WORLD MARITIME UNIVERSITY

WORKSHOP AND
SIDE EVENTS REPORT

BIODIVERSITY BEYOND NATIONAL JURISDICTION: TOWARDS THE DEVELOPMENT OF A BALANCED, EFFECTIVE AND UNIVERSAL INTERNATIONAL AGREEMENT

WORKSHOP 7 FEBRUARY 2019
MALMÖ, SWEDEN

SIDE EVENTS, UNHQ, NEW YORK

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Published by World Maritime University

DOI: http://dx.doi.org/10.21677/wmu20200304
ISBN Print: 978-91-985700-8-3
ISBN Online: 978-91-985700-9-0
https://commons.wmu.se/lib_reports/65/

Suggested Citation: R. Long and Z. Sun (Ed.), *Workshop Report: Biodiversity Beyond National Jurisdiction: Towards the Development of a Balanced, Effective and Universal International Agreement,* Malmö: World Maritime University, 2020.

The editors would like to acknowledge the contribution of Jill Jarnsäter on the copyediting, production and graphic design of the report.

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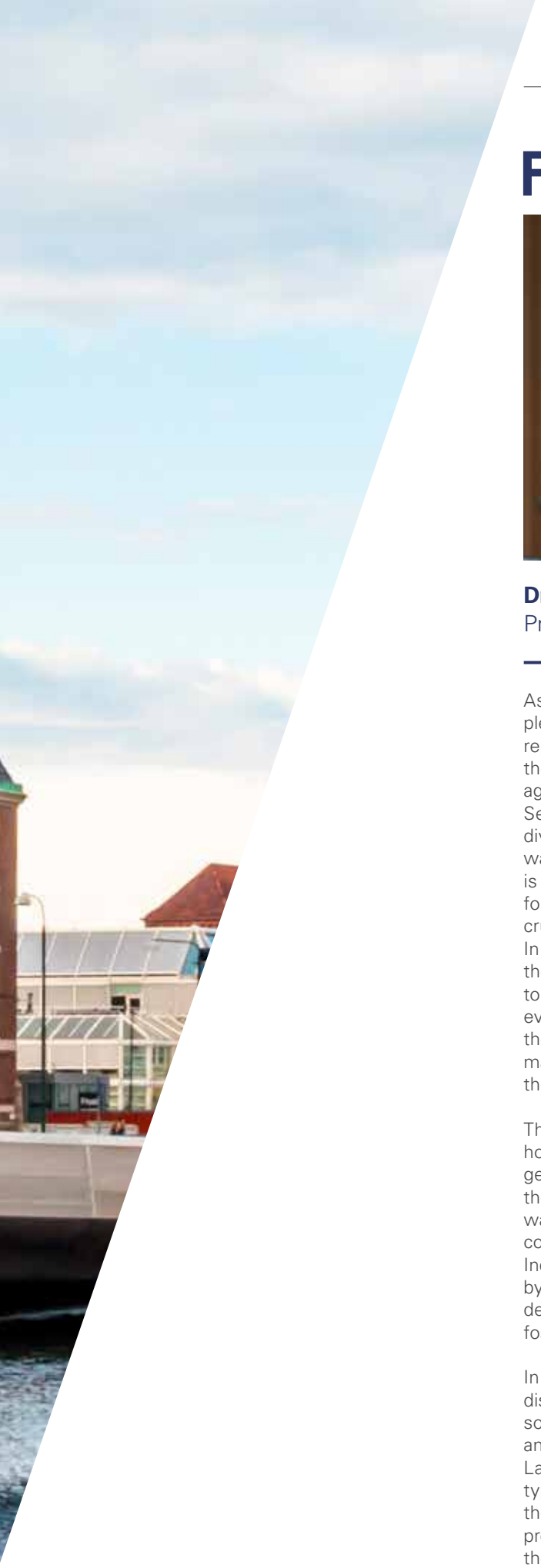


FOREWORD

Dr. Cleopatra Doumbia-Henry
President, World Maritime University

As President of the World Maritime University, it gives me great pleasure to provide a short foreword to this workshop and side events report hosted by the WMU-Sasakawa Global Ocean Institute on the development of a balanced, effective and universal international agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The workshop, which was generously supported by the Ministry of Foreign Affairs of Japan is part of our relatively wide-ranging contribution to the long quest for what is often called the "BBNJ Agreement", which is now at a crucial milestone in the negotiation process at the United Nations. In designing and delivering the workshop, we enjoyed working with the Ministry in preparing all aspects of the programme. I also wish to acknowledge the contributions to these proceedings and related events of participants from our parent body within the United Nations, the International Maritime Organization, as well as the contributions made by the United Nations Division for Ocean Affairs and the Law of the Sea, and the International Seabed Authority.

This report also highlights two other important initiatives that we co-hosted at the intergovernmental conference including a side-event on gender equality and the BBNJ Agreement with a particular focus on the special needs of Small Island Developing States. The latter event was supported by Ireland, Palau and the Nippon Foundation with commentaries by senior diplomats from the PSIDS, CARICOM and Indonesia. The second side event mentioned herein was co-hosted by World Maritime University and Sweden and reviewed capacity development for negotiations and diplomacy, and the use of it for fostering successful outcomes.

In the report, we are fortunate to have short observations from a distinguished group of diplomats, academics, representatives of civil society and industry, who all share insights on a BBNJ Agreement. As an international negotiator myself for over 30 years at the International Labour Organization, I am acutely aware of the importance of this type of extramural academic engagement and its scope to parley the challenges faced by plenipotentiaries in intergovernmental processes in a constructive fashion. Accordingly, it is my hope that the contribution of the World Maritime University has added a degree of momentum in steering the BBNJ process towards the successful adoption of a new agreement.

INTRODUCTION

Professor Ronán Long
Director, WMU-Sasakawa Global Ocean Institute

One of the key attributes of the mission of the WMU-Sasakawa Global Ocean Institute is tackling some of the most pressing issues in ocean affairs and the law of the sea.[1] Thus, it is entirely fitting that the Institute is making a substantive contribution to the BBNJ process through a range of academic undertakings including specialist training programmes, outreach activities, discrete workshops and conferences to assist delegations in bringing the long and arduous BBNJ journey to a successful conclusion. In addition, we have already tailored the PhD and MSc programmes at our University to focus on the successful implementation of the new Agreement.

From our engagement and various capacity-building initiatives, it is clearly evident that the successful outcome of the BBNJ negotiations will mark a very important turning point for the international community in addressing several existential threats faced by humanity. Indeed, the Secretary-General of the United Nations has pointed out that the conservation status of the ocean has never been "more perilous" and that the world is facing a "global emergency" due to the unrelenting loss of marine biodiversity and their associated goods and services.[2] Clearly, environmental pressures on marine biodiversity are exacerbating inequalities and threatening food security in some of the world's most vulnerable communities, which are home to many of our students at our University including from Small Islands Developing States most particularly.[3]

There have been several pressing imperatives that have filled the plenipotentiary's deliberations over the past two years.[4] With the benefit of hindsight, it is also evident that there has been little time to negotiate specific rules on the consequences of damage to biodiversity of areas beyond national jurisdiction. There is however still scope at IGC-4 for the negotiators to address this vital issue by including a legal basis in the Agreement that allows for the adoption and establishment at a future date of a *sui generis* liability and compensation regime that is closely aligned with the rules on area-based management tools and environmental impact assessment.[5] For this purpose, further detail on liability and compensation could be elaborated upon in a separate protocol similar to the approach followed by the Annex VI (Liability) to the Protocol on Environmental Protection to the Antarctic Treaty. This may be achieved by the inclusion of an enabling provision in the BBNJ Agreement along the following lines:

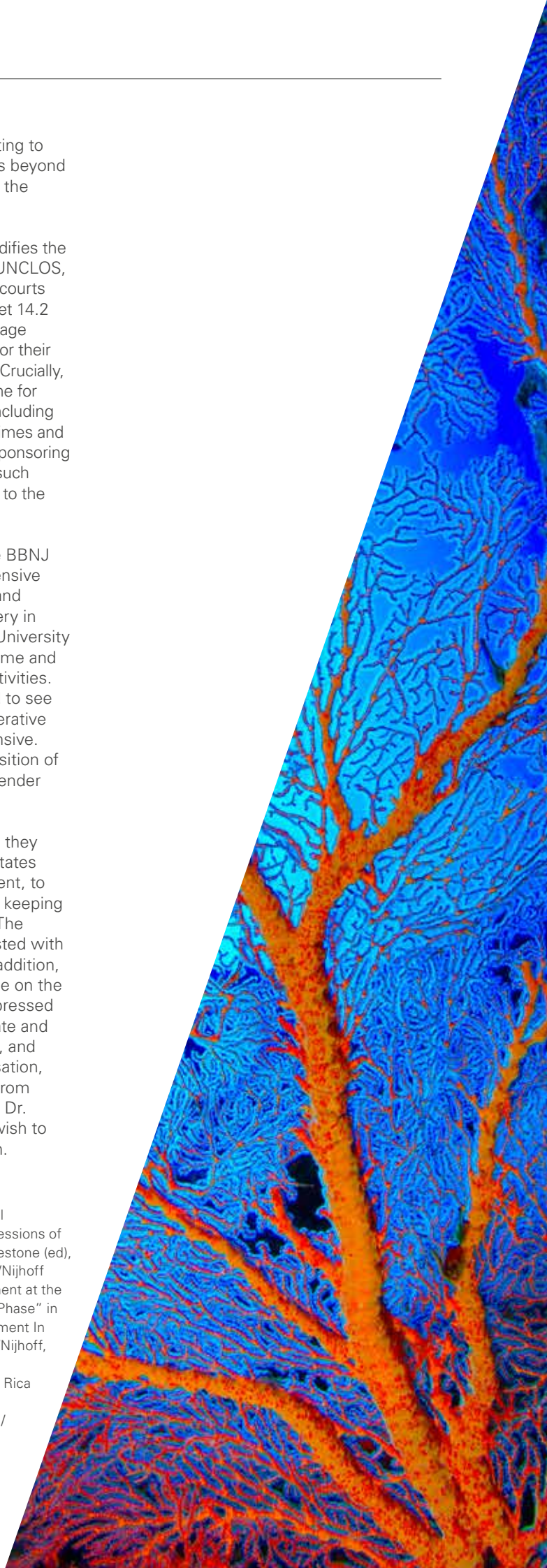
1 World Maritime University, WMU-Sasakawa Global Ocean Institute, at: https://wmu.se/global-ocean-institute
2 A. Guterres, "We Face a Global Emergency" over Oceans: UN Chief Sounds the Alarm at G7 Summit Event (9 June 2018)
3 United Nations (UN), The First Global Integrated Marine Assessment (Cambridge University Press 2016) 8, 936.

The Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in areas beyond national jurisdiction in a Protocol, which shall be appended to the Agreement.

By doing so, the negotiators will ensure that the Agreement codifies the obligation to make good marine environmental damage under UNCLOS, as further elaborated upon in the jurisprudence of international courts and tribunals. This will also contribute to the attainment of Target 14.2 of SDG 14, which requires all stakeholders to "sustainably manage and protect marine and coastal ecosystems …and take action for their restoration in order to achieve healthy and productive oceans". Crucially, the elaboration of a *sui generis* liability and compensation regime for BBNJ at a future date will complement other liability regimes including the International Maritime Organization's (IMO) civil liability regimes and related conventions for vessel-source pollution, the liability of sponsoring States for seabed mining, as well as regional specific regimes such as the one that applies under the Antarctic Treaty and pursuant to the European Union's Environmental Liability Directive.[6]

One final point concerning the capacity building theme of the BBNJ negotiations. As many readers are aware, the WMU has extensive expertise on capacity-building in maritime and ocean affairs and prides itself on having a long track record of successful delivery in these fields for well over three decades. In this context, the University takes special pride in its efforts to empower women in maritime and ocean affairs through education, research and extra-mural activities. Our faculty, students and alumni are thus particularly pleased to see that capacity-building under the new Agreement will be an iterative process that is participatory, cross-cutting and gender-responsive. Furthermore, they very much are of the view that the composition of the proposed Scientific and Technical Body will also reflect gender balance and equitable geographical representation.

At our University, everyone is looking forward to the role that they can play in assisting States Parties, in particular developing States Parties, in implementing the provisions of the BBNJ Agreement, to achieve its objectives and many of its substantive provisions, keeping a close eye on the needs of present and future generations. The papers in this report are drawn from the workshop jointly hosted with the Ministry of Foreign Affairs of Japan in February 2019. In addition, we have added a contribution from Professor Meinhard Doelle on the subject of Environmental Impact Assessment. The views expressed in the report are purely academic and intended to foster debate and discussion in preparation for subsequent sessions of the IGC, and should therefore not be attributed to any international organisation, government or representative body. The final text benefited from the rapporteur notes prepared by Dr. Tafsir Matin Johansson, Dr. Beatriz Martinez Romera and Dr. Aleke Stöfen-O'Brien. We wish to acknowledge the support of The Nippon Foundation of Japan.



4 R. Long and M Rodríguez-Chaves, "Anatomy of a New International Instrument for Biodiversity beyond National Jurisdiction: First Impressions of the Preparatory Process" (2015) 6 Environment Liability 214; D Freestone (ed), Conserving Biodiversity in Areas beyond National Jurisdiction (Brill/Nijhoff 2019); R. Long, J. Brincat, "Negotiating a New Biodiversity Instrument at the United Nations: A European Union Perspective on the Preparatory Phase" in M. Nordquist, J. Norton Moore, R. Long, Cooperation And Engagement In The South China Sea And Asia Pacific Region (Leiden/Boston: Brill/Nijhoff, 2019) 443-468.

5 R. Long, "Restoring Marine Environmental Damage: Can the Costa Rica v Nicaragua compensation case influence the BBNJ negotiations?" (2019) 28(2) RECIEL 244-257, at: https://onlinelibrary.wiley.com/doi/full/10.1111/reel.12309

6 Ibid.

BIOGRAPHIES

Doumbia-Henry, Cleopatra

Dr. Cleopatra Doumbia-Henry (LL.B, LL.M, Ph.D. International Law) joined WMU as President in the summer of 2015. Prior to joining WMU, Dr. Doumbia-Henry served as the Director of the International Labour Standards Department of the International Labour Office (ILO) in Geneva, Switzerland.

Dr. Doumbia-Henry began her career at the University of the West Indies, Barbados, as a lecturer in law. She later worked with the Iran-US Claims Tribunal in The Hague, The Netherlands and then joined the ILO in 1986 where she served both as a senior lawyer of the Organization and in several management positions. She was responsible for developing ILO Maritime Labour Convention, 2006 and remained responsible for it until she joined WMU. Since the late 1990s, she led the ILO participation in a number of IMO/ILO interagency collaborations on several issues of common interest to the International Maritime Organization (IMO) and ILO, including the Joint IMO/ILO Ad Hoc Expert Working Groups on Fair Treatment of Seafarers and on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers.
Her qualifications include Barrister at Law and Solicitor, and she is entitled to practice in all English-speaking Caribbean jurisdictions and is a Member of the Inner Temple, Inns of Court, United Kingdom. She holds:
– a Masters of Law from the University of the West Indies;
– a Masters in International Law from the Graduate Institute of International Studies, University of Geneva, and
– a Doctorate in International Law from the University of Geneva and the Graduate Institute of International Studies, Geneva, Switzerland.

Dr. Doumbia-Henry has dual Dominican and Swiss nationality and has published extensively on a wide range of international law subjects, including on: International labour standards and trade, the Maritime Labour Convention, 2006, the Seafarers' Identity Documents Convention, 2003 and the Carriage of Dangerous Goods by Sea.

Egge, Kjell-Kristian

Norwegian Career Diplomat since 1995. Have held different positions in the Legal Department of the Norwegian Ministry for Foreign Affairs since 2003, presently Deputy Director General. Have worked extensively on Law of the Sea and Arctic Issues, including heading Norwegian delegations to various United Nations and Arctic processes. Head of Norwegian delegation to the UN BBNJ negotiations.

Barnes, Richard

Professor of Law and Associate Dean for Research in the Faculty of Business, Law and Politics at the University of Hull. He is Director of Hull University Marine and Maritime Institute. He has published widely on law of the sea matters. He authored Property Rights and Natural Resources (2009) (winner of the SLS Prize for Outstanding Legal Scholarship) and his edited books include: The United Nations Convention on the Law of the Sea: A Living Instrument (with Barrett, 2016); Beyond Responsibility to Protect (with Tzevelekos, 2016); and Law of the Sea: Progress and Prospects (with Freestone and Ong, 2006). Recent publications include: "Environmental Rights in Marine Spaces" in Bogojevic and Rayfuse (eds.) Environmental Rights in Europe and Beyond (2018) and several contributions to Alexander Proelß (ed.), The United Nations Convention on the Law of the Sea: A Commentary (Beck/Hart/Nomos, 2017). He has advised a range of organizations, including the WWF, the European Parliament and Defra. His current research is focused on new governance mechanisms for fisheries in areas beyond national jurisdiction, and the legal implications of Brexit for marine fisheries, a topic on which he has been called as an expert witness before several UK Parliamentary committees.

Becker-Weinberg, Vasco

Professor Vasco Becker-Weinberg, Dr. iur. (Hamburg), LL.M (Lisbon), lectures at the NOVA School of Law on the law of the sea and ocean governance subjects, as well as at several Portuguese and foreign universities. He is the co-coordinator of the Master's program at NOVA in Law and Economics of the Sea and a researcher at CEDIS - *Centro de Investigação & Desenvolvimento sobre Direito e Sociedade.* He has researched at prominent academic institutions and written and published extensively on the law of the sea. His recent publications include Preliminary Thoughts on Marine Spatial Planning in Areas Beyond National Jurisdiction, in: Conserving Biodiversity in Areas beyond National Jurisdiction, edited by David Freestone (forthcoming), also published in The International Journal of Marine and Coastal Law, v. 32. He has been on several delegations to international fora, including the preparatory committee and the intergovernmental conference on an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. He often advises on law of the sea matters and has been involved in the drafting of policies and legislation on many ocean governance subjects. He was previously Legal Advisor to the Portuguese Secretary of the Sea and a full-time scholar at the International Max Planck Research School for Maritime Affairs at the University of Hamburg.

Cicin-Sain, Biliana

Dr. Biliana Cicin-Sain (PhD in political science, UCLA, postdoctoral training, Harvard University) is President of the Global Ocean Forum, and former Director of the Gerard J. Mangone Center for Marine Policy and Professor of Marine Policy at the University of Delaware. An expert in the field of integrated coastal and ocean governance, she has authored over 100 publications in the field, and has forged international collaboration among all sectors of the international oceans community to advance the global oceans agenda, as founder and president of the Global Ocean Forum.

Dr. Cicin-Sain's international ocean work has been recognized through a number of awards, including: 2018 Pioneer of the High Seas, French National Sea Center, France; 2017 Champion of the Ocean award, Monmouth University; 2010 Laureate for the Elizabeth Haub Award for Environmental Diplomacy; 2010 honorary doctorate in maritime law by Korea Maritime University; 2007 Coastal Zone Foundation Award, USA; 2007 Elizabeth Mann Borgese Meeres Preise, Germany; 2002 co-recipient of the Ocean and Coastal Stewardship Award (US). In 2019. Dr. Cicin-Sain will be receiving the Prince Albert I of Monaco "Grand Prix des Sciences de la Mer." Dr. Cicin-Sain has been active in the UN negotiations on biodiversity beyond national jurisdiction since 2004. Most recently, Dr. Cicin-Sain has led the mobilization of multi-stakeholder analyses on capacity development regarding Areas Beyond National Jurisdiction (https://bit.ly/2C0FuvD) and the Roadmap to Oceans and Climate Action initiative to advance the issues related to oceans and climate within the UN Framework on Climate Change and other relevant international fora.

Doelle, Meinhard

Professor Doelle holds the Canadian Chair in Marine Environmental Protection at WMU. Prior to joining WMU in July 2019, Meinhard served as Professor of Law, and Associate Dean, Research at the Schulich School of Law, Dalhousie University, and as an Associate Director and Director of the Marine & Environmental Law Institute (MELAW). He is a Senior Fellow at the Centre for International Governance Innovation (CIGI).

Meinhard served as policy advisor to the federal government during the development of the original Canadian Environmental Assessment Act, as a member of the Regulatory Advisory Committee, and as drafter of the NS Environment Act. He was a non-governmental member of the Canadian delegation to the UN climate negotiations from 2000-2006. He co-chaired the Tidal Energy Strategic Environmental Assessment in 2007, served on the Lower Churchill Joint Federal-Provincial Review Panel from 2009 – 2011, and co-chaired the Nova Scotia panel on aquaculture from 2013 - 2014. He currently serves on the Technical Advisory Committee for the new federal Impact Assessment Act in Canada.

Meinhard has written on a variety of environmental law topics, including climate change, energy, invasive species, environmental assessments, and public participation in environmental decision-making. He is currently working on a book on the new Impact Assessment Act in Canada, and on Loss & Damage from climate change. His completed book projects include "Environmental Law: Cases and Materials" (2019), "The Paris Climate Agreement: Analysis and Commentary" (2017), "Compliance in an Evolving Climate Change Regime (2011), and "The Federal Environmental Assessment Process, a Guide and Critique" (2009).

Eurén Höglund, Lisa

Lisa Eurén Höglund, deputy director at the Department for International Law, Human Rights and Treaty Law at the Swedish Ministry for Foreign Affairs. Ms. Eurén Höglund is the head of the Swedish Delegation to the 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, and has been actively engaged in the BBNJ process as representative of Sweden since 2012. Ms. Eurén Höglund is an experienced diplomat with experience from a broad range of foreign policy areas, including development cooperation, and fulfilled the Diplomatic Training Program of the Swedish Ministry for Foreign Affairs in 2004. Ms. Eurén Höglund has a law degree from Uppsala University and has studied international law at the Université de Strasbourg Robert Schuman.

Grainger, Carl

Carl Grainger is a lawyer with the Department of Foreign Affairs and Trade, Ireland. He advises on a wide range of matters involving national law, EU law and public international law. He regularly represents Ireland at EU and UN level, in particular in law of the sea forums. He is a member of the EU team in the ongoing BBNJ negotiations, focusing on the area of capacity building and the transfer of marine technology. Previously, he worked as a protection officer with UNHCR, as a judicial fellow with the Irish High Court and as a researcher with the School of Law at University College Dublin. He holds an LLB in Law from the University of Durham, an LLM in Public International Law from University College London and a Barrister-at-Law Degree from King's Inns. He was called to the Bar of Ireland in 2010.

Goettsche-Wanli, Gabriele

Gabriele Goettsche-Wanli has been working in the field of ocean affairs and the law of the sea, including on issues relating to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for most of her career at the United Nations, and since 2013 in the capacity of Director of the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs. Prior to that she had been working in the Division for 23 years, including as Deputy Director, and for three years as Chief of the Treaty Section, Office of Legal Affairs. Ms. Goettsche-Wanli is an alumnus of the National University of Ireland, Galway, and of Columbia University, New York.

Griffiths, Lowri Mai

Lowri Mai Griffiths is the Head of the Maritime Policy Unit at the Foreign and Commonwealth Unit of the United Kingdom. The work of the Maritime Policy Unit covers all aspects of the implementation and interpretation of the UN Convention on the Law of the Sea, as well as other marine and maritime issues. Lowri is the Head of the UK delegation to the BBNJ Intergovernmental Conference. She is also a member of the UK delegation to the International Seabed Authority. Prior to joining the Maritime Policy Unit, Lowri was a lawyer in the Foreign and Commonwealth Office Legal Directorate, advising on issues relating to the UK's Overseas Territories, including maritime boundary negotiations and marine management issues.

Haag, Fredrik

Fredrik Haag is Head of the Office for the London Convention/Protocol and Ocean Affairs at the International Maritime Organization. He has a background in applied environmental research, focusing on marine and coastal zone management, and holds several postgraduate degrees; an MSc in Earth Sciences and a Licentiate of Philosophy (Phil. Lic.) in Environmental Impact Assessment from Uppsala University, Sweden, as well as a Master in Maritime Affairs from the World Maritime University. Fredrik joined IMO in 2006, and represents IMO in several UN wide processes, and has been deeply involved in matters related to the 2030 Agenda for Sustainable Development and the SDGs, Biodiversity in Areas Beyond National Jurisdiction (BBNJ), as well as the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP). As head of the Office, his primary task is to support the implementation of the London Convention and Protocol on dumping of wastes and other matters at sea, but he is also involved in IMO's work on PSSAs, marine litter, noise and ship-strikes. He has also contributed to work on GHG emissions from ships and Ballast Water Management.

Long, Ronán

Professor Ronán Long is the Director of the WMU-Sasakawa Global Ocean Institute at the World Maritime University in Malmö, Sweden, and holds the Nippon Foundation Chair in Ocean Governance and the Law of the Sea.

He is the author/co-editor of 12 books and over 100 scholarly articles on oceans law and policy. He read for his PhD at the School of Law Trinity College Dublin, he has been a Senior Visiting Scholar-in-Residence at the University of California, Berkeley, and a Visiting Scholar at the Centre for Oceans Law and Policy at the University of Virginia. Additionally, Professor Long teaches on the Law of the Sea programme at Harvard Law School.

Prior to his academic career, he was a permanent staff member at the European Commission and undertook over 40 missions on behalf of the European Institutions to the Member States of the European Union, the United States of America, Canada, Central America as well as to African countries. During his previous career in the Irish Naval Service, he won an academic prize at Britannia Royal Naval College and held a number of appointments ashore and afloat, including membership of the Navy's elite diving unit.

As a keen yachtsman, he has represented Ireland at the top competitive level in offshore racing. Ronán is passionate about the law of the sea, conservation and global sustainability, as well as the implementation of the 2030 Agenda for Sustainable Development.

Mason, Annekah

Annekah Mason is a Jamaica national. She received her LLB from the University of London and has a Bachelor of Arts degree in Spanish and International Relations from the University of the West Indies. She is currently the Training Coordinator within Contract Management Unit of the International Seabed Authority. She is responsible for: managing, coordinating and performing all administrative duties for the implementation of training activities and programmes that are provided by Contractors (in accordance with their exploration contracts); the implementation of programmes under the ISA Endowment Fund for Marine Scientific Research and the implementation of ISA internship programmes.

Ms. Mason has worked in the diplomatic corps offering consular and administrative support to the Government of Chile and Mexico for over five years. She is fluent in Spanish having previously worked in Colombia.

Nishimoto, Kentaro

Kentaro Nishimoto is Associate Professor of International Law at the School of Law, Tohoku University, Japan. He is currently in charge of the newly launched English-taught LL.M. program on the law of the sea. He received his Ph.D. in Law from the University of Tokyo with the thesis "Territoriality and Functionality in the Historical Evolution of the Law of the Sea." His research focuses on the international law of the sea, including issues such as the history of the law of the sea, sustainable development of ocean resources and the settlement of maritime disputes.

His recent publications in English include "The Rights and Interests of Japan in regard to Arctic Shipping" in Robert C. Beckman et al. (eds.), Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States (Brill, 2017) and a contribution to Alexander Proelß (ed.), The United Nations Convention on the Law of the Sea: A Commentary (Beck/Hart/Nomos, 2017). He is an advisor to the Japanese delegation to the intergovernmental conference on marine biodiversity of areas beyond national jurisdiction (BBNJ).

Schofield, Clive

Professor Clive Schofield is Head of Research at the WMU-Sasakawa Global Ocean Institute at the World Maritime University in Malmö, Sweden, and is also a Professor with the Australian Centre for Ocean Resources and Security (ANCORS), University of Wollongong (UOW), Australia. He is a Distinguished Fellow of the Law of the Sea Institute at the Law School of the University of California Berkeley and teaches on the Law of the Sea programme at Harvard Law School. His research interests relate to international boundaries and particularly maritime boundary delimitation and marine jurisdictional issues on which he has published over 200 scholarly publications. Clive is an International Hydrographic Office (IHO)-nominated Observer on the Advisory Board on the Law of the Sea (ABLOS) and is a member of the International Law Association's Committee on International Law and Sea Level Rise. He has also been actively involved in the peaceful settlement of boundary and territory disputes by providing advice to governments engaged in boundary negotiations and in dispute settlement.

Shirayama, Yoshihisa

Dr. Yoshihisa Shirayama, born in 1955 in Tokyo, Japan, obtained D. Sc. Degree from the Graduate School of Science, The University of Tokyo (UT), in 1982. He then served as Assistant and Associate Professor at Ocean Research Institute, UT. In 1997, he became a Professor of Seto Marine Biological Laboratory, Faculty of Science, Kyoto University. In 2003, the laboratory moved to Field Science Education and Research Center.

He served as Director of the center from 2007. After that, he has worked as the Executive Director of Research, Japan Agency for Marine-Earth Science and Technology (JAMSTEC) for seven years starting in April 2011, and has served as both the Associate Executive Director and the Director, Global Oceanographic Data Center (GODAC) of JAMSTEC from April 2018. His major research field is marine biology, especially taxonomy and ecology of deep-sea meiobenthos. He also is working on the marine biodiversity and the impact of ocean acidification upon it. He was awarded "Oceanic State Promotion Contributors Award", one of the Prime Minister's Award in Japan, in August 2018.

Tanaka, Yoshifuma

Yoshifumi Tanaka is Professor of International Law with specific focus on the law of the sea at the Faculty of Law, University of Copenhagen, Denmark, and a member of the Centre for Enterprise Liability (CEVIA). He holds a DES and a PhD from the Graduate Institute of International Studies, Geneva (currently the Graduate Institute of International and Development Studies, Geneva) and an LLM from Hitotsubashi University, Tokyo. He is the single author of four books, i.e. Predictability and Flexibility in the Law of Maritime Delimitation (2nd edition, Hart 2019), A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea (Ashgate, 2008), The International Law of the Sea (3rd edition, Cambridge University Press, 2019), and The Peaceful Settlement of International Disputes (Cambridge University Press, 2018). He has published widely in the fields of the law of the sea, international environmental law and peaceful settlement of international disputes.

Tladi, Dire D.

Dire Tladi is Professor of international law at the University of Pretoria and an Extraordinary Professor at the University of Stellenbosch. He is currently a Global Visiting Professor of Law at the University of California Irvine where he is on a sabbatical under a Fulbright Research Grant. He has served as the Principal State Law Adviser for International Law for the South African Department of International Relations and Cooperation and the South Africa Permanent Mission to the United Nations. He is a member of the International Law Commission and its Special Rapporteur for the topic Peremptory Norms of General International Law *(Jus Cogens)*. He is also an associate member of the Institut de Droit International.

Warner, Robin

Dr. Robin Warner is Professor, Deputy Director and Head of Postgraduate Studies at the Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong, Australia. She is a member of the Advisory Board for the Oceans Coasts and Coral Reefs Specialist Group of the IUCN World Commission on Environmental Law. Her research interests include law of the sea, oceans governance, marine environmental law and climate law. She is the author of more than 80 publications on ocean law and policy including "Protecting the Oceans beyond National Jurisdiction: Strengthening the International Law Framework" (Martinus Nijhoff, Leiden, 2009).

KEYNOTE ADDRESS

BACKGROUND AND OVERVIEW OF BBNJ NEGOTIATION

Mr. Kjell-Kristian Egge
Director, Law of the Sea, Ministry of Foreign Affairs, Norway

Introduction

The ocean is facing increasing challenges from human activities. Pollution, habitat degradation, overfishing, and abuse of the marine environment have an inevitable result – destruction of marine biodiversity. Healthy oceans are of value in itself. Healthy oceans are a prerequisite for continuous sustainable use of natural resources. Mankind, represented through States, not only has the right to utilise the ocean and its natural resources, but also a duty to protect them.

The dualism in use and protection is reflected in the United Nations Convention on the Law of the Sea (UNCLOS). Under UNCLOS, States have a right to utilise ocean resources on a zonal basis. With this right comes the duty and/or obligation to use these resources in a sustainable manner and, more generally, the duty to protect and preserve the marine environment. Despite differences in opinion and debates held in international and national forums, there is a general consensus on the dualistic viewpoint in relation to the oceans. New phrases might be used to describe "protection" and "use", but the basic opinion remains intact.

At international level, there are many ongoing activities dedicated to discussion of ocean-related issues. With the adoption of the United Nations 2030 Agenda for Sustainable Development and its 17 Goals, and the conclusion of the United Nations Ocean Conference in 2017, there has been an expression of a collective will to address challenges faced by the oceans. This collective is the product of a very long process that started back in the year 2000 when discussions took place in an informal consultative process at the UN (ICP). This process consists of concrete work on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction

(BBNJ) that began with the establishment of the BBNJ Working Group, followed by the conclusion of the work of the Preparatory Committee on BBNJ, and brought to fruition with the convening of the Intergovernmental Conference (IGC) on the BBNJ in 2018.[1]

The IGC has given States an historic opportunity to develop tools to promote conservation and sustainable use of the oceans. It represents a collective will to develop the law of the sea to meet future needs, as well as changing challenges, and the will to assume obligations necessary to deliver the changes mankind needs to make. The IGC has held three substantive sessions up to September 2019.

The BBNJ Negotiation Package

The IGC considers the recommendations of the Preparatory Committee on the elements and elaborate the text of an international legally binding instrument (ILBI) under UNCLOS. The negotiations address the topics identified in the package agreed in 2011 at the meeting of the Ad Hoc Open-ended Informal Working Group, namely, "the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology."[2]

Area-Based Management Tools

In terms of Area-Based Management Tools (ABMT), more specifically Marine Protected Areas (MPA), there are a few important elements that States need to tackle during the negotiations. MPAs represent an answer to most of the problems. For some States, MPAs are one out of many effective tools. So the question is – what is an MPA? It is generally observed that opinions differ when it comes to defining an MPA, and an issue that the negotiations need to look at. It is important to understand what an MPA embodies but it is unclear whether or not there is a need for a standard definition. Another matter that has been discussed before and will be discussed again is – who should adopt MPAs and who should decide on the measures within the MPA, and what should be the basis of that decision? The answer to these questions touches on the institutional issue and institutional structure. Opinions are again divided. Some argue that there is a need for a heavy structure around the ILBI, some favour a lighter approach, while others maintain that one should be careful not to opt for solutions and elements in the agreement requiring a heavy structure that would require more investment and someone to bear the costs.

Various ABMT, particularly MPAs, have been developed by other regional or international organisations, including the International Maritime Organization (IMO), the Regional Fisheries Management Organizations (RFMO), International Seabed Authority (ISA), and the Regional Seas Organizations (RSA). States need to explore the relationship between any ABMT developed by the ILBI and the existing sectoral organisations. It is generally agreed that there is a need for interplay with the existing structures since they are the foundation of ocean management and there is a need to build on that. There needs to be coordination and effective operations between these mechanisms.

A question that has been discussed many times is – who will have the last word? It is possible to create a situation whereby a sectoral body

1 Intergovernmental Conference on Marine Biodiversity of Areas beyond National Jurisdiction, https://www.un.org/bbnj/.

2 A/66/119, 30 June 2011, Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, para. I.1. (b).

provides input to the process when an MPA is being developed, and possibly a Conference of the Parties (COP) under the ILBI will decide on the MPA. But the question then is – how can one resolve a problem when there is a disagreement between the sectoral body and the adopting body? One might envisage a situation where, for example, the RFMO considers that a particular stock can sustain fishing while States meeting in New York consider otherwise. In that instance, should the COP be able to decide on what it deems appropriate or should the contrary decisions made by the RMFO stand? There have been instances where the ISA has designated an area for mining that has led to objections from the States meeting in New York, also known as the "not-undermine issue" recognised in the Resolutions. Developing an MPA would mean that the "not-undermine issue" would have to be taken into account in any decision by the COP.

Another important aspect around the MPA discussion is the relationship with the coastal States. MPAs might be established adjacent to the Exclusive Economic Zones (EEZ) over the national continental shelf outside 200 nautical miles (nm). In such cases, should the coastal States have a particular role to play in the development and management of an MPA?

It is commonly agreed that all decisions must be based on science, even though the reality might sometimes be a little different. An issue that becomes relevant is – who should supply that science? Should there be separate new bodies under the ILBI for that purpose, or should one utilise the structures that are already there? A separate question is whether there is a need for "real science" decisions made by qualified scientists, or should there be a body where the general public can participate and express an opinion. Today such bodies do exist.

Environmental Impact Assessment

The second element, Environmental Impact Assessment (EIA), represents common sense – everyone should be cognisant of the consequences of actions. This is recognised in Articles 204 to 206 of UNCLOS. A link is also observed in relation to the Precautionary Principle. An issue that needs to be dealt with is – when should an EIA be required and what should the threshold be when triggering an EIA? It is observed that a threshold is already embedded in Article 206 of UNCLOS: substantial pollution of or significant and harmful changes to the marine environment. So the question can be posed: Is that threshold sufficient or do we require a stricter threshold? Some argue that there is a need for a stricter threshold and some maintain that the threshold found in Article 206 will suffice. In this context, an important question that begins to surface is – who should conduct EIAs? It could be the operator, the flag State or instruments under the new BBNJ bodies. This begs an answer to another question: Who will make the decision on whether to proceed with the planned activities? Should that rest with the flag State or a new body under the BBNJ? Opinions continue to differ.

Strategic Environmental Impact Assessments (SEAs) are other issues that have been raised. There is a need to come to a decision as to whether they are required. If SEAs are considered, the question is then who should conduct them? This also touches on the issue of whether there should be newly structured bodies, or should existing ones be used.

Marine Genetic Resources

The element of MGRs is not an environmental issue in itself. This kind of activity utilising MGRs might have minimal impact on the environment. The reason for the MGRs being introduced to the package and considered as a very important element is the fact that only a few States have the ability to utilise MGRs in areas beyond national jurisdiction. This issue has given rise to another highly debated issue, the "benefit-sharing" aspect. Some argue that MGRs are the common heritage of mankind. Others argue, however, that as far as the UNCLOS common heritage of mankind provisions are concerned, they apply only to "minerals", while MGRs relate to the freedom of the high seas. These are diametrically different approaches, considered to be difficult and, by some, as impossible discussions. Many argue that there needs to be a pragmatic approach that can focus on the benefits for the developing countries rather than on the principle or the legal issue. This may result in the realisation that it might be difficult to reach an agreement around such a difficult issue.

In retrospect, the discussions to date in New York created an understanding that there is a will to share benefits. However, the types of benefits States are willing to share are still undetermined. There are discussions around monitoring of benefit sharing whereby some States have reservations on that aspect. Those States have indicated that they are more than willing to participate in research programmes and assist developing countries in the development of products for MGRs. However, the community as a whole need to make a choice.

In terms of access, some argue that access to MGRs is not a part of the package at all. There is no explicit reference to access. Others argue that in order to have meaningful benefit sharing, there is a need to have control on access and it cannot be an open system where everyone can do as they please. However, many are concerned that if access is restricted, then it might hamper research and innovation. If that was to occur, then it is a lose-lose situation. A challenge posed when drafting the agreement is one that relates to Part XIII of UNCLOS: all States have the right to conduct Marine Scientific Research (MSR). This creates limits as to how far States can restrict the rights of other States under UNCLOS. One challenge is to distinguish between what is MSR and what is bioprospecting, which is an issue States might have to deal with.

Capacity-building and transfer of technology

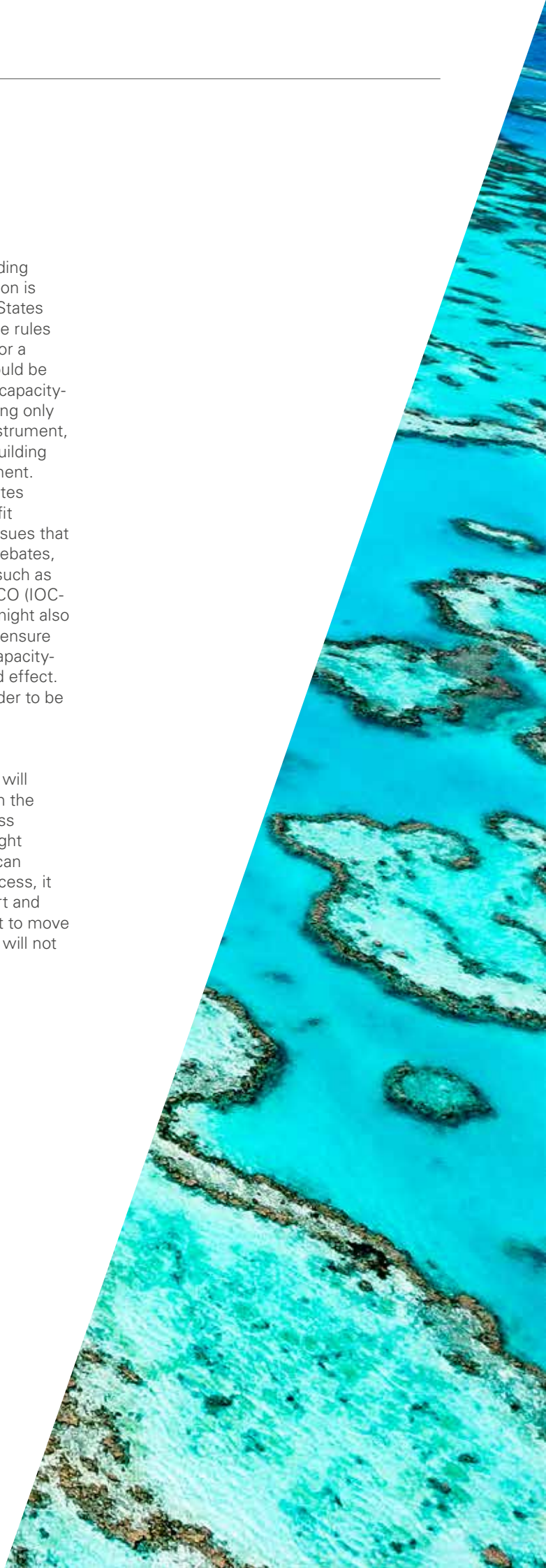
Capacity-building is an essential part of the ILBI. In order for the ILBI to function effectively and efficiently, all States must have the capacity to implement the rights and obligations developed under the new agreement.

One might observe that States agree to implement high standards when it comes to the scientific basis for MPAs, EIAs etc. If standards are set very high, it becomes difficult for some States to fulfil those standards and satisfy the obligations in a befitting manner. Ideally, capacity-building would also have positive consequences for developing countries. With adequate capacity, countries might be in a better position, not only to fulfil their obligations, but also to utilise their own resources in their own waters. That is an aspect that must be borne in mind when designing the rules around capacity-building.

A general issue that comes up in the context of capacity-building is whether it should be voluntary or mandatory. So the question is – what rules need to be in place and what types of rules are States willing to accept? One way forward could be to implement the rules without involving the "ratification" process. There is a need for a balance in order to keep States on board. Another solution could be to look at which body could assume the responsibility to link capacity-building to the ILBI. While some favour linking capacity-building only to the ILBI and subsequently to the implementation of the instrument, others prefer to focus on the wider perspective of capacity-building without linking it strictly to the implementation of this instrument. That is a choice that the negotiators need to make. Some States mention the connection between capacity-building and benefit sharing from MGRs while others view this as two different issues that should not be connected. This debate will give rise to other debates, for example, the relationship between existing mechanisms such as the Intergovernmental Oceanographic Commission of UNESCO (IOC-UNESCO) – an established actor that could be utilised. One might also take the view that a new structure needs to be developed to ensure that these rules are implemented. There are many rules on capacity-building in UNCLOS, but they may not have led to the desired effect. One must observe closely what can be done at the IGC in order to be more successful.

Conclusions

The BBNJ negotiation has been an encouraging process that will help in reaching the desired goal. An inherent challenge lies in the legal aspect of the design and drafting of the ILBI. The process will take time and it requires the political will of States. The right stakeholders should be engaged in the process so that they can facilitate the process. Even if some States desire a faster process, it might be useful to take all the time necessary to build comfort and trust in the process. That said, States must make every effort to move faster, because the problems in the oceans will still exist and will not disappear by themselves.



SESSION 1

Major Topics of the BBNJ Negotiations

MODERATOR
Professor Ronán Long
Director, WMU-Sasakawa Global Ocean Institute

SESSION 1.1
OVERVIEW OF THE INTERGOVERNMENTAL CONFERENCE UP TO IGC-2

Ms. Gabriele Goettsche-Wanli
Director, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations (DOALOS)[1]

On 24 December 2017, the General Assembly decided to convene an intergovernmental conference (IGC), under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee (PrepCom), established by Resolution 69/292 of 19 June 2015, on the elements and to elaborate the text of an international legally binding instrument (ILBI) under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ), with a view to developing the instrument as soon as possible.[2] The IGC is tasked with addressing the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources (MGRs), including questions on the sharing of benefits, measures such as area-based management tools (ABMTs), including marine protected areas (MPAs), environmental impact assessments (EIAs), and capacity-building and the transfer of marine technology. The General Assembly reaffirmed that the work and results of the IGC should be fully consistent with UNCLOS and should not undermine

1 The opinions expressed are personal, remain the responsibility of the author in her individual capacity and do not necessarily represent the views of the United Nations.

2 United Nations General Assembly (UNGA), A/RES/72/249, 19 January 2018. Intergovernmental Conference on Marine Biodiversity of Areas beyond National Jurisdiction, https://www.un.org/bbnj/.

existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.[3]

Recommendations of the PrepCom

The PrepCom met on four occasions in 2016-2017.[4] The elements it recommended to the General Assembly and which the IGC is mandated to consider, are presented in sections A and B of section III of its report.[5] The recommendations state that neither sections A nor B reflect consensus and do not reflect all the options discussed at the PrepCom.

Section A includes non-exclusive elements with respect to the four thematic clusters of the package of issues and cross-cutting elements to be considered, with a view to developing a draft text of an ILBI which generated convergence among most delegations. Section B highlights some of the main issues on which there was a divergence of views. The PrepCom identified the need for further discussions with regard to the common heritage of mankind and the freedom of the high seas; on whether the instrument should regulate access to MGRs; the nature of these resources; what benefits should be shared; whether to address intellectual property rights; and whether to provide for the monitoring of the utilisation of MGRs; the decision-making and institutional set-up for measures such as ABMTs, including MPAs; the degree to which the EIA process should be conducted by States or be "internationalised"; whether the instrument should address strategic environmental assessments; the terms and conditions for the transfer of marine technology; institutional arrangements; how to address monitoring, review and compliance; the scope of the financial resources required and whether a financial mechanism should be established; settlement of disputes; and responsibility and liability.

The President's aid to discussions

The President of the IGC prepared an aid to discussions (ATD) in advance of the first substantive session of the IGC to assist the negotiations.[6] The ATD builds on the report of the PrepCom and identifies issues that need to be further discussed at the IGC. It focuses on the four thematic clusters of the package, and includes some cross-cutting issues at the end of each cluster with a view to facilitating the identification of how these issues might be related in practical terms to those specific clusters.

The ATD formed the basis of the negotiations in informal working groups created by the IGC at the first session to address the four thematic clusters and some of the cross-cutting issues. An overview of the main issues discussed is provided in the reports of the Facilitators of those informal working groups which were presented to the plenary at the IGC.[7] While, the main issues on which there were divergent views in the IGC were generally the same as those listed in section B of the Prepcom recommendations, concerted efforts were made at the first session aimed at developing approaches to move forward from the Prepcom elements.

The President's aid to negotiations

At the end of the first session, the IGC requested the President to prepare a document for the second session with the aim of facilitating both focused discussions and text-based negotiations. The President's aid to negotiations (ATN) presents a set of options, which attempt to translate into treaty text where possible, the ideas and proposals generated during the discussions in the IGC and taking into account the Prepcom elements in sections A and B.[8] In the interest of presenting a comprehensive text, options which might benefit from further elaboration are also included as well as "no-text" options. The ATN indicates that the options listed are not intended to be exhaustive

and do not preclude consideration of matters not included in the document.

The ATN invites States to consider ideas and proposals that may narrow the range of options, including by developing the text of proposals that can help to bridge the differences in the options presented. States are also invited to consider the cross-cutting issues that are not included in the ATD.

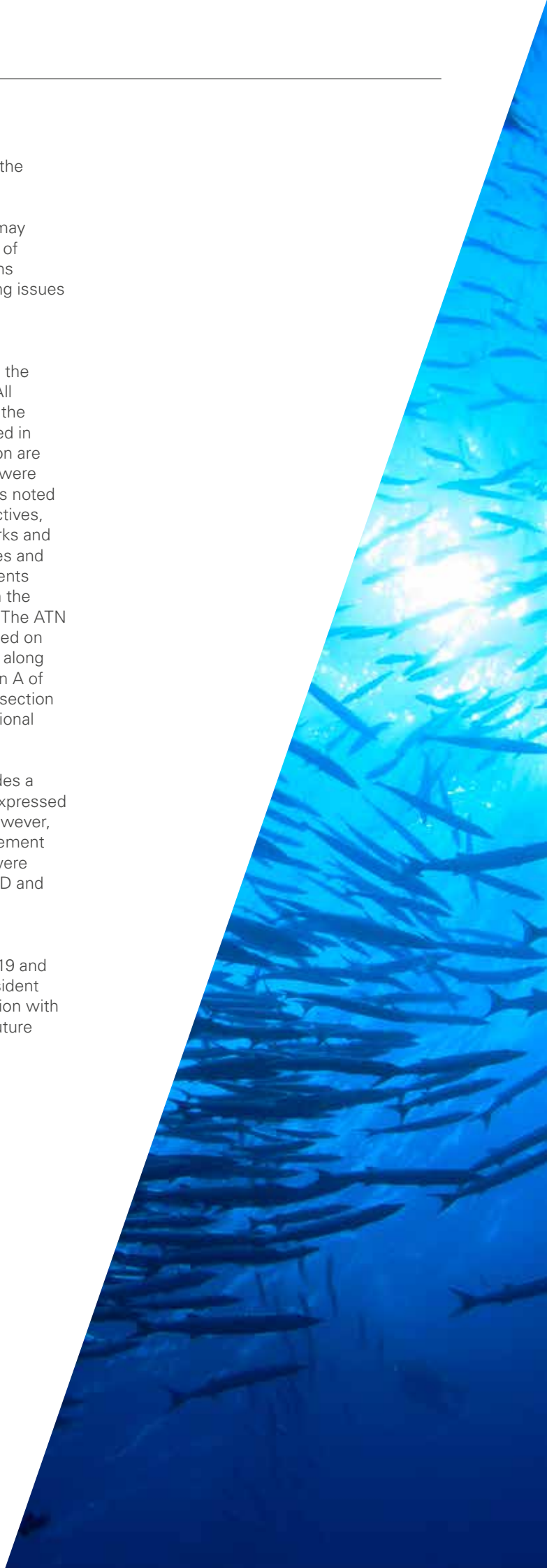
Comparison of the structure of the documents

A comparison between the PrepCom elements, the ATD and the ATN, reveals a number of common and distinctive features. All three documents include the four thematic clusters. None of the documents, however, set out provisions that could be included in the preamble of an ILBI. Provisions on the scope of application are only included in the ATN because some proposals and ideas were expressed on this issue during the first session of the IGC. As noted earlier, the other cross-cutting issues, i.e. use of terms, objectives, relationship to UNCLOS and other instruments and frameworks and relevant global, regional and sectoral bodies, general principles and approaches, international cooperation, institutional arrangements and clearing-house mechanism were presented in the ATD in the context of each of the four thematic clusters of the package. The ATN brings together all the ideas and proposals that were expressed on those cross-cutting issues during the first session of the IGC along the lines of the structure of the elements presented in section A of the PrepCom's recommendations. It also includes a new subsection under the heading of "other subsidiary bodies" under institutional arrangements.

As in the case of the PrepCom elements, the ATN also includes a section on "review", since some proposals and ideas were expressed in relation to this issue during the first session of the IGC. However, sections on financial resources and issues, compliance, settlement of disputes, responsibility and liability and final clauses that were included in the PrepCom elements are not included in the ATD and the ATN.

Next steps

The IGC held its second session from 25 March to 5 April 2019 and its third session from 19 August to 30 August 2019. The President has been requested to prepare a document for the third session with the aim of enabling delegations to negotiate the text of the future instrument.



3 A/RES/72/249, paras. 2, 6 and 7.
4 Preparatory Committee established by General Assembly Resolution 69/292, https://www.un.org/depts/los/biodiversity/prepcom.htm.
5 UNGA, A/AC.287/2017/PC.4/2, 31 July 2017, Report of the Preparatory Committee established by General Assembly Resolution 69/292.
6 UNGA, A/CONF.232/2018/3, 25 June 2018, President's aid to discussions.
7 UNGA, A/CONF.232/2018/7, 20 September 2018, Statement by the President of the Conference at the closing of the first session, Annex.
8 UNGA, A/CONF.232/2019/1*, 3 December 2018, President's aid to negotiations.

SESSION 1.2
DISPUTE SETTLEMENT AND THE BBNJ AGREEMENT

Professor Dire D. Tladi
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The role of dispute settlement in a future international legally binding instrument (ILBI) under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ) has not been the focus of much discussion at the PrepCom or the intergovernmental conference (IGC) to date.[1]

Both the President's aid to discussions (ATD) and the President's aid to negotiations (ATN) do not include substantive text on this issue. This is understandable given that delegations have focused more on substantive issues. However, considering the importance of promoting peaceful settlement of disputes and the fact that the wording of treaty terms often gives rise to different interpretations, the time has come for States at the IGC to start deliberating on dispute settlement mechanisms. While dispute settlement, broadly speaking, refers to a range of options, including political, amicable and judicial mechanisms, this contribution is focused mainly on judicial mechanisms.

Possible role of dispute settlement mechanism prior to and during negotiations

When reviewing the process leading to the IGC, it is worth recalling that the negotiations arose from two legal disputes, one which has largely been resolved while the other continues. The marine protected areas (MPAs) dispute, which has largely been resolved, concerned the possibility of a group of States establishing MPAs in areas beyond national jurisdiction (ABNJ) and the applicability of those MPAs to certain States that are not party to their establishment. The marine genetic resources (MGRs) debate, which remains outstanding, concerned the legal regime applicable to MGR in the Area, i.e. whether freedom of the high seas or common heritage applies.

The negotiations of area-based management tools seem to be smoother than the MGRs debate precisely because the legal debate has largely been resolved. The negotiations on the MGRs issue has not moved beyond the well-known positions taken by States in 2006, because the legal debate has not been resolved. States, as negotiators, therefore decided that they would resolve those issues by means of negotiations, which is an acceptable way of resolving legal disputes.

However, the legal uncertainty relating to MGRs and MPAs in ABNJ could have been resolved through a judicial settlement mechanism. This remains a possibility for the MGRs question in particular. The current negotiation process does not preclude the General Assembly from adopting a resolution that seeks an advisory opinion from either the International Court of Justice (ICJ) or the International Tribunal of the Law of the Sea (ITLOS) on these issues. Obtaining such an opinion could add additional legal clarity and assist in expediting the negotiation process underway at the IGC.

1 At IGC-3, new draft provisions have been added under "Settlement of Disputes" in the draft text of the negotiated agreement. United Nations General Assembly, A/CONF.232/2019/6, 17 May 2019, Articles 54-55, at: https://undocs.org/a/conf.232/2019/6

The possibility of a judicial settlement for some of these issues and the negotiation process currently underway, are not mutually exclusive. Answers to legal issues that remain under dispute, such as whether the rules relating to marine scientific research would be consistent with a permit system to cater for a benefit-sharing regime for marine genetic resources, could be useful to assist States in crafting provisions for a treaty. The option of seeking a clarification of some legal issues through a judicial mechanism is, at this stage, very unlikely. Moreover, it is not clear whether it is necessarily desirable, but it does remain an option.

Potential dispute settlement provisions in an ILBI

Assuming that there is a dispute settlement provision in the ILBI, there are three options with regard to the content of such a provision. The first option is a minimalistic approach that could state: "any dispute arising out of the implementation and interpretation of this treaty shall be settled by negotiation". There could be a throw-in provision stating that: "if the parties are not able to settle this by negotiation, they may agree to submit to a third-party judicial body (ICJ or ITLOS)". However, this option has three potential flaws. First, the provision does not add much as States tend to seek to resolve their disputes by first negotiating their differences with one and another, and they do not need a provision for that. It is similarly not worth providing a right to agree to dispute settlement since such a right already exists. Secondly, such provisions do not work well in multilateral treaties since they create the potential for differing political solutions among different States. Thirdly, and flowing from the two previous points, such a provision could threaten the integrity of the instrument and allow the dispute to drag on.

The second option is to rely on the UNCLOS dispute settlement mechanism as found in Part XV. This could be done either by including a provision that reads: "the disputes under this treaty shall be settled in accordance with the provision of Part XV of the UNCLOS", or by means of incorporating into the ILBI the relevant parts of Part XV. However, the dispute settlement regime under UNCLOS is unnecessarily complex and unwieldy. More importantly, where States have selected different means for the settlement of disputes, or where one or more parties to a dispute has not made a choice at all, the dispute will be resolved by the compulsory arbitration which is the

default on the UNCLOS regime. Given the existence of the ICJ and ITLOS, the primary judicial organ of the United Nations and dispute settlement mechanism established by UNCLOS respectively, it seems counterintuitive to have an alternative method for dispute settlement being the default.

Finally, the third option, and my preferred option, is mandatory third-party dispute settlement. It is simple yet effective. This option requires parties to first try to settle their dispute by negotiations, and where negotiations fail, any State may submit the case to a third-party judicial body, either the ICJ or ITLOS. States, however, are creatures of habit and it is more likely that they will fall back on UNCLOS Part XV rather than seek a more effective model.

A number of questions may be raised about the proposed model. One question concerns standing and whether a State that has not suffered direct harm should be entitled to submit a dispute. The nature of the obligations being created in this instrument are erga omnes inter partes and it would be unfortunate if standing required proof of direct harm. A second question concerns whether the preferred, third, option, would not encourage forum shopping. After all, a breach of an obligation under the new agreement may, at the same time, also amount to a breach of an obligation under UNCLOS. In this scenario, a State would have the option of instituting its action under either UNCLOS or the ILBI. This would certainly be the case if all the States involved in the dispute are party to both the ILBI and UNCLOS. But assuming that the dispute settlement mechanism develop consistent jurisprudence, the problem need not preclude the adoption of the third option.

SESSION 1.3
THE ART OF "NOT TO UNDERMINE" IN THE INTERNATIONAL LEGALLY BINDING INSTRUMENT UNDER UNCLOS

Professor Vasco Becker-Weinberg
NOVA School of Law

The relationship between the new international legally binding instrument (ILBI) on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ) and the United Nations Convention on the Law of the Sea (UNCLOS), and the relationship between regional and global organisations/mandates and the rights of coastal States, are two related issues addressed in the ongoing negotiations of the Intergovernmental Conference (IGC). These issues are being discussed in the context of area-based management tools (ABMTs), including marine protected areas (MPAs). ABMTs are one of the elements of the "package deal" agreed in 2011. Other elements include marine genetic resources including the questions on access and benefit-sharing, environmental impact assessment (EIA) and strategic environmental assessment (SEAs), capacity-building and transfer of technology, as well as ensuring the compatibility of BBNJ and other uses, such as high seas fisheries.

It should be noted, however, that the two aforementioned issues are not exclusively related to ABMTs. EIA, for example, together with SEAs, may also be relevant to the decision-making process regarding

ABMTs, especially with respect to the designation of MPAs. Perhaps, it would be preferable, indeed helpful, to have it as a cross-cutting or general provision in the negotiation and that States should consider it with respect to different elements of the "package deal". Another example of an important general provision that ought to be included is the interpretation and application of the ILBI in a manner consistent with UNCLOS.

The question that must be addressed is how different bodies will interact under the ILBI, i.e. those to be created and the existing international, regional and sectoral organisations. Will it be mostly a centralised, decentralised or hybrid organisation system? Equally important is to determine the relevance of coastal States adjacent to an area beyond national jurisdiction (ABNJ). Moreover, how can the requirement "not to undermine" be a substantive obligation under the ILBI?

Caution would suggest that the existing organisations decide the terms of their own participation and the conditions in which to participate in any consultation procedure established by the ILBI. It would be difficult to see how existing organisations could be "forced" to do so under the ILBI or by any new centralised body established thereunder.

This is also relevant to determining where the competence for decision-making should rest, including on matters regarding setting and adopting standards and guidelines. It should be noted that even in a situation where States members of a regional body are also party to the ILBI, any decision regarding the regional body must be adopted under the relevant rules as established by its States parties. Indeed, it does not seem feasible to establish a hierarchy between different legal bodies, either for the purpose of decision-making or setting or imposing scientific or management standards and guidelines.

However, not all mandates have the same legal substance. Likewise, not all seas are covered by a regional fisheries management organisation or an environmental protection programme. There is a legal vacuum regarding ABMTs, including concerning the establishment of MPAs. As such, the ILBI could provide an overarching framework and global criteria for the selection and establishment of MPAs in the ABNJ, namely the identification and designation of MPAs and the establishment of a global network of MPAs. A framework for regional cooperation could also be contemplated. The goal is that a new legal framework would legitimise ABMTs in the ABNJ, including MPAs, make them legally binding and ensure an effective response to information on areas of ecological or biological significance.

In these circumstances, a centralised body could potentially fill the gap. Alternatively, the ILBI could provide the right incentive for States in a specific region to come together and develop regional frameworks as provided by UNCLOS and the 1995 Fish Stocks Agreement. There could also be a hybrid organisation system, with elements of centralisation and decentralisation.

It is fundamental for the whole exercise of creating a third implementing agreement of UNCLOS that existing organisations "feed into" the work and procedures of the bodies to be created under the new implementing agreement. The ILBI must achieve coherence, coordination and cooperation between global and regional bodies.

Discussions during the 1st and 2nd IGC also focused on the outlook of the new institutional structure. It would seem that there is some consensus on establishing a conference of parties (COP), for which resources (human, material and financial) will have to be

made available. Whether there will be subsidiary bodies under the ILBI or established later by the COP is still to be determined by the negotiations.

The COP must be intimately linked with the scope of the ILBI, and States should resist the temptation to see the COP as a new global forum for the ocean. Ambitions must remain within the allotted mandate of the ILBI. The challenge, of course, is that the latter implements certain provisions of UNCLOS and is not a stand-alone agreement. Indeed, the ILBI should not be a new overarching treaty. That role belongs to UNCLOS. Moreover, bearing in mind that States Parties to UNCLOS may not necessarily be parties to the ILBI and therefore will not have a seat at the respective COP, the question can be asked: What should be the legal status of non-States parties?

The ILBI must also implement rules of coexistence between areas within and beyond national jurisdiction. In this regard, the balance established under UNCLOS should be upheld. This implies that the guiding legal principle should be "due regard", which reflects the notion of cooperation. In this respect a distinction ought to be made between legal principles and objectives or concerns that should be addressed in the ILBI. This is the case of adjacency, regarding which there might be little support for its recognition as a binding legal principle, albeit without dismissing the underlying concerns, which should merit consideration in the ILBI.

These and many other questions must be addressed in the upcoming negotiations during the 3rd and 4th IGC, which in total consist of only four weeks.

Bearing in mind the tight time frame and the wide range of matters under consideration, the document entitled President's aid to negotiations (ATN) was prepared following the 1st IGC *"in response to the request by the Conference to prepare a document with the aim of facilitating focused discussions and text-based negotiations".*

The ATN also refers to the relationship of the ILBI to UNCLOS and other instruments and frameworks and relevant global, regional and sectoral bodies. It mentions at the outset that "[t]*he work and results of the Conference should be fully consistent with the provisions of*

the [UNCLOS], *and the process and its result should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies."*

The ATN underlines that nothing in the ILBI shall prejudice the rights, jurisdiction and duties of States under UNCLOS and that it shall be interpreted and applied in the context of and in a manner consistent with the Convention. It goes on to put forward options addressing coherence and complementarity with legal instruments and frameworks and relevant global, regional and sectoral bodies, and how the ILBI should not undermine those instruments. It also proposes some ambiguous language, namely the reference that the ILBI will be implemented in a *"mutually supportive manner with other international instruments relevant to it."*

Regarding the geographical scope, the ATN also mentions *"the rights and jurisdiction of coastal States over all areas under national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the [EEZ] shall be respected."*

The ATN has been a very important contribution to the preparation and the work of the 2nd IGC. Undoubtedly, this session has provided the opportunity for States to focus on wording. The 3rd IGC, however, must start working on the treaty text and move into treaty-language negotiations. Going forward it will need to streamline these options, including the extensive list of principles and approaches, given that some are duplicated and repeated throughout the text, and in some cases there is an overlap. It can be difficult on some occasions to fully understand how these principles and approaches are to be implemented in the substantive part of the ILBI. Additionally, some of the listed principles and approaches remain very contentious amongst many States. Perhaps, similarly to a section on definitions, these and other matters should be left for a later stage, after more substantive matters have been agreed.

There is great expectation that the 3rd IGC will be a turning point. However, this and the overall success of the next two sessions of the IGC, is a challenge for all States and not merely the President and the Secretariat of the Conference. What remains to be seen is whether all will rise to the occasion and constructively face the many complex challenges and reach a consensus on the substance of the ILBI under UNCLOS.

SESSION 2

Environment and BBNJ Negotiations

MODERATOR
Professor Richard Barnes
Faculty of Business, Law and Politics, University of Hull

SESSION 2.1
ENVIRONMENTAL IMPACT ASSESSMENT IN THE WORLD'S OCEANS BEYOND NATIONAL JURISDICTION: CRAFTING A COMPREHENSIVE REGIME

Professor Robin Warner
Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong

Introduction

The process initiated by the UN General Assembly (UNGA) in Resolution 69/292[1] to develop the elements of an international legally binding instrument (ILBI) on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ) has prompted wide-ranging research into existing ocean governance frameworks and their applicability to conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ). UNGA 69/292 provides that negotiations to develop the new ILBI should address the four elements of a package deal agreed by States in 2011. These elements comprise marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools (ABMT), including marine protected areas, environmental impact assessments (EIAs), capacity-building and the transfer of marine technology. The Preparatory Committee (PrepCom) meetings held in 2016 and 2017 identified additional cross-cutting issues for consideration, including definitions, scope of the instrument, relationship of the instrument to other instruments and frameworks,

1 United Nations General Assembly, *Development of 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, resolution adopted by the General Assembly on 19 June 2015*, GA Res 69/292, 69th session, Agenda Item 7, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/187/55/PDF/N1518755.pdf?OpenElement.

institutional arrangements, compliance, responsibility and liability, dispute settlement and final clauses.[2] UNGA Resolution 69/292 also stipulates that the process to develop the ILBI should not undermine existing relevant legal instruments and frameworks and relevant global, sectoral and regional bodies.[3]

This paper highlights key questions which have been discussed in the EIA element of the package agreed in 2011. It will review areas of convergence and divergence on the EIA element which emerged during the PrepCom meetings and continued during the first session of the Intergovernmental Conference (IGC) on the ILBI in September 2018. Finally, it discusses the options included in the EIA section of the President's aid to negotiations for the second session of the Intergovernmental Conference (IGC) and some of the capacity-building needs associated with those options at global, regional and national level.

Areas of convergence and divergence on EIAs in the PrepCom phase and IGC-1

In the PrepCom discussion of the EIA element, States predominantly agreed on the need to further operationalise the obligation under Article 206 of UNCLOS to assess the potential effects of activities under their jurisdiction or control where they have reasonable grounds for believing that these activities may cause substantial pollution of or significant or harmful changes to the marine environment of ABNJs. They discussed the various procedural stages in the EIA process, including thresholds and criteria for EIA, the terms of reference for an EIA public notification and consultation, post EIA decision-making and monitoring as well as how these might be implemented in the ABNJ context. Similar concerns to those articulated in the ABMT component of the package arose in the EIA discussions. These focused on whether there should be regional or global oversight of EIAs in ABNJ, how EIA processes for ABNJ activities would relate to existing regional and sectoral EIA processes and institutional requirements for the EIA process such as an information repository. There was also extensive discussion of how strategic environmental assessment processes might be implemented in ABNJs, whether transboundary EIA processes for activities with the potential to have significant effects across areas within national jurisdiction and whether ABNJs would be regulated in any way through the new instrument.[4]

Under the areas that generated convergence among most delegations, the ILBI would:

- set out the obligation for States to assess the potential effects of planned activities under their jurisdiction or control in an ABNJ;
- set out the relationship to EIA processes under relevant legal instruments and frameworks and relevant global, regional and sectoral bodies;
- address the thresholds and criteria for undertaking EIAs in respect of ABNJs;
- address the procedural steps of an EIA process, such as: screening; scoping; impact prediction and evaluation using the best available scientific information including traditional knowledge; public notification and consultation; publication of reports and public availability of reports; consideration of reports; publication of decision-making documents; access to information; and monitoring and review;
- address decision-making following the EIA, including on whether an activity would proceed or not and under which conditions, and the question of involvement of adjacent coastal States;[5]
- address the required content of EIA reports, such as: description of the planned activities, reasonable alternatives including non-action alternatives, scoping results, potential effects on the marine environment, including cumulative impacts and any transboundary

2 Preparatory Committee established by the General Assembly Resolution 69/292: Development of 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, *Chair's indicative suggestions of clusters of issues and questions to assist further discussions in the informal working groups at the second session of the Preparatory Committee,* https://www.un.org/Depts/los/biodiversity/prepcom_files/IWGs_Indictive_Issues_and_Questions.pdf.

3 UNGA Res 69/292, above note 1, paragraph 3.

4 PrepCom 2 Chairs indicative suggestions, see above note 2, 61-77.

5 Ibid, 13-14.

6 Ibid, 17.

7 President's Aid to Negotiations, UN Doc A/CONF.232/2019/1, 3 December 2018, http://undocs.org/A/CONF.232/2019/1

impacts, environment likely to be affected, any socioeconomic impacts, any measures for avoiding, preventing and mitigating impacts, any follow-up actions, including any monitoring and management programmes, and uncertainties and gaps in knowledge; and a non-technical summary;
- based on and consistent with UNCLOS Articles 204 to 206, set out the obligation to ensure that the impacts of authorised activities in ABNJs are monitored, reported and reviewed; and
- address the question of information to adjacent coastal States.

The issues on which there was a divergence of views are:
- whether the instrument should address strategic environmental assessment (SEA), and
- the degree to which the EIA process should be conducted by States or be "internationalized".[6]

After further discussion at IGC-1, the areas of convergence and divergence of views among participating States on the EIA element of the proposed instrument remained very similar. There is still no consensus on the role that any global institution created under the new instrument might play in relation to EIAs conducted by States and proponents of activities in ABNJs. There has also been considerable confusion among participating States in the PrepCom meetings and IGC-1 on how SEA processes might operate for plans and programmes related to the conservation and sustainable use of marine biodiversity in ABNJs. Among other things, this confusion could be related to the lack of global governance bodies with the authority to initiate SEA processes in ABNJ.

Options expressed in the EIA section of the President's aid to negotiations for IGC-2

The President's aid to negotiations (ATN) for IGC-2[7] contains a number of options for expressing the international law obligation to conduct EIAs of activities with the potential to affect marine biodiversity in an ABNJ and for further operationalizing that obligation. The options included in the President's ATN provide an indication of the types of activities that States, proponents of activities and global and regional bodies may be required to undertake and thus areas where capacity-building and technology transfer may be required.

Activities for which an EIA is required

This section of the President's ATN sets out a range of options on thresholds and criteria for determining which activities in an ABNJ require an EIA. These include:

- When States parties have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment;
- When States parties have reasonable grounds for believing that planned activities under their jurisdiction or control are likely to have more than a minor or transitory effect on the marine environment; and,
- An environmental impact assessment shall be required unless the proponent can demonstrate that the potential impacts of the proposed activity would be very minimal, by reference to the criteria, standards and threshold elaborated by the scientific/technical body.

There are also options in this section of the President's ATN relating to a list of activities that require or do not require an EIA, the inclusion of cumulative impacts and transboundary impacts in EIAs, and requirements for EIAs of proposed activities in ecologically and biologically significant areas (EBSAs) or areas that have been identified as vulnerable in an ABNJ.

The EIA process

The three broad options in this section of the President's ATN on the EIA process, range from less to more prescriptive. The three broad options are:

- Option I – Details to be developed at a later stage.
- Option II – General description of procedural steps in the EIA process and roles, obligations and responsibilities of States.
- Option III – Set out the steps in the EIA process.

There are multiple steps in the EIA Process set out under Option III highlighting significant capacity-building needs for developing countries including technical and financial assistance, development of institutional capacity and transfer of marine technology. These steps include:

- Screening;
- Scoping;
- Mitigation and impact management and reporting;
- Identification of alternatives to mitigation, prevention and compensation for potential adverse effects;
- Public notification and consultation;
- Publication of reports and public availability of reports;
- Consideration and review of reports;
- Decision-making;
- Publication of decision-making documents;
- Access to information;
- Monitoring and review;
- Compliance;
- Enforcement;
- Auditing;
- Examination of residual effects; and,
- Consideration of post-monitoring measures.

The options concerning who will conduct an EIA process also indicate the potential need to develop capacity within the scientific/technical body established under the new instrument to assist developing countries in conducting EIAs. The options in this section of the President's ATN include the following:

- Where the proponent is responsible for conducting an EIA, it may contract with a third party to conduct the EIA;
- Where the State party with jurisdiction and control over the planned activity is responsible for the conduct of an EIA, it may require the proponent of the activity to conduct the EIA or contract with a third party to conduct the EIA which will be subject to review and decision by the State;
- The EIA is conducted by an independent consultant appointed by a panel of experts designated by the scientific/technical body;
  - States parties, in particular SIDS, are not precluded from submitting joint EIAs
  - A pool of experts shall be created under the scientific/technical body and States parties with capacity constraints may commission these experts to conduct EIAs for planned activities

Content of EIA reports

The options in this section of the President's ATN include:

Option I in which details regarding the required content of an EIA report would be developed at a later stage

Option II in which the content of an EIA report is specified and could include but would not be limited to:

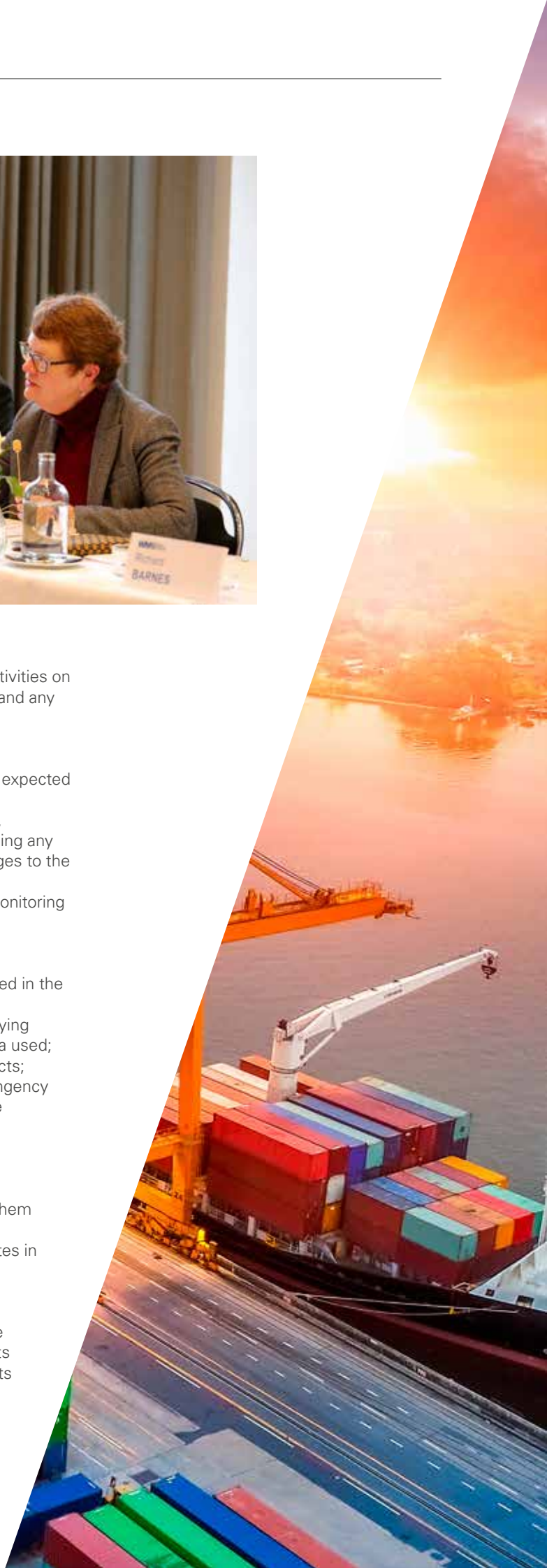
- A description of the planned activities and/or their purpose;
- A description of reasonable alternatives to the planned activities, including non-action alternatives;
- A description of the results of the scoping exercise;

- A description of the potential effects of the planned activities on the marine environment including cumulative impacts and any transboundary impacts;
- A description of the environment likely to be affected;
- A description of any socioeconomic impacts;
- A description of the worst-case scenario that could be expected to occur as a result of the planned activity;
- A description of the measures for avoiding, preventing, mitigating and, where necessary and possible, redressing any substantial pollution of or significant and harmful changes to the marine environment;
- A description of any follow-up actions, including any monitoring and management programmes;
- Uncertainties and gaps in knowledge;
- A non-technical summary;
- Identification of the sources of the information contained in the report;
- An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
- The methodology used to identify environmental impacts;
- An environmental management plan, including a contingency plan for responding to incidents that impact the marine environment;
- The environmental record of the proponent; and,
- A review of the business plan for the activity.

The multiple components required in an EIA report, many of them requiring substantial scientific and technical input, is a further indication of the need for capacity-building for developing States in implementing the new instrument.

Monitoring, reporting and review

Under this section of the President's ATN, the options provide that States either individually or in conjunction with proponents of authorised activities in ABNJs are to ensure that the impacts of such activities are monitored, reported and reviewed. This section also contains options relating to compliance with monitoring and reporting provisions in the new instrument. These options include:



Option 1 in which compliance is to be facilitated through a body set forth in the instrument using supervision mechanisms, such as periodic reports, periodic evaluation or review, and individual complaints.
Option II in which the compliance committee established in the instrument:

- reviews reports under this section to ensure implementation of the relevant provisions;
- reports to the decision-making body/forum set forth in this part; and
- In the case of non-compliance, the decision-making body/forum shall take adequate measures.

Option III in which non-compliance with the provisions of the EIA part of the instrument is to be reported to the decision-making body/forum established in the instrument for its consideration.

There are also notification and consultation requirements in this section which relate specifically to the involvement of adjacent coastal States and Small Island Developing States (SIDS) in the monitoring, reporting and review of activities in ABNJ. These options are:

Option I – Adjacent coastal States shall be kept informed of the monitoring, reporting and review process in respect of an activity approved under this instrument;
Option II – Adjacent coastal States shall be notified and consulted about monitoring reporting and review processes in respect of activities in ABNJ; and,
Option III – Adjacent coastal States and SIDS shall be actively consulted in monitoring, reporting and review processes in respect of activities in ABNJ.

These additional responsibilities will require quite extensive capacity-building and technology transfer for States parties, proponents of activities in ABNJs and global and regional bodies, including those established under the new instrument.

Strategic environmental assessment
The options in this section of the President's ATN are less detailed but nevertheless presage the fact that if provisions on SEAs are included in the new instrument, there would need to be considerable capacity-building and technical assistance, particularly for developing States, to implement the less familiar process of SEAs for programmes and plans relating to ABNJs. The options are:

Option I – Each party shall ensure that a strategic environmental assessment (SEAs) is carried out for plans and programmes under their jurisdiction or control, affecting an ABNJ, which meets the threshold/criteria established for SEAs in the instrument;
Option II – The instrument would set out rules and conditions to carry out SEAs as one type of EIA.

Relationship to EIA processes under relevant instruments, frameworks and bodies
This section of the President's ATN is particularly significant for enhancing cooperation and coordination on EIAs with relevant global regional and sectoral bodies with a mandate to regulate activities in ABNJs or to protect the marine environment. The implementation of these provisions in the new instrument will require the establishment and fostering of multiple cross-sectoral and cross-institutional links between global, regional and national bodies which do not currently exist.
The options set out in the President's ATN include:

- The conduct of EIAs under the instrument to be consistent with UNCLOS obligations and customary international law;
- Options on EIA processes under the instrument not undermining existing legal instruments, frameworks, global regional and sectoral bodies;

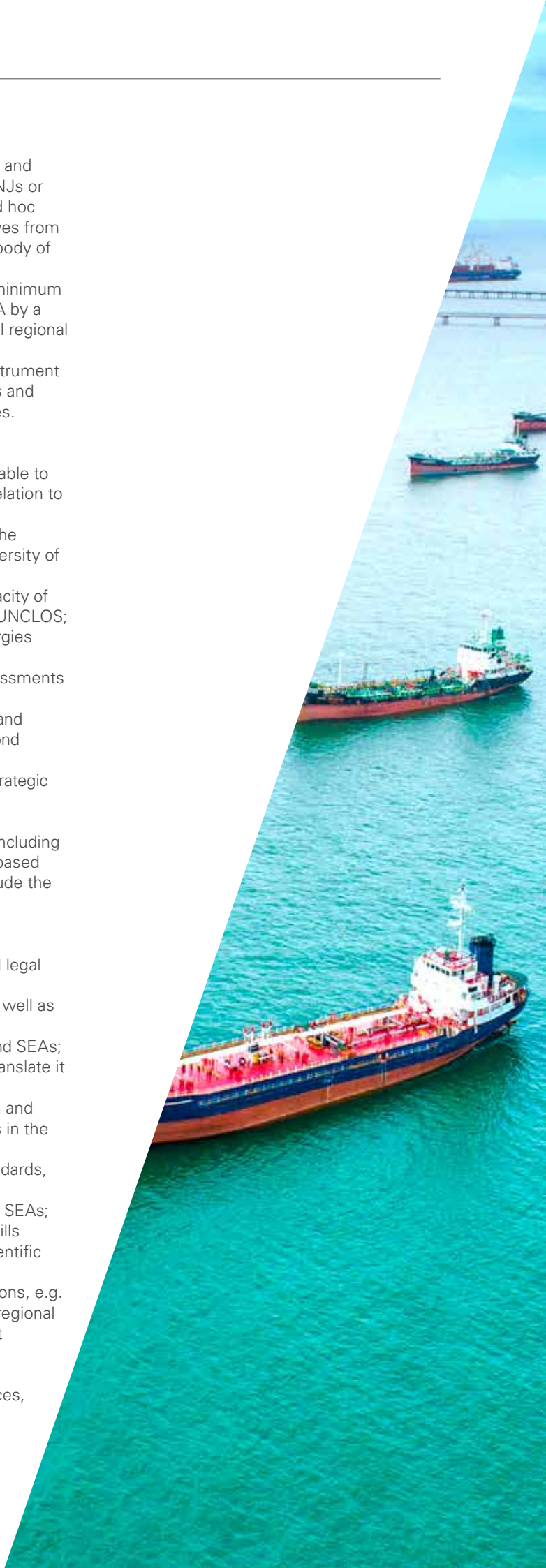
- Option relating to coordinating with relevant global regional and sectoral bodies with a mandate to regulate activities in ABNJs or to protect the marine environment – establishment of an ad hoc inter-agency working group or participation of representatives from these organisations in meetings of the scientific/technical body of the new instrument;
- Options on inclusion in the instrument or development of minimum global standards and/or guidelines for the conduct of an EIA by a scientific/technical body or through consultation with global regional and sectoral bodies; and,
- Options related to the requirement for an EIA under the instrument to apply or not to any activities already covered by the rules and guidelines established by global regional and sectoral bodies.

The capacity-building and technology transfer section of the President's ATN highlights a number of issues that are applicable to EIAs, many of which are the same as those noted above in relation to ABMTs. These include:

- Increasing, disseminating and sharing knowledge on the conservation and sustainable use of the marine biodiversity of areas beyond national jurisdiction;
- Developing the marine scientific and technological capacity of States parties in accordance with Parts XIII and XIV of UNCLOS;
- Strengthening cooperation and coordination and synergies between relevant organisations;
- Conducting and evaluating environmental impact assessments and strategic environmental assessments; and,
- Undertaking and participating in measures to conserve and sustainably use marine biological diversity of areas beyond national jurisdiction, inter alia, through the conduct and evaluation of environmental impact assessments and strategic environmental assessments.

The President's ATN also provides proposals for modalities, including the need for capacity-building and technology transfer to be based on and responsive to expressed needs. These proposals include the following measures related to EIAs and SEAs:

- Technical support;
- Infrastructure;
- Institutional capacity, including governance, policy and legal frameworks and mechanisms;
- Scientific and research capacity and its application, as well as scientific and technical cooperation;
- Information and knowledge-sharing concerning EIAs and SEAs;
- Collection and exchange of data and the capacity to translate it into effective and efficient policies;
- The acquisition of the equipment necessary to sustain and further develop research and development capabilities in the context of EIAs and SEAs;
- The development of manuals, guidelines, criteria, standards, reference materials;
- Training programmes on all required aspects of EIAs and SEAs;
- The development of regional centres of excellence, skills development and national and regional centres for scientific research;
- Increasing cooperative links between regional institutions, e.g. North-South and South-South collaboration between regional seas organisations and regional fisheries management organisations;
- The development of human resources and individual capacity-building, including in natural and social sciences, both basic and applied, through exchange of experts, short-term, medium-term and long-term training and the establishment of a global scholarship fund;



- The provision of scholarships or other grants for representatives of SIDS in workshops, programmes or other relevant training programmes in order to develop their specific capacities;
- The establishment of a networking mechanism among trained human resources;
- The exchange of experts;
- Assistance in the development, implementation and enforcement of national legislative, administrative or policy measures, including associated regulatory, scientific and technical requirements at national or regional level;
- The raising of awareness of stressors on the oceans that affect marine biodiversity of areas beyond national jurisdiction; and,
- Mechanisms for financing.

Conclusions

Consistent with the President's ATN, it is envisaged that capacity-building and technology transfer will enable inclusive and effective participation of all States and other stakeholders in the implementing of EIAs and SEAs. This would include the screening stage to identify those activities, plans and programmes for which EIAs and SEAs are required, the scoping stage to identify impacts and alternatives for mitigation, prevention and compensation of potential adverse effects, review of EIA and SEAs reports, decision-making on whether activities, plans and programmes should proceed and monitoring, review and enforcement of EIA and SEAs conditions.

At a global level, international organisations, including the secretariat and scientific/technical body for the new instrument will address global level capacity needs relevant to implementation of EIAs and SEAs in ABNJs. Capacity-building between and among regional and sectoral bodies will also be required to improve information-sharing and training on the conduct and evaluation of EIAs and SEAs by States and proponents of activities, plans and programmes in ABNJs at national level. At all levels, UN and international organisations, NGOs, academic and research organisations and funding entities will have a role to play in facilitating capacity-building and technology transfer related to the conduct and evaluation of EIAs and SEAs in ABNJs.

SESSION 2.2
AN ASSESSMENT OF ENVIRONMENTAL ASSESSMENT ELEMENTS OF THE BBNJ NEGOTIATING TEXT

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Introduction

With environmental assessment (EA) emerging as a key element of the BBNJ regime, it is important to step back and consider how the emerging EA system measures up against EA practice and literature. There has been considerable discussion in jurisdictions around the world, among practitioners, policy makers and academics, about the state of EA. Academics have written extensively about the gap between the promise of EA as a powerful tool to shift societies toward sustainability, and its actual performance to date. They have explored the potential causes of this apparent gap, and how to overcome it.

The focus of much of the literature on EA has been on domestic processes dealing with human activities on land and coastal areas. Less has been written about EA in the oceans and beyond individual states. The ongoing negotiations on an international legally binding instrument on marine biological diversity of areas beyond national jurisdiction (BBNJ) provides a rare opportunity to take the lessons learned through almost 50 years of domestic practice to design an effective international marine EA regime. The mandate for the negotiations contains a package of four elements, one on which is the design of an environmental assessment regime for marine areas beyond national jurisdiction (ABNJ).

The new instrument will be established under the United Nations Convention on the Law of the Sea (UNCLOS). It aims at the conservation and sustainable use of biodiversity in any parts of the oceans and the ocean floor that are not under the jurisdiction of any state, namely the deep seabed in "the Area" and the High Seas. A source of complexity is the governance of ABNJ, where all states enjoy equal rights. While this is commonly associated with the freedom of the high seas and a void of regulation, ABNJ are actually subject to a complex regulatory system that includes a variety of negotiated agreements and international organisations, which the negotiations must not undermine.

State of BBNJ Negotiations on EA

The current BBNJ negotiations are the result of a long process that started well over a decade ago. The work of the preparatory committee was informed by submissions from negotiating blocks of parties, individual parties, and from non-state actors. It is premature to draw any firm conclusions from the current text given that the negotiations are very much ongoing. However, some observations are warranted based on the text in combination with views expressed in formal submissions and reactions to the text at a negotiating session in August, 2019. First, it seems that there is broad support for an EIA process for activities proposed in ABNJ, but so far, no clear emerging consensus on when it would apply, what the process would look like, and how it would feed into planning and decision-making. There are limited signs of recognition of the potential for EIA to be integrated into other elements of the BBNJ regime or into the broader global ocean regime.

There is an absence of any concrete proposals before negotiators on how to effectively integrate EIA into an effective overall governance regime for ABNJ. There are some who appear to view the solution as delegation or substitution in case of potential for multiple processes and multiple decisions making responsibilities, whereas others seem to favour more cooperative approaches resulting in one integrated process that informs all decision makers. One of the challenges for the BBNJ negotiations is that the mandate does not explicitly include adjustments to other regimes, making effective cooperation and integration perhaps are more complex tasks. The following table offers a snapshot of how the negotiations measure up against 12 "Good EA" elements drawn from the literature.

EA Element	Status in the Negotiations
Tiered Assessments	Some support for the inclusion of Strategic Environmental Assessment (SEA), otherwise limited recognition of tiering. Unclear whether SEAs will include Regional Environmental Assessment (REAs), or whether they can be incorporated into other elements of the BBNJ Regime, such as area-based planning, and then linked to the EA process.
Assessment Streams	Limited recognition of the importance of designing multiple processes for proposals with different levels of complexity and scale, but the screening process could contribute to proper streaming if a range of streams are included in the final design.
Cooperative Assessments	Some recognition of the need for cooperation with coastal states, but limited recognition of the value of cooperating with other relevant actors either regionally or globally, such as the International Maritime Organization (IMO), the International Seabed Authority (ISA), and Regional Fisheries Management Organizations (RFMOs).
United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Compliant	Not clear whether there are areas where indigenous rights extend to ABNJ, no sign of the issue having been raised. There has been pressure to consider the role of indigenous knowledge in the assessment process.
Transparent & Accountable	Some recognition of the need for transparency, but not enough focus to date on accountability of decision-making through criteria and reasoned decision, with some ability to challenge decision made.

Sustainability-based assessment and decision-making	Focus on biophysical impacts, with a push for a broader range of impacts and benefits, but so far, no consideration of a sustainability or public interest test for ultimate decision-making.
Alternatives	Several reference to alternatives, but no clear consensus for their inclusion, and no clarity on the appropriate scope of alternative assessments, or the importance of regional and SEAs for the effective consideration of alternatives.
Cumulative Effects	Strong support in principle, but no detail, and no clarity on the importance of regional and SEAs for the effective consideration of cumulative effects.
Public Participation	Strong recognition of the importance of public participation, but concern that the complexity of public engagement in ABNJ is not adequately recognized.
Learning Oriented	No sign that mutual learning is a design consideration.
Monitoring and Follow-up	Some recognition of the importance of monitoring and follow-up, but no clear signs to date that this will be a priority in the process.
Independent & Impartial Administration	Considerable agreement to hold states rather than proponents responsible for EA, but no clear indication that the appropriate allocation and direction of discretion to ensure a legitimate administration of the process has been a priority in the negotiations. The push for internationalization of (parts of) the EIA process has the potential to contribute to this element.

A Way Forward?

The UNCLOS has created a dilemma for the governance of the oceans. On the one hand, it has divided the ocean into maritime zones with rights and duties for states. These zones cut across natural biological systems and create challenges for the management of biological diversity. On the other hand, UNCLOS recognizes that the elements and challenges of the ocean are interrelated and need to be considered as a whole, requiring states to cooperate. The 1995 United Nations Fish Stocks Agreement (UNFSA) has sought to address this tension for the fish stocks that straddle and migrate across the jurisdictional boundaries. With a new implementation agreement

to UNCLOS addressing the management of biodiversity, there is a need to introduce many of the same mechanisms for collaboration on biodiversity.

The regional level is particularly important in this respect. Somehow, the relevant regional states, RFMOs/Regional Fisheries Management Arrangement (RFMAs) and other bodies with relevant mandates need to find appropriate mechanisms for the collaboration needed, including the option of establishing new regional fora. There is a need to collaborate on marine scientific research, to share the data necessary for conducting all kinds of assessments, to undertake such assessments, and to allocate the responsibility for the management of human activities to the appropriate bodies. The EA process being negotiated can play a constructive role in this regard if designed appropriately.

To be effective and to respond to these challenges in the current state of international law, the EA process being negotiated needs to be properly integrated into the overall BBNJ regime, and, ideally, into the broader governance regime in each of the regions where it will apply. This would include proper integration with the ISA, RFMOs/RFMAs, and the IMO. It is imperative in this regard that the negotiations, with respect to the mandate to be consistent with the provisions of the UNCLOS and not to undermine existing relevant legal instruments, transitions from a battle over the scope of the mandate to a constructive discussion on how to effectively integrate the BBNJ regime and its EIA process into an effective overall governance system for ABNJ. The negotiations on global minimum standards could contribute to a more consistent approach to EA across ocean sectors and areas. Activities in areas within national jurisdiction that have potential to impact ABNJ should be included, and the concept of transboundary assessments requires attention in the negotiations.

Let us now return to the table of 12 elements of Good EA. It is clear that a good number of the elements are explicitly recognized by parties and in the draft text. This is very encouraging. For these elements, given the high-level nature of the negotiations to date, there is every opportunity to incorporate them in a manner consistent with the literature. They include the elements of transparency and accountability, public participation, cumulative effects, and alternatives. It will be important for the negotiations to build on the recognition of the importance of these elements to ensure they become important building blocks of an effective EA regime for ABNJ. The details can be worked out in the implementation rules, but a clear commitment in the treaty text is needed on the importance and meaning of transparency, accountability, on meaningful public engagement (including appropriate engagement mechanisms, capacity building and resources), and on the importance and scope of cumulative effects and alternatives.

A second group of elements have so far not featured significantly in the negotiations, but could be integrated without too much difficulty. They include an appropriate range of assessment streams to accommodate a variety of activities, a clear commitment to sustainability-based assessments and decision making, follow-up, and impartial and independent administration. Assessment streams could easily be included to offer some process options depending on the size, nature and complexity of the proposal being assessed. This would allow for a broader range of proposals to be assessed effectively and efficiently.

A shift from a focus on biophysical impacts to sustainability seems appropriate for ABNJ, particularly in light of the broad global endorsement of the sustainable development goals (SDGs). Key

steps in implementing a sustainability approach would be to broaden the scope of the assessment to consider all predicted impacts and benefits, and to develop sustainability-oriented decision-making criteria, that would result in approvals where a net contribution to sustainability is predicted. A commitment to implementing the process in a manner that is learning oriented rather than adversarial could be recognized as a guiding principle for key aspects of the process, such as public participation and follow-up. A bigger challenge will be its meaningful implementation.

Building on Articles 39 to 41 of the draft text, clear responsibility for an effective monitoring and follow-up program should be included, with attention to compliance, adjustments to terms and conditions, and learning for future assessments. A focus on impartial and independent decision-making, particularly with respect to broadly discretionary decisions throughout the process, would further strengthen the assessment process.

While formally assigning responsibility to states, the current text does not suggest a deviation from the practice of delegating much of the work to proponents, and it does not identify or address the challenges associated with this approach, particularly the potential implications for the independence and impartiality of the EIA process. Clearly, both the proponent and the controlling state party have important roles to play in EA, but the proponent is not sufficiently impartial to control any aspect of the process, and in some cases, the controlling state may also be insufficiently impartial to be a suitable entity in control of the process. Carefully allocation of process decision-making responsibility for triggering, scoping, and conclusions and recommendations, along with clear legal direction can go a long way toward addressing this issue, and enhance the legitimately and quality of the process.

There is not yet a clear path from the assessment to the recommendations and conclusions and to the final decision. Whoever makes the final decision should have the benefit of clearly and publicly articulated conclusions and recommendations based on the assessment carried out, the obligation to consider them, and to justify their decision in relation to them. Among the options for the basis for the final decision are whether the proposed activity is in the public interest, whether it makes a net contribution to sustainability, whether it helps or hinders the efforts under relevant global regimes, and whether it contributes to the SDGs. There is a long history of experience in domestic contexts that suggests an EIA report that simply predicts the biophysical impacts of proposed activities will do little to improve final decision-making (beyond the modest impact of imposing mitigation measures to address the most egregious impacts).

What remains is a third group of the 12 elements of Good EA that will be more difficult to integrate into the emerging assessment process, but are critical for the effectiveness of the EA system and the overall governance regime. They are the tiering of regional, strategic and project level assessments, including their integration into planning and regulatory decision making, and cooperative assessments involving all key actors. To effectively implement the elements of tiering and cooperative assessments, the EA process for ABNJ would ideally start with a cooperative regional impact assessment in each of the regions of the ABNJ. Each REA would consider all past, current, and a range of possible future activities to determine how they might interact with each other and the natural world. With respect to future activities, the assessment would not focus on individual activities, and would not be limited to activities that are proposed or are individually likely to be carried out. Rather, a key component of the regional impact assessment would be the preparation of a range of reasonable

future development scenarios for the study area. Such a process would have significant synergies with other elements of the BBNJ negotiations, such as area-based management and marine genetic resources.

A key goal of the REA would be to understand how various activities interact with each other and the biophysical environment. This would allow decision makers to identify an appropriate combination and scale of human activities for the region. It would then allow decision-makers to prioritize activities that help to meet human needs in a way that minimize interference with the natural world, and are most consistent with sustainability. It would make it easier for decision makers to focus on activities that clearly further the pursuit of the SDGs in an integrated manner, rather than place the pursuit of some at the cost of losing ground on others. Such an approach to REA could provide an important foundation for putting ecosystem-based management into practice, not leaving it as an abstract principle. Moreover, it could help EA out of its reactive focus.

First and foremost, SEAs would be carried out proactively as needed in the face of new information that was not considered or available when the REA was carried out. Such new information could come in the form of activities not contemplated at the time the regional impact assessment was carried out, a new understanding of the health and resilience of ecosystems, or a new understanding of the benefits or impacts. SEAs would serve an important role in ensuring the REA remains current in light of evolving circumstances. SEAs would also be carried out reactively, as envisaged in the current text, to consider the impacts, of proposed new policies, plans, and programs that may have an impact on biodiversity in ABNJ.

Project level assessments would be informed by the results of regional and relevant SEAs carried out in a given region, including the selection of preferred development scenarios and their implications for the consideration of the societal need, purpose, and rational, alternatives, and cumulative effects in light of potential future development. Assessments would consider the impact of proposed activities, compared to a reasonable range of alternatives, in the context of preferred and likely development scenarios, on efforts to meet the goals of relevant global and regional regimes and instruments such as the UN Climate Regime.

In the context of an EIA process for ANBJ, a key unresolved issue is who has decision-making responsibilities for proposed activities. Leaving aside the question who will be a decision-maker in a particular situation, a desirable outcome would be a cooperative approach to decision-making involving all decision makers within the regime and beyond, while ultimately each decision-maker retains the responsibility to make appropriate decisions given their mandate and responsibilities.

An important part of the decision-making process will be the terms and conditions under which proposed activities may be permitted to proceed. This then naturally leads to the importance of monitoring and follow up, including the three key roles it plays, to ensure compliance (and act in case of non-compliance), to verify predictions (and adapt to ensure the sustainability goals are not compromised by bad predictions), and to learn to improve predictions made during the course of EIAs for future assessments. EIA experience elsewhere suggests that clear direction is needed on who is responsible, and when action needs to be taken in order to ensure the hard work done during the EIA process is not compromised through inadequate follow up.

Conclusion

It is not necessary for negotiators to work out the details of the EA process in the current negotiations. However, the basic building blocks need to be in place. They include the institutional structure, clarity on the respective roles of REA, SEA, and EIA, the connection between EA and other planning and decision-making in ABNJ, the scope of assessments to be carried out, meaningful public engagement, measures to ensure the independence and impartiality of the process, and the effective integration of EA into the existing ABNJ governance system. With such a solid foundation in the legal instrument, the parties would be able to develop details later with input from EA experts. However, without the appropriate building blocks in place in the negotiating text, there is little hope of implementing an effective EA regime for ABNJ.

SESSION 2.3
MARINE GENETIC RESOURCES IN AREAS BEYOND NATIONAL JURISDICTION: FINDING WAYS TOWARDS A PRAGMATIC SOLUTION

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Introduction

The issue of marine genetic resources (MGRs) has been one of the most controversial topics in the work towards an international legally binding instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). Key questions concerning the conservation and sustainable use of MGRs, such as whether access should be regulated, the nature of these resources, and what benefits should be shared, have been under discussion at the United Nations for nearly twenty years without reaching agreement.

The main focus of the discussion on MGRs has been whether MGRs are the common heritage of mankind (CHM).[1] Those in favour of regulating access to MGRs and creating a regime for sharing of benefits arising from the utilisation of MGRs base their arguments on the understanding that MGRs in areas beyond national jurisdiction (ABNJ) are CHM, and thus should be subject to certain principles fundamental to this concept, which are non-appropriation, international management, fair and equitable benefit-sharing, and peaceful use. Those against creating a new regime argue that MGRs in ABNJ are not CHM, and are instead subject to the principle of the freedom of the high seas.

The importance of this question concerning the applicable legal principle cannot be understated, especially because the work and results of the intergovernmental conference (IGC) on BBNJ are to be "fully consistent" with the provisions of UNCLOS.[2] Moreover, some point out that the significance of this debate is not limited to the practical issue of benefit-sharing, arguing that the CHM concept embodies foundational elements of sustainable development.[3] Nevertheless, since both sides are entrenched in their positions, it would seem inevitable for negotiators to seek a solution based on a practical approach, focusing on the desirable rules for access to and benefit-sharing of MGRs.

This short paper will explore to what extent it would be possible to sidestep the CHM debate by focusing on the pragmatic issues concerning access to and benefit-sharing of MGRs. It will attempt to draw some conclusions from two premises that are believed to be uncontroversial. First, the new regime for MGRs should reflect the realities of MGR-related activities and should promote, or at least not hinder, scientific research and technological innovation. Second, the provisions should be fully consistent with the provisions of UNCLOS.

Access to marine genetic resources

Discussions at the Intergovernmental Conference

The current draft text includes provisions reflecting proposals for regulation of all types of access to MGRs in ABNJ.[4] The proposals for regulation of in situ access of MGRs in ABNJ are intended to ensure that benefits arising from such access will be shared and that such access is conducted in an environmentally sound manner. Some

1 See, for example, Alexander Proelss, "Marine Genetic Resources under UNCLOS and the CBD," *German Yearbook of International Law,* Vol. 51 (2008), pp. 417-432; María Fernanda Millicay, "The Common Heritage of Mankind: 21st Century Challenges of a Revolutionary Concept," in Lilian del Castillo (ed.) Law of the Sea, *From Grotius to the International Tribunal for the Law of the Sea* (Brill, 2015), pp. 272-295.

2 UN Doc. A/RES/72/249, para. 6.

3 Dire Tladi, "The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas beyond National Jurisdiction: The Choice between Pragmatism and Sustainability", Yearbook of International Environmental Law, Vol. 25, No. 1 (2015), pp. 113–132.

4 Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction [draft text], Article 10, UN Doc. A/CONF.232/2019/6, p. 9.

developing States who favour establishing a regulatory scheme have emphasised the need to link the issue of access to MGRs with the sharing of benefits arising from their utilisation. Systems of prior notification, permission, and licensing have been proposed for the purpose of ensuring the traceability of MGRs until their utilisation, or even as a trigger for benefit-sharing at the time of access. Developed States have generally opposed regulation of access for these purposes, based on their position that there should be no sharing of monetary benefits.

Necessary considerations
Regardless of the position adopted on the question of benefit-sharing, the promotion of scientific research and development for the realisation of various benefits of MGRs should be a priority for all States. Since the collection of samples in ABNJ is costly and difficult, the regime for access to MGRs in ABNJ should not create disincentives to research efforts, and should instead facilitate access. It needs to be recognised that most samples from ABNJ are collected in marine scientific research (MSR) activities. The effects of the restrictions on access for scientific research should be given serious consideration, in consultation with the scientific community and taking into account existing good practices.

The design of the access regime also needs to be in line with the realities of the utilisation of MGRs.[5] Genetic materials for such purposes may be collected within areas of national jurisdiction or else acquired from public collections or databases, without undertaking the costly and difficult effort of obtaining a sample from ABNJ. The content of the samples collected may not be known in advance, and those collected in situ by scientific research vessels without commercial intent may later be utilised for commercial purposes. Any system of prior notification, permission, or licensing must be designed in line with how MGRs are collected, taking into account possible future developments in science and technology. The rules on other modes of access, such as access ex situ and access to MGRs to obtain genetic sequence data, for the purpose of ensuring traceability of MGRs, would also need to take into account how such a system would fit with the existing practices of the scientific community and related industries.

Consistency with UNCLOS
Different views have been expressed on whether the collection of MGRs for commercial purposes falls within the scope of MSR.[6] The relationship between commercial activities relating to MGRs and MSR under UNCLOS has been a subject of a long-standing debate. This discussion has been hampered by the fact that UNCLOS does not contain a definition of MSR. If the scope of the access regime was limited to certain types of collection of MGRs, such as those with commercial intent ("bioprospecting"), the line between such activities and MSR will have to be defined. Thus far, the discussions within the BBNJ process have avoided such an approach, focusing on the concept of "access" without any distinction based on the type of activity. It would seem advisable to continue to follow this approach, as the definition of MSR is a controversial issue with implications extending beyond the question of MGR access.[7]

If the collection of MGRs through MSR activities, together with other possible types of collection activities, are to be regulated by the access regime, conditions or restrictions concerning access to MGRs in ABNJ would have to be consistent with the provisions of UNCLOS on MSR. Under UNCLOS, "all States" have the right to conduct MSR in ABNJ (Articles 256 and 257). States have the freedom to conduct MSR on the high seas, subject to the requirement that such freedom must be exercised in accordance with Parts VI and XIII and

5 On the current state of economic activity involving MGRs in ABNJ, see Paul Oldham et al., *Valuing the Deep: Marine Genetic Resources in Areas Beyond National Jurisdiction* (UK Department for Environment Food and Rural Affairs, 2014).

6 Joanna Mossop, "Marine Bioprospecting," in Donald R. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015), pp. 831-833; Andree Kirchner, "Bioprospecting, Marine Scientific Research and the Patentability of Genetic Resources," in Norman A. Martínez Gutiérrez (ed.), *Serving the Rule of International Maritime Law: Essays in Honour of Professor Joseph Attard* (Routledge, 2010), pp. 119-128.

7 See generally, Paul Gragl, "Marine Scientific Research," in David Joseph Attard et al. (eds.), *The IMLI Manual on International Maritime Law,* Vol. I (Oxford University Press, 2014), pp. 399-407.

other relevant provisions of the Convention (Articles 87(1)(f) and 257). Moreover, Article 256 provides that all States have the right to conduct MSR in the Area in conformity with the provisions of Part XI.[8]

Even if conditions or restrictions on access to MGRs are considered desirable, they should be consistent with the freedoms and rights of States to conduct MSR, to the extent that such conditions or restrictions apply. There are some obligations on researching States under Part XIII of UNCLOS that could be invoked as providing justification for certain restrictions or conditions on access. In conducting MSR, States are subject to general obligations so as to comply with "all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment" (Article 240(d)), and to make available "information on proposed major programmes and their objectives as well as knowledge resulting from marine scientific research" (Article 244(1)).

It could be argued that a prior notification regime for access to MGRs is consistent with the provisions on MSR in UNCLOS, as it only seeks to operationalise the relevant obligations that already exist. This approach should be more acceptable to many States than if prior notification was linked to monetary benefit-sharing.[9] On the other hand, making access conditional on permits and licences would seem difficult to justify without resorting to arguments based on the CHM principle and the need for traceability of MGRs for monetary benefit-sharing. In contrast to the requirement of prior notification, which assumes that States have the right or freedom to conduct MSR but prescribes requirements to be followed in the exercise of that right or freedom, the requirement of permits and licences makes MSR subject to the granting of permits or licences by another party. It would be difficult to justify such conditions based on the existing obligations under UNCLOS, as they may be considered to be in direct conflict with the basic principle that States have the right or freedom to conduct MSR.

Sharing of benefits arising from marine genetic resources

Discussions at the Intergovernmental Conference

Discussions at the IGC have not led to much agreement on the issue of benefit-sharing. While most States seem to agree on the need for non-monetary benefit-sharing, views are sharply divided between developing and developed States on the need for monetary benefit-sharing.[10] Without agreement on this main issue, the modalities for benefit-sharing are also yet to be discussed. The objectives of access and benefit-sharing of MGRs are also yet to be decided.

Necessary considerations

The regime for sharing of benefits arising from the utilisation of MGRs must be well aligned with the practices of the scientific community and related industries and should be designed in such a way that it would not create disincentives to research and development on MGR in ABNJ. While sometimes misunderstood, there appears to be limited commercial interest at present in the collection of MGRs in ABNJ in situ for their potential value in developing new pharmaceutical or cosmetic products. There are only limited examples of successful commercial products from MGRs, all of which derive from MGRs found in waters within national jurisdiction.[11] Therefore, the benefit-sharing regime would have to be designed so that businesses in the future would have the incentive to invest in research and development on MGRs in ABNJ. Although this is particularly relevant for monetary benefits, the sharing of non-monetary benefits also involves costs that must be taken into account.

It is important that genetic material for commercial development can also be collected from maritime areas within national jurisdiction

8 The relevant provision in Part XI is Article 143. Whether this article could be seen as establishing additional requirements in relation to the CHM principle is subject to debate. On this point, see Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea:* A Commentary (Beck/Hart/Nomos, 2017), pp. 1706-1707 (Article 256).

9 On a possible prior notification system with links with non-monetary benefit-sharing, see Arianna Broggiato *et al.,* "Mare Geneticum: Balancing Governance of Marine Genetic Resources in International Waters," *International Journal of Marine and Coastal Law,* Vol. 33 (2018), pp. 3-33.

10 Draft text, Article 11.

11 Broggiato *et al., supra note* 9, p. 23.

and terrestrial areas. While there is the possibility that some MGRs of value exist only in ABNJ, it is likely that most will also be found within areas of national jurisdiction. MGRs from areas within national jurisdiction are likely to be used for research and development if less favourable conditions apply to those collected from ABNJ. Therefore, the benefit-sharing regime for MGRs in ABNJ would have to be designed so that research and development efforts would not be driven away to other areas.

Due recognition should also be given to the fact that we have yet to see any substantial monetary benefits from MGRs in ABNJ.[12] Moreover, commercial products from MGRs are a result of efforts over a considerable amount of time, even decades. Therefore, the provisions need to be flexible enough to adapt to future developments while also ensuring predictability for the relevant industries. The current discussions on monetary benefit-sharing have been difficult in the sense that they seek to create rules for monetary benefits whilst uncertain as to their scope and scale. The degree of detail in the benefit-sharing regime required in the BBNJ agreement would have to be decided.

Consistency with UNCLOS

Discussions on benefit-sharing in the BBNJ negotiation process have centred on the question of whether MGRs in ABNJ are CHM. Developing States have called for the inclusion of monetary benefit-sharing in the agreement, as a legal regime that would be required, based on the principle of CHM. However, in the light of the current deadlock on this issue, it may be useful to consider alternative grounds for benefit-sharing under UNCLOS, and also whether agreeing on a certain new benefit-sharing regime would be inconsistent with UNCLOS.

There are various provisions in UNCLOS which can provide grounds for non-monetary benefit-sharing in relation to MGRs. The provisions in Part XIV on the development and transfer of marine technology provide the basis for different kinds of non-monetary benefit-sharing, although they have traditionally not been seen through the lens of this concept. In addition, some provisions in UNCLOS can be considered as a basis for benefit-sharing.[13] The obligations under provisions

12 David Leary, "Marine Genetic Resources in Areas beyond National Jurisdiction: Do We Need to Regulate Them in a New Agreement?" *Maritime Safety and Security Law Journal,* Vol. 5(2018-2019), pp. 21-42.

13 Arianna Broggiato *et al.,* "Fair and Equitable Sharing of Benefits from the Utilization of Marine Genetic Resources in Areas beyond National Jurisdiction: Bridging the gaps between Science and Policy," *Marine Policy,* Vol. 49 (2014), p. 180.

such as Article 244 on publication and dissemination of information and knowledge from MSR and Article 143(3) on the promotion of international cooperation in MSR in the Area can be put into further detail in relation to MGRs in ABNJ in the BBNJ agreement.

In contrast, there does not seem to be anything in UNCLOS, other than CHM, that could be interpreted as requiring monetary-benefit sharing. Nevertheless, it might be argued that it would not be entirely inconsistent with UNCLOS if States were to agree on monetary benefit-sharing for a specific purpose such as the conservation of MGRs or the operation of the treaty regime, without prejudice to their positions on CHM. Even if the collection of MGRs in ABNJ is considered a high seas freedom, it is uncertain as to what extent monetary-benefit sharing requirements would be inconsistent with the freedom. While an obligation to share the MGR collected in situ could be regarded as inconsistent with the freedom to engage in such an activity, it is unclear whether such freedom could be interpreted as protecting the utilisation of the MGR collected from restrictions or requirements.

Conclusion

While it seems unlikely that the CHM versus freedom of the high seas controversy will be resolved soon, there are many possibilities for agreement on access and benefit-sharing of MGRs in ABNJ. The CHM principle is not a sine qua non for many, although not all, of the proposals for a new international regime on access and benefit-sharing. On the other hand, creating some new rules for access and benefit-sharing is not necessarily inconsistent with the freedom of the high seas. The draft treaty text prepared by the President of the IGC before the third session did not include a reference to the CHM principle, but incorporated its substantive elements into the relevant provisions for discussion. It is hoped that an approach focused on the actual design of the desired legal regime would contribute to an agreement on the highly debated issue of access and benefit-sharing of MGRs in ABNJ.

SESSION 2.4
IMO AND MANAGEMENT OF THE MARINE ENVIRONMENT

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International shipping, accommodated by the oceans, delivers approximately 80% of the world's seaborne trade by volume and 70% by value. Vessel-based activities include, but are not limited to, voyages and carriage of goods, fishing, tourism, the exploration and exploitation of the sea and mineral resources, as well as scientific research. These activities are all connected to international shipping, which works as an engine to keep the global economy moving and contributes to the livelihood of people across the world.

Shipping is a fundamental component of any programme for sustainable development and the blue economy. It is agreed by all that the oceans are crucial for our collective future and that there are issues relating to shipping that need to be addressed in accordance with Goal 14 of the United Nations 2030 Agenda for Sustainable Development. In this scenario, the International Maritime Organization (IMO) has an important role to play.

As a specialised agency of the United Nations, IMO is the global standard-setting authority for the safety, security and environmental performance of international shipping. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and implemented. IMO is also a sectoral body established by the same States that are participating in the BBNJ negotiation process, while the IMO itself plays the role of an observer at the IGC. IMO's work supports the implementation of the UN Sustainable Development Goals (SDGs). This has been articulated in IMO's recent Strategic Plan 2018 – 2023.

Standard-setting for international shipping

IMO currently has 174 Member States with more than 130 observers from international organisations and non-governmental organisations (NGOs) representing diverse interests. The IMO has adopted and facilitated the adoption of more than 50 international treaties, among which the majority are binding in nature and currently in force. In addition, there are supplementing measures such as guidelines, guidance, recommended practices and codes that have also been developed by the IMO. Some of these deal directly or indirectly with protection of biodiversity in areas beyond national jurisdiction.
One of the important features of the IMO Conventions is that, when entered into force, they tend to cover all ships regardless of the flag they fly. This is due to the embedded principle of "no more favourable treatment" in IMO Conventions. It enables the application of these Conventions to ships of non-Convention States entering the waters of the port or ports of Convention States. In other words, this principle creates a level playing field so that ships and operators cannot compromise safety, security and environmental performance. This is what ensures that the global standards apply to the entire world fleet, regardless of where the ship operates or who operates the ships. It also contributes to increasing efficiency within the shipping and maritime industries.

In terms of the development of the environmental regime, IMO is the body through which governments maintain and develop global relations with national shipping. Once in force, the Member States are responsible for implementing and enforcing the adopted regulatory framework. This is done through a system of comprehensive Flag State, Port State and Coastal State compliance, monitoring and enforcement mechanisms. Through this system, IMO is able, through the States, to implement the standards and regulations on all ships.

Relevance to the BBNJ negotiations

All Conventions adopted by IMO, to various extent, are connected to the protection and preservation of the marine environment. In the context of BBNJ, the most important ones being the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78), the International Convention for the Safety of Life at Sea of 1974 (SOLAS), Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972 (London Convention), and the Ballast Water Management Convention (BWM Convention) to name but a few.
In addition, IMO has developed a number of highly relevant non-binding guidelines, such as the 2011 Guidelines for the Control and

Management of Ships' Biofouling to Minimize the Transfer of Invasive Aquatic Species, the 2014 Guidelines for the Reduction of Underwater Noise from Commercial Shipping, and the Guidance Document for Minimizing the Risk of Ship Strikes with Cetaceans.

In the context of Area-Based Management Tools, there are several measures in the IMO toolbox that are relevant, such as "special areas" under MARPOL 73/78, and Particularly Sensitive Sea Areas (PSSA). The latter can be used to protect any areas that are considered as biologically sensitive from international shipping. To date, IMO has designated 19 areas as "special areas" under Annexes 1-5 and "emission control areas" pursuant to Annex 6 of MARPOL 73/78; and 15 PSSAs, one of which has been extended twice.

While IMO takes the lead in developing the environmental regulatory framework, it has not been developed in isolation. The PSSA process draws heavily on the Ecologically or Biologically Significant Marine Areas (EBSAs) process under the Convention on Biological Diversity (CBD). During the development of PSSAs, the Member States, despite having no formal approach, follow the EBSAs criteria and try to harmonise the two processes. There are also strong linkages with the Marine Programme of the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Centre. They are effective in the process of developing regulatory regimes at the IMO once the vulnerability to shipping has been identified. A carefully crafted environmental regulatory regime could strike a balance between the delivery of essential goods and world trade, and protection and preservation of the marine environment and sustainable development.

Capacity-building within the IMO framework

There is an intrinsic linkage between the protection and preservation of the marine environment and capacity building, which is an important element of the environmental regime. A crucial part of IMO's task is to create a level playing field and, in this context, technical assistance in relation to capacity-building is of the utmost importance and a key pillar of IMO's work.

IMO has a comprehensive capacity-building programme, established to assist developing countries to improve their ability to comply with environmental and safety-related rules and standards. This is achieved through an extensive technical cooperation programme with a number of activities that attract the participation of a large number of trainees. In addition, IMO has major projects aimed at specific topics, some of which are highly relevant to BBNJ. Furthermore, IMO works in close collaboration with the World Maritime University (WMU) in Sweden and the International Maritime Law Institute (IMLI) in Malta. These institutions function as key capacity-building institutions in relation to maritime and ocean education as well as international training and research. Regardless of the outcome of the BBNJ negotiation process, the roles of sectoral bodies such as the IMO that currently carry out technical cooperation and capacity-building will continue to be complementary.

Conclusions

Through IMO, and based on the framework and responsibilities set out in the UNCLOS, Member States have, over the past 70 years, established a comprehensive regime for international shipping in order to protect the marine environment. In the last decade it has been confirmed that this regime is effective. IMO has not only set the general global framework, it also has the tools to apply stricter measures in special areas and PSSAs where area-based management tools are needed. IMO Member States and governments are key to the implementation and enforcement of these regulations. In the capacity as a flag State, States must ensure

that ships are complying with these regulations; and as port States, they must make sure that ships calling at their ports are in compliance. IMO Conventions apply to all ships regardless of flag and regardless of whether flag States have actually ratified the instrument.

The IMO Secretariat has been following the BBNJ process since the early days, and has been providing advice and information to the delegations in New York during the preparatory work around the negotiations. Efforts have been made to ensure that the negotiation does not undermine IMO's regime, which is successfully implemented and respected. IMO welcomes all efforts to further address the conservation and sustainable use of marine resources in areas beyond national jurisdiction.

SESSION 3

Capacity-Building and BBNJ

MODERATOR
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SESSION 3.1
POLICY BRIEF ON CAPACITY DEVELOPMENT AS A KEY ASPECT OF A NEW INTERNATIONAL AGREEMENT ON MARINE BIODIVERSITY BEYOND NATIONAL JURISDICTION

Professor Biliana Cicin-Sain
President, Global Ocean Forum

Capacity development and technology transfer is the enabler of the other three elements in the work towards the development of an international legally binding instrument (ILBI) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). Recognising the importance of this element, various efforts have been made to identify meaningful practices designed to strengthen global capacity to effectively address issues regarding the management of resources in areas beyond national jurisdiction (ABNJ). The Global Environment Facility (GEF), and the Food and Agriculture Organization of the United Nations (FAO) together with many partners, jointly initiated a programme on Global Sustainable Fisheries Management and Biodiversity Conservation in the Areas Beyond National Jurisdiction Programme (Common Oceans Programme). One of the four projects under the Common Oceans Programme, the project on Strengthening Global Capacity to Effectively Manage Areas Beyond National Jurisdiction (ABNJ

Capacity Project) led by the Global Ocean Forum and the FAO together with many partner organizations, aims to facilitate global and regional cross-sectoral policy dialogue and coordination, improve knowledge management and outreach, and contribute to increased capacity for decision-making at various levels of ABNJ management.[1]

Within the framework of the Common Oceans Programme, a multi-author, multi-institutional effort produced a Policy Brief on Capacity Development as a Key Aspect of a New International Agreement on Marine Biodiversity Beyond National Jurisdiction, published in 2018.[2] The Policy Brief addresses the challenges of capacity-building, relevant international prescriptions on capacity development, discussions on capacity in the BBNJ process so far, existing efforts in capacity-building relevant to BBNJ, financing capacity-building for BBNJ, a possible clearing-house mechanism, and possible modalities for linking capacity-building efforts at global, regional, and national level.[3] The Policy Brief will contribute directly to discussions at the Intergovernmental Conference (IGC) on development of the ILBI.

What capacity is needed?

A review of implementation of past prescriptions and surveys of existing efforts on capacity development show that most of the past and current capacity-building efforts have been, or still are, focused on the individual level, and mainly on sectoral rather than cross-sectoral issues. In addition to policymakers', researchers' and marine managers' individual capacity needs, it is essential to mobilise efforts to address the institutional capacity needs of national government agencies, universities and regional bodies, not to mention capacity needs at the societal level such as public awareness, understanding and actions.

On the subject and content of capacity needs, countries will need legal, policy, scientific, and marine management capacity to implement and comply with the new ILBI, participate effectively in global and regional cooperation in all aspects of the management and sustainable use of marine biological diversity in ABNJ, and support national/regional efforts towards a healthy resilient ocean and sustainable economies and livelihoods.

1 Areas Beyond National Jurisdiction, https://globaloceanforum.com/areas-of-focus/areas-beyond-national-jurisdiction/.

2 Announcing Policy Brief on Capacity Development as a Key Aspect of a New International Agreement on Marine Biodiversity Beyond National Jurisdiction (BBNJ) and UN Side Event at the forthcoming BBNJ Intergovernmental Conference, https://globaloceanforum.com/2018/08/29/announcing-policy-brief-on-capacity-development-as-a-key-aspect-of-a-new-international-agreement-on-marine-biodiversity-beyond-national-jurisdiction-bbnj-and-un-side-event-at-the-forthcoming-bbnj-in/. Common Oceans - A partnership for sustainability in the ABNJ, http://www.fao.org/in-action/%20commonoceans/projects/strenghtening-capacity/en/.

3 Biliana Cicin-Sain (et al), Policy Brief on Capacity Development as a Key Aspect of a New International Agreement on Marine Biodiversity Beyond National Jurisdiction (BBNJ), https://globaloceanforumdotcom.files.wordpress.com/2018/08/policy-brief-on-bbnj-capacity-development-dec-2018-email-version.pdf, vii.

Capacity-building measures must be tailored to the needs of each country/region and promote home-grown approaches. Greater efforts should be focused on cross-sectoral capacity-building and improving coordination within ministries, among sectors and stakeholders nationally and regionally. Moreover, capacity-building efforts should benefit both the management of ABNJ and national coastal zones.

Possible modalities for linking the global, regional, and national levels are three-folds. At global level there should be global institutions such as a Conference of the Parties to oversee implementation, monitoring and review, financing and other aspects of the potential ILBI. At the regional level, regional entities should come together, and there should be well-developed funding, with adjoining nations working together on specific ABNJ areas. Funding for regional centres of excellence is also needed. At the national level, governments need to support national-level policy development, the development of nationally determined goals, government capacity-building, and enhancing societal awareness, etc.

The concept of nationally determined goals (NDGs) for BBNJ could be explored as a potential approach, whereby countries could set goals and priorities and assess capacity needs according to their own national priorities, needs and responsibilities. As in the case of climate change, while BBNJ is a global challenge, each nation faces unique circumstances, including different interests and priorities in ocean and coastal management, different bodies of water (ABNJs) of immediate national concern, different risks from a changing ocean environment and status of resources, and different resource needs. Developing NDGs would allow countries to set goals and priorities and assess capacity needs in relation to a new ILBI on BBNJ according to their own national priorities, capabilities, and responsibilities. Such individual national measures could be the basis of collective action at all levels towards the achievement of global ILBI goals.

Financing capacity-building for BBNJ

In order to make capacity development efforts effective, it is essential to ensure sustained and stable financing support. The United Nations Convention on the Law of the Sea (UNCLOS), adopted back in 1982, does not have a standing financial mechanism, in contrast to the UNCED related conventions adopted in 1992 or later (i.e., UNFCCC, CBD, and UNCCD), all of which have a standing financing mechanism. UNCLOS has relied mainly on voluntary contributions to voluntary trust funds and to the Assistance Fund, and these have not provided sufficient funding for the implementation of UNCLOS.

The extensive work that will need to be done under a new ILBI will likely require sustainable public finance mechanism to finance its implementation, including the capacity development activities needed at global, regional and national level. To this end, innovative funding sources, including private investment and public-private partnerships, will be required.

Possible clearing-house mechanism

The Capacity Policy Brief examined nine Clearing-house mechanisms to learn lessons relevant to a future BBNJ clearing-house mechanism: the CBD Clearing-House Mechanism (CHM), the ABS Clearing-House (ABSCH), The Biosafety Clearing-House (BCH), UNFCCC Capacity-Building Portal, Joint Clearing-House Mechanism (Basel, Rotterdam and Stockholm Conventions), Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES) Capacity-Building Functions, Biodiversity and Ecosystem Services Network (BESNet), UNESCO GAP Clearing-house and SCP Clearinghouse (UNEP).

A review of the existing clearing-house mechanisms suggests that the following capacity-building functions could be incorporated in the design of a clearing-house mechanism under the ILBI. Some already provide access to information about existing capacity-building initiatives, others have a dedicated capacity-building portal or clearing-house section with its own identity; many provide access to publications, training workshops, courses, funding opportunities, online forums, workspaces, toolkits, webinars and targeted technical support; a few provide a way for countries to register their capacity-building needs and priorities; and many also provide access to a human network of experts. All these functionalities could be useful for a BBNJ clearing-house mechanism.

A clearing-house mechanism under the potential ILBI can provide a useful tool for facilitating information sharing. It could offer a platform for countries, institutions and individuals to register their capacity development needs, both initially and on an ongoing basis, thus facilitating dialogue and cooperation between those providing capacity development and those requiring it. There will be challenges, however, in keeping the user community engaged, ensuring compatibility with other existing data repositories and enabling access in multiple languages.

Next steps

This Policy Brief focuses on the overall framework of capacity development in the development of an ILBI on the BBNJ. Within the same framework of the GEF/FAO/GOF Common Oceans Project, a second Policy Brief on Capacity Development for Implementing the BBNJ Agreement: Possible Modalities for Addressing Area-Based Management, Environmental Impact Assessment, and Marine Genetic Resources in the Context of Climate Change was published in 2019.[4] The GEF/FAO/GOF Common Oceans Program was initiated to bring about improvement in the management and conservation of tuna and deep-sea fisheries resources and biodiversity in ABNJ, in order to achieve global targets and goals. As part of the ABNJ Capacity Project, GOF has developed an ABNJ Regional Leaders Program to strengthen the capacity of leaders from developing countries and small island developing States (SIDS) at regional and national level to better address ABNJ resources and issues and to participate more effectively in global and regional ABNJ discussions. There is a need to expand the participation of the ABNJ Regional Leaders Program to prepare regional leaders and decision-makers to participate actively at the IGC and fully implement the potential ILBI.

4 Announcing draft of Second Policy Brief on Capacity Development for Implementing the BBNJ Agreement and UN Side Event at the forthcoming BBNJ Intergovernmental Conference, https://globaloceanforum.com/2019/03/22/announcing-draft-of-second-policy-brief-on-capacity-development-for-implementing-the-bbnj-agreement-and-un-side-event-at-the-forthcoming-bbnj-intergovernmental-conference/.

SESSION 3.2
CAPACITY-BUILDING AND THE INTERNATIONAL SEABED AUTHORITY

Ms. Annekah Mason
Training Coordinator, International Seabed Authority

The International Seabed Authority (ISA) is the organisation created by the UNCLOS and the 1994 Agreement relating to the implementation of Part XI of the Convention (Implementation Agreement) to regulate mineral exploration and exploitation in the deep seabed beyond national jurisdiction. In developing activities in the Area, an essential part of ISA's mission is to promote and encourage the conduct of Marine Scientific Research (MSR) in the Area and in particular, to facilitate the active participation by developing States in deep seabed exploration and scientific research. Several articles cover the capacity-building aspects including: Articles 143, 144, and Article 15 of Annex 3 of the Convention; as well as section 5 of the Annex to the Implementation Agreement. In particular Article 15 of Annex 3 provides that the contractor must draw up practical training programmes for personnel of the Authority and developing States.

The ISA offers three types of training programmes: The Contractor Training Programme, the Endowment Fund for Marine Scientific Research, and the ISA Internship Programme. Since 2009, a total number of 259 training placements have been awarded through these programmes. Through ISA capacity-building schemes, a range of personnel, young professionals and other qualified candidates from developing States are being equipped with more advanced knowledge of UNCLOS and the ISA's mandate, role and function. As demonstrated in the negotiations that took place during the annual sessions at the ISA, these trainees are able to better understand the interests at stake. Because the Area is considered the Common Heritage of Mankind and as such, each State has a stake and interest in the exploitation and exploration in the deep seabed. With ISA's training programmes, trainees can acquire knowledge and practical experience that can be used in future negotiations under the ISA and concerning the BBNJ.

Contractor training programme

Under the Implementation Agreement, the ISA's contractors have a legal obligation to draw up and fund the practical hands-on programmes for the training of personnel from the ISA as well as developing States in all activities in the Area which are covered by the contract. The legal obligation of contractors to provide capacity-building is one feature that distinguishes the Part XI framework from other agreements. The training programmes aim to improve knowledge and strengthen research capabilities. The nominating parties are governments or institutions within the United Nations Member States.

To date, 105 placements have been awarded under the Contractor Training Programme, which comprises At-Sea Training, fellowships/internship, Ph.D. and Master's Degree, and workshops/seminars. The subjects range from geological training to environmental training, taxonomy as well as legal internships. The training programme takes a holistic approach relating to the development of activities in a given area to deliver the much-needed impact. Currently, the At-Sea Training is the most popular programme among candidates from developing States who have less opportunity to engage in practical work.

Geographic representation is an important aspect when it comes to the selection of trainees for the various programmes. The overall geographic representation of the Contractor Training programme since 2013 shows that 33% of the trainees are from the African group, 32% from the Asia-Pacific group, 31% from the Latin American and Caribbean Group and 2.8% from the Eastern European group. Under UNCLOS, when promoting the participation of developing States in activities in the Area, there is a need to pay special attention to the needs of coastal, landlocked and geographically disadvantaged States. Since 2013, the ISA has awarded 35 placements for this special group. Twenty percent out of the 35 placements went to Least Developing Countries (LDC), 48% to Small Island Developing States (SIDS) and 9% to Landlocked Developing Countries (LLDCs). In this context, the ISA intends to increase partnerships in the area of ocean sciences. It is noteworthy that, out of the 35 placements that went to LDC, SIDS and LLDC group, only 11 were women. There is an ongoing effort to bridge the gap to ensure gender equality in the programme.

Endowment fund for marine scientific research

Under Article 143 of UNCLOS: The ISA shall promote and encourage the conduct of MSR in the Area and shall coordinate and disseminate the results of such research and analysis when available. To that end, the ISA set up the Endowment Fund on 16 August 2006 with the intention of supporting and promoting international cooperation in MSR in the Area for the benefit of developing States and technologically less developed States. The source of funding is the contingency sum that remained from the pioneer contractors' application which was subsequently invested. The interest accrued from this investment yearly is then offered as grants for technical assistance and training programmes. The ISA also relies on third-party monetary assistance.

Since 2009, 126 placements have been offered under the Endowment Fund. 54 of the candidates benefited from UNCLOS training, while 65 out of the 126 went to the science programme offered. These training programmes offer qualified scientists and technical personnel from

developing countries an opportunity to participate in international scientific and technical cooperation.

In terms of geographic representation, out of the 126 placements, 39% were awarded to the African group, 3% to the Eastern European group and 16% to GRULAC. However, only 47 of the 126 were women. A further breakdown shows that 26 of the 126 went to the special needs group – 31% of which went to LDCs and 69% to SIDS. Ten (10) out of the 26 were women. Again, there is an ongoing effort to increase the number of female participants.

Internship programme

The ISA accepts interns on a limited basis, depending on the specific needs of the respective offices within the Secretariat and the candidates' capacity to effectively support the institution. Unlike the other programmes, the internship programme is self-funded due to the lack of a consistent funding mechanism within the ISA. In contrast to other capacity-building programmes, the internship programme is open to all member States. The aim of the programme is to provide students and young professionals from diverse academic backgrounds with more experience of the mandate, role and functions of the ISA, as well as for the ISA to benefit from the assistance of these qualified persons. The duration of the internship is up to four months and it contributes to building a talent pool for the next generation of legal and technical personnel.

Since 2014, there have been 28 candidates who have participated in the internship programme, of which 78% were women. Geographic representation shows that 32% Asia-Pacific group; 16% from GRULAC and 36% from Western European Group. Of the 28 placements, only 9 we (occupied by/went to/taken up by) candidates from the special needs group, all of whom were from SIDS.

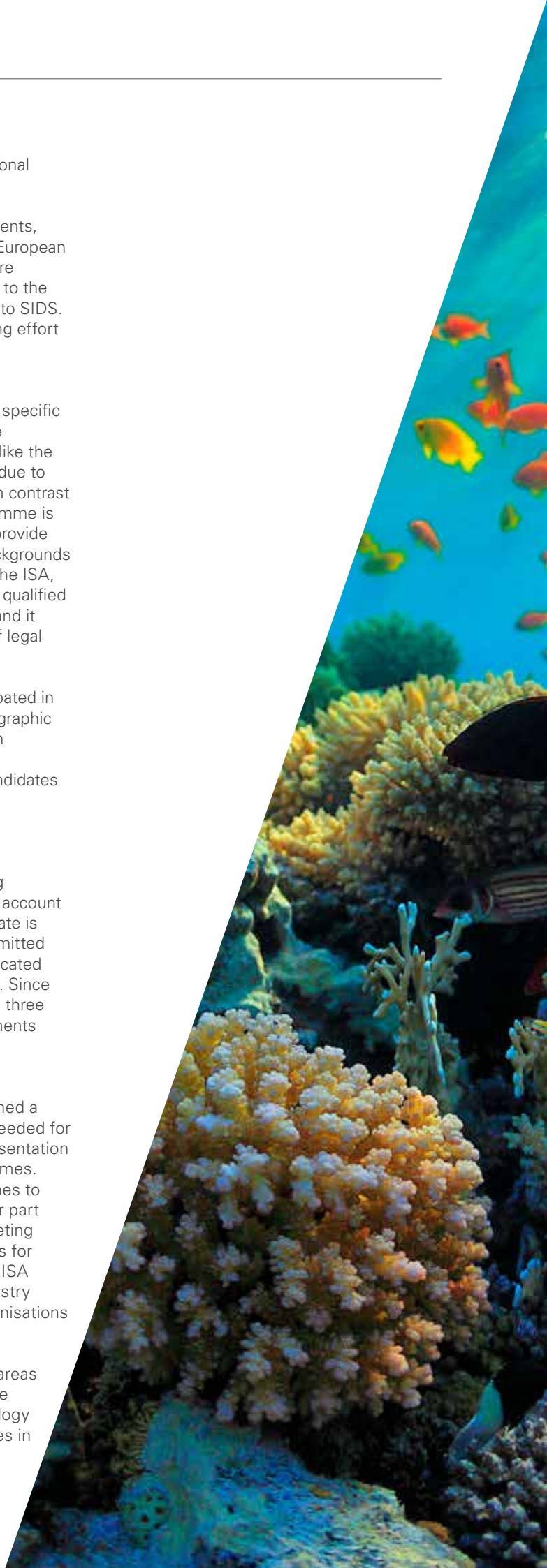
Gender equality

In terms of voluntary commitments, the role of the ISA is to enhance the role of women in MSR through capacity-building (#OceanAction15467). According to UNESCO, women today account for only 38% of the world's research in ocean science. This rate is lower for women from developing countries. The ISA is committed to gender equality and women's empowerment and has dedicated resources to promote awareness of the training programmes. Since 2009, among the 259 training placements awarded across all three ISA capacity-building programmes, 107 or 41% of the placements were awarded to female candidates.

Conclusions

The ISA has a mandate for capacity-building. It has established a system to identify the type of training that is required and needed for specific countries, and to take gender and geographic representation into consideration in the design and delivery of the programmes. The ISA conducts a technical study to review the programmes to evaluate progress and to address shortcomings. In the latter part of 2019, the ISA will hold a Member State Consultation meeting to understand capacity-building needs and develop solutions for Member States accordingly. In terms of the next steps, the ISA is looking to expand partnerships with Member States, industry partners, academia, UN system and other international organisations and professional associations.

In the ISA Strategic Plan 2019-2023, three priority working areas are identified: promoting MSR and sharing the results for the benefit of mankind; increasing capacity-building and technology transfer; and facilitating the participation of developing States in activities in the Area.



SESSION 4

Financing and Technology Transfer for Capacity-Building of the BBNJ

MODERATOR
Professor Yoshifumi Tanaka
Faculty of Law, University of Copenhagen

SESSION 4.1
FINANCING CAPACITY-DEVELOPMENT

Ms. Lowri Mai Griffiths
Head of the Maritime Policy Unit, Foreign and Commonwealth Office, London, United Kingdom

As shown in the President's aid to negotiation and the previous discussions, there are a number of options on how the capacity-building and transfer of technology section and its linkage to funding could be framed within the final implementing agreement. The objectives of the capacity-building and transfer of technology section will influence the discussion of the funding mechanisms. Such objectives will also influence the assessment of the States' capacity-building needs, which have a direct impact on the level of funding required and the appropriate types of funding mechanism. Thus, the objectives of capacity-building and transfer of technology provisions are likely to influence the potential sources of funding and the design of any new or adapted funding mechanisms.

There has been some discussion in the BBNJ negotiations about the use of existing funding mechanisms. The extent to which any of these existing funding mechanisms can be an appropriate mechanism under the implementing agreement will depend on their aims and objectives. All funding mechanisms, whether international funds or private institutions, offering financial support come with rules and

procedures. In order for any capacity-building programmes to obtain those existing funds or grants, they must satisfy both the criteria of the implementing agreement and the specific criteria of the existing mechanisms.

Institutional framework

It is acknowledged that any institutional capacity-building framework established under the implementing agreement will require financing, and the operational cost will further complicate the institutional structure. Even when institutional structures are not set up specifically in the implementing agreement, there may be "hidden costs". For example, if the financial costs of participation in the scientific committee fall onto a nominating State, then the State has to factor that into its overall costs of engaging and working with the implementing agreement. In theory, it should be a simple matter to distinguish between the costs of the institutions under the implementing agreement and the costs of the capacity-building provisions. In practice, however, it needs a clear vision as to what type of costs are needed under both scenarios.

It is unclear, both from the discussions and the President's aid to discussion, what is considered to be part of the "institutional architecture" of the overall implementing agreement, and what is considered to fall in the "capacity-building and technology transfer" pot. It should be acknowledged that it is the Member States that have responsibility for clarifying these issues. Which begs the question – is the clearing-house mechanism part of the institutional framework or a stand-alone capacity-building mechanism or both? The answer to this question has an impact on the potential funding mechanism used to finance the clearing-house mechanism. This is one of the reasons why it is extremely important to explore existing mechanisms and architectures that could be used to deliver the aims of the implementing agreement.

Financing capacity-building and financing for capacity-building

Currently, there is some confusion in the proposals put forward in the negotiations and recorded in the President's aid to discussion between the means of delivering capacity-building and technology transfer, and the kinds of capacity-building projects/programmes in which developing States may be interested. For example, from section 6.2 option in the President's aid to discussion:

(a) technical support for the implementation of provisions, including data monitoring and reporting;
(j) programmes of research, education and training taking into account the IOC Criteria and Guidelines on Transfer for Marine Technology;
(l) development of regional centres of excellence;
(n) designation/creation of a financial mechanism to support implementation activities; and,
(q) open access and wide dissemination of environmental and biological information collected through research conducted in areas beyond national jurisdiction as well as in the Area.

The funding mechanisms for the aforementioned different types of activity are also likely to be different. This is particularly relevant for the discussion of "mandatory funding". It again argues for the need to step back and look at which parts of the "package" belong together and then look at how best to fund the various elements. Some of the costs may currently be hidden, for example the costs of depositing open access data and maintaining open access databases – these hidden costs need to be brought into the light, as part of a comprehensive view of the overall package of funding and its various sources.

Sources of funding

In terms of recourse to existing structures and institutions, given that this is an implementing agreement under UNCLOS, the provisions on capacity-building and technology transfer could be characterised as putting flesh on the bones of the provisions of Part XIV of the Convention, as they apply to areas beyond national jurisdiction. There are institutions, in particular the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO), whose work can be seen as implementing Part XIV of UNCLOS. It is necessary to look at what is already being done, not only to ensure that there is no duplication and overlap, but also to make the most effective use of funding opportunities. However, there is a chance that some of the existing funding mechanisms, such as the IOC-UNESCO, may not be able to undertake additional tasks relating to the implementing agreement due to the lack of resources.

Conclusions

There are a number of potential sources of funding for capacity-building. States parties to the implementing agreement would be the obvious starting point. And there should be opportunities for States that are not parties to the implementing agreement to contribute. Quite often, States may be reluctant to ratify treaties but find it easier to fund capacity-building for others States or programmes. Other sources that could be considered include existing global funding mechanisms, financial institutions, the private sector and wealthy philanthropists. All of these should be given the opportunity to engage in funding capacity-building. However, all scenarios will depend on the type of capacity-building programmes that States are seeking to fund. Only then will appropriate funding mechanisms become easy to identify.

SESSION 4.2
CAPACITY-BUILDING AND TRANSFER OF MARINE TECHNOLOGY FOR MANAGEMENT OF BBNJ

Dr. Yoshihisa Shirayama
Associate Executive Director, Japan Agency for Marine-Earth Science and Technology

This paper focuses on two points. The first concerns the review of the capacity and technology necessary for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ), and the second relates to issues of how to transfer the capacity and technology to countries that need it.

There are two major issues concerning the review of the necessary capacity and technology. The first concerns infrastructure such as research vessels, shipboard equipment and laboratory equipment. For Marine Genetic Resources (MGR) and related research activities in areas beyond national jurisdiction (ABNJ), vessels and equipment are top priorities. The second issue relates to the human resources required to conduct the research activities, including scientists, officers and crew of research vessels, operators of equipment and laboratory technicians. The two issues need to be integrated, with a special focus on human resources, because it is important to identify the people that can support the operation of the equipment on board ships. These capacities are indispensable for carrying out MGR research, environmental impact assessments (EIA) and management of Marine Protected Areas (MPA).

To illustrate the need for research vessels, the Japanese Agency for Marine-Earth Science and Technology currently operates the following vessels: R/V Hakuhomaru, R/V Mirai, R/V Yokosuka, R/V Kairei, R/V Shinseimaru, R/V Kaimei, D/V Chikyu and Shinkai 6500, all of which have the capacity to venture into ABNJ. The smallest of these vessels is the R/V Shinseimaru, which is 55 metres in length with a gross weight of 1,629 tonnes. The largest vessel is 170 metres in length with a gross weight of 56,752 tonnes. In addition, the Agency operates a number of autonomous underwater vehicles: AUV Urashima, AUV Otohime, AUV Kaiko Mk-IV, AUV Yumeiruka, AUV Jinbei as well as remotely operated vehicles, ROV Kaiko 7000 II, for the deep sea operations. All these vessels and vehicles are indispensable to the research carried out in the ABNJ. Additionally, the vessels are well-equipped with laboratory equipment. Furthermore, upon return to shore, facilities are needed to analyse and store the research data, including costly high-end computers.

Both infrastructure and human resources are indispensable components of the package for conducting research in ABNJ. Equally important are the qualifications of the personnel engaged in the research, operating and coordinating at every stage. For example, there is a risk of incidents where a ROVs crashes on the seabed, hindering investigation and research and requiring human intervention. It is worth emphasising that in order to accommodate proper capacity-building for States that need it, one must ensure that all the relevant materials are in place. These include the following:

Infrastructure related elements:
- Research vessel;
- Shipboard equipment; and,
- Laboratory equipment.

Human resources and knowledge related elements:

- Scientists;
- Officer and crew of research vessel;
- Operator of equipment; and,
- Laboratory technician.

Cost-related elements:

- Ship operation (fuel);
- Maintenance;
- Operation of equipment; and,
- Data sharing.

The cost of human resources and of monitoring the work should be taken into account in the best interest of both the provider and the recipient. A monitoring mechanism is needed to ensure that the recipient acts responsibly and maintains the required level of capacity. The providing countries could assist in evaluating the human resources and identifying people who can provide assistance in capacity-building and training, and also provide a "trainers evaluation" system.

Moreover, one should also consider future technology development. For example, in the context of deep seabed activities, the development of ocean research and scientific equipment is quite recent. Up until the early 2010s, research, such as collecting water samples, was conducted manually. With the development of technology, robots and AUVs can now travel hundreds of miles to measure ocean parameters. The IOC-UNESCO, for example, is trying to determine ocean variables and important parameters using calculation by sensors. Technological development will reshape the content of capacity-building in the future.

Financial and capacity support is an ongoing requirement for marine research in ABNJ. Therefore, the responsibility to maintain the necessary capacity should be clearly defined before the start of future BBNJ operations.

SESSION 4.3
CAPACITY-BUILDING AND THE EUROPEAN UNION

Mr. Carl Grainger
Lawyer, Legal Division, Department of Foreign Affairs and Trade, Ireland

Ireland can best be described as a Small Island State or a large Ocean State with a marine area that is approximately ten times its land mass. In addition, Ireland has a considerable continental shelf beyond 200 nautical miles. As a result of this, Ireland has a profound interest in the BBNJ process. This is compounded by the linkages between BBNJ and the Sustainable Development, over which Ireland feels a particular sense of ownership, having acted as co-facilitator of the negotiations leading to the adaptation of the UN 2030 Agenda on Sustainable Development Goals together with Kenya. The BBNJ agreement as an important element in the ongoing efforts to achieve the SDGs, in particular Goal 14.

Capacity-building is an essential part of achieving the success of the BBNJ agreement. The goal of the ongoing BBNJ negotiation is to establish a legal instrument that is binding in conjunction with global participation and global legitimacy. Hence, it is essential to build the capacity for developing countries to participate in a meaningful manner.

In terms of objectives, there seems to be convergence among participants at the BBNJ negotiations around the idea of capacity-building and assisting States, particularly developing States, to fulfil the objectives of the agreement, i.e., conservation and sustainable use of marine resources in areas beyond national jurisdiction. The European Union supports an inclusive mechanism in which the opportunities are not limited to any State in a particular category, but are offered under a "needs-based" approach. The future agreement should recognise the requirements of developing countries, in particular Small Island Developing States. However, a distinction can be made between recognising the special requirements of certain States, and automatic preferential treatment for certain States based on membership of a particular group. The latter is preferred by some States but considered problematic by others. Membership of a particular group or geography does not, in any given context, confer a status of greater need. A needs-based approach would be fairer and more practical.

It should be acknowledged that assessing capacity needs is not such a straightforward matter, and would depend on the institutional framework adopted in the agreement. A mechanism needs to be developed whereby States can voice their capacity needs. Moreover, experience teaches us that states will sometimes require assistance in identifying their needs. The clearing-house mechanism to be developed under the future agreement could have an important role to play in needs-identification.

Delegations at the intergovernmental conference (IGC) need to decide on the scope of capacity-building. The objectives of capacity-building need to focus more on assisting States to pursue the specific activities necessary to comply with the future agreement. In this context, the President put forward a particular provision that merits careful consideration to support the implementation of the parts of the agreement related to Marine Genetic Resources (MGRs), Area Based Management tools (AMBTs) and Environmental Impact (EIAs). It is worth bearing in mind that capacity-building is interlinked with the content of the more substantive areas of the agreement. It is still not clear what other parts of the package, for example, ABMTs, EIAs,

and MGRs will be envisaged in this regard. Until the more substantive content of the agreement becomes clearer, the parameters of any capacity-building regime will clearly not be settled.

As regards the draft provisions of the agreement dealing with types of capacity building, one suggestion is to include an indicative and non-exhaustive list of broad categories of capacity-building, such as scientific and technical assistance, education and training and human resources development. The advantage of such a non-exhaustive list is that it would remain flexible and future proofed. It is also questionable whether developing a more comprehensive list would be a valuable use of precious negotiating time. A further issue to be considered is whether further guidance on capacity-building, including types of capacity-building, could be better developed in due course by the Conference of Parties or a subsidiary body under the future agreement. A number of delegations refer to the Port State Measures agreement model which includes a dedicated working group on capacity-building. Such a body could flesh out the details of what should be in the primary instrument.

An important matter on which there is a consensus is that capacity-building needs to be as inclusive as possible as regards potential providers. It could be provided bilaterally or multilaterally through international bodies and by the private sector.

Furthermore, there seems to be consensus on the value of having a clearing-house mechanism. The European Union and its Member States would perceive this as essentially performing three main functions: as an information repository, as a proactive promoter of coordination in accordance with capacity-building objectives, and as a facility for matching needs and requests between providers and receivers.

Existing resources and institutions need to be utilised, as far as possible avoiding duplication of efforts. One obvious example is the Intergovernmental Oceanographic Commission of UNESCO (IOC-UNESCO) which has a global membership and considerable experience in maintaining databases of relevance to BBNJ.

There is also broad support for monitoring and reviewing mechanisms, to ensure that capacity-building measures under the future agreement are achieving their goals. The agreement could conceivably bestow on the Conference of Parties certain guidance functions to improve the implementation of capacity-building and transfer of marine technology provisions.

Several issues have generated more divergent views among the delegations at the BBNJ negotiations. One of these is the terms and conditions of capacity-building. Currently, a distinction is drawn between so-called voluntary and mandatory capacity-building. However, the meaning of the two terms can quite often be blurred. Mandatory capacity-building often refers to the model adopted by the International Seabed Authority (ISA). It is important to bear in mind that the ISA's work is context-specific. It is unclear how context-specific programmes could be transferred into the BBNJ process. Some delegations have suggested a form of licensing or permit system for access to MGRs. However, one must also acknowledge the difficulties that might arise from such a system of regulating MGRs.

The issue of intellectual property rights is another source of diverging views in the BBNJ negotiations. Some delegations see this as an opportunity to amend the international legal regime. Others, however, argue that this is not the appropriate forum for that. There are broader issues that need to be resolved at the IGC. On the issue of modalities of capacity-building and transfer of marine technology, the view of the EU and its Member States is that it should be needs-driven and carried out in a transparent manner on the basis of mutually agreed terms. This could translate into favourable, concessional or preferential terms, but there must be mutual agreement between providers and receivers.

The President's aid to negotiations paper is not exhaustive, but it is quite comprehensive and a fair reflection of the various options that have been suggested in the negotiations. The paper demonstrates a wide range of options and very different competing visions of what the ILBI might include. The negotiators will need to consolidate the various options, including reconciling contradicting opinions from different groups. Clearly there is a spirit of compromise and a determination to bring this agreement to fruition. With this approach, the work can be completed within the assigned timeframe and create the basis for an agreement.

CLOSING REMARKS

Closing Remarks from Japan's Perspective

Mr. Toru Hotta
Director, Division for the Law of the Sea, Ministry of Foreign Affairs Japan

The international community held the inaugural Intergovernmental Conference (IGC) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) negotiations in September 2018. The negotiations have seen many proposals and documents on various subjects, as identified by the recommendations of the PrepCom, as well as the documents prepared by the President of the IGC.

Japan's approach to marine environmental issues and to the BBNJ negotiations

Japan's commitment to the conservation of the marine environment remains unwavering, and it has embodied this commitment in three approaches. First, all measures taken for the conservation of the marine environment must be based on the best available scientific knowledge, and be in full accordance with established international law, in order to ensure the long-term stability of the maritime order. Second, Japan shares a common responsibility to enable future generations to enjoy the benefit of the ocean for thousands of years to come. Third, Japan shares another common responsibility to ensure that every member of the global community can enjoy the benefit of the ocean in an equitable manner.

Putting this commitment into the context of the BBNJ negotiations; Japan must first continue to increase its knowledge in the field of oceanography, marine biology and genetics, marine technologies, as well as the international law, particularly the United Nations Convention on the Law of the Sea (UNCLOS). It is anticipated that moving towards the successful conclusion of the international legally binding instrument (ILBI) on BBNJ, Japan will face a number of challenging phases. All the stakeholders of the international community have their own interests, but scientific and legal expertise should always provide a common ground on which to debate and reach conclusions.

Second, for the benefit of mankind in the future, it is necessary to establish a legal framework that maintains an optimal balance between the conservation of marine biological diversity and its sustainable use. Conservation and sustainable use are not at all mutually exclusive, nor in a zero-sum relation. On the contrary, truly effective conservation measures would enhance the possibility of sustainable use. Indeed, such a win-win relationship is realised, in practice, only by the practical application of scientific knowledge. Third, in addition to the approach mentioned above, it is also necessary to provide all stakeholders of the global community with the opportunity to enjoy the benefit of ocean in an equitable way. All States, whether technically developed or less-developed, coastal or landlocked, are entitled to enjoy the benefit of BBNJ with a view to improving their living standards. And in this context, capacity-building is an essential element.

There are already capacity-building programmes in marine observation, study and conservation of the ecosystem, and fishery resource management. Under the United Nations system, many organisations, such as The Intergovernmental Oceanographic Commission of UNESCO (IOC-UNESCO), have contributed greatly to disseminating marine expertise to the world. Japan itself has taken a variety of initiatives to improve their capacity to prospect, exploit and utilise marine resources, including those conducted in collaboration with the International Seabed Authority. In short, Japan has a wealth of expertise at the disposal of the global community to enhance its knowledge and skills for the conservation and sustainable use of BBNJ. Moving forward, Japan needs to identify the role of the new ILBI in capacity-building in accordance with the needs of beneficiaries, and to make optimal use of its knowledge, expertise, human and financial resources.

Momentum of the BBNJ negotiations

Ocean-related issues are increasing and becoming more interrelated with one another. To mention but a few, the oceans are facing challenges from plastic pollution, climate change, ocean acidification, sea level rise and its effects on small island countries, and the sustainability of fishery resources. In response, the international community has reinforced their actions, such as the political commitments made under Sustainable Development Goal (SDG) 14, to combat these challenges. The BBNJ negotiations, when put in the context of the development of ocean-related issues, are still at an embryonic stage. The ongoing IGC has an urgent task to consolidate the basic ideas and translating them into a tangible legal instrument.

Integrity as a legal text

The necessity to maintain the integrity of the ILBI within the entire global maritime regime is well-acknowledged. The ILBI needs to be consistent with, or at least not contradict, the UNCLOS.

As ocean-related issues become even more diversified, so do a number of relevant international legal documents. Under these circumstances, Japan strongly believes that UNCLOS should remain the sole umbrella that provides a fundamental understanding shared by the global community on which a rule-based maritime order can be achieved. It is an integral legal instrument that embodies the historical experiences of past centuries, seeking an ever better maritime order.

UNCLOS, as a basic legal document, has provisions dealing with particular current issues, while accommodating new developments in ocean affairs. Ocean-related issues, particularly those concerning the marine environment, are mutually entangled, and therefore need an anchor document. In developing any legal instrument on BBNJ, one cannot cherry-pick particular articles from UNCLOS or particular interpretation of its provisions. The integrity of the ILBI as a component of the entire maritime order under UNCLOS is indispensable.

Japan, along with the international community, is committed to contributing its ideas to the BBNJ process, and to ensure the conservation and sustainable use of marine resources in the long term in an equitable manner.

RELATED EVENTS

Side Event IGC-1

CAPACITY DEVELOPMENT FOR INTERNATIONAL NEGOTIATIONS AND DIPLOMACY, AND THE USE OF IT FOR SUCCESSFUL NEGOTIATIONS

The first session of the "Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ)" (IGC-1) took place from 4-17 September, 2018, at the United Nations Headquarters in New York. During this conference, the World Maritime University (WMU) co-hosted a joint Side Event with the Swedish Ministry of Foreign Affairs and the International Institute for Environment and Development at the London School of Economics on 11 September 2018.

The Side Event gathered over 90 members of Delegations and senior representatives from UN systems bodies who discussed the question: "How can capacity building strengthen negotiations and participation in a future BBNJ legal instrument?". They looked at current initiatives in the field of capacity building for negotiations and diplomacy with a view to investigating how this could be translated to assist the BBNJ-process reach a successful outcome. WMU recent graduate Ms Emma Metieh Glassco spoke about her WMU acquired knowledge and the negotiation module and its application in practice in her new capacity as Director General of Fisheries in Liberia.

The Side Event was live streamed by UN TV and has received very positive feedback both on the format and the content of the event.

SIDE EVENT PROGRAMME

MODERATOR
Ms. Lisa Eurén Höglund, Deputy Director Department for International Law, Human Rights and Treaty Law, Ministry of Foreign Affairs, Government Offices of Sweden

SPEAKERS
Professor Ronán Long, Director, WMU-Sasakawa Global Ocean Institute, World Maritime University, Sweden

Ms. Emma Metieh Glassco, Director-General, The National Fisheries and Aquaculture Authority, Liberia

Dr. Francios Bailet, Senior Legal Officer, United Nations Division for Ocean Affairs and the Law of the Sea

Dr. Essam Yassin Mohammed, Principle Researcher, International Institute for Environment & Development

Dr. Alvin K. Leong Esq, Legal Adviser to Papua New Guinea

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International Institute for Environment and Development

Government Offices of Sweden
Ministry for Foreign Affairs

WMU WORLD MARITIME UNIVERSITY

Side Event IGC-3

CAPACITY-BUILDING, GENDER EMPOWERMENT AND THE BBNJ AGREEMENT WITH A PARTICULAR FOCUS ON THE SPECIAL NEEDS OF SMALL ISLAND DEVELOPING STATES

On 30 August 2019 at the United Nations Headquarters, as part of the Third Session of the Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea (UNCLOS) on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ) (IGC-3), the World Maritime University (WMU) co-organised a Side Event on Capacity-Building, Gender Empowerment and the BBNJ Agreement with A Particular Focus on the Special Needs of Small Island Developing States.

Sponsored by WMU, Ireland, the Government of the Republic of Palau, and The Nippon Foundation, this Side Event explored the initiatives that are underway in selected multilateral organizations to promote gender equality, and specifically the empowerment of women in ocean affairs, and in the conduct of ocean science in accordance with UN Sustainable Development Goal 5, which are important considerations for the BBNJ negotiations.

Dr. Cleopatra Doumbia-Henry, President of the WMU, delivered a keynote address at the Side Event highlighted the timely focus on gender with this year's World Ocean Day theme of "Gender and the Ocean", as well as the 2019 World Maritime Day Theme, "Empowering Women in the Maritime Community". She conveyed that gender equality is central to the mission of WMU, and that the University is committed to educating maritime and ocean leaders that have a deep and abiding responsibility to manage the ocean sustainably, and become Stewards of the Sea.

The importance of appropriate gender sensitive references in the BBNJ agreement was highlighted by the speakers and participants including the need for a specific reference to the empowerment of women in the provisions on capacity building.

SIDE EVENT PROGRAMME

MODERATOR
Professor Ronán Long, Director, WMU-Sasakawa Global Ocean Institute, World Maritime University, Sweden

WELCOME REMARKS
Ambassador Geraldine Byrne Nason, Permanent Representative of Ireland to the United Nations

Ambassador Olai Uludong, Permanent Representative of Palau to the United Nations

KEYNOTE ADDRESS
Dr. Cleopatra Doumbia-Henry, President, World Maritime University (WMU)

SPEAKERS
Mr. Michael Lodge, Secretary-General, International Seabed Authority

Dr. Francesca Santoro, Programme Specialist, IOC-UNESCO

Mr. Frederick Kenney, Director of Legal and External Affairs, International Maritime Organization

COMMENTATORS
PSIDS – **Ms. Margo Deiye,** Counsellor Mission of Nauru to the UN, Nauru

CARICOM – **Mrs. Diedre Mills,** Minister/ Deputy Permanent Representative, Jamaica

Indonesia – **Ms. Shanti Utami Retnaningsih,** Ministry of Foreign Affairs of Indonesia

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The World Maritime University was established in 1983 within the framework of the International Maritime Organization, a specialized agency of the United Nations.

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