1550
	Institutional arrangements	2	33	0	1797
26 Aug 2022	**Full draft**	**10**	**344**	**8**	**20,501**
"Further refreshed" IGC-5 draft	MGRs	0	43	0	2471
	ABMTs/MPAs	0	62	0	3058
	EIAs	7	90	8	5016
	CBTMT	0	23	0	1628
	Institutional arrangements	1	33	0	1938

The first part of the IGC-5 draft text, circulated prior to the conference, was centred on General Provisions (Part I), followed by separate parts for each of these four packages, and then (1) Institutional arrangements, (2) Financial resources and mechanisms, (3) Implementation and compliance, (4) Settlement of disputes and advisory opinions, (5) Non-parties to this agreement, (6) Good faith and abuse of rights, and (7) Final provisions. The analysis in this paper follows this basic order in the draft text, to facilitate comparison with other analyses in our Marine Policy series, as well as the drafts of the treaty, illustrating the degree to which contention pervades multiple parts of the treaty design. Though we focus on the four packages and (1) Institutional issues for the purposes of this study, we acknowledge that all the other six issues also have great importance.

4.1. Part II Marine Genetic Resources (MGR) including sharing of benefits

> "Marine biological resources of ABNJ are global commons. The conservation and sustainable use of these biological resources still lacks an inclusive international regime, though it has been envisioned by the UNCLOS" – Nepal, speaking during the closing plenary, August 26th, 2022

According to our observations, the 'common heritage of mankind' (CHM) principle was mentioned 41 times during IGC-1, 56 times during IGC-2, 18 times during IGC-3 and only 8 times during IGC-4. While this trend can be interpreted as meaning the issue had been resolved, this is far from the case. At IGC-5, with the potential finalization of the agreement in sight, the question of whether, where, and how to include CHM loomed large once again. The principle was mentioned at least 82 different times according to our observations, in both the discussions on general principles and approaches and the sessions on MGRs. The discussion taps into deep disagreements, including fundamental disputes over history, values, and the nature of the international system. The CHM concept is present in Article 5(b) in each of the three draft texts used during IGC-5, as part of the list of "General Principles and Approaches." At the beginning of the final debate on this specific article, every single developed country that took the floor stated that they could not accept the inclusion of this principle, and recommended the deletion of CHM from Article 5. In sharp contrast, all major developing country coalitions expressed strong support for the principle.

The debate over CHM was both factual and ideological. A developed state said for example that "the common heritage of mankind is not an established principle of international law." But the CHM principle is deeply embedded in the existing ocean governance regime. After being formally affirmed in UNGA Resolution 2749 in 1970, the principle was written into UNCLOS as applying to "the Area and its resources" (Article 136). There is a wider scholarly debate about the status of CHM, specifically whether it is a part of customary international law, and whether it applies (or should apply) to non-mineral resources in the Area [17–22].

In forwarding their argument – that the CHM is a fundamental part of UNCLOS and should apply to any implementing agreement – developing countries sometimes made errors in description. For example, several asserted that CHM applies to the "high seas" and one state claimed that the principle had been accepted since the late 1950 s. And when a developed maritime country argued that CHM only applied to mineral resources, no one pointed out that the text of UNCLOS is ambiguous on this point. One developing country coalition did note that an International Tribunal on the Law of the Sea Advisory Opinion suggests that CHM applies to the Area as a whole.[3] Its inclusion in the final agreement would clearly be a "deal breaker" for the developing states adopting the agreement or not. As a potential way forward, some suggested that it could be placed in the preamble instead, an idea which President Rena Lee echoed in her summary of the discussions. Specifically, the suggestion was to "contextualize" CHM. This idea was immediately rejected by a major representative of developing countries, who asserted that if CHM should be moved anywhere, it should be the front of the list of General Principles and Approaches, which is where it remained, in brackets, in the last and "further refreshed" draft of August 26th.

Monetary vs. Non-monetary benefits was another point of great divergence during the negotiations. Developing states emphasized on the first day in the MGRs session that benefit sharing had to be mandatory, and both monetary and non-monetary, setting the stage for the revival of dichotomous opinions on the topic. During the first week of negotiations, the metaphor "the goose that lays the golden egg" was used by five different parties with reference to commercial exploitation of MGR from the ABNJ, and the need for articles on specificities around benefit sharing. The "golden eggs" refer to the expected benefits from bioprospecting, the total value of which is generally unknown, but subject to much speculation [11]. Some suggested that the goose had not even started laying eggs, and we needed to protect the goose and not kill it – give the goose a chance. Others said the goose had already hatched its eggs, they were indeed golden, and they needed to be shared because everybody owned the goose together. However, another argued that with some tender loving care, perhaps the goose could lay even more eggs. Though this was all said with some humor, the seriousness was there simmering under the surface about the "golden eggs". Developing states argued that the need for both non-monetary and monetary benefits had been a continuously clear and firm position since the start. This was meant to ensure that the future agreement would be fair and equitable and that the sharing of benefits with humankind would be 'future proofed,' meaning it should be effective under future, unknown, but different circumstances. Negating this, some argued, represented a lack of political will, and would ensure that there would be little chance of reaching an agreement in the last days of negotiations. One developed state then announced a large concession, showing clear political will to move negotiations forward, by stating that it could accept a so-called 'track and trace' system that could enable the COP to make future decisions on monetary benefits based on commercialization of products

[3] The Advisory Opinion issued by the Seabed Disputes Chamber (ITLOS/PV.2010/2/Rev.2) states: “"According to the preamble and article 136 of the Convention, "the Area and its resources are the common heritage of mankind", a rule that already belongs to the corpus of customary international law. It must be recalled that the Convention developed in this regard a "basic principle" concerning the legal status of the deep seabed proclaimed by the United Nations General Assembly in 1970 in Resolution 2749.3 Article 311, paragraph 6, of the Convention provides that "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof." Article 311 prohibits not only inter se agreements but also agreements with third parties. Even if all Parties to the Convention were to conclude an amendment deviating from article 136, such agreement would constitute a breach of their obligations under the Convention. "Inderogability" of international rules is inherent in the concept of ius cogens"

from MGR in ABNJ. However, all of the ideas about monetary benefit sharing from commercialization remained in brackets in the end, with no agreement having been reached (Article 11(5)).

As such, although progress was made on settling key sections of the MGR text – including on objectives, notification, and traditional knowledge – disagreement persisted on key areas related to benefit sharing, including modalities and the nature of benefits. The stark contrast between the developing and developed world on the CHM principles suggests that these topics may be the most critical to resolve if there is to be hope of bringing the negotiations to a successful conclusion in 2023.

4.2. Part III Measures such as ABMTs, including MPAs

> "At this most urgent time for our ocean, failure to come to an agreement for the protection of spaces and species is not an option." – Susanna Fuller, Vice President of Oceans North, in a statement from the High Seas Alliance at the close of the meeting[4]

In contrast to IGC-4, during which only three Articles in the draft agreement were discussed, the ABMT/MPA discussion at IGC-5 made significant progress on refining the six Articles of Part III, all of which are now close to agreement. As has been the case throughout the negotiations, the challenge of honing definitions for ABMTs and MPAs led to considerable debate. Consensus was reached on this though during IGC-5, and the latest "further refreshed" iteration of the draft agreement includes clear, separate definitions for ABMTs and MPAs in Article 1. Interestingly, the definition for MPAs has been amended to include allowing "sustainable use provided it is consistent with the conservation objectives" (Article 1(12)). The objective to conserve "long term biodiversity" remained bracketed however, showing divergence of opinions on whether to include it or not.

A few key sticking points remain in this Part of the draft text. These include how the agreement will interact with other instruments including Regional Fisheries Management Organisations (RFMOs), which also designate ABMTs in ABNJ [23,24]. New language in Article 19 on Decision-Making points clearly to respecting the competencies of relevant legal instruments and bodies, as well as not undermining the effectiveness of measures adopted within states' jurisdiction. Another sticking point addressed how coastal states with EEZs that are adjacent to possible ABMTs/MPAs in ABNJ would be affected, as this issue of adjacency has been paramount throughout the IGCs to date [25,26]. Since no formal principle of adjacency exists under UNCLOS, the IGC negotiations provide an opportunity to define and refine it [25], and new language was added to Article 18 requiring prior notification and consultation with adjacent states when a proposed area is entirely surrounded by state EEZs. The adjacency issue also arises regarding ensuring adjacent states are consulted (Article 17 on Proposals) and that any existing measures or activities in adjacent areas within national jurisdiction be included in consultations (Article 18).

Two noteworthy decision-making mechanisms were introduced to Part III at IGC-5, both of which are intended to account for exceptional circumstances, thereby enhancing the flexibility of BBNJ processes. The first provided an "opt out" mechanism as part of Article 19 on Decision-Making, which could be triggered when an adjacent coastal state might not want to be bound to protect a sensitive area due to activities occurring within their EEZ. This "opt-out" language would allow a Party to file an objection with the Secretariat (a) if a given decision was perceived as being inconsistent with the agreement or other relevant rules of international law, (b) the decision was unjustifiably discriminating against the objecting Party, (c) the Party could not practicably comply with the Decision and/or lacked the technical capabilities to implement it, or (d) security constraints precluded the Party from implementing or complying with the decision [27]. This draft language, bracketed in the Further Refreshed draft text of 26 August 2022, would require objections to be renewed every four or five years, or they would be withdrawn. Given that it remained in brackets, this text will need further discussions to reach consensus when talks resume for IGC-5.

The second mechanism introduced to the draft agreement during IGC-5 provided an emergency closure mechanism to be implemented in a situation where a human-caused or natural phenomenon "has, or is likely to have, a significant adverse impact on marine biological diversity" in ABNJ "to ensure that the adverse impact is not exacerbated." This provision allows for the adoption of an ABMT/MPA, but only if the threat "cannot be managed in a timely manner" through other parts of the agreement or by another legal instrument, framework, or body. This language was moved up as ante to Article 20 on Implementation during IGC-5, from its previous spot in Institutional Arrangements (Article 48). By moving it up, delegates made it more visible and provided a mechanism for operationalizing a precautionary approach. Emergency closures have been implemented elsewhere, e.g. in EU legislation [28].

However, the agreement's approach to precaution has been watered down overall. Instead of referring to the precautionary principle or even a precautionary approach, it now refers to "the application of precaution" in multiple places. Although the precise meaning of each term is often ambiguous, the distinction is significant [29,30]. This simplification is problematic given the high degree of scientific uncertainty in ABNJ, especially regarding the potential impacts of climate change on fragile marine ecosystems and species. The wording on precaution is not likely to be resolved prior to the agreement's finalization as, during the informal informal discussions, delegates went back and forth on the point but did not want to preclude moving the agreement forward. While the intent behind suggesting this language was to simplify it, of course there are implications down the line, opening the door to an even broader interpretation.

Nevertheless, significant progress was made on this part of the agreement overall and how it relates to operational components elsewhere. For example, the role of the Scientific and Technical Body (STB) become clearer relative to the ABMT section of the agreement, both with respect to reviewing proposals and making recommendations to the COP, and with recommending emergency measures. Given the weakening of the precautionary principle, this STB role will have increased importance in ensuring good decisions are made, based on the best available science and accounting for uncertainty.

4.3. Part IV Environmental Impact Assessments (EIA)

> "We've made impressive progress on EIAs … we streamlined many and removed most options, also resolved contentious issues like planned vs proposed. but not enough progress on decision making, impact vs activity approach, and thresholds for EIAs to bring part 4 over the finish line." – Facilitator EIA,
>
> René Lefeber, the Netherlands, August 26, 2022

EIAs remain one of the most discussed and contentious issues in the negotiations. The section consistently has the highest word count and the highest number of options across all three drafts of the text. In the "further refreshed" version of the draft text of August 26, 2022, the EIAs section covers 13 Articles, a significant streamlining compared to the 21 Articles contained in the IGC-4 draft. While there are definite signs of agreement and progress, in some cases the "progress" (which is really just change) served as an indication of discord, where draft choices were altered and expanded upon without necessarily showing movement towards agreement. One positive development, though, is the consensus around a draft definition of what constitutes an EIA. In the IGC-5 draft text, Part I Article 1(10) had three potential definitions for an EIA. By the August 26 text, this had been reduced to one definition and removed from brackets, which is the result of work taken on by an informal

[4] Source: https://www.nature.org/en-us/newsroom/statement-on-igc-bbnj/

'homework group'. The current, and possibly final, definition describes an EIA as "a process to identify and evaluate the potential impacts of an activity to inform decision-making." This definition is shorter than any of the three options given in the IGC-5 draft text but indicates a coming together of what exactly the delegates considered the role and function of an EIA should be. This was a rare instance of agreement on the topic of EIAs, however, as can be seen by the large number of increases in options shown in the Part IV text further down.

Two major issues remain, however. The first is the scope of the treaty with regards to mandates for EIAs – the *Activity* vs. *Impact approaches.* The former states that all activities in ABNJ require some sort of EIA or screening, and the latter that all activities *with impacts* in ABNJ require an EIA or screening. The impact approach is generally understood to cover a broader set of activities, including potentially creating EIA obligations for activities undertaken within national jurisdiction. These two options are captured in Article 22, and the draft text options changed radically over the course of the negotiations. In the IGC-5 draft, Article 22 text was three short paragraphs and only included options in brackets; by the end of IGC-5, the article had been *expanded* to a full page and three completely fleshed out options. Much of the negotiation over Article 22 occurred in small group meetings, but in general, developing states were more likely to favor an impact-based approach, and developed countries were more likely to approve the activity-based approach. The expansion of options represents an attempt to create *some* obligations around activities within EEZs that impact ABNJ, without requiring an EIA that is fully driven by, and in accordance with, the provisions of the BBNJ agreement. Whereas the IGC-5 draft text simply offered the options of the agreement applying to "activities conducted in" and "activities that have an impact in" ABNJ, the last draft would either (a) make impacts-based EIAs (in line with the BBNJ agreement) optional, but require states to submit reports about any EIA processes that are conducted, or (b) make states conduct substantively equivalent impacts-based EIAs, including requirements for reporting and monitoring, or (c) make states conduct substantively equivalent impacts-based EIAs, with options for the COP to get involved. This multiplication of options compared to the IGC-5 draft could be understood several ways. First, states want to be clear about the boundaries of their obligations, to avoid a treaty text that is interpreted (and implemented) in broader ways than they had envisioned. The newer text is more precise about what those obligations are, rather than just where they might apply. Secondly, it may also be that the multiplication of options represents attempts by delegates to propose compromise solutions that, for example, impose *some* obligations on coastal states to conduct EIAs on activities in their EEZs that may impact ABNJ, without really extending the BBNJ process and provisions into national jurisdiction.

The second major issue dealt with the idea of global minimum standards for EIAs. In the IGC-5 draft text, this was covered in Article 23 paragraph 4, and consisted of two options that focused mostly on the question of whether EIA standards and/or guidelines were to be negotiated by states and set down in an Annex to the treaty, or whether they were meant to be discussed by the proposed STB. Consensus seemed to emerge around the role of the STB to develop standards and/or guidelines to recommend to the COP, through consultation or collaboration with other relevant international legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies (IFBs). However, as the latest version indicates, there is still debate over whether these are even to be considered "standards" at all, as opposed to "guidelines". "Standards" would be more appropriate for a legally binding set of practices; "guidelines" might more accurately reflect a more flexible approach.

Finally, the question of what thresholds to use has been tangled up with two other topics: whether there should be an initial screening step that precede a potential EIA step, and whether, when, and how any aspect of the process should be internationalized. Discussions generally revolved around the question of a tiered approach, involving an initial screening step with a lower threshold to determine whether an EIA was needed, and a second step where the EIA is conducted and a decision is made about whether the planned activity should move forward, or move forward as planned. One text proposal on the two-tiered approach would allow for two streams of EIAs – a state-led review and decision-making stream and an international one, led by BBNJ bodies. Reasons for an internationalized option include capacity issues, the desire to avoid "EIAs of convenience," and the fact that ABNJ is global commons, so equity issues should be paramount to the process. These ideas have been explored in both the BBNJ discussions and the academic literature [31].

In general, progress was made on the specific details of the EIA process for ABNJ, and compromise proposals (or proposals intended to prompt compromises) exist throughout this section of the text. But the major sticking points all revolve around the basic question: how much do states want the BBNJ institutions and bodies to be doing things, especially things that may legally bind states, private actors, or existing IFBs. There is a crystallization of different options in the draft text, making the lines of divergence between states clearer, but not necessarily in a way that indicates that agreement is any closer.

4.4. Part V Capacity-Building and Transfer of Marine Technology (CBTMT)

> "The oceans have to wait a little longer but hopefully not much longer." – Delegate from Philippines during closing statements August 26th 2022, referring to the fact that the delegates did not reach consensus on an agreement during IGC-5.

In our analysis of IGC-4 [7], we argued that CBTMT had been the most stagnant area of negotiations, with little movement towards consensus since IGC-1 [32,33], especially with regards to the difficult term "mandatory" when it comes to technology transfer. Going into IGC-5, the CBTMT section still appeared relatively resolved, in that only one of the articles had contained options (three of them) at the start of this round of negotiations, namely Article 47 on monitoring and review, indicating divergence of opinions that goes beyond wording around

Table 2
Three options for monitoring and review of capacity building and transfer of marine technology.

Option 1: Monitoring and Review	Option 2: Working group on capacity-building and transfer of marine technology	Option 3: Capacity-building and transfer of marine technology committee
No specific details of subsidiary bodies, but left to the COP to make these specificities, or even keep the review mechanisms at COP level if deemed necessary. Arguments against a committee created by the agreement (options 2 and 3) were associated with cost and number of bodies created by the agreement and need to rationalize the latter. Leaving this to the COP would provide for a more flexible governance structure with a lasting agreement and avoidance of amendments. This option was largely supported by many developed nations.	A version drafted to strengthen the mechanism, by looking to needs assessment, how these needs would be operationalized and translated into action, reviewed and assessed and how these recommendations would to the COP in turn for decision making. A working group has a place to strengthen coordination and consistency, and it would be under the control and guidance of the COP. Some felt there was too much overlap and prescriptiveness here though.	Emphasis on a specific subsidiary body, with representation of SIDS and others for geographic equity. Some considered this option too prescriptive and detailed, whereas others, particularly developing states, commented that the text brought certainty to the role of the committee. The committee would be a smaller group of individuals with specialized competencies that meet more frequently than the COP, nominated based on geographic distribution. If established by the agreement, this work could start immediately and not need to wait for COP.

whether or not there would be a "group", "committee" or leave decisions to the COP (Table 2). On this article, the negotiations started by focusing on commonalities around the three options from the start though, attempting to come to consensus on a common text. There were four common elements of the three options for decision making authority on CBTMT of this specific article, the facilitator emphasized. These were around the topics of (a) Reviewing needs and priorities; (b) Reviewing funding support; (c) Measuring performance; and (d) A forward-looking process [34]. Specifically, much of the discussion was around the proposed CBTMT committee or group, a topic thar had not been clearly articulated until IGC-5.

In fact, the name of the group or committee did matter for many, some delegates emphasized – as to whether it was a working group or a committee, and there was a reference to the hierarchy of names reflecting their importance, with "committee" having higher status. Some delegates commented on the need for reporting to this committee or group to not to be overly burdensome, as this could rather be done at an activity level instead. Others emphasized that this section on monitoring and review, especially the part on assessing needs and priorities of developing states, was critical – even crucial – for states to be able to implement the rest of the instrument and allow them to participate and implement the agreement as needed.

In the "refreshed" draft text that was circulated on August 21st 2022 [16], option 1 was chosen in an edited version, and a new article 47bis was included in brackets (indicating that there is difference of opinions on it), pulled from option 3 and named Capacity-building and transfer of marine technology (CBTMT) committee. With this change, the text had shrunk to 1550 words. In the "further refreshed" draft text circulated on the final day of negotiations August 26th 2022 [15], the brackets were off this 47bis with only a slight modification in detail in subparagraph 2. Only three sub-sections were left containing brackets though at the end of negotiations, down from ten in the "refreshed" draft text, indicating a path towards consensus.

In her closing statement, the delegate from the Philippines emphasized that CBTMT challenges were specifically critical for them as an archipelagic state, entirely dependent on the sea. However, she stated, their delegation had come to the negotiations with full flexibility, ready and open to run the full distance. She noted though that even if the states were close the finish line, there were still fundamental principles without convergence, and without this, the agreement would not provide a fair and equitable CBTMT framework that could facilitate meaningful participation of developing states in the agreement.

5. Institutional issues

Institutional issues are of great importance for implementing the BBNJ agreement, because the bodies created and/or empowered by the BBNJ instrument are the architecture which can, and should, ensure that duties and rights under the agreement are fulfilled. Although the discussion around "institutional arrangements" has been organized in different ways throughout the IGCs, we find it useful to address BBNJ institutions in one place, to highlight the relationship between functions and form, and to illustrate patterns that underlie the discussions about multiple different BBNJ bodies.

During IGC-2 [35], the Icelandic delegate mused on the oft-repeated idea that "*form follows function,*" stating during plenary discussions that if the form of the BBNJ agreement is a light agreement in terms of function and economic burdens that builds on existing bodies and expertise, it is easy to see that only core functions will be entrusted to the global level of governance, whereas the regional and sectoral levels will bear the bulk of the work. The opposite, he said, would be an agreement which would have an overhead that would be big and expensive, with overlapping and duplicate functions, and a global level governance that is endowed with extensive or comprehensive decision-making power. The former, the Hybrid approach, had already been suggested as a compromise by New Zealand between the second and third preparatory committee meetings that preceded the IGCs (PrepCom2 and 3). This was envisioned as a global body with high-level decision making, using existing institutions as much as possible and establishing new governance bodies when necessary, making it cost-effective and efficient [36]. To promote transparency and accountability, States would have to report to the COP on individual activities (including the activities of related regional and sectoral bodies) and, to foster participation and inclusiveness, meetings would be open to non-contracting parties, NGOs and other stakeholders as observers to the proceedings [10]. During IGC-5, the delegates worked to achieve consensus on precisely this issue, on what the institutional arrangements would be for the final agreement, looking to make sure that all subsidiary bodies discussed in the different sections of the agreement would be streamlined and that there were no overlapping issues delegated to different bodies. The following are a list of subsidiary bodies that were discussed during this latest negotiation.

5.1. Conference of Parties (COP)

Article 48 holds the text on the COP. In both IGC-4 and 5, there was agreement on the COP meeting one year after the agreement entered into force, after which it would be decided what intervals their meetings would continue with. In terms of voting mechanisms for the COP, we had some movement, going from full consensus (with options listed if consensus failed), to consensus with a $^{2}/_{3}$ majority if consensus failed. However, the "further refreshed" draft of August 26th 2022 contained options on this in Article 48(4), where the first option gives the authority to the COP itself to decide the procedure for this – removing it from the text of the agreement. This option represents a meaningful difference, because the COP will be made up of only parties to the BBNJ agreement, whereas the negotiations likely represent a broader set of interested states.

5.2. Scientific and Technical Body (STB)

In Article 49 of the refreshed text, the STB is established and its role is described. The STB is to (a) be composed of experts that are nominated by parties and elected by the COP and (b) provide scientific and technical advice a well as other functions that are determined by the COP. The main point of contention that is still under negotiation for the STB is in reference to EIAs and whether it should produce guidelines and standards for non-BBNJ EIA processes. Although other roles, such as providing guidance in the proposal and designation of ABMTs, are also being contemplated. The text is unchanged from the further revised to the "further refreshed" August 26th draft, reflecting the fact that the creation of an STB is generally uncontroversial, although contention remains around its precise role and functions.

5.3. Secretariat

There was also a lengthy discussion of the Secretariat during IGC-5, where concrete suggestions crystallized. Secretariats are the supportive structures of most global agreements that perform administrative and bureaucratic functions to aid the management and the implementation of the convention in question. Their allegiance is to the agreement itself, and not to any specific state. Their role is to help states effectively fulfil the goals of the agreement, by having expert knowledge of the agreement and also providing a science-policy-stakeholder interface and linking relevant actors together. Importantly, they are also stable parts of an agreement, and with the long-term goals of an agreement, important for continuity [37]. The Secretariat is mentioned 26 times in the "further refreshed" draft agreement of August 26th, demonstrating the importance of its role to delegates drafting the agreement. There is still not consensus on just *who* the Secretariat might be, however, with some delegates wishing to keep it with the Division for Ocean Affairs and the Law of the Sea (DOALOS) – who have held this role throughout the

negotiations; and others who want a dedicated Secretariat that is not part of the budgetary processes and limitations of the UN system. Both options described under article 50, sub paragraph 1, have DOALOS involved though, either as an interim Secretariat or as the Secretariat proper. Whether DOALAS can, and how it might, take on this role remains a topic of interest and consideration for the office itself, as well as delegates to the negotiations.

5.4. Clearing House Mechanism (CHM)

Article 51 describes the role of the clearinghouse mechanism, whose functions mainly revolve around being a repository for information that can be accessed by BBNJ parties and others, thereby facilitating transparency. Depending on the functions taken on by the clearinghouse, it might also facilitate benefit sharing of MGRs and CBTMT. The text in the treaty on this mechanism did not change from IGC-4 to the “further refreshed” text of August 26th. Its role is to provide an open access platform, which will allow for collection, organization, synthesis, and dissemination of information on the work in the four packages. It is to be managed by the Secretariat and will not require the disclosure of protected information. The only change was that there was in the final text in sub paragraph 4 references to "without prejudice to possible cooperation with relevant organizations…" where these are listed in brackets as examples.

5.5. Committee for Capacity Building and Transfer of Marine Technology (CBTMT)

Though not listed in Part VI under Institutional Arrangements, this subsidiary committee was discussed throughout the negotiations as a facilitator for the obligations contained in the CBTMT section. The creation of a dedicated CBTMT committee was a strong wish from the developing states and was drawn out of the third of three options that were available in the first of three IGC-5 drafts of Article 47 into Article 47bis, but without details on the specific functions of the committee.

5.6. Access and Benefit Sharing (ABS) mechanism

This mechanism is also not listed under Institutional Arrangements, but directly under the MGR section (Part II). Article 11bis shrunk considerably during the 10 days in August 2022, and text on the potential to increase the size of the mechanisms and qualifications of members were removed in full. The refreshed text establishes an access and benefit sharing mechanism though, composed of members nominated by states and elected by the COP, and will make recommendations including: proposed implementation measures, rules/guidelines for MGRs, and other matters relating to this part. Still, text on the mechanism’s ability to propose rates for monetary benefit-sharing was moved into brackets for reconsideration when talks resume.

6. No consensus, but continued momentum

Recalling that there were still 10 places left with options in the “further refreshed” draft of August 26th 2022, as well as 7 bracketed "shall"s, there is not a clear and obstacle free path toward consensus that is emerging, even though the President declared that IGC-5 is just in recess and talks will resume in 2023. At the start of the IGC-5 negotiations, when the authors asked delegates whether they expected to conclude a treaty by the following Friday, answers were a mix of “definitely not” and a slightly more positive “maybe, but it won’t be the best agreement.” The narrative started changing the second week, and some delegates started highlighting that there was a need to make movements towards compromise that would ensure that enough states were happy enough to come to an agreement. Growing frustration mixed with disappointment, such that the conclusion of the session required a concerted effort to shake off the negative emotions and focus on finding a workable path towards consensus.

A particular and notable theme of IGC-5 was a recurring reference to the 1995 Fish Stocks Agreement (FSA)[5] as an important model for the treaty. At the most basic level, the association with the FSA suggests that most delegates expect the BBNJ instrument to be a free-standing treaty, that can be ratified by non-UNCLOS members (unlike the Part XI implementing agreement, which essentially fused with UNCLOS). But perhaps more importantly, the FSA did not create new institutions or bodies that play a role in decision-making, but rather created new obligations related to existing organizations (specifically RFMOs). The BBNJ agreement, however, faces a great deal more complexity, in large part because it deals with multiple sectors and activities. And the FSA has not been uniformly successful, having far fewer parties compared to UNCLOS. Munro points out that the management of straddling fish stocks (those shared between a state and the high seas) is particularly difficult and weak under the FSA [38,39]. Molenaar [40] finds that a lack of capacity is a reason for non-adoption of the FSA, highlighting the importance of proposed CBTMT and benefit sharing parts of the BBNJ. Even if the FSA is not a useful model for *how* to regulate activities related to marine biodiversity in ABNJ, it does illustrate what is acceptable to much of the international community. Many states called for the BBNJ text to have language like it or taken directly from it, with examples including the use of language to define “undermine” and in the discussion of potential dispute settlement mechanisms.

The agreement may be near consensus – but it does not *have* consensus, even on central issues like whether there should be an empowered COP or any kind of funding associated with it. Since IGC-1, delegates have warned against reaching consensus only on a treaty that is a “*paper treaty*” or “*paper tiger*,” with beautiful provisions but without sharp teeth, “One that is outwardly powerful and dangerous but inwardly weak and ineffectual” [41]. Will states accept a giant step back on legal principles, and baby steps forward on conservation when they meet again? And will we be able to overcome fears of states to negotiate themselves into a comparative disadvantage, or a situation where domestic industries are impeded by new costs and new restrictions? Getting a treaty that works, not just for some but for everyone, requires more from states - it requires a commitment to doing what is right for ocean biodiversity and for future generations. Hope may be simmering, but delegates must build on what the Icelandic delegate emphasized in their closing statement. At the late hours of the last night of negotiations, he encouraged all to remember that IGC-5 had been a turning point in the negotiations, with more progress in the two weeks they had been there than in the decades before. To ensure that we land an agreement in 2023, they must shake off the disappointment of IGC-5, and preserve and build on the progress that was indeed made – so that IGC-5bis concludes with the Once and Future Treaty [4].

Credit Authorship contribution Statement

Rachel Tiller: Conceptualization, Methodology, Investigation, Data curation, Writing – original draft, Writing – review & editing. **Elizabeth Mendenhal**: Conceptualization, Methodology, Investigation, Data curation, Writing – original draft, Writing – review & editing. **Elizabeth De Santo**: Writing – original draft. **Elizabeth Nyman**: Writing – original draft.

Declarations of interest

The authors have no competing interests to disclose.

[5] The “Fish Stocks Agreement” is the colloquial name for the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

Data Availability

The authors do not have permission to share data.

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