



British Institute of
International and
Comparative Law

Biodiversity Beyond National Jurisdiction: Where are we and where to next?

18 February 2020

Chair:

- **David H Anderson**; Former Judge, International Tribunal for the Law of the Sea

Speakers:

- **Professor Richard Barnes**, University of Hull
- **Dr Surabhi Ranaganathan**, University of Cambridge
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Fisheries and ABNJ: or The Importance of (not) Undermining

Professor Richard Barnes



Overview

1. Context
2. The inclusion of fisheries?
3. 'Not Undermining'
4. Finding Space for Fisheries?
 - a) General principles
 - b) Institutions and enhanced cooperation
 - c) Conflicts and compatibility clause
5. To Undermine or Not to Undermine

Inclusion of Fisheries?

- Political not legal issue?
- Fisheries should be **included**:
 1. Fishing is main threat to biodiversity
 2. Need for an integrated approach
 3. **As a minimum ABNJ Agreement will indirectly affect fisheries**
 4. 'Moment in time'
- Fisheries should be **excluded** because an ABNJ Agreement must not should be interpreted and applied in a manner which would not undermine existing instruments, frameworks and bodies.



Not Undermine

- ‘The work and results of the conference should be fully consistent with the provisions of the Convention. The process and its result should **not undermine** existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies’
 - Direct conflicts are not permitted
 - Permits enhancements
 - Non-retrogression of standards



ABNJ Agreement and Fisheries

- Part II: MGR and benefit sharing
- Art. 8 – explicit ‘non-inclusion of fish as a commodity’

[1. The provisions of this [Part] [Agreement] shall apply to marine genetic resources [of] [accessed in] [originating from] areas beyond national jurisdiction.]

[2. The provisions of this [Part] [Agreement] shall apply to:

[(a) [The use of fish [samples] and other biological resources for research into their genetic properties] [Marine genetic resources, including fish, insofar as they are collected for the purposes of being the subject of research into their genetic properties];]

(b) Marine genetic resources collected *in situ* [and [accessed] [obtained] *ex situ* [and [*in silico*] [[and] [as] [digital] [genetic] sequence data [and information]]];]

[(c) Derivatives.]]

[3. The provisions of this [Part] [Agreement] shall not apply to:

[(a) [The use of fish and other biological resources as a commodity.] [Fish and other biological resources that are collected beyond a threshold amount shall be considered as a commodity. The threshold amount shall be determined by the [Scientific and Technical [Body] [Network]].] [If a species of fish is found to have value for its genetic material, that species shall be treated as a marine genetic resource, regardless of the volume of the catch.] [If a species of fish or other biological resources are found to have value for their genetic material, that species or those resources, where utilized for their genetic material, shall be treated as a marine genetic resource;]]

Can positions be reconciled?

- Creative solutions?
 - Proper framing of fisheries in ABNJ Agreement: eg General Principles
 - Enhanced cooperation
 - Conflicts and compatibility clause



General Principles

1. Respect for the (rule of) law of the sea;
2. Protect and preserve the environment
3. **Duty to cooperate**
4. *Science-based approach*
5. **Precautionary approach**
6. **Ecosystem-based approach**
7. Sustainable and equitable use
8. Public availability of information
9. Transparent and open decision-making
10. Stewardship of the environment ??

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
|--------|---|---|---|---|---|---|---|---|----|----|
| CECAF | ? | | + | + | | | | | ? | |
| SWIOFC | ? | | + | + | | | | | ? | |
| WECAFC | ? | | + | + | + | + | | + | ? | |
| APFIC | ? | ? | + | + | | | | + | ? | |
| GFCM | ? | ? | + | + | + | + | + | + | ? | |
| IOTC | ? | | + | + | | | + | + | ? | |
| RECOFI | ? | | + | + | + | | | | ? | |
| CCAMLR | ? | ? | + | + | ? | + | + | + | ? | |
| CCSBT | ? | | + | ? | | | | | ? | |
| NAFO | ? | + | + | + | + | + | + | + | ? | |
| NEAFC | ? | ? | + | + | + | + | + | + | ?+ | |
| SEAFO | ? | | + | + | + | + | + | + | ? | |
| SRFC | ? | | + | | + | + | | | ? | |
| ICCAT | ? | | + | + | | | | + | ? | |
| SIOFA | ? | + | + | + | + | + | + | + | ? | |
| NPAFC | ? | | + | + | | | | + | ? | |
| NPFC | ? | + | + | + | + | + | + | + | ? | |
| WCPFC | ? | + | + | + | + | + | + | + | ? | |
| SPRFMO | ? | + | + | + | + | + | + | + | ? | |
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |

General Principles

- 7 principles?
- Article 6 Cooperation

Article 5

General [principles] [and] [approaches]

In order to achieve the objective of this Agreement, States Parties shall:

- [(a) Apply an integrated approach [/principle];]
- (b) Apply an approach that builds ecosystem resilience to the adverse effects of climate change and ocean acidification and restores ecosystem integrity;
- (c) Act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another;
- (d) Endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should [, in principle,] bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment;
- [(e) Ensure accountability;]
- [(f) Be guided by the principle of non-regression;]
- [(g) Take into consideration flexibility, pertinence and effectiveness.]

Enhanced Cooperation:

- ‘Ordinary Cooperation’:
 - UNCLOS Articles 63(2),
 - 64, 118, 197, 242 and 243 of UNCLOS

- Enhanced cooperation?

- New models: corrective cooperation, asymmetrical cooperative processes,
- Analogies: undelimited sea areas? Responsibility to Protect
- Cooperative structures & Institutional Provisions

| | | | |
|--------------------|--|--|----------------------|
| | Strong Integration | | |
| Centralized | A1 Single ABNJ Management Authority <ul style="list-style-type: none"> • ISA+ option • Single multi-sector institution with comprehensive planning/licensing authority, established under a binding instrument. | B1 Composite Regional ABNJ Management Organizations <ul style="list-style-type: none"> • Combined RFMO/regional environmental management regimes • Revised mandates and institutional arrangements governed under a strong binding agreement. | Decentralized |
| | A2 ABNJ Advisory Body/Process <ul style="list-style-type: none"> • <i>Status quo</i> • Non-binding guidelines advanced through resolutions of the UNGA. | B2 Coordinated Sectoral Management Organizations <ul style="list-style-type: none"> • ‘Enhanced <i>status quo</i>’. • Retain regional bodies, subject to structured coordination and revised obligations set out in a framework instrument. | |
| | Weak Integration | | |

Figure 1: Scenarios and characteristics of institutional arrangements for ABNJ



Enhanced Cooperation: Institutional Options

- Conference of parties (Art 48)
 - Further elaboration of details:
 - Art 10, 13 & 20 (MGR access);
 - 11 (Benefits), 14, 16-19 (ABMT);
 - 21, 25, 27, 29, 34-5, 38 & 41 (EIA);
 - and 44, 46-7 (capacity building)
 - Part VI: Institutional Arrangements
 - Rules of Procedure; Direct STB
 - Part VIII: Implementation
 - Guide State monitoring



Conflict and Compatibility Clauses

- Art 4 UNFSA: ‘Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.’
- Art 7 UNFSA: ‘Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible ...’

To undermine or not to undermine...

- Should we tolerate: Destructive fishing practices, Pollution, Overfishing, Subsidies, Governance gaps...
- Long-term perspective required – risks of ‘missing moment in time’ and enduring impact of legal regimes



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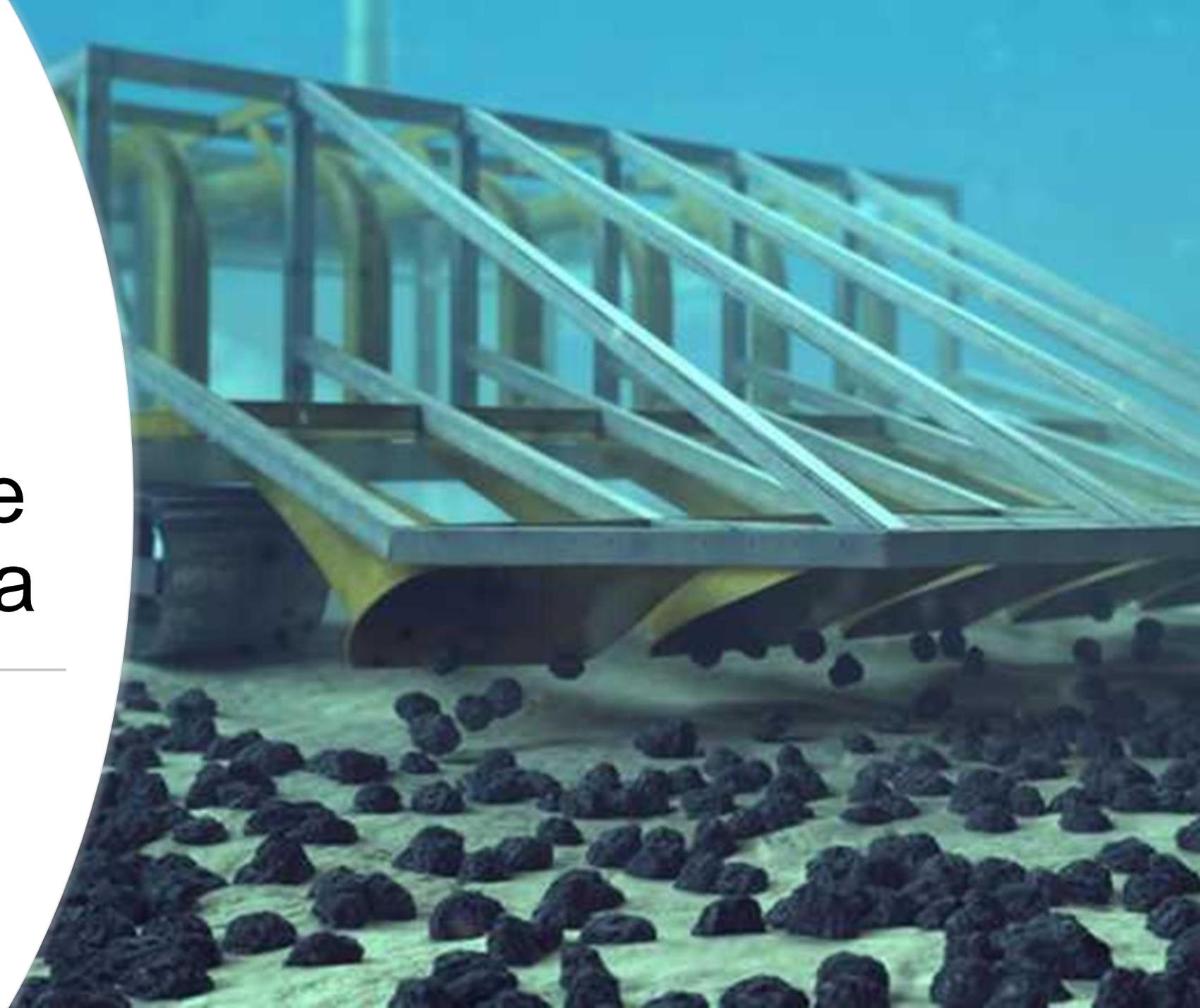
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The Common Heritage Principle in the Law of the Sea

Perennial hope or constant
distraction?



Three points on CHM

- Application to living resources as a matter of existing law
- A principle with a double life, full of sound and fury, signifying... what?
- Nevertheless, why include CHM

CHM and living resources

Article 136. Common heritage of mankind

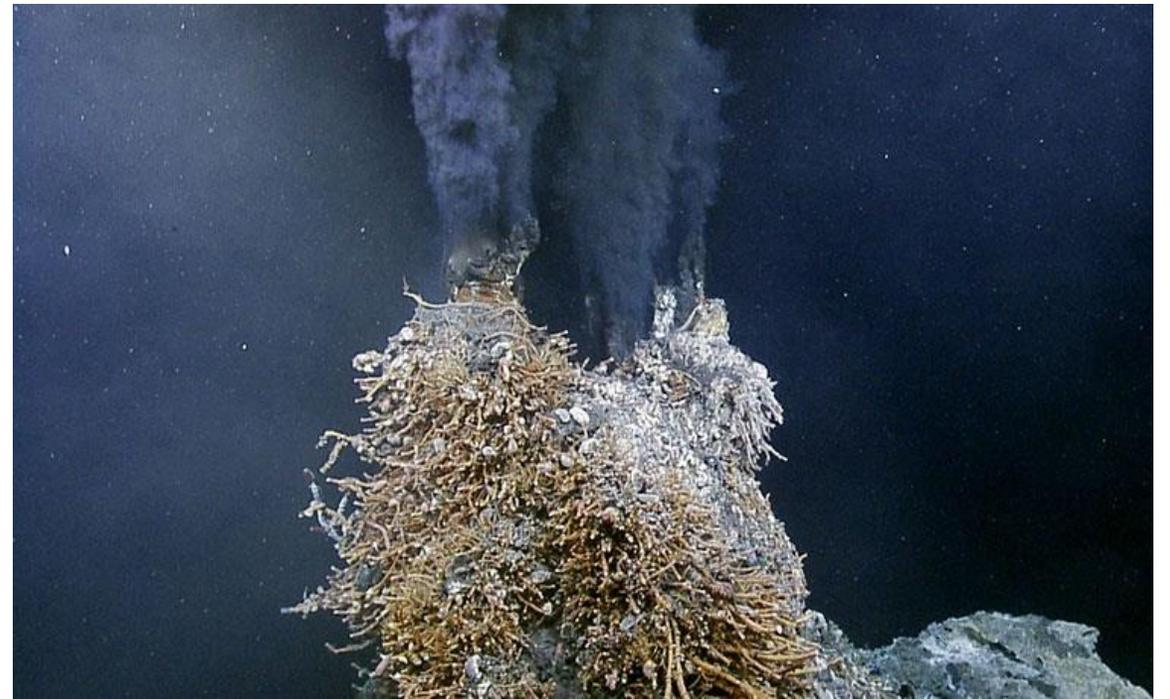
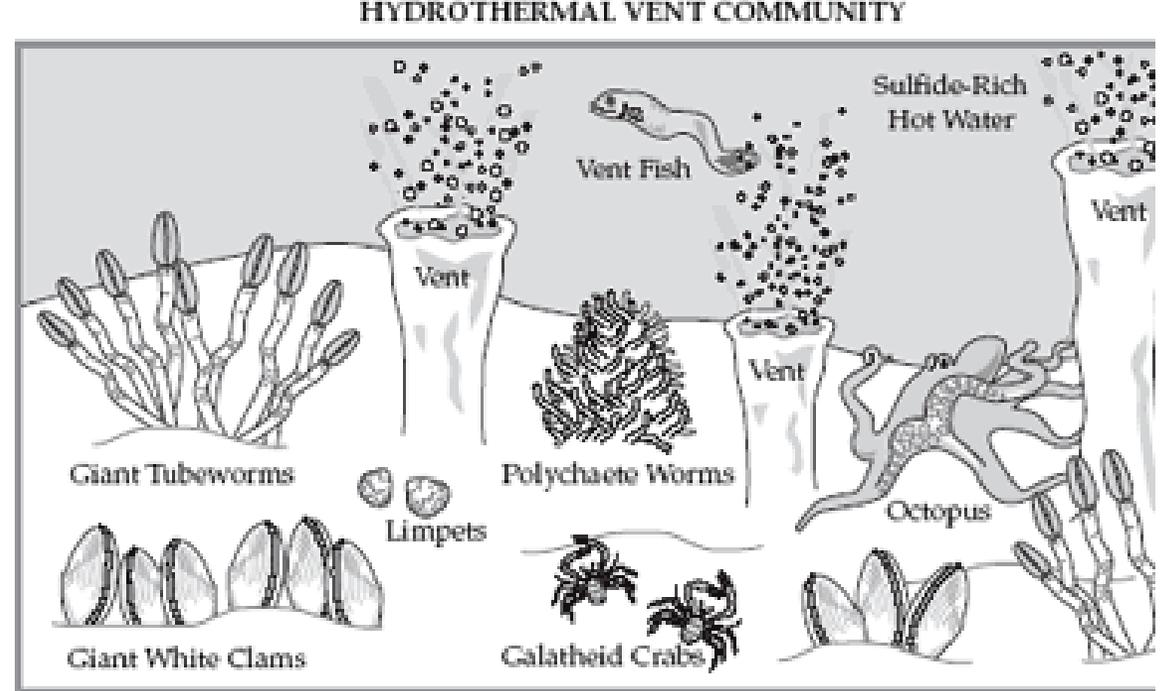
The Area and its resources are the common heritage of mankind.

*Article 133. Use of terms

(a) "resources" means all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules;

Seabed or water column?

- Hydrothermal vents
- Home to chemosynthetic bacteria; starting point of the dark food web
- Where to draw the line b/w land water?
- That said, the law of the sea already makes arbitrary divisions between land and water. See, Ranganathan (EJIL 2019), Mossop (ESIL Refl. 2019)



What does
CHM entail?



An ever retreating principle

- Pardo 1967: seabed, but not water column
- UNCLOS III and 1982 LOSC
 - Mineral resources
 - Parallel system
 - Protections for pioneer investors
- 1994 Agreement
 - Stripped back regime

1994 Agreement

- ❖ Emphasized commercial viability
- ❖ Placed the Enterprise on a commercial footing; conditioned its operation
- ❖ Reduced financial obligations of developed states
- ❖ No mandatory transfer of technology
- ❖ Shift in administrative control, from Assembly to Council
- ❖ No production ceilings
- ❖ **Features retained: site banking (but N.A. to sulphides and crusts); some profit sharing, but reduced pot**



Ongoing mining code negotiations

- Current financial models suggest even lower amounts will be available for redistribution; questions over mode
- Efforts to redefine benefits as non-monetary; just contractor training; lowered prices
- Upswing in environmental concerns

CHM

- Facilitated participation fr South X
- Sharing of benefits, monetary ?
- Sharing of benefits, non monetary Y, but
- Licensed access* Y
- Administrative control w. South X

*Not an issue as such



So, why bother for BBNJ?

- Commitment and intent
- Distributive potential more sound, real prospect of reconciling w. ecological
- CHM as future proofing



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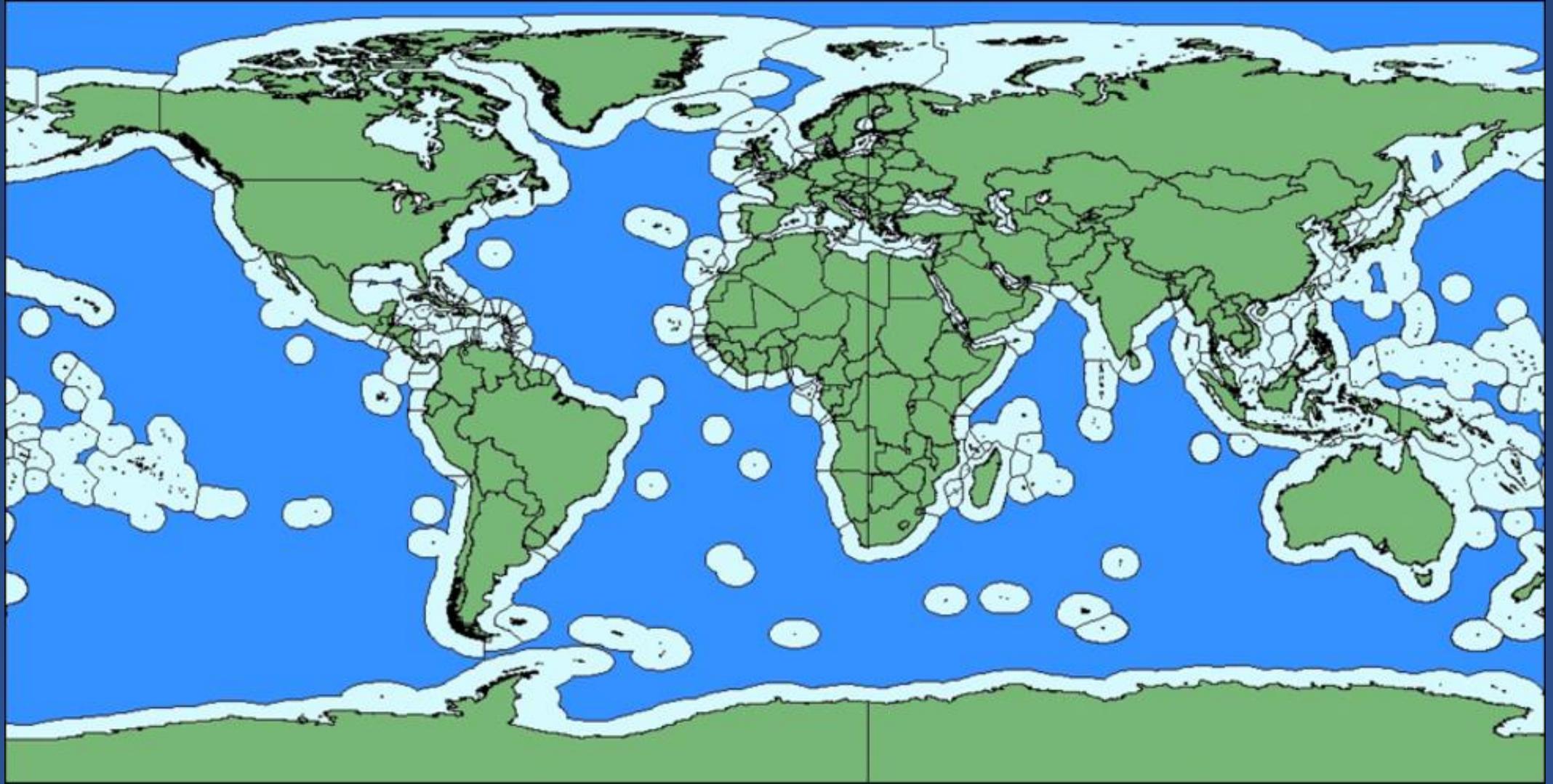
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The need for
ambition in the
new treaty on
marine biodiversity
in areas beyond
national jurisdiction
(BBNJ)



Joanna Mossop
Victoria University of Wellington



BBNJ at a glance (+ a guide to alphabet soup)

- UN GA Resolution 72/249 authorised the negotiations for a new international legally binding instrument (**ILBI**) for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (**BBNJ**). Four sessions agreed.
- ‘Negotiations shall address the topics identified in the package agreed in 2011’
 - Marine genetic resources (**MGRs**)
 - Area-based management tools (**ABMTs**) including marine protected areas (**MPAs**)
 - Environmental Impact Assessments (**EIAs**)
 - Capacity building and the transfer of marine technology (**CBTMT**)
- ‘... this process and its result should **not undermine** existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.’

BBNJ at a glance

- Third Intergovernmental Conference (IGC) held in August 2019. First discussion of a draft text.
- Fourth meeting scheduled for late March 2020. Will discuss second draft text.



Marine Genetic Resources and sharing of benefits

What legal regime should govern access and benefit sharing of MGRs in ABNJ? Role of common heritage of mankind?



Area-based management tools including marine protected areas

What criteria, process, for adoption of ABMTs in ABNJ? Role of institutions, especially when there is overlap with existing bodies?

Four elements of the package

Environmental Impact Assessment

How to implement arts 204-206 in ABNJ?
What process, what role for institutions?



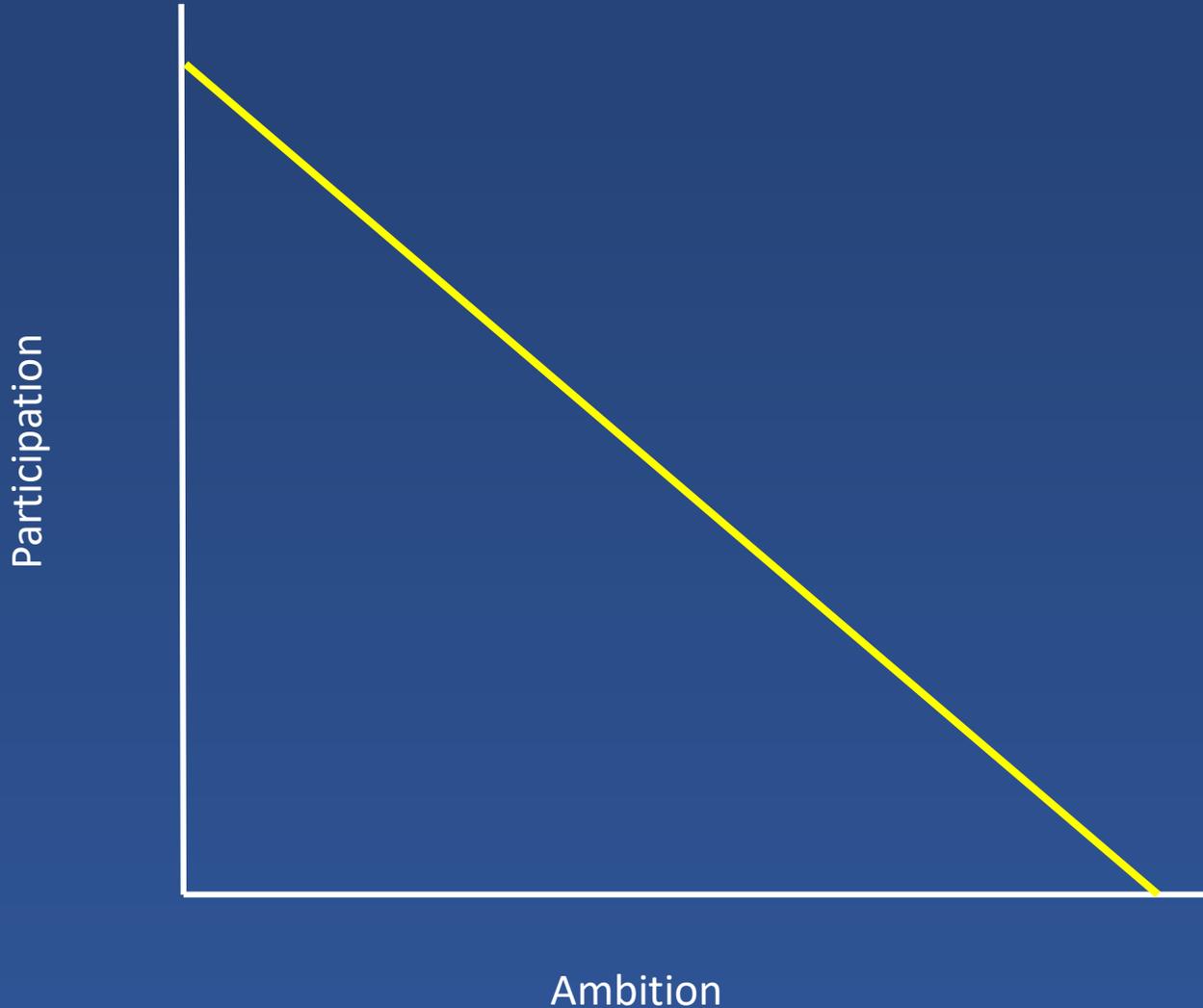
Capacity building and transfer of marine technology

How can developing countries can engage in biotech industry; meet obligations?
Should contributions be mandatory or voluntary?

Change is needed

- IPBES (2019): “Through ‘transformative change’, nature can still be conserved, restored and used sustainably – this is also key to meeting most other global goals. By transformative change, we mean a fundamental, system-wide reorganization across technological, economic and social factors, including paradigms, goals and values”
- IPCC (2019): services and options provided by the ocean can be supported by protection, restoration, precautionary ecosystem-based management of renewable resource use, and the reduction of pollution and other stressors. Integrated water management and ecosystem-based adaptation approaches lower climate risks locally and provide multiple societal benefits.

The trade-off between participation and ambition

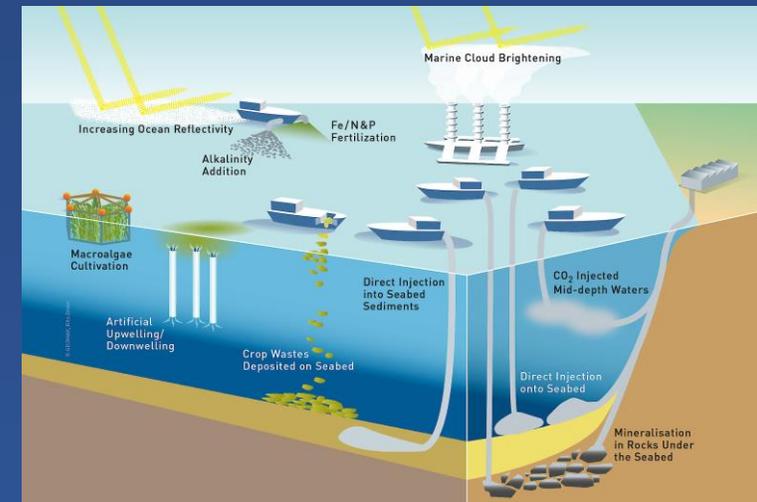


- Full participation can ensure full implementation of a treaty, but will not ensure its effectiveness.
- Participation especially key when dealing with the high seas.
- Looking for the point at which the treaty is ambitious enough to achieve objectives and gains the appropriate participation to ensure adequate coverage.

Focus on the four elements

- Agreement in 2011 on four elements:
 - An attempt to keep the discussions manageable
 - A deal to ensure key interests were addressed
- Potential to keep the relevance of the ILBI open for other issues:
 - General obligations
 - General principles
 - Institutional structures that empower the COP and other bodies to consider new issues
 - Possible to agree a Protocol in the future?

Will we need another treaty to address plastics in the ocean? For new activities that impact on the ocean in significant ways?



'Not Undermine'

- Key question: how will the ILBI interact with global, regional and sectoral bodies? What decision making power will the COP have?

If a GRSB exists,
COP cannot take
decisions on its
subject matter



COP can take decisions
'complementary' to
GRSB mandate.

“...it is perhaps more useful to think in terms of complementarity and compatibility, rather than trying to delineate geographically and materially the individual and overlapping mandates.” (De Lucia, 2019)

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Conclusions

- Understandable focus on four elements should not preclude options for mechanisms to improve oceans governance – ‘future-proofing’ is important.
- Focus on ‘not undermining’ could be defined as seeking complementarity and compatibility.
- Still significant potential for regime interplay, so long as states allow it.
- Desire for ‘full participation’ should not be used to weaken the treaty to the point it is ineffective.

Thank you

