INTERNATIONAL LAW STUDIES
Published Since 1895

Another Missed Opportunity to Adopt a Universally Accepted Maritime Treaty

Raul (Pete) Pedrozo

103 INT'L L. STUD. 132 (2024)

Volume 103

2024

Published by the Stockton Center for International Law

ISSN 2375-2831

Another Missed Opportunity to Adopt a Universally Accepted Maritime Treaty

Raul (Pete) Pedrozo[*]

CONTENTS

[*] Captain Raul (Pete) Pedrozo, JAGC, U.S. Navy (Ret.), is the Howard S. Levie Professor of the Law of Armed Conflict at the Stockton Center for International Law, U.S. Naval War College. After retirement from the U.S. Navy, he was a Professor of International Law at the Naval War College and Principal Deputy Staff Judge Advocate, U.S. Indo-Pacific Command. On active duty, he served in senior positions in the Department of Defense, including Staff Judge Advocate, U.S. Pacific Command, and Special Assistant to the Under Secretary of Defense for Policy.

The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

On May 1, 1974, the United Nations General Assembly adopted the Declaration on the Establishment of the New International Economic Order.[1] At its core, the New International Economic Order (NIEO) sought to transform the global economy to address the growing inequality between the developed and developing States. Although developing countries constituted 70 percent of the world's population, these States only accounted for 30 percent of the world's income.[2] Proposed measures to correct this imbalance included mandatory transfer of technology, extending additional development assistance, tariff reductions and other trade preferences, securing transfer of financial resources, debt rescheduling or forgiveness, and regulation of activities of transnational corporations.[3]

The original Part XI of the United Nations Convention on the Law of the Sea (UNCLOS), adopted in 1982, was modeled on these themes.[4] Activities in the Area—the "seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction"[5]—for example, were to "be carried out for the benefit of mankind as a whole, . . . taking into particular consideration the interests and needs of developing States."[6] Article 140 also required the International Seabed Authority to "provide for the equitable sharing of financial and other economic benefits derived from activities in the Area . . . on a non-discriminatory basis."[7] Likewise, States wanting to conduct marine scientific research in the Area were required to develop their projects "through the Authority . . . for the benefit of developing States . . . with a view to strengthening their research capabilities [and] training their personnel . . . in the techniques and applications of research."[8] States were additionally required to "cooperate in promoting the transfer of technology and scientific knowledge . . . [to include] transfer of technology to . . . developing

1. G.A. Res. 3201(S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974).

2. *Id.* ¶ 1.

3. *Id.* ¶ 4.

4. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

5. *Id.* art. 1.

6. *Id.* art. 140.

7. *Id.*

8. *Id.* art. 143.

States . . . under fair and reasonable terms and conditions"[9] and were required to promote "the effective participation of developing States in activities in the Area."[10] Finally, consistent with NIEO principles, the Assembly was authorized to "establish a system of compensation . . . to assist developing countries which suffer serious adverse effects on their . . . economies . . . caused by activities in the Area."[11] Part XI also created a sizeable bureaucratic structure—the International Seabed Authority—to administer the seabed mining regime, which includes the Assembly, Council, Secretariat, Legal and Technical Commission, Finance Committee, Economic Planning Commission, and Enterprise.[12]

These NIEO-inspired provisions had the practical effect of making ratification of UNCLOS untenable for the industrialized nations. The United States, for example, believed that Part XI was fundamentally flawed and would "deter future development of deep seabed mineral resources" rather than serve the interests of all nations.[13] As a result, the United States (along with other developed States like Germany and the United Kingdom) did not sign the Convention when it opened for signature in 1982.[14]

Although UNCLOS was signed by 119 States, by 1993 it had still not entered into force, primarily over concerns by the industrialized nations over Part XI. Iceland was the only developed State to join the treaty at that time. However, political changes brought on by the demise of the Soviet Union and the growing appreciation of free market principles by a more significant part of the international community provided an avenue to re-examine Part XI.[15] Clearly, the developed States would not accept the existing seabed mining regime. Consequently, from 1990 to 1994, the UN Secretary-General convened fifteen informal consultations among States to address the

9. *Id.* art. 144.

10. *Id.* art. 148.

11. *Id.* art. 151(10).

12. *Id.* arts. 156–75.

13. Ronald Reagan, Statement on United States Actions Concerning the Conference on the Law of the Sea (July 9, 1982), https://www.reaganlibrary.gov/archives/speech/statement-united-states-actions-concerning-conference-law-sea.

14. U.N., MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS AT 31 DECEMBER 1982, at 632–33, U.N. Doc. ST/LEG/SER.E/2, U.N. Sales No. E.83.V.6 (1983), https://treaties.un.org/doc/source/publications/MTDSG/1982-english.pdf.

15. U.S. President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI to the U.S. Senate with Commentary (Oct. 7, 1994), *reprinted in* 34 INTERNATIONAL LEGAL MATERIALS 1393 (1995) [hereinafter U.S. Commentary on UNCLOS].

perceived shortcomings of Part XI in an effort to achieve universal participation in the Convention.[16] These consultations resulted in the adoption of the Part XI Implementing Agreement in 1994, which revised the objectionable NIEO-supported provisions of Part XI and paved the way for all States to join the Convention.[17]

Unfortunately, the international community is seeing history repeat itself with the negotiation and adoption of the 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 (BBNJ Agreement).[18] In 2015, the UN General Assembly established a preparatory committee to develop a text for an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[19] Two years later, the General Assembly convened an intergovernmental conference to consider the recommendations of the preparatory committee.[20] After a three-day organizational meeting in April 2018, the conference held five sessions from September 2018 to March 2023, completing its work on March 4, 2023.

II. CONTESTED AREAS

In its current form, the BBNJ Agreement repeats many of the mistakes of Part XI and will never receive the required votes for advice and consent in the U.S. Senate. Like the failed original Part XI, it creates a new sprawling UN bureaucracy to be funded by the State parties, contains numerous NIEO-like provisions that conflict with free market principles, and has the potential to impede navigational rights and freedoms on the high seas. The Agreement could also have the unintended consequence of increasing regional tensions in areas like the South China Sea, where States like China

16. U.N. Secretary-General, Consultations of the Secretary-General on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea, U.N. Doc. A/48/950 (June 9, 1994).

17. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 3.

18. 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, U.N. Doc. A/CONF.232/2023/4 (June 19, 2023) [hereinafter BBNJ Agreement].

19. G.A. Res. 69/292 (July 6, 2015).

20. G.A. Res. 72/249 (Jan. 19, 2018).

assert excessive maritime claims over marine areas beyond national jurisdiction.

To begin, it is unclear whether the BBNJ Agreement will be applied in contested areas. The treaty purportedly applies in "areas beyond national jurisdiction," which is defined in Article 1(2) to mean "the high seas and the Area."[21] China claims it has "indisputable sovereignty over the islands in the South China Sea (SCS) and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof" contained within the nine-dash line.[22] Nonetheless, an international arbitral tribunal has ruled that China's nine-dash line claim has no legal basis in international law.[23] Under UNCLOS, a decision rendered by a court or tribunal having jurisdiction over a dispute "shall be final and shall be complied with by all the parties."[24] Yet, China has declared that the "award is null and void and has no binding force" and that "China neither accepts nor recognizes it."[25]

Although decisions under Part III of the Agreement (area-based management tools) shall generally be made by consensus, Article 23 allows for decisions to be made by a three-quarters majority if no consensus is reached.[26] Suppose Vietnam and the Philippines submit a joint proposal under Article 19 to establish a marine protected area (MPA) in the high seas donut hole in the South China Sea. Will the Conference of the Parties reject China's position and adopt the measure under Articles 22 and 23, or will the parties succumb to Chinese pressure and fail to take action on the proposal?[27] This decision is complicated by Article 6, which provides that the Agreement,

21. BBNJ Agreement, *supra* note 18, art. 1(2).

22. Note Verbal, Permanent Mission of the People's Republic of China to the United Nations, CML/18/2009 (May 7, 2009), https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

23. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award ¶¶ 276–78 (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/2086.

24. UNCLOS, *supra* note 4, art. 296.

25. Ministry of Foreign Affairs of the People's Republic of China, Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea (July 12, 2016, 7:21 PM), https://english.www.gov.cn/archive/publications/2016/07/12/content_281475391807773.htm.

26. BBNJ Agreement, *supra* note 18, art. 23.

27. *Id.* arts. 19, 22–23.

> including any decision or recommendation of the Conference of the Parties or any of its subsidiary bodies, and acts or measures or activities undertaken on its basis, shall be without prejudice to, and shall not be relied upon as a basis for asserting or denying any claims to, sovereignty, sovereign rights or jurisdiction, including in respect of any disputes relating thereto.[28]

This problem is not isolated to the South China Sea. Besides China, eighteen other States assert historic water claims, which the United States and other States have protested as inconsistent with international law.[29]

III. SOVEREIGN IMMUNITY

Oddly enough, the Agreement contains two sovereign immunity provisions. First, Article 4 exempts warships, military aircraft, and naval auxiliaries from the terms of the treaty; however, other government-owned or operated non-commercial vessels or aircraft must comply with Part II of the Agreement on marine genetic resources.[30] Second, Article 10(3) only exempts military activities by government non-commercial vessels and aircraft from Part II; non-military activities conducted by these sovereign immune vessels and aircraft are subject to obligations with respect to the utilization of marine genetic resources.[31]

These two articles erode the principle of sovereign immunity and set an adverse precedent for future maritime agreements. Both open the door for revisionist States like China and Russia to claim that all their activities regarding marine genetic resources are military in nature, which begs the question—who determines whether an activity is military or non-military? Article 298 of UNCLOS allows a State to exempt its military activities from the compulsory dispute settlement provisions of the Convention.[32] No major maritime power would allow an international tribunal or organization to determine what constitutes a military activity, as illustrated by the 2019 International Tribunal for the Law of the Sea (ITLOS) case between Ukraine and

28. *Id.* art. 6.

29. *See* DEP'T OF DEFENSE REPRESENTATIVE FOR OCEAN POLICY AFFAIRS, MARITIME CLAIMS REFERENCE MANUAL, https://www.jag.navy.mil/national-security/mcrm/ (last visited Feb. 14, 2024) [hereinafter MCRM].

30. BBNJ Agreement, *supra* note 18, art. 4.

31. *Id.* art. 10(3).

32. UNCLOS, *supra* note 4, art. 298(1)(b).

Russia.[33] In prescribing provisional measures, ITLOS effectively diminished the military activities exemption of Article 298 by holding that the classification of an activity as military cannot "be based solely on the characterization of the activities in question by the parties to the dispute . . . especially in the case of the party invoking the . . . exception."[34] Instead, the tribunal decided that the characterization of an activity as military "must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case."[35] Based on the evidence presented by the parties, the tribunal concluded that Article 298(1)(b) did not apply because the use of force by Russian authorities was a law enforcement operation rather than a military operation.[36] Thus, the tribunal assumed the authority to contravene the determination of a sovereign State of what was or was not a military activity, arguably making nugatory the party's determination of a military activity under Article 298.

IV. INTELLECTUAL PROPERTY RIGHTS

The BBNJ treaty requires States to provide information regarding marine genetic resources and digital sequence information on marine genetic resources to a clearinghouse mechanism established under Article 51 prior to the collection in situ of marine genetic resources (Article 12). It is unclear whether providing such information is consistent with other international agreements regarding the protection of intellectual property rights, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[37]

TRIPS incorporates and expands on the intellectual property agreements administered by the World Intellectual Property Organization.[38] It sets

33. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Provisional Measures, Order of May 25, 2019, ITLOS Rep. 2019, ¶¶ 63–77.

34. *Id.* ¶ 65.

35. *Id.* ¶ 66.

36. *Id.* ¶¶ 74, 77; *see also* James Kraska, *Did ITLOS Just Kill the Military Activities Exemption in Article 298?*, EJIL:TALK! (May 27, 2019), https://www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/.

37. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Apr. 15, 1994, *reprinted in* 33 INTERNATIONAL LEGAL MATERIALS 81 (1994).

38. *Trade Related Aspects of IP Rights*, UNITED STATES PATENT AND TRADEMARK OFFICE, https://www.uspto.gov/ip-policy/patent-policy/trade-related-aspects-ip-rights (last visited Feb. 14, 2024).

"minimum standards for the availability, scope, and use of seven forms of intellectual property: copyrights, trademarks, geographical indications, industrial designs, patents, layout designs for integrated circuits, and undisclosed information (trade secrets)."[39] TRIPS also establishes "permissible limitations and exceptions in order to balance the interests of intellectual property with interests in other areas, such as public health and economic development."[40] Additionally, it sets out "minimum standards of protection for copyrights and related rights, trademarks, geographical indications (GIs), industrial designs, patents, integrated circuit layout designs, and undisclosed information."[41] Since it entered into force in 1995, TRIPS has provided significant benefits for individuals and industries engaged in (inter alia) the pharmaceutical, agricultural, chemical, and biotechnology industries.[42] TRIPS does not specify that pre-existing intellectual property rights agreements will protect information given to the BBNJ clearinghouse mechanism.

It is also unclear why Article 13 of BBNJ prohibits accessing traditional knowledge associated with marine genetic resources held by indigenous people and local communities without their free, prior, and informed consent or approval. If the object of the Agreement is to benefit all humanity (Article 11), then this information should also be shared without limitation, much in the spirit of the principle of the common heritage of humankind that governs the use of modern technology.

V. NIEO REVIVAL

The objectives in Part II of the BBNJ treaty regarding marine genetic resources include several NIEO-inspired provisions similar to the original Part XI of UNCLOS: (1) the fair and equitable sharing of benefits arising from activities with respect to marine genetic resources; (2) capacity building of developing States; and (3) the transfer of technology.[43] Moreover, the treaty makes clear that

39. *Council for Trade-Related Aspects of Intellectual Property Rights*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/wto-multilateral-affairs/-world-trade-organization/council-trade-related-aspects-in (last visited Feb. 14, 2024).

40. *Id.*

41. *Id.*

42. *Id.*

43. BBNJ Agreement, *supra* note 18, art. 9.

> activities with respect to marine genetic resources . . . are for the benefit of all humanity, particularly for . . . advancing . . . scientific knowledge . . . and promoting the . . . sustainable use of marine biological diversity, taking into particular consideration the interests and needs of developing States.[44]

Like the failed Part XI of UNCLOS, Article 14 of the BBNJ Agreement requires the "fair and equitable" sharing of benefits arising from activities regarding marine genetic resources.[45] Contrary to free market principles, this includes sharing of non-monetary benefits (e.g., access to samples); transfer of marine technology; capacity-building (e.g., financing research programs, partnership opportunities); technical and scientific cooperation; and (most alarmingly) other forms of benefits to be subsequently determined by the Conference of the Parties based on recommendations from the Access and Benefit-sharing Committee.[46] These capacity-building and technology transfer provisions will discourage companies from the United States and other developed States from engaging in activities regarding marine genetic resources.

The Agreement also requires that monetary benefits be shared "fairly and equitably" through the financial mechanism established under Article 52. However, only developed States parties shall make annual contributions to the special trust fund. The rate of contributions shall be determined by the Conference of the Parties, which shall be 50 percent of a party's assessed contributions to the budget adopted by the conference.[47] Modalities for sharing monetary benefits shall be decided by the Conference of the Parties, considering the recommendations of the Access and Benefit-sharing Committee. If consensus cannot be achieved, the decision shall be adopted by a three-fourths majority of the parties present and voting, which will facilitate the adoption of financial measures by a voting block made up of developing States.[48] These modalities may include milestone payments; a percentage of the revenue from sales; tiered fees paid periodically; and other forms as subsequently determined by the Conference of the Parties considering the recommendations of the Access and Benefit-sharing Committee.[49] Like Part XI of UNCLOS, these provisions are inconsistent with free market principles

44. *Id.* art. 11.
45. *Id.* art. 14.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

and will discourage the participation of private enterprise and developed States in the Agreement.

VI. AREA-BASED MANAGEMENT TOOLS

Part III of the BBNJ Agreement calls for the conservation and sustainable use of areas through the establishment of a comprehensive system of area-based management tools "with ecologically representative and well-connected networks of marine protected areas."[50] The associated campaign, branded "30x30," seeks to designate MPAs over 30 percent of the oceans by 2030.[51] As defined in Article 1(9), MPAs are restrictive in nature, only allowing other "sustainable use provided it is consistent with conservation objectives,"[52] which begs the question—who determines what is a sustainable use? Thus, MPAs could have the practical effect of denying navigational rights and freedoms on the high seas that are purportedly inconsistent with the conservation objectives of the MPA.

Parties (individually or collectively) shall propose area-based management tools, including MPAs, to the Secretariat. The proposal shall be transmitted to the Scientific and Technical Body established under Article 49, which shall assess the proposal and make recommendations to the Conference of the Parties for its consideration and adoption.[53] Decisions and recommendations under Part III shall normally be taken by consensus. However, if consensus is not possible, decisions and recommendations shall be made by a three-quarter majority,[54] which facilitates the adoption of decisions and recommendations by a voting block comprised of developing States. Under certain circumstances, the Conference of the Parties is also empowered to adopt measures proposed by parties or recommended by the Scientific and Technical Body to be applied on an emergency basis.[55] Such measures "should not impose a disproportionate burden on . . . small island developing States or least developed countries, directly or indirectly."[56]

---

50. *Id.* art. 17.

51. Bethan C. O'Leary et al., *Effective Coverage Targets for Ocean Protection*, 9 CONSERVATION LETTERS 398, 401 (2016), https://conbio.onlinelibrary.wiley.com/doi/epdf/10.1111/conl.12247.

52. BBNJ Agreement, *supra* note 18, art. 1(9).

53. *Id.* arts. 19–22.

54. *Id.* art. 23.

55. *Id.* art. 24.

56. *Id.* art. 25.

Although the treaty exempts warships, naval auxiliaries, and military aircraft from the terms of the treaty, Article 25 provides that nothing in the "Agreement shall prevent a Party from adopting more stringent measures with respect to its nationals and vessels or with regard to activities under its jurisdiction or control . . . in support of the objectives of the Agreement." Thus, an environmentally progressive administration could impose BBNJ treaty obligations on U.S. warships and naval auxiliaries as a matter of domestic law. This is not beyond the realm of possibility. For example, U.S. warships are exempt from compliance with the International Convention for the Prevention of Pollution from Ships.[57] Nonetheless, U.S. law requires U.S. warships to comply with MARPOL, Annex V, which places limits on ocean discharge of solid waste materials.[58]

More importantly, although there appears to be a robust process in place to review area-based management tools,[59] there is no guarantee that the Conference of the Parties will closely scrutinize MPA proposals. Having served on the U.S. delegation to the International Maritime Organization (IMO) for more than four years, my experience has been that environmental proposals are not rigorously reviewed by the Marine Environment Protection Committee or the Maritime Safety Committee.

For example, in 1998, the Maritime Safety Committee adopted a U.S. proposal for two mandatory ship reporting systems to protect the endangered North Atlantic right whales from the threat posed by international shipping in sea areas off the northeastern and southeastern coasts of the United States.[60] The reporting system was designed to assist mariners to navigate safely through the area by informing them of potential navigation hazards and other beneficial information, thus purportedly contributing to the survival and recovery of the right whale.[61] Prior to the U.S. proposal, all mandatory reporting systems had only been adopted to prevent marine pollution from ships, not protect a particular marine species from ship collisions. The United States argued, however, that a mandatory ship reporting system for the specific purpose of protecting a single marine species was

57. Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, with Annexes and Protocols, Feb. 17, 1978, 1340 U.N.T.S. 61.

58. 33 U.S.C. § 1902.

59. BBNJ Agreement, *supra* note 18, arts. 19–21.

60. Int'l Maritime Org., *Mandatory Ship Reporting Systems*, IMO Doc. MSC 70/23/Add.2 (Dec. 7, 1998).

61. Int'l Maritime Org., *Report to the Maritime Safety Committee, Forty-fourth Session of the Navigation Sub-Committee*, IMO Doc. NAV 44/14, ¶¶ 3.23–3.24 (Sept. 4, 1998).

warranted if there was clear scientific evidence that the marine species was immediately endangered with extinction, shipping lanes passed through an area of critical habitat, and the greatest known threat to the survival and recovery of the species was posed by direct physical impacts from ship collisions.[62]

A substantial minority of States (1) were not convinced that the proposed protective measures would be effective, (2) expressed concern that the proposal would create an undesirable precedent that would impede navigational freedoms, and (3) preferred that IMO adopt a recommendatory ship reporting system.[63] Despite these concerns, the IMO Sub-Committee on Safety of Navigation endorsed the U.S. proposal that a mandatory system was required in this case.[64] A 2007 report prepared for the Marine Mammal Commission confirmed that the proposed system had not produced its desired effect. Commenting on the ship strike reduction strategy, the Commission determined that the mandatory ship reporting systems "have not brought an end to ship strikes, nor is there any evidence that they have reduced the incidence of such events."[65] According to the Sierra Club, the number of right whales has been falling since 2010 and currently stands at less than 350.[66]

VII. ENVIRONMENTAL IMPACT ASSESSMENTS

Part IV of the BBNJ Agreement requires parties to conduct environmental impact assessments (EIA) for planned activities under their jurisdiction or control that take place in areas beyond national jurisdiction.[67] Additionally, if an activity conducted in marine areas within national jurisdiction may cause "substantial pollution of or significant and harmful changes to the marine environment in areas beyond national jurisdiction," parties must conduct an EIA under their national process.[68] The national EIA shall be made available to the Scientific and Technical Body (via the clearinghouse mechanism) for

62. *Id.* ¶ 3.24.4, annex 8.

63. *Id.* ¶¶ 3.25–3.26.

64. *Id.* ¶ 3.27.

65. RANDALL REEVES ET AL., REPORT OF THE NORTH ATLANTIC RIGHT WHALE PROGRAM REVIEW FOR THE MARINE MAMMAL COMMISSION 13–17 (2007).

66. Abe Musselman, *Extinction Is Looming. Everyone's Fighting*, SIERRA (Jan. 16, 2022), https://www.sierraclub.org/sierra/extinction-looming-everyones-fighting-right-whale-lobster-fishing-noaa.

67. BBNJ Agreement, *supra* note 18, art. 28.

68. *Id.*

comment.[69] EIAs are additionally subject to public notification and consultation and comments by the Scientific and Technical Body.[70] The Agreement does not specify whether States must consider these comments when making their final determination for a planned activity. It is unclear whether the Scientific and Technical Body can override decisions by a State party.[71] If it can, this would be a serious infringement on State sovereignty, which would not be acceptable to most industrialized nations.

VIII. CAPACITY BUILDING AND TRANSFER OF TECHNOLOGY

Like the misguided provisions of the original Part XI of UNCLOS, Part V of the BBNJ Agreement calls for the development of marine scientific and technological capacity of developing States, to include access to marine technology and transfer of marine technology.[72] In this regard, States parties shall provide resources to support capacity-building of and transfer of marine technology (and other sources of support) to developing States.[73] Transfer of marine technology "shall take place on fair and most favourable terms, including on concessional and preferential terms."[74]

Types of capacity-building are extensive and include (1) sharing and use of data, information, knowledge, and research results; (2) information dissemination and awareness-raising; (3) development and strengthening of relevant infrastructure, including equipment and capacity of personnel for its use and maintenance; (4) development and strengthening of institutional capacity and national regulatory frameworks and mechanisms; (5) development and sharing of human and financial management resource capabilities, and technical expertise through exchanges, research collaboration, technical support, education and training, and transfer of marine technology; (6) development and sharing of manuals, guidelines, and standards; (7) development of technical, scientific, and research and development programs; and (8) development and strengthening of capacities and technological tools for effective monitoring, control and surveillance of activities.[75] Like the old Part XI, these provisions suffer from the mistaken belief that private enterprise and

69. *Id.*
70. *Id.* arts. 32–33.
71. *Id.* art. 37.
72. *Id.* arts. 40–42.
73. *Id.* art. 42.
74. *Id.* art. 43.
75. *Id.* art. 44.

developed States will be willing to give away advanced technology to developing States. Like UNCLOS, the BBNJ Agreement does not identify exactly what technologies should be transferred, on what terms they should be transferred, or what criteria should be used for making such transfers.[76]

IX. SPRAWLING NEW UN BUREAUCRACY

Also, like UNCLOS, the BBNJ Agreement creates a new, sprawling UN bureaucracy to manage the treaty, which will be funded by the States parties. Despite the adoption of the Part XI Implementing Agreement, the creation of new UN institutions continues to be a key factor cited in opposition to U.S. accession to UNCLOS. Opponents of UNCLOS believe that without adequate protections in place, UN bureaucracies tend to insulate themselves from scrutiny and are vulnerable to corruption, mismanagement, and abuse.[77] Undoubtedly, opponents to UNCLOS will take a similar position regarding the BBNJ Agreement.

Article 15 establishes an Access and Benefit-Sharing Committee, which is responsible for establishing guidelines for benefit-sharing and ensuring a fair and equitable sharing of both monetary and non-monetary benefits. The Committee is comprised of fifteen members, nominated by the parties, and elected by the Conference, "taking into account gender balance and equitable geographic distribution, and providing for representation . . . from developing States, including the least developed countries, from small island developing States, and from landlocked developing countries."[78] The Committee will have a major role in making recommendations to the Conference regarding rates or mechanisms for the sharing of monetary benefits, as well as matters relating to the clearinghouse and financial mechanisms. Based on the make-up of the Committee, it is foreseeable that the industrialized States will have little influence in deciding how monetary and non-monetary benefits are to be shared, which, in turn, will discourage industrialized States from becoming a party to the Agreement.

---

76. Igor Olegovich Anisimov & Elena Evgenyevna Gulyaeva, *Promoting the Development and Transfer of Marine Technologies as a Mechanism for Implementing the Sustainable Development Goals: International Legal Aspect*, 19 JOURNAL OF JURIDICAL OPINIONS 184 (2021), https://www.redalyc.org/journal/6338/633875002007/html/.

77. Baker Spring & Brett Schaefer, *The United Nations Convention on the Law of the Sea: The Risks Outweigh the Benefits*, HERITAGE FOUNDATION (May 16, 2007), https://www.heritage.org/report/the-united-nations-convention-the-law-the-sea-the-risksoutweigh-the-benefits.

78. BBNJ Agreement, *supra* note 18, art. 15.

Capacity-building and transfer of marine technology will be monitored and reviewed by the Capacity-Building and Transfer of Marine Technology Committee established under Article 48.[79] This includes, (1) "assessing and reviewing the needs and priorities of developing States Parties in terms of capacity-building and the transfer of marine technology"; (2) "reviewing the support required, provided, and mobilized, and gaps in meeting the assessed needs of developing States Parties"; (3) "identifying and mobilizing funds under the financial mechanism . . . to develop and implement capacity-building and the transfer of marine technology, including the conduct of needs assessments"; and (4) "making recommendations . . . on how capacity-building and transfer of marine technology could be further enhanced to allow developing States . . . to strengthen their implementation of the Agreement."[80] The Committee will be comprised of an unspecified number of members nominated by the parties and elected by the Conference, "taking into account gender balance and equitable geographic distribution and providing for representation . . . from the least developed countries, from the small island developing States, and from the landlocked developing countries."[81] Like benefit-sharing, industrialized States will lack sufficient influence to decide how capacity-building and transfer of marine technology will be carried out under the Agreement.

Article 47 establishes a Conference of the Parties, which shall be responsible for keeping the implementation of the Agreement under review and evaluation. These responsibilities include: (1) adopting decisions and recommendations related to the implementation of the treaty; and (2) reviewing and facilitating the exchange of information. At its first meeting, the Conference will adopt by consensus rules of procedure and financial rules governing funding for itself, the Secretariat, and its subsidiary bodies. However, of significant concern, the Conference can adopt its "budget by a three-fourths majority of Parties present and voting if all efforts to reach consensus have been exhausted, at such frequency and for such a financial period as it may determine."[82] Industrialized States could, therefore, be shut out of the budget-making process by a developing State voting bloc.

Of equal concern, the Conference is empowered to "establish such subsidiary bodies as deemed necessary to support the implementation of this

79. *Id.* art. 45.
80. *Id.*
81. *Id.* art. 46.
82. *Id.* art. 47(6)(e).

Agreement."[83] Given the decision-making process in Article 47, the creation of such subsidiary bodies could be made without the consent of the industrialized States. Although every effort will be made by the Conference to adopt decisions and recommendations by consensus, if all efforts to reach consensus are exhausted, the Conference may adopt decisions and recommendations by a two-thirds majority (on questions of substance) and by a majority (on questions of procedure).

Article 49 establishes a Scientific and Technical Body, which shall provide scientific and technical advice to the Conference and perform functions assigned to it under the treaty (or any other functions as may be subsequently determined by the Conference). Members with suitable qualifications will be nominated by the parties and elected by the Conference, "taking into account the need for multidisciplinary expertise, including relevant scientific and technical expertise and expertise in relevant traditional knowledge of Indigenous People and local communities, gender balance, and equitable geographical representation."[84] Thus, the industrialized States will be outnumbered in the scientific body, which plays a critical role in the establishment of area-based management tools, including MPAs, and reviewing the adequacy of EIAs.

Article 50 establishes a Secretariat, which shall provide administrative and logistical support to the Conference and its subsidiary bodies. It is unclear where it will be situated, but undoubtedly there will be significant expenses associated with establishing and financing a headquarters for the Secretariat in a host State, which undoubtedly will be borne primarily by the developed States.

Article 51 establishes a clearinghouse mechanism, which will serve as a centralized platform to enable parties to access, provide, and disseminate information. The mechanism shall be managed by the Secretariat. When managing the clearinghouse mechanism, "full recognition shall be given to the special requirements of developing States Parties [and] small island developing States Parties, and their access . . . shall be facilitated to enable those States to utilize it without undue obstacles or administrative burdens."[85] The mechanism shall include information "on activities to promote information-sharing, awareness-raising, and dissemination in and with those States," as well as provide specific programs for those States.[86] It is unclear what

83. *Id.* art. 47(6)(d).
84. *Id.* art. 49.
85. *Id.* art. 51.
86. *Id.*

information will be shared within this mechanism, but it arguably could include trade secrets and other intellectual property rights contrary to the interests of private industry and developed States.

Article 52 establishes a Finance Committee composed of an unspecified number of members considering gender balance and equitable geographic distribution. The Finance Committee shall (1) assess the needs of the parties, in particular developing States parties; (2) determine the availability and timely distribution of funds; (3) ensure that decision-making and management processes concerning fundraising and allocations are transparent; and (4) hold recipient developing States parties accountable for the agreed use of funds.[87] Article 55 establishes the Implementation and Compliance Committee to facilitate and consider the implementation of, and promote compliance with, the Agreement. Like the Finance Committee, the Committee shall be composed of an unspecified number of members considering gender balance and equitable geographic distribution.[88] Given the NIEO-inspired principles of the Agreement and "majority-rule" voting procedures, if consensus cannot be achieved, it is likely that developed States will be underrepresented on (and have little influence in) the Finance and the Implementation and Compliance Committees.

X. FUNDING THE NEW BUREAUCRACY

The institutions established under the BBNJ Agreement shall be funded through assessed contributions of the parties.[89] Additionally, a financial mechanism is established to provide "adequate, accessible, new, and additional predictable financial resources."[90] This mechanism "shall assist developing States Parties in implementing the Agreement, including through funding in support of capacity-building and the transfer of marine technology, as well as perform other functions . . . for the conservation and sustainable use of marine biological diversity."[91] The financial mechanism shall include: (1) "a voluntary trust fund . . . to facilitate the participation of representatives of developing States Parties . . . in the meetings of the bodies under the Agreement"; (2) a special fund funded by annual contributions from developed States parties, payments under Article 14(7) regarding the sharing of

87. *Id.* art. 52.
88. *Id.* art. 55.
89. *Id.* art. 52.
90. *Id.*
91. *Id.*

monetary benefits, and additional contributions from parties and private entities; and (3) a Global Environmental Facility trust fund.[92] Clearly, the developed States will provide a disproportionate share of the funding, discouraging their ratification of the Agreement.

The special fund and Global Environmental Facility trust fund shall be used to (1) "fund capacity-building projects"; (2) "assist developing States Parties to implement the Agreement"; (3) support conservation and sustainable use programs "by Indigenous Peoples and local communities"; (4) support public consultations; and (5) "fund the undertaking of any other activities as decided by the Conference of the Parties."[93] These funds are, in effect, a slush fund that can be used to finance any activity approved by the Conference, even if an activity is opposed by a minority of developed States.

Article 52 also empowers the Conference of the Parties to establish additional funds as part of the financial mechanism to support the conservation and sustainable use, and finance rehabilitation and ecological restoration, of marine biological diversity of areas beyond national jurisdiction. Funding under the special fund shall be distributed according to equitable sharing criteria, taking into account the needs for assistance of parties with special requirements, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States and coastal African States, archipelagic States and developing middle-income countries, and taking into account the special circumstances of small island developing States and of least developed countries (Article 52).[94] Given that decisions of the Conference do not require consensus, it would be impossible for developed States to block the assessment of these additional funds. Moreover, access to the fund under the Agreement is only open to developing States parties based on need.

XI. CONCLUSION

The BBNJ Agreement is, in effect, a NIEO-inspired treaty on steroids. Twenty articles refer to the need to consider the special needs of developing States, in particular least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States, and developing middle-income

92. *Id.*
93. *Id.* art. 52(6).
94. *Id.* art. 52.

countries.[95] The Agreement thus gives these countries a free pass, allowing them to share in monetary and non-monetary benefits, profit from the transfer of marine technology, and receive capacity-building assistance at no cost.

That means "developing" countries like Afghanistan, China, Cuba, North Korea, Iran, the "State of Palestine," Syria, and Venezuela will receive beneficial treatment under the treaty. North Korea and Iran, for example, will have access to BBNJ proceeds that can be used to fund their nascent nuclear weapons programs. The United States signed the new agreement; if it becomes a party, States like China will no longer have to steal U.S. marine technology because it will be easily available to Beijing under the terms of the Agreement.

Moreover, the establishment of seven new UN institutions, funded by assessed contributions of the States parties and additional annual contributions by developed States, is unprecedented. Of equal concern, given the make-up of these various institutions, based on geographic distribution and the need to accommodate developing States, industrialized nations will be out voted on every important issue regarding the sustainable use of marine genetic resources in areas beyond national jurisdiction. The end result will be that genetic resources, like deep seabed minerals, will not be exploited for the benefit of mankind.

95. *See id.* arts. 7, 9, 11–15, 17, 25, 27, 32, 40–43, 45–46, 49, 51–52.