doi:10.1017/aju.2018.43

SYMPOSIUM ON GOVERNING HIGH SEAS BIODIVERSITY

NATIONAL SECURITY CONSIDERATIONS FOR A BINDING INSTRUMENT ON MANAGING BIODIVERSITY BEYOND NATIONAL JURISDICTION

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The effort to negotiate and adopt a legally binding instrument to manage marine biodiversity beyond areas of national jurisdiction (BBNJ) implicates national security interests both directly and tangentially. First, negotiations for any agreement will contend with the long-standing concept that the oceans are reserved for "peaceful purposes." The maritime powers will insist that the concept, which reflects customary law and the practice of virtually all states, does not demilitarize the oceans. Second, any BBNJ treaty must overcome two interrelated spatial issues: the geographic parameters of what constitutes "areas beyond national jurisdiction" when those maritime boundaries are often uncertain, and how measures to protect the environment interact with military activities in those areas. Naval powers will insist that requisite marine protected areas (MPAs) and associated protective measures do not diminish naval freedom of navigation and other military uses of the sea. Third, BBNJ negotiations will be compelled to address how a new treaty will relate to the United Nations Convention on the Law of the Sea (UNCLOS),[1] a host of other treaties, and customary norms. Imperfect as the contemporary global order of the oceans is, major maritime powers and even middle powers will seek to protect it and resist efforts at radical change that may destabilize existing regimes in pursuit of an ephemeral gain for BBNJ. This strategic interest in international stability, while understandable, unintentionally creates inertia that is likely to frustrate the most progressive proponents of BBNJ. Fourth, more broadly, any treaty is likely to affect marine ecosystem services and perhaps marine genetic resources (MGR), which help propel the "blue economy" and undergird national security. We may expect most coastal states to continue to jealously protect their exclusive rights to the living and nonliving resources offshore, and even to propose expansion of those rights and jurisdiction to "adjacent areas." The most developed states, for their part, are unlikely to agree to any text that diminishes their rights to intellectual property related to marine biotechnology, which is a strategic sector for bio-weapons research and defense. In short, states with advanced military capabilities, and major maritime powers in particular, are unlikely to support more than incremental change to the regimes reflected in UNCLOS.

Emergence of BBNJ

In 2011, the UN General Assembly (UNGA) initiated negotiations for a new regime focused on conservation and sustainable use of BBNJ, with a specific focus on marine genetic resources, area-based management tools,

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[1] UN Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 397 [hereinafter UNCLOS].

environmental impact assessments, capacity-building and the transfer of marine technology.[2] After these initial discussions, in 2015 the UNGA began negotiations to conclude an International Legally Binding Instrument (ILBI) within the context of conservation and sustainable management of BBNJ. For this purpose, the UNGA established a Preparatory Committee (PrepCom), which met in 2016 and 2017 and produced informal working documents to inform the BBNJ process.[3] The BBNJ preparatory process had widespread participation from 147 UN member states and two nonmember states; numerous UN programmes, funds, and offices; specialized agencies and related organizations of the UN system; intergovernmental organizations; and nongovernmental organizations.

States will meet again in September 2018 to open formal negotiations on a draft text.[4] If negotiations are successful, the intergovernmental conference will produce a third Implementing Agreement to UNCLOS. The concert of interests among maritime powers, coastal states, and flag states is poised to maintain the basic architecture of the existing order and to ensure the outcome will have a rather limited effect on national security interests. Any draft text, like UNCLOS itself, will be imbued with general obligations rather than specific mandates, and will contain a dose of constructive ambiguity.

Treaty Elements

The PrepCom was charged with exhausting every effort to reach agreement on substantive matters by consensus on potential elements that may be included in a legally binding agreement.[5] These elements inform the BBNJ negotiations and provide a roadmap for considerations of national security. The PrepCom report contains nonexclusive elements that generated convergence among most delegations. The elements that experienced greater convergence are likely to persist. Elements for which there was great divergence among states may not make it into the final text or may do so only in vague or diluted form.

Elements of convergence at the PrepCom include respect for the sovereignty and territorial integrity of all states, and adherence to the balance of rights, obligations, and interests in UNCLOS. The principle of due regard reflected in UNCLOS is likely to be included as well.[6] These core concepts are familiar tenets of the international law of the sea and would serve a stabilizing function, reassuring both parties and nonparties to any BBNJ Agreement that the general framework of UNCLOS remains intact. Similarly, any treaty could progressively develop principles that have become staples of international environmental law, including sustainable development, the ecosystem approach (integrated approach), precautionary principle, science-based approach, adaptive management, and polluter pays.

Peaceful Purposes

Like the Implementation Agreement of Part XI of UNCLOS—and UNCLOS more generally—we may expect any BBNJ Agreement to reserve areas beyond national jurisdiction for peaceful purposes only. The terms are

[2] G.A. Res. 66/231 Annex (Apr. 5, 2012).

[3] G.A. Res. 69/292 (July 6, 2015).

[4] G.A. Res. 72/249 (Dec. 24, 2017).

[5] Report of the Preparatory Committee Established by 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, UN Doc. A/AC.287/2017/PC.4/2 (July 31, 2017).

[6] The principle of due regard is well established and appears throughout UNCLOS, including the preamble and two annexes. *See* UNCLOS, *supra* note 1, arts. 27(4), 39(3)(a), 58(3), 60(3), 66(3)(a), 87(2), 148, 162(2)(d), 163(2), 167(2), 234; Annex II, art. 2(1); Annex IV, arts. 5(1), 5(2), 7(3).

https://doi.org/10.1017/aju.2018.43 Published online by Cambridge University Press

included eight times in provisions of UNCLOS and in its preamble: The high seas are reserved for peaceful purposes through Article 88,[7] and Article 58(2) applies this provision throughout the exclusive economic zones (EEZs).[8] Article 141 reserves the international seabed area for peaceful purposes,[9] and Articles 143, 240, 242, and 246 specify that marine scientific research may be conducted only for peaceful purposes.[10] Article 301 of UNCLOS is titled "peaceful uses of the seas," and it declares that states parties shall refrain from "the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[11] While these provisions do not demilitarize the oceans, they reflect the general proscription against armed aggression contained in Article 2(4) of the UN Charter.[12]

As was the case during the Third United Nations Conference on the Law of the Sea, the major maritime powers will collectively resist any suggestion that the term as included in any BBNJ agreement demilitarizes the seas. The core five major maritime powers—the United States, Russia, the United Kingdom, France, and Japan—are in an even stronger position on this point than they were during the 1970s, given the rapid expansion of naval power by nontraditional maritime states such as China and India. These emerging maritime powers are likely to reject constraints on their naval operations as well.

Geographic Scope and Freedom of Navigation

Naval forces rely on unimpeded freedom of navigation to conduct military operations throughout the oceans. States resist restrictions on their operational flexibility and rely on the doctrine of sovereign immunity to avoid foreign jurisdiction over their warships, submarines, and military aircraft at sea. The existing legal regimes for the high seas and the interational seabed area lie beyond coastal state jurisdiction and impose virtually no restrictions on military activities. While the regime of high seas freedoms also applies throughout EEZs and on the continental shelf, coastal states enjoy sovereign rights and jurisdiction in these areas over living and nonliving resources. Disagreement over the scope of coastal states' rights and navigational freedom in these areas sometimes leads to disputes, and even conflict.

The ILBI will apply only to areas beyond national jurisdiction, which encompasses some 62 percent of the oceans. Consequently, any agreement will not prescribe mandatory rules over territorial seas and EEZs and on the continental shelf. Since these are areas subject to coastal state sovereignty (territorial sea), or sovereign rights and jurisdiction (EEZ and continental shelf), excluding them avoids most international disputes and potential conflict. The BBNJ process envisions employing ecosystem-based management tools to address vessel source pollution, possibly through creation of new MPAs and Particularly Sensitive Sea Areas (PSSAs) and areas to be avoided. But as many maritime boundaries are unresolved, it may be difficult to determine exactly where any BBNJ instrument or associated protective measures will apply. For example, delimitation of the extended continental shelf in the Arctic Ocean appears years, if not decades, away.

[7] *Id.* art. 88.

[8] *Id.* art. 56(2).

[9] *Id.* art. 141. The "area" refers to "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." *Id.* art. 1(1).

[10] *Id.* arts. 240, 242, 146.

[11] *Id.* art. 301.

[12] UN Charter art. 2(4). *See* G.A. Res. 3314 (XXIX), Annex, art. 1 (Dec. 14, 1974); *see also* UN Secretary-General, General and Complete Disarmament, Study on the Naval Arms Race, UN Doc. A/40/535, at para. 188 (Sept. 17, 1985) (noting that when exercising their rights and performing their duties under UNCLOS, "States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the principles of international law embodied in the Charter of the United Nations").

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Overcoming the challenge of indeterminate maritime boundaries related to BBNJ is feasible, however. The Baltic Sea PSSA, for example, was proposed at the International Maritime Organization by a group of regional states that excluded the Russian Federation.[13] When Russia objected that the PSSA could not apply to the Russian EEZ in the Baltic Sea, it raised a dilemma because those boundaries are not delimited. The elegant solution? Constructive ambiguity. The Baltic Sea PSSA applies throughout the Baltic Sea proper and the Gulf of Bothnia and the Gulf of Finland, but not in any maritime areas under the sovereignty or jurisdiction of the Russian Federation (wherever those may be).[14] The same approach is likely to be useful in bypassing the thicket of maritime boundary jurisdiction questions arising in the BBNJ negotiations.

Even if delimitation of coastal state jurisdiction is uncertain, the risk of impairing freedom of navigation of warships and military aircraft is not high since states will insist on explicit exemptions in any ILBI for sovereign immune vessels and aircraft. In any event, many states require as a matter of policy that their naval forces comply with protective measures to the extent practicable. These restrictions may reduce training opportunities, constrict operational areas, and diminish force readiness, but they do not risk an international incident because they are self-imposed.

Regime Interaction and Stability

We may also anticipate that a new BBNJ instrument will respect not only existing boundaries, but also long-standing regimes already governing areas of the global commons, such as the 1959 Antarctic Treaty[15] or the 1944 Convention on International Civil Aviation (Chicago Convention).[16] By taking the path of continuing within the UNCLOS framework and deferring to preexisting lex specialis regimes and regional and sectoral bodies (e.g., the Arctic Council), the BBNJ instrument is more likely to progressively develop ocean law in a stabilizing and non-threatening manner. Where these lex specialis regimes already cover specific geography, it is unlikely that the BBNJ instrument will supplant them. Similarly, it is equally unlikely that any ILBI will confer on coastal states special new authority beyond national jurisdiction under a theory of adjacency, as some delegations have suggested. Perhaps a middle ground might be to require consultations with adjacent coastal states, as occurred with the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).[17]

The traditional maritime states, including the United States, the United Kingdom, France, Russia, and Japan, are likely to insist on a BBNJ treaty that merely adds coordination functions or fills gaps among (but does not infringe on) existing regimes—even nonlegally binding ones. Given the broad national security interest in global stability and predictability, major maritime powers will resist creation of any new, comprehensive governance structure that displaces contemporary regimes. Even middle powers, such as Indonesia or Denmark, will protect global institutions and regimes that advance their interests, albeit imperfectly, such as the Commission on the Limits of the Continental Shelf and the High Seas Fish Stocks Agreement, rather than risk the uncertainty inherent in a new approach. Likewise, coastal states will insist on preserving their exclusive sovereign rights and jurisdiction offshore so that national authorities retain sole control over resource use and conservation.

[13] Int'l Maritime Org., Resolution MEPC.136(53), Designation of the Baltic Sea Area as a Particularly Sensitive Sea Area (July 22, 2005). Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden sponsored the resolution.

[14] *Id.* Annex, para. 1.1.

[15] Antarctic Treaty, Dec. 1, 1959, 402 UNTS 71 (entered into force June 23, 1961).

[16] Convention on International Civil Aviation, Dec. 7, 1944, 15 UNTS 295 (entered into force Apr. 4, 1947).

[17] Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 2354 UNTS 67 (entered into force Mar. 25, 1998).

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Perhaps only nongovernmental organizations and some of the least developed states have the motivation to supersede existing rules. Yet the interconnected oceans face a cascade of interrelated threats, from acidification and eutrophication to pulverized plastic, which maritime powers can agree are not effectively addressed by existing rules. These threats to the marine ecosystem affect human security and put the blue economy at risk, but most states will prioritize the stability of UNCLOS and its associated treaties and view military security as more essential than environmental security. This strategic dynamic suggests that a BBNJ treaty may be successfully adopted if it builds incrementally on existing efforts, even if it falls short of the goals of its most ambitious proponents.

Marine Genetic Resources

The focus on MGR raises tertiary, but still significant, national security concerns. The BBNJ process is driven principally by a motivation to protect and preserve the marine environment, but like the negotiations over Part XI (regarding deep seabed minerals) that preceded it, it also contains an element of economic mercantilism. During the negotiations for Part XI, developing states sought mandatory marine technology transfers from developed states and access to the bounty of seabed minerals. The 1994 Implementing Agreement dissolved the mandate for technology transfers and reined in the most enthusiastic visions for sharing the "common heritage" of seabed minerals.

Today developing states hope to gain greater access to and sharing of benefits of MGR and marine genetic bioprospecting. Since they lack an advanced marine science capability, they seek to benefit from the efforts of developed states. This approach is reflected in the 2010 Nagoya Protocol to the Convention on Biological Diversity, which calls for creation of access and benefit-sharing (ABS) mechanisms for developing states for the exploitation or utilization of genetic resources.

Biotechnology is one of the most promising sectors of economic growth in an increasingly competitive global marketplace. Developed states are unlikely to agree to diminish their leadership in such a strategic industry. For example, it is unclear how a state such as China, which claims status as a developing state but is also a great power and rival of the United States, will fit into any ABS scheme. The 2017 U.S. National Security Strategy asserts that China and Russia are challengers that seek to "erode American security and prosperity," and states that China has stolen U.S. intellectual property. Furthermore, the potential for MGR to contribute to the development of synthetic biology and biological weapons may make major powers even less inclined to participate in an ABS regime.

Conclusion

National security equities linger in the background of the BBNJ negotiations. Because of the fluid nature of the negotiations and lack of a negotiating text, security interests are for the time being a backdrop to the pressing issue of protecting biological diversity and the marine environment. If negotiations veer toward supplanting existing institutions or regional or global regimes, encroach on coastal states' exclusive sovereign rights and jurisdiction offshore, or insist on compulsory approaches to ABS for marine genetic resources, they risk alienating the most powerful states, and perhaps a majority of states. On the other hand, if states produce a draft text that is incremental, interstitial, voluntary, and builds on existing regimes, the text may become the third UNCLOS Implementing Agreement. Doing so, however, means that the most ambitious proponents will walk away disappointed. But over time, much like the High Seas Fish Stocks Agreement, a limited ILBI could still provide a framework that could slowly acquire greater impact to ameliorate some of the most significant threats to the marine environment.

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