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Progress Towards the New International Legal Framework for Protecting Biodiversity in Areas Beyond National Jurisdiction

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Chandler J. Farris[†]

I. Introduction

The high seas, or oceanic areas beyond the exclusive economic zones that surround territorial waters, together with the seabed beyond the continental shelf, are known as areas beyond national jurisdiction ("ABNJ").[1] Aside from being one of the earliest

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1 Waseem Ahmad Qureshi, *Marine Biodiversity Conservation: The International Legal Framework and Challenges*, 40 HOUS. J. INT'L L. 845, 849 (2018) (noting that despite the slight difference between the terms "area beyond national jurisdiction" and "high seas," the terms are used interchangeably); *see* SIMONE BORG, CONSERVATION ON THE HIGH SEAS: HARMONIZING INTERNATIONAL REGIMES FOR THE SUSTAINABLE USE OF LIVING RESOURCES 4 (2012); *see also* U.N., THE CONSERVATION AND SUSTAINABLE USE OF MARINE BIOLOGICAL DIVERSITY OF AREAS BEYOND NATIONAL JURISDICTION: A TECHNICAL ABSTRACT OF THE FIRST GLOBAL INTEGRATED MARINE ASSESSMENT (2017),

catalysts for international law,[2] these zones have suffered from a lack of regulation that threatens the marine biodiversity in ABNJ.[3]

Biological diversity, or biodiversity, is the variety in species of animals, plants, microorganisms, and all living things in an ecosystem, and is essential for an ecosystem's development and survival.[4] Biodiversity contributes to the preservation of ocean ecosystems by helping disperse harm across many species and minimize the risk of catastrophic loss, a process called the portfolio effect.[5] Accordingly, ecosystems that have lost biodiversity can be less resilient to climate change.[6] The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services' ("IPBES") 2019 report found that sixty-six percent of the ocean is experiencing increasing cumulative impacts from human activity.[7] IPBES also found that this unprecedented rapid global change is expected to continue beyond 2050.[8] This could be detrimental to the 680 million people in coastal zones who depend on a functioning

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https://www.un.org/depts/los/global_reporting/8th_adhoc_2017/Technical_Abstract_on_the_Conservation_and_Sustainable_Use_of_marine_Biological_Diversity_of_Areas_Beyond_National_Jurisdiction.pdf [https://perma.cc/34K8-T587] ("The areas beyond national jurisdiction are estimated to cover about 60 per cent of the Earth's surface.").

2 *See* RAM PRAKASH ANAND, ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA: HISTORY OF INTERNATIONAL LAW REVISITED 2–6 (1983).

3 Qureshi, *supra* note 1, at 912; *see* Margaret A. Young & Andrew Friedman, *Biodiversity Beyond National Jurisdiction: Regimes and Their Interaction*, 112 AM. SOC'Y INT'L L. 123, 126 (2018).

4 Qureshi, *supra* note 1, at 849–51.

5 L.K. Ward, *Nature's Secret Weapon Against Climate Change*, SMITHSONIAN (May 2016), https://ocean.si.edu/conservation/climate-change/natures-secret-weapon-against-climate-change [https://perma.cc/8LEF-8LGQ].

6 PEW ENV'T GRP., POLICY RECOMMENDATIONS: CONSERVING MARINE BIODIVERSITY: ADDRESSING EXISTING COMMITMENTS AND DESIGNING NEXT STEPS FOR ACTION (2013), https://www.un.org/Depts/los/biodiversityworkinggroup/documents/Marine%20Biodiversity%20Conservation_Pew.pdf [https://perma.cc/PCA4-XWKS].

7 Intergovernmental Sci.-Pol'y Platform on Biodiversity and Ecosystem Servs. [IPBES], Rep. on the Work of Its Seventh Session, U.N. Doc. IPBES/7/10/Add.1, ¶ A4 (2019) [hereinafter IPBES].

8 *See id.* ¶ C4 (noting trends are expected to continue beyond 2050, due to projected impacts of increasing sea-use, and exploitation of organisms and climate change).

ocean system[9] that is already under stress due to climate change.[10]

Likewise, environmental change is already negatively affecting the distribution and abundance of marine life across the ocean and the sea floor.[11] The ocean has absorbed over ninety percent of the excess heat in the climate system, with warmer ocean surface temperatures causing reduced mixing between water layers and thus limiting the distribution of oxygen and nutrients for marine life.[12] Moreover, the ocean has absorbed between twenty and thirty percent of the carbon dioxide humans have emitted since the 1980s.[13] Excess carbon dioxide leads to ocean acidification, which negatively impacts the ability of some organisms, including shellfish, coral, and calcareous plankton to maintain their shells, threatening ecosystems and fishing industries worldwide.[14] Similarly, fish populations have shifted away from tropical oceans in response to ocean warming and acidification.[15] While there could be increases in catch potential in the Arctic, established fisheries in tropical oceans will see decreases significant enough to reduce the global catch potential.[16]

In addition to cuts in greenhouse gas emissions, significant policy changes are needed to minimize the depletion of fisheries and give coastal communities the opportunity to adapt.[17] Human activities such as overfishing, fishing by bottom trawling, and deep-sea mining are exacerbating the reduction of marine biodiversity.[18] Overfishing, most common in international waters where

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9 Press Release, Intergovernmental Panel on Climate Change [IPCC], Choices Made Now are Critical for the Future of Our Ocean and Cryosphere 1 (Sept. 25, 2019), https://www.ipcc.ch/site/assets/uploads/sites/3/2019/09/SROCC_PressRelease_EN.pdf [https://perma.cc/MYL4-DAHS] [hereinafter IPCC].

10 *Id*. at 1–3.

11 *Id.* at 3.

12 *See id*.

13 *Id*.

14 *What is Ocean Acidification?*, PAC. MARINE ENVTL. LAB. [PMEL] CARBON PROGRAM, https://www.pmel.noaa.gov/co2/story/What+is+Ocean+Acidification%3F#:~:text=The%20Chemistry,or%20%22OA%22%20for%20short [https://perma.cc/7DYN-BHL6] (last visited Dec. 8, 2020).

15 IPCC, *supra* note 9, at 3.

16 *See id.*

17 *See id.* at 4.

18 Qureshi, *supra* note 1, at 852–54.

monitoring is limited, threatens marine life with extinction.[19] Irresponsible fishing practices threaten more than common food species as practices such as bottom trawling, used widely since the 1980s, can entrap species like turtles or crush seafloor species and coral reefs.[20] For example, bottom trawling destroys nearly 900,000 pounds of coral reef each year along the Alaskan coast, damaging entire ecosystems in the process.[21] Deep-sea mining also destroys ocean habitats, which often means death for marine animals unable to find a new habitat in the vast ocean.[22]

Common destructive practices can become especially concerning in the high seas. "Straddling fish stocks" present a clear example, defined in the United Nations Convention on the Law of the Sea ("UNCLOS") in article sixty-three, clause two, as "the same stock or stocks of associated species [which] occur both within the exclusive economic zone and in an area beyond and adjacent to the zone."[23] The Food and Agriculture Organization of the United Nations ("FAO") has estimated that straddling fish stocks were overfished at a rate of sixty-four percent, twice that of stocks within states' jurisdictions, and sixty-seven percent of the forty-eight observed migratory fish stocks, particularly tuna, were overfished or depleted.[24] In addition, forty-six percent of migratory sharks were threatened and twenty-one percent were near threatened, contrasted with the fourteen percent of non-migratory sharks that were threatened.[25] While there is some specific governance over ABNJ, it has largely failed at its objectives.[26] For example, two-thirds of fish stocks under the management of regional fishery management organizations ("RFMOs") are depleted or

19 *Id*. at 853.

20 *Id*. at 852.

21 *See id.* at 852–53.

22 *See id*. at 854.

23 U.N. Convention on the Law of the Sea [UNCLOS], art. 63, ¶ 2, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

24 PREDICTING FUTURE OCEANS: SUSTAINABILITY OF OCEAN AND HUMAN SYSTEMS AMIDST GLOBAL ENVIRONMENTAL CHANGE 429 (William Cheung et al. eds., 2019) [hereinafter PREDICTING FUTURE OCEANS].

25 *Id.*

26 *See* Cassandra Brooks et al., *Challenging the 'Right to Fish' in a Fast-Changing Ocean*, 33 STAN. ENVTL. L.J. 289, 297 (2014).

overfished.[27] These gaps illustrate the danger of the underregulated activity that is ongoing in ABNJ.

The IPBES has identified a legally binding instrument as essential to improving sustainability, having also stated that protecting and managing ocean resources requires monitoring and managing biodiversity-rich seas beyond currently protected areas.[28] Coming to terms with the situation in our oceans,[29] the link between ocean processes and climate change, and how a healthy ocean system is critical for mitigating climate change,[30] the United Nations convened a conference to design a treaty to address modern issues in ABNJ. This Intergovernmental Conference on an International Legally Binding Instrument Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction ("BBNJ Conference") already met in September 2018, March-April 2019, and August 2019.[31] Looking ahead to the fourth and final round of negotiations, the remaining issues to be addressed can be categorized into four groups: (1) ownership over marine genetic resources ("MGRs"), including benefits sharing, (2) management of area-based tools, including marine protected areas, (3) form of environmental impact assessments ("EIAs"), and (4) participation in capacity-building and the transfer of marine technology to developing countries.[32] By holding the BBNJ Conference, the United Nations demonstrates a desire to use international law for the conservation and sustainable

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27 *Id.*

28 *See* IPBES, *supra* note 7, at 31–32, ¶¶ 34, 37.

29 *Negotiating Legally-Binding Agreement to Provide Future Generations with a 'Healthy, Resilient and Productive Ocean'*, UN NEWS (Aug. 20, 2019), https://news.un.org/en/story/2019/08/1044571 [https://perma.cc/ED2R-UH9X] [hereinafter *Negotiating*].

30 *Id.*

31 Distinguish "ABNJ," areas beyond national jurisdiction, from the more specific "BBNJ," the biodiversity beyond national jurisdiction. In other words, BBNJ is found within ABNJ. *Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction*, U.N., https://www.un.org/bbnj/ [https://perma.cc/P9CW-K9J2] (last visited Dec. 8, 2020) [hereinafter *Intergovernmental Conference*].

32 *See* Intergovernmental Conference on an Internationally Legally Binding Instrument Under the U.N. Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, *Statement by the President of the Conference at the Closing of the Third Session*, 2, U.N. Doc. A/CONF.232/2019/10 (Sept. 13, 2019) [hereinafter *President Statement*].

use of ocean resources.[33] The remainder of this article will examine the history of the UNCLOS, the state of the BBNJ Conference, and the main sources of contention to be negotiated in the final session.

II. Legal Framework

A. Law of the Sea and Its Failure

Management of ABNJ is currently under the umbrella of the UNCLOS,[34] which describes ABNJ as property of humanity, so that no single nation can claim ownership of these areas or their resources.[35] Coming into force in 1994, the UNCLOS' provisions for the conservation of biological diversity impose only a general obligation on nations to adequately preserve the marine ecosystem.[36] Part XII of the UNCLOS,[37] along with RFMOs, encompass the existing legal foundation for protecting marine biodiversity.[38] In addition, the United Nations Fish Stocks Agreement ("UNFSA"),[39] which applies to migratory fish stocks and high seas fish stocks, came into force under the UNCLOS in 2001.[40] The UNFSA emphasizes the obligation to protect marine biodiversity by advising coastal states to cooperate and practice sustainable management of fish stocks.[41] However, the UNFSA falls short of its international goals, as only 87 states have recognized the agreement.[42] Other treaties only address specific marine sectors such as shipping, fishing in the South East Atlantic,

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33 G.A. Res. 66/288, ¶ 158 (Sept. 11, 2012).

34 UNCLOS, *supra* note 23, art. 86.

35 Qureshi, *supra* note 1, at 886.

36 *Id.* at 855 ("The UNCLOS was ratified in 1994 and provides certain provisions for the conservation of the marine ecosystem and biological diversity. Part XII of the UNCLOS relates to the conservation of the marine ecosystem. It imposes a general obligation on all nations to take adequate measures to preserve the marine ecosystem and biodiversity.").

37 UNCLOS, *supra* note 23, pt XII.

38 Qureshi, *supra* note 1, at 886.

39 U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, U.N. Doc. A/CONF.164/37 (Sept. 8, 1995).

40 Qureshi, *supra* note 1, at 862.

41 *Id.* at 862–63.

42 *Id.* at 864.

or whaling.[43]

The UNCLOS addresses a wide range of marine issues, but falls short of protecting biological diversity in ABNJ. Part XII of the UNCLOS compels nations to protect the marine environment and take measures to prevent pollution.[44] Here, the UNCLOS extends the duty to prevent pollution to limit waste that would harm endangered species and their habitats, but without explicitly mentioning biodiversity.[45] To address the impacts of shipping on marine species and pollution from oil spills, the UNCLOS merely recommends that nations obey the International Maritime Organization.[46] To address overfishing, Part VII(2) of the UNCLOS grants all states the right to utilize ABNJ for fishing, but makes this freedom conditional on sustainable uses.[47] While the UNCLOS does not have its own internal body to govern this potentially unlimited freedom to fish in ABNJ, Article 118 suggests that coastal states form independent RFMOs to facilitate cooperation towards achieving conservation goals.[48] To address the dumping of pollutants into the ocean, Articles 210 and 216 merely oblige coastal states to enact domestic laws to prevent dumping in both their exclusive economic zones and in ABNJ.[49] The UNCLOS perhaps pays the most attention to deep-sea mining, in that it established the International Seabed Authority to regulate deep-sea mining in ABNJ.[50]

While the UNCLOS creates plenty of commitments for nations to protect marine environments,[51] it leaves oversight and enforcement in ABNJ to a wide array of agreements and intergovernmental organizations.[52] As a result, the greatest current threats to marine ecosystems in ABNJ—shipping, fishing, and seabed mining—are regulated by a collection of sectoral

43 *See* Young & Friedman, *supra* note 3, at 123.

44 Qureshi, *supra* note 1, at 855.

45 *Id.* at 855–56.

46 *Id.* at 858–89.

47 *Id.* at 859.

48 *Id.*

49 *Id.* at 859–60.

50 Qureshi, *supra* note 1, at 860–61.

51 *See id.* at 886–87.

52 *See* Young & Friedman, *supra* note 3, at 123–24.

organizations and RFMOs.[53] These organizations are assisted by international groups aimed at protecting regional ecosystems, like the Commission for the Conservation of Antarctic Marine Living Resources, and others concerned with specific species such as the International Whaling Commission and the Convention on International Trade in Endangered Species.[54] Additionally, the World Trade Organization ("WTO") can exercise authority over some commerce in ABNJ.[55] The confusion from these overlapping bodies is compounded by the difficulty in monitoring ships, vessels,[56] and fish stocks, and has led to unmonitored exploitation in large sections of the ocean.[57] As evidenced by the resulting lack of enforcement, the UNCLOS provisions for the conservation of the marine ecosystem only provide goals for nations to prioritize the preservation of marine biodiversity and develop international cooperation.[58] The gap between the goals of the UNCLOS and successful implementation highlights the needs for a new convention focused on ABNJ.

B. Adding a New Convention

The United Nations convened an intergovernmental BBNJ Conference to add to the UNCLOS an international legally binding instrument to expand biodiversity protections, thus focusing on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction ("BBNJ").[59] The new instrument will likely create additional obligations on top of those created by the UNCLOS, thereby strengthening existing BBNJ protections.[60] For example, a new area-based management tool created under this new instrument could overlap with an existing RFMO and consequently limit a nation from fishing in an area where it

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53 *Id.* at 124.

54 *Id.*

55 *See Id.*

56 Qureshi, *supra* note 1, at 911–12.

57 PREDICTING FUTURE OCEANS, *supra* note 24, at 429; *see* Young & Friedman, *supra* note 3, at 123–24.

58 *See* Qureshi, *supra* note 1, at 855 (referencing Part XII of the UNCLOS).

59 Distinguish "ABNJ," areas beyond national jurisdiction, from the more specific "BBNJ," the biodiversity beyond national jurisdiction. In other words, BBNJ is found within ABNJ. G.A. Res. 72/249, ¶ 1 (Jan. 19, 2018).

60 Young & Friedman, *supra* note 3, at 125.

previously had autonomy as a member and operator of the RFMO.[61] The new instrument could also supersede rules created by current regulatory arms of the UNCLOS.[62]

In 2015, the United Nations capped off a 15-year negotiation process[63] by deciding to create a new legal instrument under the UNCLOS, specifically designed to conserve and protect sustainable uses of BBNJ.[64] That process began with a Preparatory Committee, established by the U.N. General Assembly and open to participation and recommendations from all state members of the United Nations, parties to the UNCLOS, and others as observers.[65] In 2017, the United Nations decided to convene the BBNJ Conference, open to all state members, organizations that are parties to the UNCLOS, and a widely inclusive category of observers, to consider the Preparatory Committee's recommendations and draft an instrument for the conservation and sustainable use of BBNJ, with the objective to develop the instrument as soon as possible.[66] The BBNJ Conference met in September 2018, March 2019, and August 2019, and was slated to reach a final agreement in the first half of 2020.[67] While the final session has been delayed due to COVID-19,[68]

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61 *Id.*

62 *Id.*

63 Rachel Tiller et al., *The Once and Future Treaty: Towards a New Regime for Biodiversity in Areas Beyond National Jurisdiction*, 99 MARINE POL'Y 239, 242 (2019).

64 G.A. Res. 69/282, 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 (July 6, 2015); *see also Intergovernmental Conference*, *supra* note 31.

65 G.A. Res. 69/282, *supra* note 64, ¶ 1(a); David Leary, *Agreeing to Disagree on What We Have or Have Not Agreed On: The Current State of Play of the BBNJ Negotiations on the Status of Marine Genetic Resources in Areas Beyond National Jurisdiction*, 99 MARINE POL'Y 21, 24 (2019).

66 G.A. Res. 72/249, *supra* note 59, ¶¶ 8–12; *see Intergovernmental Conference*, *supra* note 31; Leary, *supra* note 65.

67 *Intergovernmental Conference*, *supra* note 31; *see Negotiating*, *supra* note 29; Rep. of the Preparatory Comm. Established by G.A. Res. 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, at 1, U.N. Doc. A/AC.287/2017/PC.4/2 (July 31, 2017) [hereinafter Preparatory Committee Report].

68 The President of the General Assembly, Letter dated Mar. 9, 2020 from the President of the General Assembly to All Permanent Representatives and Permanent Observers to the U.N. (Mar. 9, 2020), https://www.un.org/bbnj/sites/www.un.org.bbnj/files/bbnj-letter-from-president-of-the-bbnj-conference.pdf [https://perma.cc/42DZ-

delegates are hopeful that the ongoing BBNJ Conference will continue a coordinated effort to help sustain and conserve marine species.[69] The participating delegations persist and remain acutely aware of the urgent need for an ambitious yet practical treaty.[70]

C. The BBNJ Conference

After the most recent session in August 2019, and in preparation for the final meeting, the BBNJ Conference demonstrated its progress by focusing discussions around a preliminary "zero draft."[71] This draft outlines the future treaty and includes working definitions and optional wording of articles that still require discussion.[72] The suggested text in the draft proposed an objective for the final agreement to "ensure the long-term conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination."[73] At this point in the negotiations, most delegations have agreed upon the importance of facilitating the participation of developing countries, promoting conservation of BBNJ, using BBNJ only for peaceful purposes, and emphasizing a precautionary approach to scientific decision making.[74] It is also confirmed that this treaty will respect the existing rights of coastal

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YWDA] [hereinafter Letter from the President of the General Assembly].

69 *Negotiating*, *supra* note 29.

70 Press Release, General Assembly, New Oceans Treaty Must Be Robust, Practical in Application, Delegates Stress, Closing Third Round of Marine Biodiversity Negotiations, U.N. Press Release SEA/2118 (Aug. 30, 2019) [hereinafter Press Release SEA/2118]; *see* President of the Intergovernmental Conference, Letter dated Sept. 10, 2020 from the President of the Intergovernmental Conference to Permanent Representatives of Member States to the United Nations, Members of the specialized agencies, and Parties to the UNCLOS (Sept. 10, 2020), https://www.un.org/bbnj/sites/www.un.org.bbnj/files/intersessional_work_-_bbnj_president_letter_to_delegations.pdf [https://perma.cc/CE7S-Z9ZK].

71 *Id.*; *see* Intergovernmental Conference on an Internationally Legally Binding Instrument Under the U.N. Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, *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*, Introduction ¶ 4, U.N. Doc. A/CONF.232/2019/6 (May 17, 2019) [hereinafter *Draft*].

72 *Id.*

73 *Id.* art. 2.

74 *Id.* art. 9.

nations over the areas under their national jurisdictions.[75] Moreover, the BBNJ instrument will coexist with customary international law and therefore apply to states regardless of their treaty commitments.[76]

Consolidation of ideas into the zero draft illustrates the key facets of the future BBNJ convention that will need to be negotiated in the final session.[77] Most of the remaining disagreements revolve around the four thematic issues coming out of the third session that will likely also dominate debate in the final session of the BBNJ Conference.[78] These four issues are: (1) ownership over marine genetic resources, including benefits sharing, (2) management of area-based tools, including marine protected areas, (3) form of environmental impact assessments, and (4) participation in capacity-building and the transfer of marine technology to developing countries.[79]

III. Practical Topics of Debate

A. Marine Genetic Resources and Benefits Sharing

The potential value of MGRs combined with minimal oversight of ABNJ has created an imbalance between nations over the benefits obtained from MGRs and has made MGRs a central issue at the BBNJ Conference.[80] Existing U.N. objectives for MGRs have been to avoid their overexploitation and to help developing countries access and use the MGRs found in ABNJ.[81] The Preparatory Committee reiterated these objectives, while also emphasizing protection of biodiversity.[82] Remaining issues regarding MGRs include the scope of benefit sharing, who can regulate access, whether to address intellectual property rights, and the creation of a solid definition for MGRs.[83]

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75 Preparatory Committee Report, *supra* note 67, at 8; *see* Leary, *supra* note 65, at 22.

76 Young & Friedman, *supra* note 3, at 126.

77 *See Draft*, *supra* note 71.

78 Preparatory Committee Report, *supra* note 67, at 7–10.

79 *President Statement*, *supra* note 32, at 2.

80 *See id*. at 2, 5–8; Press Release SEA/2118, *supra* note 70.

81 *Draft*, *supra* note 71; *see* Preparatory Committee Report, *supra* note 67, at 10; Qureshi, *supra* note 1, at 849.

82 Preparatory Committee Report, *supra* note 67, at 10.

83 *Id.* at 17.

While the UNCLOS currently oversees management of ABNJ,[84] the UNCLOS does not define MGRs.[85] The Convention on Biological Diversity offered early guidance[86] that has been updated in the BBNJ Conference's zero draft.[87] The zero draft, still up for debate in the final session, contains two working definitions for MGRs: either the specific "any material of marine plant, animal, microbial or other origin, [found in or] originating from areas beyond national jurisdiction and containing functional units of heredity with actual or potential value of their genetic and biochemical properties," or the simple "marine genetic material of actual or potential value."[88] This second definition would require further explanation of what constitutes marine genetic material. However, the working definition for marine genetic material has not been settled, and here the two debated clauses are signaled by brackets: "any material of marine plant, animal, microbial or other origin containing functional units of heredity [collected from areas beyond national jurisdiction] [; it does not include material made from material, such as derivatives, or information describing material, such as genetic sequence data]."[89] The first optional clause, "collected from areas beyond national jurisdiction," highlights uncertainty over whether this instrument's scope will be limited to the MGRs found in ABNJ. It also reflects the assertion of some coastal states to claim sole ownership of the MGRs that can still be found within their coastal jurisdiction.[90] The second optional clause emphasizes that DNA's actual or potential value is the most important facet of MGRs, and its inclusion could preserve the possibility for limited benefits sharing.[91]

Many MGRs reside in ABNJ.[92] Advanced oceanographic technology has allowed scientists to explore the most remote areas

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84 Qureshi, *supra* note 1, at 849.

85 Kirsten E. Zewers, *Bright Future for Marine Genetic Resources, Bleak Future for Settlement of Ownership Rights: Reflections on the United Nations Law of the Sea Consultative Process on Marine Genetic Resources*, 5 LOY. U. CHI. INT'L L. REV. 151, 153 (2008).

86 Convention on Biological Diversity art. 2, June 5, 1992, 1760 U.N.T.S. 79.

87 *Draft*, *supra* note 71, at 5.

88 Bracketed text signals undecided language. *Id*.

89 Bracketed text signals undecided language. *Id*.

90 *Id*.

91 Zewers, *supra* note 85, at 154.

92 *See id*. at 151; *see also Draft*, *supra* note 71.

and discover that the unique genetics of organisms found living deep in the oceans, specifically around hydrothermal vents,[93] have expected uses for scientific research, pharmaceuticals, cosmetics, and industrial processes. These uses range from potential biofuel to an anticancer agent.[94] This "bio-prospecting" for MGRs is an emerging activity in ABNJ with the prospect of major profits.[95] However, while the potential value is clear, the significant cost of exploring the ocean floor has only allowed developed countries to take advantage of these resources that lie beyond any national jurisdictions.[96] For example, patents have been filed for MGRs derived from over 800 marine species, many found in ABNJ around hydrothermal vents, yet these patents were filed by entities from only 30 countries.[97]

Even though the exact value of MGRs in ABNJ is thus far undetermined, the value of products derived from MGRs found within national jurisdictions have created enough optimism to spur debate among delegates at the BBNJ Conference over benefit sharing.[98] Developed states want to avoid excessive burdens that might deter industry investment.[99] Alternatively, developing states, often with especially high expectations of the wealth that will come from MGRs,[100] argue that open-access to resources and a weak benefit sharing regime would result in profits going entirely to corporations from developed nations, thus disregarding the UNCLOS classification of resources in ABNJ as property of humanity.[101]

The debate over what benefits from MGRs will be shared again

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93 Zewers, *supra* note 85, at 154–55.

94 *Id.* at 153–155; *see also* DEEP-OCEAN STEWARDSHIP INITIATIVE, POLICY BRIEF MARCH 2019: THE FULL VALUE OF MARINE GENETIC RESOURCES (MGR), 2 (2019), http://dosi-project.org/wp-content/uploads/2018/05/Full-value-mgr-March2019.pdf [https://perma.cc/H9AH-RAVL].

95 Tiller et al., *supra* note 63, at 241.

96 Zewers, *supra* note 85, at 151 ("Unfortunately, due to the high cost of oceanographic excavation, estimated at one billion dollars per episode, developed countries have held a monopoly on such excavation technologies and the MGRs collected there from.").

97 PREDICTING FUTURE OCEANS, *supra* note 24, at 362.

98 Tiller et al., *supra* note 63, at 241.

99 *Id.*

100 Leary, *supra* note 65, at 27.

101 Tiller et al., *supra* note 63, at 241.

pits developing nations against developed nations.[102] The Group of 77 (a coalition of more than 130 developing countries)[103] and China have argued that both monetary and non-monetary benefits should be shared as future profits are sufficiently guaranteed.[104] The European Union, Australia, and other delegations contend that MGRs possess only potential monetary value because costly research can take ten to fifteen years and in most cases will not result in a useful product.[105] Consequently, this group only supports the sharing of non-monetary benefits, such as access to resources, data, and marine scientific research, and argues that these non-monetary benefits more accurately reflect the potential value of MGRs and the risky research process their development requires.[106]

MGRs are an emerging issue in international ocean governance and have exposed a gap left by the UNCLOS.[107] Regulation of MGRs will be a key component of a future comprehensive ocean governance regime and integral to protecting biodiversity.[108]

B. Area-Based Management Tools, Including Marine Protected Areas

The United Nations has reaffirmed a need for area-based conservation measures and has restated that ten percent of coastal and marine areas, especially those of particular importance for biodiversity, should be protected.[109] Currently, the only groups to implement area-based management tools in ABNJ are the sectoral organizations: RFMOs, the International Seabed Authority, and the International Maritime Organization.[110] These groups have only employed seasonal or partial closures in ABNJ to protect vulnerable ecosystems or spawning areas.[111] The limited restrictions, and the

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102 *Id.*

103 Brian Duignan et al., *Group of 77*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Group-of-77 [https://perma.cc/99NK-VD32] (last updated Oct. 29, 2013).

104 Tiller et al., *supra* note 63, at 241.

105 Leary, *supra* note 65, at 27.

106 *Id.*

107 Tiller et al., *supra* note 63, at 239.

108 *Id.*; *see Negotiating*, *supra* note 29.

109 G.A. Res. 66/288, *supra* note 33, ¶ 177.

110 Tiller et al., *supra* note 63, at 240.

111 *Id.*

tendency of marine protected areas to be spatially and temporally constrained, have made activists wary of relying on area-based tools to build a network of protected zones.[112]

The working definition out of the zero draft for an area-based management tool, with undecided language signaled in brackets, is "a tool for a geographically defined area, other than a marine protected area, through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives [and affording higher protection than that provided in the surrounding areas]."[113] A marine protected area is preliminarily defined as "a geographically defined marine area that is designated and managed to achieve specific [long-term biodiversity] conservation and sustainable use objectives [and that affords higher protection than the surrounding areas]".[114] The recommendation from the Preparatory Committee suggests that designating marine protected areas should include a review of the best available scientific information, standards, and criteria, including uniqueness, rarity, and fragility.[115]

Currently, due to an absence of adequate monitoring processes, existing marine protected areas in ABNJ are mismanaged and are therefore ineffective.[116] For example, RFMOs, made up of volunteer fishing entities—usually nations—that come together to jointly manage a region,[117] have thus far been tasked by the UNCLOS and the UNFSA with adopting legally binding conservation measures for fish stocks moving between the high seas and national jurisdictions; however, RFMOs have a mixed record in dealing with ecosystem and climate changes.[118] The failure of RFMOs is partially due to private industry lobbying,[119] and partly due to their voluntary nature which forces regulations to remain lax enough to ensure complete participation.[120] If even one major fishing entity refused to participate in the RFMO, the entire

112 *Id*.

113 Bracketed text signals undecided language. *Draft*, *supra* note 71, annex.

114 Bracketed text signals undecided language. *Id*.

115 Preparatory Committee Report, *supra* note 67, at 11.

116 Qureshi, *supra* note 1, at 849.

117 PREDICTING FUTURE OCEANS, *supra* note 24, at 475–76.

118 *Id.* at 377.

119 *Id*. at 381.

120 *Id*. at 476.

structure would fail; therefore, enforcement is almost completely toothless.[121] Discussions at the past BBNJ Conference sessions have recognized that the supposedly science-based decisions about opening and closing area-based management tools can be politicized, but a solution has not been proposed.[122]

In turn, the BBNJ Conference will need to determine a more appropriate institutional and decision-making framework.[123] A potential solution, supported by a few states, is to empower a global organization to design and implement area-based management tools, rather than placing responsibility entirely in local hands.[124] Alternatively, a hybrid approach would have regional bodies, such as existing RFMOs, report to a global authority under the BBNJ instrument, which would standardize best practices and propose new sites for protection.[125]

C. Environmental Impact Assessments

The Preparatory Committee suggested that EIAs should draw from the existing regime in the UNCLOS and oblige states to "assess the potential effects of planned activities under their jurisdiction or control in areas beyond national jurisdiction."[126] But the Preparatory Committee also noted a need to expand the existing framework and outline procedural steps, including screening, scoping, public notification, and the publication of reports.[127]

Delegations at the BBNJ Conference have generally agreed that EIAs are meant to make information publicly available, but have not finalized when an EIA is required and what an EIA should address within its scope.[128] In previous meetings, the European

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121 *Id.* ("No international fisheries management organization could be effective if significant portions of the fishing and market existed outside of its structure, and encouraging buy-in of all stakeholders is, therefore, paramount.").

122 Tiller et al., *supra* note 63, at 240.

123 Preparatory Committee Report, *supra* note 67, at 17.

124 Tiller et al., *supra* note 63, at 240.

125 *Id.*

126 Preparatory Committee Report, *supra* note 67, at 13.

127 *Id.*

128 *See* Press Release, Intergovernmental Conference on Marine Biodiversity, Delegates Discuss Guidelines for Content of Environmental Impact Assessment Reports, as Negotiations on New High Seas Treaty Enter Second Week, U.N. Press Release SEA/2117 (Aug. 29, 2019); *see also* Tiller et al., *supra* note 63, at 240 ("Parties at the negotiations struggled to define [EIA terms] during the negotiations, and there was no

Union called for a convention that outlines the basic content of an EIA. Meanwhile, the Group of 77, the Group of Like-Minded Latin American States, Australia, and Switzerland suggested limiting the scope of EIAs, and delegations representing the African Group and the Caribbean Community called for EIAs to address both the environmental and the social impacts of planned activity.[129]

Furthermore, states have generally agreed that the state undertaking the activity should be responsible for the EIA, but there is no consensus on what should be done with completed EIAs.[130] Some states, mostly developing countries, suggested establishing a globally associated scientific committee to review EIAs.[131] However, this proposal received pushback from developed states, especially Russia, arguing that such a system would undermine trust in EIA-drafting scientists.[132] Debate also emerged regarding the definition and purpose of Strategic Environmental Assessments, which were described as an EIA with a greater focus on future concerns.[133] Whether or not Strategic Environmental Assessments are utilized, most states have agreed that, with the redaction of intellectual property and other sensitive information, public access to EIAs is vital and a publishing mechanism will need to be developed.[134]

The zero draft contains suggestions for a number of thresholds for an EIA, including a belief that planned activities will cause substantial pollution, significant and harmful changes, or, in other words, "more than a minor or transitory effect on the marine environment."[135] Fundamental questions remaining in the zero draft, such as EIAs' thresholds and the impacts they must assess, will need to be answered in the final session of the BBNJ Conference.

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obvious consensus.").

129 *Id.*

130 Tiller et al., *supra* note 63, at 240–41.

131 *Id*. at 241.

132 *Id.*

133 *Id.* ("There was some argument over what exactly SEAs were and how it related to an EIA where some delegates argued that it was a type of EIA, but one that included future prospects as well."); *see also* Preparatory Committee Report, *supra* note 67, at 17.

134 Tiller et al., *supra* note 63, at 241.

135 *Draft*, *supra* note 71, at 22.

D. Capacity-Building and the Transfer of Marine Technology

Part XIV of the UNCLOS encourages states to help develop the marine scientific and technological capacity of developing states.[136] According to the zero draft's working definition for marine technology, the materials developing states might require could include, among other things, standards and reference materials on marine sciences, computer software and modeling techniques, and even ocean observation facilities, such as remote sensing equipment, buoys, and tide gauges.[137] Article 271 of the UNCLOS called for the establishment of guidelines for transfers of marine technology, which were eventually laid out by the Intergovernmental Oceanographic Commission in 2003.[138] These guidelines promote fair conditions for transfers and methods where all parties can benefit, but these guidelines are a non-binding tool.[139] Nonetheless, the BBNJ Conference aims to solidify a definition and provide an effective institutional mechanism for transfers of marine technology.[140]

Broad categories for capacity-building suggested by the Preparatory Committee include scientific and technical assistance, education and training of human resources, and data and specialized knowledge.[141] This recommendation was applied to the zero draft, which broadly defines transfer of marine technology as "the transfer of the instruments, equipment, vessels, processes and methodologies required to produce and use knowledge to improve the study and understanding of the nature and resources of the ocean."[142]

The main point of contention in this area has been whether transfers and capacity-building will be mandatory or voluntary, and

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136 UNCLOS, *supra* note 23, art. 266.

137 *Draft*, *supra* note 71, at 5.

138 UNCLOS, *supra* note 23, art. 271. *See generally* INTERGOVERNMENTAL OCEANOGRAPHIC COMMISSION [IOC], IOC CRITERIA AND GUIDELINES ON THE TRANSFER OF MARINE TECHNOLOGY (CGTMT) (2005).

139 *Intergovernmental Oceanographic Commission: Resources, Meetings, Documents, People*, U.N. EDUC., SCI. & CULTURAL ORG. [UNESCO], http://www.ioc-unesco.org/index.php?option=com_content&view=article&id=316&Itemid=100028 [https://perma.cc/3DAC-K9MN] (last visited Apr. 10, 2020).

140 *See* Tiller et al., *supra* note 63.

141 Preparatory Committee Report, *supra* note 67, at 14.

142 *Draft*, *supra* note 71, at 5–6.

whether money should be directly involved.[143] Some delegates at previous BBNJ Conference sessions voiced concerns that voluntary funding would be insufficient, with the Group of 77 insisting on the inclusion of the word "mandatory" to increase legal obligations.[144]

Others, such as the United States, have argued the UNCLOS sufficiently covers capacity-building and technology transfers in Part XIV and that a new instrument should not duplicate those results.[145] Similarly, the European Union explained that a needs-driven approach to capacity-building will help prevent overlap with existing country-driven programs.[146] Representatives from the Group of Like-Minded Latin American States and the Group of 77 countered that language on avoiding duplication could lead to actors carving out their own niches in the preexisting capacity-building process and crowding out newer, more efficient deliverers of marine technology.[147] Finally, many developed nations contested the inclusion of language that details specific types of capacity-building and technology-transfer benefits, with the European Union specifically speaking out against the inclusion of MGRs in this section of the instrument.[148]

Future negotiations on capacity-building will likely continue to focus on the terms and conditions for the transfer of marine technology, as well as elaboration on how a needs-driven mechanism would work.[149]

E. Ideological Debate: Common Heritage of Mankind vs. Freedom of the High Seas

Furthermore, before a new ocean governance regime can be

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143 Press Release, Intergovernmental Conference on Marine Biodiversity, Delegates Consider Role of Capacity-Building, Technology Transfer, as Deliberations Continue on Treaty Governing Marine Biodiversity Beyond National Jurisdictions, U.N. Press Release SEA/2110 (Aug. 20, 2019) [hereinafter Press Release SEA/2110]; *see* Tiller et al., *supra* note 63, at 420 ("The discussion during the negotiations centered not on this specifically, but instead on whether or not these transfers and capacity building measures should be mandatory or voluntary for states to participate in, and if there were to be money involved.").

144 Press Release SEA/2110, *supra* note 143.

145 *Id*; *see also* Tiller et al., *supra* note 63; UNCLOS, *supra* note 23, art. 266.

146 Press Release SEA/2110, *supra* note 143; *see* UNCLOS, *supra* note 23, art. 266.

147 Press Release SEA/2110, *supra* note 143.

148 *Id.*

149 *See id*; *see also* Preparatory Committee Report, *supra* note 67, at 17.

established, the United Nations will need to make a decision regarding the extremely contentious overarching principle that will describe the biological resources found in ABNJ:[150] either the common heritage of mankind, which governs seabed mining, or the freedom of the high seas, which directs navigation, fishing, and seafloor cables.[151] This longstanding debate has become particularly provocative when discussing the potentially valuable MGRs.[152] As the current UNCLOS references both the common heritage of mankind and the freedom of the high seas,[153] the principle the BBNJ instrument will adopt remains inconclusive.

The modern law of the sea can trace its origins to the 17th century European powers' expansion into markets in Asia and Africa, vying for shares of the oceanic trade routes and promoting the freedom of the high seas ethos.[154] In fact, a major foundational work for the law of the sea was Hugo Grotius' The Freedom of the Seas, written to justify the breaking of the Portuguese trading monopoly and the seizure of Portuguese ships by the Dutch East India Company.[155] In 1602, Grotius wrote that public goods are the common property of human society as a whole, and " . . . the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries."[156] These ideas, originally intended as an argument for access to the ocean, were reinterpreted in the 18th and 19th centuries to exclude territorial waters and developed into the modern concept of freedom of the high seas that has been used to defend unilateral exploitation of resources in ABNJ.[157] By the same token, Grotius' assumption that the ocean was one of those things, " . . . which can be used without loss to anyone else . . . " illustrates how his line of

150 Leary, *supra* note 65, at 23.

151 *Id*. at 23–25.

152 *Id.* at 24.

153 UNCLOS, *supra* note 23, arts. 57, 87.

154 RAM PRAKASH ANAND, *supra* note 2, at 6.

155 *See* James Brown Scott, *Introduction* to HUGO GROTIUS, THE FREEDOM OF THE SEAS, at vi (Ralph Van Deman Magoffin trans., New York: Oxford University Press 1916).

156 HUGO GROTIUS, THE FREEDOM OF THE SEAS: OR, THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE 24 (Ralph Van Deman Magoffin trans., Batoche Books 2000).

157 RAM PRAKASH ANAND, *supra* note 2, at 6.

thinking may be outdated.[158]

Article 87 of the UNCLOS gives states the freedom of navigating, shipping, constructing cables, building artificial islands, fishing, and conducting research in ABNJ as long as the activity does not harm the interest of other states.[159] Furthermore, Article 88 conditions use of the high seas for only peaceful purposes and in ways that will cause no harm to marine life or the environment.[160] While abundant food and mineral resources have been found in the ocean, with new technology making it all increasingly exploitable, the traditional ways of thinking about the uses of ABNJ and the resources within have proven inadequate to counter the ecosystem degradation that threatens future economic potential and sustainability.[161] Now, as the international society has grown beyond the traditional European powers, challenges to past ideologies have fueled debate at the BBNJ Conference, particularly as those, "[s]uppressed and neglected for a long time, the Asian and African states, along with other equally ignored Latin American states, have begun to plan an active and assertive role in the development and formulation of a new maritime law."[162] In contention with the status quo, many states at the BBNJ Conference have pushed for an explicit adoption of the common heritage of mankind ideology, which emphasizes inclusive activities in ABNJ that result in the sharing of all benefits.[163]

Generally, at the BBNJ Conference the ideological debate centers around developed states supporting the freedom of the high seas and developing states arguing for the application of the common heritage of mankind.[164] The Group of 77 and China view the principle of common heritage of mankind, due to its wide applicability, as a necessary part of an equitable regime of ocean governance that will enforce commitments, such as sharing access to and benefits of MGRs.[165] Critics of the application of the

158 *Id.*

159 Qureshi, *supra* note 1, at 887.

160 *Id.* at 887–88.

161 *See* RAM PRAKASH ANAND, *supra* note 2, at 6.

162 *Id.*

163 *See* Leary, *supra* note 65, at 23–25.

164 *Id.*

165 *Id*. at 24; *see also* .Permanent Mission of the Kingdom of Thailand to the U.N., Letter dated Dec. 5, 2016 from the Permanent Mission of the Kingdom of Thailand to the

common heritage of mankind here, particularly Iceland, believe that although many MGRs, like mining interests, are found on the seabed, common heritage should not extend to renewable biological resources and is merely delaying negotiations of more relevant matters.[166]

Taking an intermediate approach to this difficult issue, the European Union and Norway expressed an interest in abandoning the ideological debate entirely and focusing on negotiations directly involving benefit sharing for MGRs.[167] Some of the justifications cited for dropping this debate are that reconciliation seems unlikely, adopting the common heritage view is not necessary to achieve desired goals, the elements of the common heritage of mankind could be integrated into the international instrument without formally adopting the ideology, and the ideological debate merely delays practical actions to protect biodiversity in ABNJ.[168] More explicitly, the common heritage of mankind usually involves three themes: (1) non-appropriation of the deep seabed in ABNJ, (2) common management of resources, and (3) benefits sharing.[169] All of these themes have been discussed at the BBNJ Conference and, referring to the position of many developed states, they can be implemented in direct relation to the topics where they are relevant without formally adopting the common heritage of mankind ideology.[170] Another potential solution could be to follow the example of the Convention on Biological Diversity, which after debate over the common heritage of mankind instead chose to frame biodiversity as the "common concern of mankind."[171] Nevertheless, the debate has continued to the point where Norway has expressed concern that as, "[i]t appears to be difficult to reach agreement on this issue . . . . [we] hope that this disagreement will not be allowed to prevent states from utilizing this opportunity to establish a new

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U.N. addressed to the Division for Ocean Affairs and the Law of the Sea (DOALOS), U.N. Doc. A/RES/69/292 (July 6, 2015), https://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Group_of_77_and_China.pdf [https://perma.cc/38Q7-GJUZ].

166 Leary, *supra* note 65, at 24.

167 *Id.*

168 *Id*.

169 *Id.*

170 *Id.*

171 *Id.*

regime for MGRs in ABNJ, including the sharing of benefits."[172]

IV. Conclusion

The BBNJ negotiations represent an interest in filling the gaps left by the UNCLOS and finalizing a comprehensive ocean governance regime that expands to effectively govern BBNJ.[173] Whether existing gaps were due to incomplete definitions in the UNCLOS, new issues such as MGRs, or a worsened climate situation, the United Nations is conclusive in its desire to complete the regime.[174]

Key facets of the BBNJ convention will need to be negotiated in the BBNJ Conference's final session, which has been rescheduled from March 2020 to the earliest possible date following the COVID-19 outbreak.[175] It is already well-decided that existing rights of coastal states over the areas under their national jurisdiction will not be infringed upon by this treaty,[176] and this new treaty will coexist with customary international law and apply to states regardless of their treaty commitments.[177] However, the key topics yet to be finalized include the treatment of MGRs, the institutional structure of area-based management tools, the mechanisms for EIAs, and the degree to which capacity-building and the transfer of marine technology will take place. Yet, to a certain degree, these issues hinge on the decision regarding the overarching principle that will describe the biological resources found in ABNJ. Whether longstanding ideological issues or a failure to compromise will mar

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172 Leary, *supra* note 65, at 24 (quoting Preparatory Comm. Established by G.A. Res. 69/292: Development of an International Legally Binding Instrument under the U.N. Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, Comments by Norway, at 6 (Dec. 2016), http://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Norway.pdf [https://perma.cc/45KM-B8AT].

173 Tiller et al., *supra* note 63, at 239.

174 *See id.*

175 Letter from the President of the General Assembly, *supra* note 68; *see* President of the Intergovernmental Conference, Letter dated Sept. 10, 2020 from the President of the Intergovernmental Conference to Permanent Representatives of Member States to the United Nations, Members of the specialized agencies, and Parties to the UNCLOS (Sept. 10, 2020), https://www.un.org/bbnj/sites/www.un.org.bbnj/files/intersessional_work_-_bbnj_president_letter_to_delegations.pdf [https://perma.cc/CE7S-Z9ZK] ("[T]he earliest possible available date that the fourth session of the Conference can be held is in 2021.").

176 Leary, *supra* note 65, at 22.

177 Young & Friedman, *supra* note 3, at 126.

the final session is yet to be seen.

Despite grim environmental outlooks and controversial topics, the overall atmosphere of the BBNJ Conference's negotiations has been friendly.[178] The optimism of creating a BBNJ governance framework is characterized well by the statement of Rena Lee, Ambassador for Oceans and Law of the Sea Issues, Special Envoy of the Minister for Foreign Affairs of Singapore, and President of the BBNJ intergovernmental conference: "Individually, it will be challenging to bring about the necessary transformative change that the areas beyond national jurisdiction need, if we are to conserve and sustainably use its biodiversity. But together, there is so much that we can achieve."[179] The UNCLOS describes ABNJ, and therefore the biodiversity within them, as property of humanity so that no single nation can claim ownership of these areas or their resources.[180] If that statement is going to be respected, any additions to the UNCLOS will need to facilitate the participation of developing countries, prioritize sustainability, and protect biodiversity.

178 Tiller et al., *supra* note 63, at 241.

179 *President Statement*, *supra* note 32, at 4.

180 Qureshi, *supra* note 1, at 886.